No. 20-1104

In The
Supreme Court of the United States

MAUMEE INDIAN NATION,

Petitioner,

v.

WENDAT BAND OF GURON INDIANS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONERS/APPELLANTS

TEAM: T1037

Counsel for Petitioners

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QUESTION(S) PRESENTED

1. Did the Treaty with the Wendat of 1859, ratified in 1859, abrogate the Treaty of Wauseon, ratified in 1802, giving the Wendat Band legal title to the Topanga Cession? Or were the Maumee Indian Nation and the Wendat Band reservations diminished by their respect allotment acts dated in 1908 and 1892, respectively, leaving the Topanga Cession outside of Indian country?
2. If the Topanga Cession does lie within Indian county, does the doctrine of Indian preemption or infringement bar the State of New Dakota from collecting the Transaction Privilege Tax from the Wendat tribal corporation?

STATEMENT OF THE CASE

A. STATEMENT OF THE PROCEEDING

The Maumee Indian Nation (hereinafter "Maumee") filed suit in the United States District Court for the District of New Dakota on November 18, 2015. R. at 8. In their complaint, the Maumee sought a declaration requiring the Wendat Band of Huron Indians (hereinafter "the Band") to procure a Transaction Privilege Tax license for any development constructed by the Wendat Commercial Development Corporation (hereinafter the WCDC) within the Topanga Cession. Alternatively, the Maumee sought a declaration stating that the Topanga Cession was outside of Indian county. *Id*. at 7-8. The District Court ruled in favor of the Maumee, holding that the Topanga Cession was "clearly a part of the lands reserved by the Maumee Indian Nation in the Treaty of Wauseon" and that the State of New Dakota was not barred from collecting taxes from the Band by either the doctrine of preemption or infringement. *Id*. at 9.

Following the holding of the District Court, the Band appealed to the United States Court of Appeals for the Thirteenth Circuit on September 20, 2018. *Id*. at 10. The Thirteenth Circuit held the case for nearly two years waiting the United States Supreme Court's decision in *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020). *Id*. The Thirteenth Circuit eventually reversed the District Court finding that the Treaty with the Wendat of 1859 abrogated the Maumee's Treaty of Wauseon and therefore the Topanga Cession lies within the boundaries of the Band's reservation. *Id*. Furthermore, the Thirteen Circuit held that requiring the Band to pay the tax imposed by the State of New Dakota would infringe on the Band's tribal sovereignty in addition to United State Supreme Court precedent regarding preemption also served as a bar to the levying the state's Transactional Privilege Tax. *Id*.

The Supreme Court of the United States has granted certiorari to determine if the Treaty with Wendat abrogated the Maumee's claim to the Topanga cession and whether the Maumee or the Band's reservations had been diminished during the allotment era. *Id.* at 3. Additionally, the Court will determine if the Topanga Cession lies within Indian County and

if so, whether the State of New Dakota is barred by the doctrine of infringement and/or preemption from levying its Transactional Privilege Tax against the Wendat tribal corporation. *Id*. at 3.

B. STATEMENT OF THE FACTS

Both the Maumee and the Band have called what is now the State of New Dakota home for generations. In the Nineteenth century both the Maumee and the Band entered treaty negotiations with the United States in which both tribes ceded large portions of their traditional homelands to the United States in exchange for the United States' promise to reserve lands free for the encroachment of United States settlers. R. at 16-18. The Maumee were the first to have their treaty ratified by Congress in 1802. The Treaty of Wauseon established the Maumee reservation entailed the lands that lie at the *western* bank of the Wapakoneta River. *Id*. at 16 (emphasis added). On November 19, 1859, Congress ratified the Treaty with the Wendat of 1859 which created a reservation for the Band that lied to the *east* of the Wapakoneta River. *Id*. at 18 (emphasis added). In the intervening time between the ratification of the Treaty of Wauseon and the Treaty with the Wendat of 1859, the Wapakoneta River moved approximately three miles to the west and in doing so created what is now known as the Topanga Cession, an area that both tribes claim title to. *Id*. at 5.

Regardless of the dual claims of ownership, the Maumee and the Band avoided seeking a definite answer to who, if anyone, owns the Topanga Cession. *Id*. The lack of Federal involvement can be credited to the fact that neither tribe had sought to commercialize the Topanga Cession until 2013 when the Band purchased a 1,400-acre parcel of land in fee located within the Topanga Cession. *Id*. On June 6, 2015, nearly two years after their land purchase the Band announced their plan to construct a dual residential-commercial development. *Id*. Located within the development would be public housing, a nursing care facility for elders, tribal cultural center, a tribal museum, and a shopping complex owned by Wendat Commercial Development Corporation (hereinafter "WCDC"). *Id*. at 7-8. The WCDC shopping complex would be constructed to house a café, a grocery store, salon/spa, bookstore and a pharmacy. *Id*. at 8. A prospectus provided by the WCDC suggested that the complex will earn more than eighty-million dollars in gross sales annually, of that projected

annual income one hundred percent of the corporate profit would be remitted quarterly to the Band. *Id*.

After hearing of the Band's plan for the Topanga Cession the Maumee sent representatives to approach the WCDC and the Band's council to reaffirm their belief that the Topanga Cession lied within the boundaries of the Maumee reservation. *Id*. Further the Maumee expressed that because the complex would be built on Maumee land and would earn more than five-thousand dollars the Band and WCDC would be subject to the State of New Dakota's Transaction Privilege Tax (hereinafter the TPT). 4 N.D.C. § 212(1), (4). R. at 5-6. Under the TPT each "licensee is obligated to remit to the state 3.0% of their gross proceeds of sales or gross income on transactions commenced in this state." 4 N.D.C. § 212(2). R. at 5-6. If the profits were earned from entities located on reservation and that entity was owned by the reservation the state would remit the proceeds of the TPT back to the tribe. 4 N.D.C. § 212(5). R. at 6. In addressing the issue of land ownership, the Maumee referred to the 1892 allotment act which, as they claim, diminished the Band's reservation accordingly entitling the Maumee to remitted tax collected by the TPT. R. at 8.

The Band and WCDC answered the Maumee by claiming that the land had been a part of the Band's reservation since the ratification of the Treaty of Wendat of 1859. *Id*. Alternatively the Band and WCDC stated that even if the land was part of the Maumee Reservation after 1859, under the Treaty of Wendat of 1859 the land reverted to the Band once the Maumee were diminished by the Allotment Act of 1908. *Id*. The Band recognizes that the land it has purchased iin the Topanga Cession has not been taken into trust and is considered Indian free land. *Id.* However, The Band further claimed that it would not apply for a TPT license because even if the purchased land had yet to be taken into trust, the State of New Dakota is barred from collecting the TPT tax by the doctrine of preemption and that by doing so the state would be infringing upon the Band's sovereign powers. *Id*.

Unable to resolve the inter-tribal conflict the Maumee filed suit on November 18, 2015 seeking among other things an answer to the long pending question of who, if anyone, owns the Topanga Cession. R. at 8.

SUMMARY OF ARGUMENT

ARGUMENT

I. THE BAND HAS FAILED TO PROVIDE SUFFICIENT EVIDENCE OF CONGRESSIONAL INTENT TO SUPPORT A FINDING THAT THE TREATY OF WAUSEON WAS ABROGATED BY THE TREATY OF WENDAT.

Congress ratified two treaties which established the Maumee Reservation and the Band's Reservation, both of which were to have the Wapakoneta River serve as a boundary line. However, for reasons wholly unknown or lost to history in the creation of the later of the two treaties Congress failed to make mention of the shifting of the Wapakoneta River in the 1830s. Such shifting came nearly 30 years after Congress established the Maumee Reservation, in 1802, and nearly thirty years prior to the ratification of the treaty that would establish the Band's reservation. The Band now argues that Congress intended to abrogate the Maumee's reservation treaty, the Treaty of Wauseon, when it placed their western boarder at the eastern banks of the Wapakoneta River. However, there is no clear intent in the Treaty with the Wendat of 1859 that Congress intended such action when it ratified the treaty.

In *Lone Wolf v. Hitchcock*, the Supreme Court acknowledged Congress' ability to abrogate treaties that "were entered into between the United States and a tribe of Indians." *Lone Wolf v. Hitchcock*, 23 S. Ct. 216, 221 (1903). However, the Court noted that such abrogation of treaty rights was "exercised only when circumstances arise which will not only justify the government in disregarding the stipulation of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so." *Id*. Having acknowledged Congress' ability to abrogate treaties with Native American tribes the United State Supreme Court granted certiorari in the case of *United State v. Dion* in order to

establish when sufficient evidence of Congressional intent has been shown to abrogate an existing tribal treaty. *United States v. Dion*, 106 S. Ct. 2216 (1986).

In *Dion*, an enrolled member of the Yankton Sioux Tribe of South Dakota was charged with having violated the Endangered Species Act. *Id*. Defense argued that Dion was not in violation of the Endangered Species Act because the Treaty with the Yankton (1858 spelling) Sioux "had not placed any restriction on the Yanktons' hunting rights." *Id*. at 2219. The Solicitor General argued that regardless of the rights granted to the Yanktons in their treaty Congress had subsequently abrogated the Yanktons hunting right with the passing of the Endangered Species Act. *Id*. Agreeing with the Solicitor General the Supreme Court held that "it is long settled that "the provisions of an act of Congress, passed in the exercise of its constitutional authority, . . . *if clear and explicit*, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty" with a foreign power." *Id*.; see also *Fong Yue Ting v. United States,* 149 U.S. 698, 720, 13 S. Ct. 1016, 1025, 37 L.Ed. 905 (1893); cf. *Goldwater v. Carter,* 444 U.S. 996, 100 S. Ct. 533, 62 L.Ed.2d 428 (1979) (emphasis added).

The Supreme Court has employed different standards for determining when such "clear and explicit" intent for abrogation is shown stating that times "we [the Supreme Court] have required that Congress make "express declaration" of its intent to abrogate treaty rights" while other times the Court looks to "the statute's "'legislative history'" and 'surrounding circumstances' as well as to 'the face of the Act.'" *United States v. Dion*, 106 S. Ct. 2216, 2220 (1986); see *Leavenworth, L., & G. R. Co. v. United States,* 92 U.S. 733, 741-742, 2 Otto 733, 741-742, 23 L.Ed. 634 (1876); see also *Wilkinson & Volkman* 627-630, 645-659; see *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 587, 97 S.Ct. 1361, 1363, 51 L.Ed.2d 660

(1977), quoting *Mattz v. Arnett,* 412 U.S. 481, 505, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92 (1973). The Supreme Court went on to emphasis its preference for explicit statutory language stating that "absent explicit statutory language, we [the Supreme Court] have been extremely reluctant to find congressional abrogation of treaty rights." *United States v. Dion*, 106 S. Ct. 2216, 2220 (1986).

Following the precedent in *Dion*, it is clear from the record of this case that Congress never intended to abrogate the Treaty of Wauseon. The Treaty with the Wendat of 1859 makes no mention that any public interest would be furthered, or that there was any public interest in, abrogating the Treaty of Wauseon. In contrast by abrogating the Treaty of Wauseon Congress would be acting in direct conflict of the interest of the Maumee who at the time of ratification of the Treaty with the Wendat of 1859 had laid claim to the disputed land for roughly fifty-seven years. Congress never made mention that any rights of the Maumee would be destroyed by the ratification of the Treaty of Wendat of 1859. The treaty does state that the land east of the Wapakoneta River would be reserved for the Band however, looking at the circumstances surrounding the ratification of the Band's treaty, the issue of placing the boarder within the reservation of the Maumee can be summed up by a lack of knowledge of the shift of the Wapakoneta River on behalf of Congress. The lands that make up both the Maumee and the Band's reservations were not surveyed, and the shifting of the river was not made known to Congress until the passage of the General Allotment Act in 1887, and the subsequent allotment acts that specially address the Maumee and the Band's reservations. Thus, such surveying of the land presumably did not begin on the Band's reservation until January of 1892 or May of 1908 on the Maumee reservation. Absent other information that Congress was aware of the shifting of the Wapakoneta River it would be

clear for the language of the allotment acts that Congress was unaware of the changing demographics caused by the shifting of the river and mistakenly placed the Band's western boarder within the Maumee reservation. Therefore, absent explicit language in addition to Congress' silence as to the Treaty of Wauseon the Band has failed to show that the Treaty with the Wendat of 1859 abrogated the earlier Treaty of Wauseon.

II. THE MAUMEE ALLOTMENT ACT OF 1908 DID NOT DIMINISH THE MAUMEE RESERVATION ACCORDING TO ESTABLISHED PRECEDENT HOWEVER THERE WAS CONGRESSIONAL INTENT TO DIMINS THE BAND'S RESERVATION.

A. There was no clearly expressed Congressional intent in either the Statutory language of the Allotment Act of 1908 or the surrounding Legislative history or circumstances to support a finding of diminishment of the Maumee reservation.

An Indian reservation begins and ends with its boundaries. Boundaries cannot and will not simply be reduced or eliminated. After a federal reservation is established, only Congress can diminish or disestablish it and this requires Congress' clear, express intent to do so. *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2463 (2020). While *McGirt* dealt with the issue of disestablishment, this case deals with the issue of whether or not the Maumee reservation was diminished by the Maumee Allotment Act of 1908. There is a distinct difference in disestablished and diminished. "Although the terms "diminished" and "disestablished" have at times been used interchangeably, disestablishment generally refers to the relatively rare elimination of a reservation while diminishment commonly refers to the reduction in size of a reservation." *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1017 (8th Cir. 1999). There is no question of whether or not the Maumee Reservation has been disestablished. Further, there is no clear and express intent by Congress that the Maumee Reservation has been diminished given supporting case law, the facts, and the legislative history of the Allotment Act of 1908.

The surplus lands allotted in the Maumee Reservation Allotment Act of 1908 did not diminish the Maumee Reservation. The history behind the allotment of land between Tribal Sovereignties and the United State is complex. After setting aside large sections of western

States and Territories for Indian Reservations, Congress later adhered to the view that Indian tribes should abandon their way of life on communal reservations and settle onto privately owned parcels of land. *Solem v.* Bartlett, 104 S. Ct. 1161, 1164 (1984). As a result of this, Congress passed a series of surplus land acts in order to force the Indians onto individual allotments carved out on reservations and to open up the unallotted lands to non-Indians. *Id.* Congress began by legislating the Indian allotment program on a national scale but then began dealing with the surplus land question on a reservation-by-reservation basis due to the fact that each act was employing its own statutory language. *Id.* This then became the topic of disputes between State and Federal officials over which sovereignty held authority over the lands that were opened by the surplus land acts and passed out of Indian ownership. *Id.* When the surplus land act frees the land from its reservation status it thereby diminishes the reservation boundaries giving the State jurisdiction. *Id.* Whereas the Federal, State and Tribal authorities share jurisdiction if the surplus land act did not diminish the existing reservation boundaries when the open area falls under the definition of Indian country pursuant to 18 U.S.C. §1151. *Id.* To resolve the dispute over who has authority, precedent has "established a fairly clean analytical structure for distinguishing those surplus land acts that diminish[] reservations from those acts that simply offer[] non-Indians the opportunity to purchase land within established reservation boundaries." *Id.* at 1166. Following the standards set forth in *Solem* and its proceeding case law, it is clear that the Maumee Allotment Act did not diminish the boundaries of the reservation but offered non-Indians in the State of New Dakota the opportunity to purchase land parcels within the congressionally established boundaries.

When dealing with the issue of diminishment, Congress will not lightly infer that a reservation's boundaries have been diminished. *Solem v.* Bartlett, 104 S. Ct. at 1166 (1984). "Our analysis of surplus land acts requires that congress clearly evince "an intent to change boundaries" before diminishment will be found." *Solem v. Bartlett*, 104 S. Ct. at 1166; citing *Rosebud v. Kneip*, 97 S. Ct. 1361, 1377 (1977). Once a reservation has been established, all

the tracts of land shall remain a part of the reservation until they are separated by Congress. *U.S. v. Celestine*, 30 S.Ct. 93, 95 (1909). This Court has ruled in favor of both sides. There is case law that shows a finding that some surplus land acts have diminished reservations and other case law to show when a surplus land act did not diminish the reservation.[1] *Hagen v. Utah*, 114 S. Ct. 958, 965 (1994). As to the question of whether or not a reservation's boundaries have been diminished, case law has "established a fairly clean analytical structure" which directs the Court to look at three factors from the *Solem* case. Hagen, 114 S. Ct. at 965. The first is the statutory language used to open up the Indian lands. *Id.* The Court will also consider the historical context surrounding the passage of the surplus lands. *Id.* The Court also recognizes the people who have moved onto the open land as relevant in the analysis. *Id.* By applying of the factors to the facts in this case, it is clear that although there is seemingly explicit language of diminishment that alone does not diminish an established reservation. Instead, the Court must look at the language of the Allotment Act as well as the surrounding circumstances and the legislative history. By doing that, the Court will see that the Maumee Allotment Act of 1908 did not diminish the Maumee Reservation.

The statutory language used to open up the land on a reservation is important in the analysis of whether or not a reservations boundary have been diminished. In *Solem,* the Court noted that when there is explicit language that references cession or other language that indicates the present and "total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted open lands. *Solem*, 104 S. Ct. at 1166 (1984); citing *DeCoteau v. District County Court*, 95 S. Ct. 1082, 1092-1093 (1975). Further, when such language is strengthened by an unconditional commitment from Congress to compensate the tribe for their open land, "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Id.* The Respondents will be quick to point out the express language in the Maumee Allotment Act of 1908 which

[1] The Supreme Court found that the surplus land act diminished the reservation in both *DeCoteau v. District County Court*, 95 S. Ct. 1082 (1975) and in *Rosebud Sioux Tribe v. Kneip*, 97 S. Ct. 1361 (1977). In contrast, the found that it did not dimmish the reservation in *Mattz v. Arnett*, 93 S. Ct. 2245, 2258 (1973) and in *Seymour v. Superintendent of Wash. State Penitentiary,* 82 S. Ct. 424, 426 (196

provides: “The Indians have agreed to consider the entire eastern section of quarter surplus and to cede their interest in the surplus lands to the United States where it may be returned to the public domain by way of this act.” However, their case is not so easily won. The Supreme Court has stated that “explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment.” *Solem v.* Bartlett, 104 S. Ct. at 1167 (1984); see also *Rosebud Sioux Tribe v. Kneip*, In *Rosebud,* the Court found that the reservation was diminished not just because of the express language of the Act but taken in totality with the description of the legislative history, which was “precisely suited for the purpose” of diminishment. 97 S. Ct. at 1366 (1977).

The situation in *Rosebud* is not parallel to the facts in this case. Petitioners are aware that on its face the language of the Allotment Act of 1908 is not only damning but will be used against them as a main point of contention in the respondent’s argument that the Maumee Reservation has been diminished. While this may suggest Congress intent to diminish the boundaries of the Maumee Reservation, that is all it is: a mere suggestion of what might have been the congressional intent. This is not enough. “The congressional intent must be clear, to overcome ‘the general rule that '(d)oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.” *DeCoteau v. District County Court*, 95 S. Ct. 1082, 1092 (1975). Case law expressly states that not only must the language of the Act show the clear, express congressional intent, this must be buttressed by the surrounding circumstances and legislative history. *Id.* at 1093. In this case, the surrounding circumstances and the legislative history do not strengthen the statutory language of the Allotment Act and do not support a finding that it was the congressional intent regarding the diminishment of the Maumee Reservation.

There is no language in the Congressional Record from May 29, 1908 that even suggests it was congress’ clear, express intent to diminish the boundaries of the Maumee Reservation. In fact, there is no language in the legislative history that even suggests that by opening up the lands of the Maumee Reservation, Congress intent was to diminish the

borders and stripping the tribe of the borders originally given to them by the Treaty of Weauson like in this Court found in *Rosebud.* The language in the congressional description and the ratification of the 1901 Act in *Rosebud* clearly supports a finding of diminishment given the use of phrases such as "(t)he cession of Gregory County' by ratification of the Agreement 'will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation." 97 S. Ct. at 1366 (1977). Additionally, it was conceded in *Rosebud* that if the description was correct, the effect would be a change in the Reservation boundaries. *Id.*

In contrast, there no language in the Maumee Allotment Act to support a finding that by opening the lands, Congress was changing the borders of the reservation. In fact, there is no mention of the Reservation's borders. Instead, the focus is on surveying the Maumee Reservation land and opening it up for allotment. R. at 23. Further, it seems that a major purpose of the Allotment Act of 1908 was to integrate the Maumee Indians with the non-Indians in order for the Indian's to interact with the non-Indian's, and the non-Indian's can "come in with their influence and the Indian citizen what we all hope for him and expect him to be." R. at 26. This is similar to *Mattz v.* Arnett, where the unallotted plots on the Klamath River Reservation became available to non-Indian's with the purpose of promoting interaction between the races and encouraging Indian's to adopt white ways. 93 S. Ct. 2245, 2253 (1973). Just because a reservation has been opened up land settlement does not mean that the opened area has lost its status as a reservation. *Id.* The same applies in this case. Just because the Indian's agreed to open up their land for settlement by non-Indians, does not mean that the boundary of the reservation has been diminished. This Court in *Mattz* looked at the legislative history and the circumstances surrounding the act in addition to the language used in the Act. *Id.* In its analysis of this case, this Court should follow the same approach as it did in *Mattz*, to show that the legislative history and surrounding circumstances did not show the clear, express Congressional intent to diminish the Maumee Reservation boundaries.

The third *Solem* factor recognizes that Congress looks at who has moved onto the land after it was opened up. While there are uncontested facts that the Topanga Cession consists mostly of land declared surplus under one of the Allotment acts, there is no direct evidence to show which one. R. at 7. However, virtually no member of either tribe moved onto the land during the allotment era. R. at 7. This might lead one to conclude that the Indian's abandoned the land but that is not the case. Eventually Indian's being purchasing land from the non-Indian's, moving back to the land once bought and settled on by non-Indians. Census Records do not distinguish between unopen and open lands on the Band's reservation effectuated by their allotment act and the Topanga Cession is not a census designated place, both tribes have worked together to provide a demographic analysis using U.S. Census records taken since 1880. R. at 6. This Census data indicates that while the Maumee Indian Reservation has decreased slowly over time, it still has more of a population on the once surplus lands than the Western half of the Band's Reservation and the Topanga Cession. Therefore, it is clear that the Maumee Tribe did not abandon that land but continued to live there.

Additionally, the Petitioners have provided this Court with uncontested evidence that while it received about two million dollars for the land sold under the Maumee Allotment Act of 1908, the Bureau of Indian Affairs lost or spoiled the records that show exactly which parcels of land the Maumee Tribe was compensated for. Therefore, given that these records are gone, there is no way to prove that the land opened up for settlement allowed for any changes to the boundaries of the Maumee Reservation. Therefore, there is no evidence to support the suggestion of express Congressional intent to diminish the boundaries of the Maumee Reservation.

B. THE WENDAT BAND RESERVATION WAS DIMINISHED GIVEN THE CLEAR CONGRESSIONAL INTENT FOUND WITHIN THE LEGISLATIVE HISTORY AND SURROUNDING CIRCUMSTANCES.

Taken the *Solem* factors listed above, it seems to be the clear intent of the Legislative that when opening up and allotting the land of the Band's Reservation, the Congressional intent was to diminish the reservation. Unlike the Maumee Allotment Act of 1908, there is more than a mere suggestion of Congressional intent. The Wendat Allotment Act of 1892 illustrates clear, express Congressional intent in the language of the Act, the Legislative history and surrounding circumstances as well as to who moved onto the surplus land. All this taken in totality indicates that there was clear, express Congressional intent to diminish the boundaries of the Band's reservation given the legislative history and the surrounding circumstances.

Applying the first of the *Solem* factors, there is seems to be explicit language there does not appear to be clear, express Congressional intent to diminish the reservation. Hagen, 114 S. Ct. at 965. The language in the Allotment Act of 1892 that is explicit is the United States unconditional commitment to compensate the Band for the unallotted, surplus land.

> "The United States hereby agrees to pay into the Treasury, in the name of the Wendat Band, the sum of three dollars and forty cents for every acre declared surplus, provided that no matter how much land is ultimately surplus the Wendat Band shall not be entitled to a payment of more than two-million and two hundred-thousands dollars in total and complete compensation." Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892).

This language from the Wendat Allotment Act makes shows that no matter how much surplus land is given to the Band, they would receive compensation for the land as long as it did not amount to more than two-million and two-hundred thousand dollars in total. Which is the total amount the Band claimed to have received. R. at 5. Therefore, given that this is an unconditional commitment to compensate the Band, it speaks directly to clear, express Congressional intent to diminish the land.

Next, looking at the surrounding circumstances and legislative history of the allotment it, it makes clear that Congress' intention during this allotment era was to reduce the Band's reservation therefore diminishing it. The language in the Legislative History of the Allotments Acts states very clearly: "The work in the Bureau of Indian Affairs was perhaps never so large as now, by reason of the numerous negotiations which have been proceeding with the tribes for a *reduction of the reservations*…" Representative Ullrich. "An act for relief and civilization of the Wendat Band of Huron Indians in the State of New Dakota. *Congressional Record* 23 (January 14, 1892) p. 1778. (Emphasis added). "The good work of *reducing larger reservations*, by allotments in severalty to the Indians and the cession of remaining lands to the United States for disposition under the homestead law… *Id.* (Emphasis added). This language clearly shows that it was not the intention of Congress to simply open up the Band's reservation and allow for settlement by non-Indians. Instead, the use of words such as "reduction" and "reducing" clearly indicates that they were reducing the Band's reservation and therefore diminishing it.

As to the third factor, as discussed above, the Census data shows that has time went one, the Band's population in the surplus land started to decline, more so than the Maumee's Reservation. Taking in the totality of the circumstances around the Allotment Act of 1892 by the language of the Act and the mention of reducing the size of the reservation in the Congressional Record and the decrease in the Band's reservation, it is clear that the Congressional Intent of this Act was to diminish the boundaries of the Band's reservation.

C. THE TOPANGA CESSION IS INSIDE INDIAN COUNTRY GIVEN THE FACT THAT IT IS LOCATED ON THE MAUMEE RESERVATION WHICH HAS NOT BEEN DIMINISHED AND THE TREATY GIVING THE LAND TO THE MAUMEE WAS NOT ABROGRATED BY THE TREATY WITH THE WENDAT.

Previously in this brief, Petitioners have made arguments proving that the Treaty with the Wendat did not abrogate the Treaty with Wauseon and that the Allotment Act of 1902 did not diminish the Maumee Reservation. In the alternative, if this Court finds that either that Maumee Reservation has been diminish and/or the Treaty of Wauseon has been abrogated, the Topanga Cession would fall outside Indian County. The Allotment Act of 1892 diminished the Band's reservation and reduced its boundaries reserving only the Eastern half of the reservation for the Band and subjecting the Western half, which borders Wapakoneta River, to allotment with the clear, express Congressional intent to diminish the Reservation as argued above in Subsection II.B. above.

III. DUE TO THE COMPELLING INTEREST OF BOTH THE MAUMEE NATION AND THE FEDERAL GOVERNMENT THE STATE OF NEW DAKOTA IS NOT BARRED FROM LEVYING ITS STATE TAX ON THE BAND.

The Band has purports that the WCDC will bring in annually eighty million in gross sales. Under state law 4 N.D.C. § 212(1) "every person who receives gross proceeds of sales or gross income of more than $5,000 . . . shall apply to the department for an annual Transaction Privilege Tax license." The Band however claims that the WCDC complex is exempt from the state law under both or either the doctrine of preemption or infringement. In buying land within the Topanga cession in hopes of commercializing it the Band availed themselves to the State of New Dakota's taxes. In *Muskogee Creek Nation v. Pruitt*, the tenth circuit citing from *Mescalero Apache Tribe v. Jones* notes that "when Indians act outside of their own Indian county, including within the Indian country of another tribe, they are subject to non-discriminatory state laws otherwise applicable to all citizens of the state. *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1172 (10th Cir. 2012); quoting *Mescalero Apache*

Tribe v. Jones, 411 U.S. 145, 148–49, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973); *see Colville,* 447 U.S. at 161, 100 S.Ct. 2069. Because the Maumee Nation was never diminished nor was their treaty abrogated by the ratification of the Treaty of Wendat of 1859 unless the Band can show that the tax is being imposed on a discriminatory basis they are to the State of New Dakota's tax. Adversely, if the Court does not find that the *Mescalero* case is applicable the *Bracker* weighing test must be applied.

In *White Mountain Apache Tribe v. Bracker* the court took up the issue of a state tax law in regard to a company whose operations were solely performed on the White Mountain Apache reservation. In determining whether the state could impose its tax the Court looked at who and where the issue arose from. *Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159, 1172 (10th Cir. 2012). The Court found that "when on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). While the State of New Dakota does not assert that it has any compelling state interest in being able to collect the TPT tax the federal government and Maumee do. As stated in *Bracker* the federal government as a strong interest in encouraging tribal self-government. Due to global changes in temperatures the Maumee have continuously lost twelve percent of their largest source of revenue. If the Maumee continue to lose such profits and if they are unable to receive the taxes due to them under the TPT by way of preemption the Maumee will be facing exactly what it is the federal government is trying to avoid; the inability to self-govern. However, if given the due taxes the Maumee would be able to invest in scholarships and renewable

energy that would help them to diversify their economy while being able to provide basic services and jobs to other tribal members. R. at 8.

If not barred by preemption the Band also asserts that they have a right to self-govern which would be impermissibly infringed on by the state's tax law. In *Williams v. Lee* the Supreme Court found that a state may not exercise jurisdiction in tax disputes between a Non-Indian and an Indian when the tax would be imposed within Indian county "because to do so 'would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.'" Nathan Quigley, *Defining the Contours of the Infringement Test in Cases Involving the State Taxation of Non-Indians a Half-Century after Williams v. Lee*, 1 A. Indian L. J. 147, 150 (2012). The *Williams* holding was viewed as only barring those state actions that would "infringe[] on the right of reservation Indians to make their own laws and be ruled by them." However approximately fourteen years after the *Williams* case the Supreme Court heard the case of *McClanahan v. State Tax Commission of Arizona*. In *McClanahan* the Court held that the *Williams* test for infringement "was only intended to apply to attempted exercises of state jurisdiction over non-Indians in Indian Country" and that the proper test for "evaluat[ing] state attempts to tax Indians in Indian Country . . . was the preemption analysis." *Id*. at 151. Having already stated the State of New Dakota would not be barred by preemption the holding in *McClanahan* would also support the finding that the doctrine of infringement would likewise not bar the State of New Dakota from levying its tax. In further support of this argument the *Supreme Court in Washington v. Confederated Tribes of the Colville Indian Reservation* stated that under *Williams* a state does "not infringe on the right of reservation Indians to 'make their

own laws and be ruled by them' merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving." *Id*. at 154.

Wherefore, given the precedent handed down by the Supreme Court as well as the federal circuit courts it is clear that the Band availed themselves of the State of New Dakota's tax when they purchased land from within the Maumee reservation in order to make a commercially profit complex.

CONCLUSION

WHEREFORE, the Petitioner, prays to this Court to find that the Treaty of the Wauseon was not abrogated by the Treaty of the Wendat. There was no clear Congressional intent in either the Treaties to support such a finding. No of the standards set out by case were met in the language of the Treaty of Wendat that would even suggest to this Court that it abrogated the Treaty of Wauseon. Additionally, the Maumee Reservation has been diminished given that there is no clear and expressed Congressional intent to do from the surrounding circumstances and the legislative history. On the other hand, this Court should find that the explicit language regarding the reduction of the reservation found in the legislative history of the Wendat Allotment Act of 1892, is the clear and express language required by case law in finding for diminishment of a reservation. Further, due to the fact that the Maumee reservation was not abrogated or diminished, the Topanga Cession, which lies on Maumee's land, is within Indian County. Lastly, neither the doctrine of preemption nor infringement prevent the State of New Dakota from collecting TPT taxes against the Band given that the Band's right to self-govern is not being infringed on by the collection of the taxes and that by purchasing the land on an Indian reservation that is not there are, they do

not get to benefit from the exclusion of tribes not being forced to apply for a license or pay the TPT tax as supported by case law.

REQUEST FOR ORAL ARGUMENT

Due to the importance of the issues raised in this brief, Petitioners, requests an oral argument.

Respectfully Submitted,

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Team T1037

Attorneys for Petitioners