No. 20-1104

IN THE

Supreme Court of the United States

MAUMEE INDIAN NATION,

Petitioner,

v.

WENDAT BAND OF HURON INDIANS,

Respondent.

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

BRIEF FOR RESPONDENT

TEAM: T1042
Counsel of Record
Respondent Wendat Band of Huron Indians

PETITION FOR WRIT OF CERTIORARI FILED:
CERTIORARI GRANTED: NOVEMBER, 6, 2020.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

QUESTIONS PRESENTED

1. Did the Treaty with the Wendat abrogate the Treaty of Wauseon and/or did the Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908) diminish the Maumee Reservation? If so, did the Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) also diminish the Wendat Reservation or is the Topanga Cession outside of Indian country?

2. Assuming the Topanga Cession is still in Indian country, does either the doctrine of Indian preemption or infringement prevent the State of New Dakota from collecting its Transaction Privilege Tax against a Wendat tribal corporation?

STATEMENT OF THE CASE

A. Statement of the proceedings

On November 18, 2015, the Maumee Nation filed a complaint against the Wendat Band. J.A. 8. The District Court found that Maumee Reservation was not diminished and that the State of New Dakota was permitted to levy its Transaction Privilege Tax directly on a non-member tribal entity. Maumee Indian Nation v. Wendat Band of Huron Indians, 305 F. Supp. 3d 44 (D. New Dak. 2018). The Thirteenth Circuit reversed, holding that the Maumee Reservation has been diminished, the Wendat Reservation remained intact, and that the State of New Dakota was prohibited from levying its tax on a Wendat tribal entity. Wendat Band of Huron Indians v. Maumee Indian Nation, 933 F.3d 1088 (13th Cir. 2020). The Maumee Nation now appeals the decision of the Thirteenth Circuit. The Wendat Band of Huron Indians ask that this Court to affirm the Thirteenth Circuit's decision.

B. Statement of the facts

The Maumee Indian Tribe and the Wendat Band of Huron Indians are federally recognized tribes in what is now the State of New Dakota. J.A. 4. Each tribe has between 1,500 and 2,000 members. J.A. 4. Each tribe has a treaty, which reserved its rights in what was then known as the New Dakota Territory. J.A. 4. The history between these tribes is long and complicated. J.A. 4. The Maumee Indian Nation traces its rights to the Treaty of Wauseon, ratified by Congress in 1802. J.A. 4–5. In the treaty, the Maumee Reservation's boundaries ran west of the Wapakoneta River. J.A. 5. In the 1830s, the Wapakoneta River moved three miles west, creating the disputed tract, known as the "Topanga Cession." J.A. 5. Approximately thirty years after the Wapakoneta's westward transfer, Congress ratified the Treaty with the Wendat of 1859, which established the Wendat Reservation. J.A. 5. In this treaty, the Wendat Reservation's boundaries ran east of the Wapakoneta River. J.A. 5.

For over eighty years, the two tribes have each respectively asserted their ownership to the Topanga Cession. J.A. 7. However, the tribes have refrained from asking a United States court to resolve the dispute because the lands have almost exclusively been used for non-commercial purposes. J.A. 7. No TPT tax is currently collected on the land. J.A. 7. Until the Wendat Band announced its commercial development, there seemed no need for a definitive answer. J.A. 7. The parties agree that the Topanga Cession consists mostly of lands declared surplus under one of the two the allotment acts but disagree about which act declared them so. J.A. 7. Both the Maumee Nation and Wendat Band submit that virtually no member selected an allotment with the Topanga Cession and the Indians that live there now purchased their land from non-Indian homesteaders.

In December 2013, the Wendat Band purchased a 1,400-acre parcel from non-Indian owners in fee simple within the Topanga Cession. J.A. 7. This land has not yet been taken into trust. J.A. 11. In 2015, the Wendat Band decided to develop the parcel for residential and commercial purposes including: public-housing units to low-income tribal members, a nursing care facility for elders, a tribal cultural center, tribal museum, and a shopping complex with a café serving traditional Wendat cuisine, a grocery store offering both fresh and traditional foods to help prevent the area from becoming a food desert, a salon/spa, bookstore, and a pharmacy. J.A. 7–8. This development is owned by the Wendat Commercial Development Corporation (WCDC)—a Section 17 IRA Corporation. J.A. 7–8. The WCDC is wholly owned by the Wendat Band and 100% of the corporate profits are remitted quarterly to the tribal government. J.A. 8. This prospective development is expected to employ 350 people and earn $80 million in gross sales annually. J.A. 8. The funds would support low-income public housing units and the nursing care facility and imposing the TPT would take

away revenue for the tribal government to perform its essential functions for its members. J.A. 8. The shopping center would attract non-Indian consumers who potentially may live outside of the reservation. J.A. 8.

However, to operate a business in the State of New Dakota, the state requires a Transaction Privilege Tax license along with a $25 fee. J.A. 5. However, no Indian tribe or tribal business need obtain a license. J.A. 6. The law requires a business operating in the state to remit 3.0% of the gross proceeds of sale or gross income on transactions commenced in the state if those sales or income is greater than $5,000. J.A. 5. This is known as the Transaction Privilege Tax (TPT). J.A. 5. It is paid by business to the state for the "privilege" of doing business in the state. J.A. 5. The collected proceeds from the TPT are paid into the state's general revenue fund, which helps the state fund the Department of Commerce and civil courts, as well as maintain roads and other transportation infrastructure to facilitate commerce. J.A. 6. The TPT law specifically remits the proceeds from the TPT to all entities operating on their respective reservations. J.A. 6. Tribal entities not operating on their respective reservations will not receive a remittance of the tax. J.A. 6. The failure to obtain a license or pay the required tax is a class 1 misdemeanor. J.A. 6. Imposing the TPT on the Wendat Band would take away $2.4 million from the tribe.

On November 4, 2015, the Maumee Nation approached the WCDC and the Wendat Tribal Council to assert its ownership of the Topanga Cession. J.A. 8. As such, the Maumee claimed that the WCDC's development is on Maumee land and that the Maumee expected the WCDC to pay the State of New Dakota's Transaction Privilege Tax (TPT). J.A. 8. The Maumee then claim that because the WCDC is a non-Maumee-member business, operating on Maumee land, the State of New Dakota would then remit this tax to the Maumee, pursuant

to §212(5). J.A. 8. The WCDC and the Wendat Tribal Council replied to the Maumee Nation that the Topanga Cession was part of the Wendat Reservation and had been since the Treaty with the Wendat of 1859. J.A. 8. The Maumee Tribe now seeks to reverse the Thirteenth Circuit Court decision in order to unlawfully obtain the State of New Dakota's TPT tax remittance from the Wendat. J.A. 7–8.

SUMMARY OF THE ARGUMENT

The Maumee Indian Tribe and the Wendat Band of Huron Indians, like many other tribes throughout this country's history, have been subject to the passage of federal policy intent on Indian assimilation. Although some Indian treaties even preceded its ratification, Article I, Section 8, Clause 3 of the Constitution, ("Indian Commerce Clause") gives Congress authority over Indian affairs. With this power, Congress can abrogate or modify Indian treaty rights if it shows that it clearly intended to do so. Here, Congress changed its mind as a river changes its course. After consideration of where to place the western border of the Wendat Reservation, Congress chose to abrogate the Maumee's rights to claim the Topanga Cession. Unfortunate as it is for the Maumee Indian Tribe, Congress made its intentions clear and plain.

Additionally, under the doctrine of diminishment, Congress may diminish the boundaries of an Indian reservation so long as it clearly expresses it intentions. Evidence of congressional intent is made through reference to cession or the total surrender of tribal rights. Here, Congress' statutory language clearly showed that it intended to diminish the Maumee reservation. In contrast, Congress did not use any explicit language to modify the boundaries of the Wendat Reservation. Thus, the Topanga Cession remains within the boundaries of the Wendat Reservation.

This case is also about the self-determination of the Wendat tribe to establish its own self-sustaining economy—without futile state taxation or interference. The Indian Commerce Clause provides that Congress has the power to regulate commerce with the Indian tribes. Because Indian reservations are distinct territories, states have limited—if any—authority in Indian Country. Any state law—like taxation—cannot tread on either the doctrine of preemption or infringement. Preemption will void a state law over a tribe if there is already a federal regulation, statute, or policy in place. That is, the federal scheme "occupies the field." Here, the Indian Reorganization Act (IRA) trumps the State of New Dakota's transaction privilege tax (TPT). The Wendat Corporation is incorporated under Section 17 of the IRA that seeks promote tribal self-sufficiency and encourage tribes to control their business and economic affairs. There is sufficient evidence that the state's transaction privilege tax (TPT) undercuts this federal policy that would rob the Wendat of revenues crucial to tribal self-government. And, after balancing the interests of the state, tribe, and federal government, the tribal and federal interests outweigh the state's baseless and broad interests in taxing the Wendat tribe because the TPT would substantially reduce revenues used to provide tribal services—housing for low-income members, employment, and access to food, to name a few. The TPT would clearly defeat that federal purpose of self-determination and as such, the federal scheme must be given preemptive effect, and the State of New Dakota's TPT is invalid.

In addition, under the second doctrine, Indian infringement, a state tax is invalid if the state tax oversteps or affects tribal self-government. The state tax must have legitimate state interests in the taxed activity and the tax must be narrowly tailored to meet that state's legitimate interest. Most importantly, there is a presumption against finding a legitimate state

interest. Here, the TPT does not meet either requirement. The TPT is not legitimate because the revenue is paid into the state's general revenue fund. Moreover, the state's interests are too broad. That is, there is no explicit or precise quantification in the record demonstrating that the TPT will achieve the State of New Dakota's interests or why those interests justify taxing the Wendat.

Furthermore, the TPT is not narrowly tailored because a state cannot use a tax to profit from the tribe's valuable development. Because there is no apparent other significant revenue stream for the Wendat government besides this development, the WCDC will be vital to the economic development of the Wendat Tribe. The TPT infringes upon the one of the only income streams for the Wendat to provide essential government services and employment for its members. The state cannot justify taking away that revenue without infringing upon the Wendat's governance. As such, the Wendat Band of Huron Indians ask that this Court affirm the Thirteenth Circuit's decision.

ARGUMENT

I. THE TOPANGA CESSION IS IN INDIAN COUNTRY ON THE WENDAT RESERVATION BECAUSE THE WENDAT TREATY ABROGATED THE MAUMEE NATION'S CLAIM TO THE TOPANGA CESSION IN 1859 AND CONGRESS HAS NOT DIMINISHED THE WENDAT RESERVATION.

Long before white men arrived, Indian tribes were independent and sovereign nations. McClanahan v. State Tax Comm'n., 411 U.S. 164, 172 (1973). From its earliest Indian law decisions however, the Supreme Court recognized Congress' plenary authority over Indian affairs. Worcester v. Georgia, 31 U.S. 515, 553 (1832). Congress derives its authority from the federal responsibility for regulating commerce with the Indian Tribes. U.S. CONST. art. I, § 8, cl. 3. This Court also recognized that this decision-making authority over Indian affairs has always been a political one to make. Lone Wolf v. Hitchcock, 187

U.S. 553, 565 (1903). As such, the judiciary traditionally presumed that Congress, in its best judgement, acted in good faith toward the Indians and thus did not inquire further into the motives behind its legislative decisions. Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903).

Throughout the country's western expansion during the nineteenth and into the twentieth century, this power evolved into the United States holding "supreme power" over national territories, including those inhabited by Indians. Murphy v. Ramsey, 114 U.S. 15, 44 (1885); United States v. Kagama, 118 U.S. 375, 380 (1886); United States v. Winans, 198 U.S. 371, 383 (1905). Until 1871, the United States used treaties as the means to exercise its policy of dealing with the tribes. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903). By its nature, a treaty is a negotiated contract between nations, which represents the political policy of the nation at the time it was made. Charles F. Wilkinson & John M. Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" - How Long a Time Is That?, 63 CALIF. L. REV. 601, 604 (1975). Naturally, a government's circumstances and national interest are liable to change over time. Unsurprisingly, in their duty to carry out the changing interests of the country, Congress may, from time to time, feel it necessary to modify or even repeal the terms of a treaty. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903); Fong v. United States, 149 U.S. 698, 720-721 (1893).

A. The Treaty with the Wendat Band abrogated the Maumee's boundary line established in the Treaty of Wauseon because Congress explicitly chose to locate the western border of the Wendat Reservation to include the Topanga Cession.

Since Lone Wolf, this Court has repeatedly affirmed Congress' right to unilaterally abrogate Indian treaties. See also, Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-413 (1968); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 588 (1977); United States v. Sioux Nation, 448 U.S. 371, 408 (1980); United States v. Dion, 476 U.S. 734, 738

(1986). However, in nearly paralleled existence, this Court has also affirmed that such "intention[s] to abrogate or modify a treaty [are] not to be lightly imputed." Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-413 (1968) (citing Pigeon River, etc., Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160. (1934)). Often, treaties are merely promissory in character, but they are a nation's promise to a tribe. Accordingly, if Congress seeks to break its pledges and abrogate Indian treaty rights, "it must clearly express its intent to do so." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202-203 (1999) (quoting United States v. Dion, 476 U.S. 734, 739 (1986)). The precedent also leans on the notion that "Treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." South Dakota v. Bourland, 508 U.S. 679, 697 (1993) (quoting Montana v. United States, 450 U.S. 544, 561 (1981).

In Dion, the Court considered whether the Eagle Protection Act abrogated the treaty rights of members of the Yankton Sioux Tribe from hunting bald or golden eagles. United States v. Dion, 476 U.S. 734, 735 (1986). The tribal member, Dwight Dion, Sr., was convicted for shooting four bald eagles, in South Dakota, violating the Endangered Species Act. Id. The Court weighed various standards for determining clear and plain intent to abrogate but decide to distill its own test and established the "actual consideration and choice" test. Robert Laurence, The Abrogation of Indian Treaties by Federal Statutes Protective of the Environment, 31 NAT.RESOURCES J. 859, 865 (1991). The test requires that a court seeking to determine whether Congress abrogated a treaty must find "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." United States v. Dion, 476 U.S. 734, 739-740 (1986). In applying the test to Mr.

Dion's treaty rights, the Court found that the Bald Eagle Protection Act contained a religious exemption for Indian Tribes. United States v. Dion, 476 U.S. 734, 740 (1986); see 16 U.S.C. § 668(a)). Furthermore, it found that the presence of this exemption made it "difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indian." Id. As a result, the Court held that the "congressional intent to abrogate Indian treaty rights to hunt bald and golden eagles is certainly strongly suggested on the face of the Eagle Protection Act. Id.

While the facts in this case are distinguishable from others, in that, the specific Act of Congress is the ratification of a treaty rather than a statutory measure. Nevertheless, the "actual consideration and choice test," established in Dion, carries to the present day. Similar to that case, the factual timeline here makes it difficult to explain Congress' intentions, except as a reflection of an understanding that it knowingly chose to reserve the Topanga Cession for the Wendat and not the Maumee. The fact that nearly three decades had passed between by the river's movement and the Treaty with the Wendat's ratification further illustrates the evident reality that Congress knew of the conflicting rights of the respective treaties to this tract and in its plenary authority chose to abrogate the Maumee's right to it.

Here, the United States, as it has done many times before, drew an arbitrary line distinguishing the boundary between itself and the Indian tribes. It just so happens that the line drawn here is between two reservations. Although the Wendat Treaty abrogated the Maumee Tribe's borders, the Maumee retain most of their original treaty rights, including the right to hunt and fish. They simply must hunt and fish within the boundaries in which Congress provided them after 1859.

B. The Maumee Allotment Act diminished the Maumee reservation because the statutory language shows that Congress clearly intended to dispose of the Maumee's

surplus lands.

Until 1948, the United States held the terms "reservation" and "Indian country" synonymously. Solem v. Bartlett, 465 U.S. 463, 468 (1984). At the turn-of-the-century, during the height of the surplus land acts, the distinction seemed unimportant. Id. By that time, members of Congress believed that Indian reservations were a thing of the past and that within a short time would cease to exist. Id. This anticipated demise of the reservation led Congress to seldom detail whether lands opened for settlement retained reservation status. Id. Therefore, with the passage of every subsequent surplus land act, this Court has repeatedly extrapolated congressional purpose from the language of the act and the circumstances underlying its passage. Id. at 469. Such extrapolation has established a "fairly clean analytical structure for distinguishing those surplus land acts that diminished reservations from those acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries." Id. at 469-470.

It is well settled that "only Congress may diminish the boundaries of an Indian reservation, and its intent to do so must be clear." Nebraska v. Parker, 136 S. Ct. 1072, 1078-1079 (2016) (quoting Solem v. Bartlett, 465 U.S. 463, 470 (1984)). However, such a breach of its own promises is not to be lightly inferred. Id. To make a clear determination of congressional intent, the Court must examine "all the circumstances surrounding the opening of a reservation." Hagen v. Utah, 510 U.S. 399, 412 (1994). Evidence of Congress' intent to diminish a reservation must be explicit in the statutory language of the Act. Nebraska v. Parker, 136 S. Ct. 1072, 1075 (2016).

In Parker, the Court identified some "common textual indications of Congress' intent to diminish reservations boundaries [to] include":

> [Explicit] reference to cession or other language evidencing the present and total surrender of all tribal interests" or "an unconditional commitment from Congress to compensate the Indian tribe for its opened land." Such language "providing for the total surrender of tribal claims in exchange for a fixed payment" evinces Congress' intent to diminish a reservation, and creates "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished," Similarly, a statutory provision restoring portions of a reservation to "the public domain" signifies diminishment.
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> Nebraska v. Parker, 136 S. Ct. 1072, 1079 (2016) (quoting Solem v. Bartlett, 465 U.S. 463, 470 (1984); South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 345 (1998)).

The Court in Parker held that the disputed legislation did not diminish the Omaha Indian reservation. Nebraska v. Parker, 136 S. Ct. 1072, 1082 (2016). It also agreed that it is well settled that some surplus land acts, when considered in the isolation, diminished reservations, see, e.g., Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975), and some surplus land acts did not. See, e.g., Mattz v. Arnett, 412 U.S. 481 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962)(quoting Solem v. Bartlett, 465 U.S. 463, 468–469 (1984)).

In McGirt, this Court narrowed the scope to more succinct but similar indictors, such as "cession," "abolishing the reservation," "restoring" land to the "public domain," or an "unconditional commitment" to "compensate" the Tribe. McGirt v. Oklahoma, 140 S. Ct. 2452, 2489 (2020). It also announced a more restrictive approach to the Court's consideration of "extratextual sources." Id. at 2487. Instead, a court's focus should first be toward the statutory language, where it asserts the focus has been all along. Id. In fact, this Court asserts that it has never found the disestablishment of a reservation without first concluding that a statute required that result. Id. at 2469. The Court may look to the events surrounding the passage of the Act and subsequent demographic history and subsequent

treatment of the land only to "help clear up… ambiguity about a statute's original meaning." Id. (quoting Milner v. Department of Navy, 562 U.S. 562, 574 (2011).

Whether the Court examines the Maumee's ownership claim to the Topanga Cession from the purview of McGirt or not, does not change the outcome. The claim fails either way because Congress explicitly diminished the Maumee Reservation. First, Sec. 1 of the Maumee Allotment Act provides:

> Unclaimed lands in the western three-quarters of the reservation shall continue to be reserved to the Maumee. The Indians [Maumee] have agreed to consider the entire eastern 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.
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> Maumee Allotment Act of 1908, P.L. 60-8107 (May 29, 1908).

The statutory text chosen by Congress is model language of an explicit reference to cession. Under the Parker framework, this semantic choice signals that Congress intended for the Maumee's total surrender of all tribal interests in the eastern quarter of the reservation. Second, Under the McGirt framework, the Court can further extract congressional intent to diminish the eastern quarter of the Maumee Reservation because it provided that surplus lands shall be "returned to the public domain." Id. Lastly, Sec. 3 of the Act declares that the price of the Maumee's lands… "shall be fixed by appraisement." Id. Under the textual indicators of Parker, this confirms that Congress intended to remove the Maumee of tribal claims in exchange for a fixed payment. These written words, read together, as Congress ratified them, makes a clear statement of congressional intent. Congress explicitly diminished the Maumee Reservation, ceding the entire eastern quarter of the lands and the Maumee's claim to them.

In glaring contrast, the statutory text of the Wendat Allotment Act merely declares that surplus lands shall be "open to settlement." Wendat Allotment Act, P.L. 52-8222 (Jan.

14, 1892). In preparation for allotment, the Act commands the Indian Agent at Fort Crosby to "continue… surveying… the western half of the lands reserved by the Wendat Band in the 1859 Treaty." Id. The treaty also affirms that the eastern half of the lands reserved by the Wendat Treaty "shall continue to be held in trust by the United States for the use and benefit of the Band." Id. This language unmistakably splits the lands into two halves, the eastern "in trust," but both equally "reserved by the Wendat Treaty." Under the new restrictive approach established by McGirt, this Court requires additional arguments concerning the events surrounding the passage of the Act, subsequent demographic history, and subsequent treatment of the land only if ambiguity remains about a statute's original meaning. McGirt v. Oklahoma, 140 S. Ct. 2452, 2469 (2020). No such ambiguity exists here. The only language that presents mild uncertainty here is whether members of the Wendat Tribe were equally free to choose an allotment on the eastern half of the reservation as they were on the western half.

What is clear however, is that Congress chose to retain the boundaries of the Wendat Reservation, including the Topanga Cession, which it previously assigned to the Wendat Band. Considering that the Wendat Treaty of 1859 abrogated the Maumee Reservation's borders and the Wendat Allotment Act did not diminish the Wendat Reservation, the Topanga Cession is clearly within the borders of the Wendat Reservation.

II. BECAUSE THE TOPANGA CESSION IS STILL IN INDIAN COUNTRY, THE DOCTRINES OF INDIAN PREEMPTION AND INFRINGEMENT PREVENT THE STATE OF NEW DAKOTA FROM COLLECTING ITS TRANSACTION PRIVILEGE TAX AGAINST THE WENDAT TRIBAL CORPORATION.

Congress has the power to regulate commerce with Indian tribes. U.S. CONST. art. I, § 8, cl. 3 Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903); United States v. Kagama, 118 U.S. 375, 384–85 (1886). As such, Indians on Indian reservations are, generally, not subject

to the laws of the states. Worcester v. Georgia, 31 U.S. 515, 534, 561 (1832) (holding that an Indian reservation "is a distinct community occupying its own territory . . . in which the laws of [a State] can have no force . . . ."). State law can only apply to activities on Indian reservations only if the state law is specifically authorized by acts of Congress. Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 687 n.3 (1965); Crow Tribe of Indians v. Montana, 819 F.2d 895, 902 (9th Cir. 1987), aff'd, 484 U.S. 997 (1988) (holding that a state tax on "Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation . . . is not permissible absent congressional consent."). When no federal statute or regulatory scheme exists, a state law may be permissible, but only if it does not tread on the doctrines of Indian preemption and infringement. McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164, 172 (1973). That is, state laws must not "unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them."' Williams v. Lee, 358 U.S. 217, 220 (1959)).

Evaluating the validity of a state tax under the doctrines is a two-part analysis. First, federal preemption. This analysis requires a balancing of the state, federal, and tribal interests. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980). The tribe's interest is "strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 156–57 (1980). And the State's interest is "likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." Id. However, any ambiguities in the federal scheme should be construed in favor of the tribe. Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 838 (1982).

Second, the tax must not infringe upon tribal sovereignty (i.e., tribal self-governance). Crow Tribe of Indians v. Montana, 819 F.2d 895, 902–903 (9th Cir. 1987), aff'd, 484 U.S. 997 (1988). A state tax is valid only if there are legitimate state interests in the taxed activity, *and* the tax is narrowly tailored to meet that state's legitimate interest. Id. at 901 (gauging whether a tax is narrowly tailored by evaluating the manner in which the tax revenues are used and the legislative intent for the tax) (emphasis added). Moreover, there is a presumption against finding a legitimate state interest Id. But, a stating raising revenue is legitimate. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 156–57 (1980). As such, "the federal tradition of Indian immunity from state taxation is very strong and . . . *the state interest in taxation is correspondingly weak.*" California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 n. 17 (1987) (emphasis added).

The state tax must pass each hurdle in order for the tax to be valid. And typically, the federal government prohibits state taxation within Indian country under the doctrines. See e.g., Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 690 (1965); McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973).

A. The State of New Dakota's transaction privilege tax (TPT) is invalid under the doctrine of preemption because the federal Indian reorganization act (IRA) governs tribal corporations and promotes economic self-sufficiency of tribes incorporated under it.

The first part of the analysis begins with federal preemption. A state tax will be invalid when if federal statutes, regulations, or policies are "so pervasive as to preclude the additional burdens sought to be imposed [by the state]. . . ." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 148 (1980). Moreover, state tax laws have been preempted in multiple instances. See e.g., Bracker, 448 U.S. at 148 (holding that federal timber-harvesting laws preempted a state motor-carrier license and fuel taxes on a non-Indian logging company

on a reservation); Warren Trading Post Co., 380 U.S. at 687; Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160 (1980) (holding the state's "transaction privilege tax" on an unlicensed non-Indian corporation that sold farm machinery to the Gila River Indian Tribe to be invalid because the sale between the Gila Tribe and Central Machinery took place on the reservation and was preempted by the Indian trader statutes).

In Warren Trading Post, Arizona sought to levy a 2% gross profits of sales or gross income tax on a non-Indian corporation doing business with the Navajo tribe on the Navajo Indian Reservation. Warren Trading Post Co., 380 U.S. at 685–86. The corporation, Warren Trading Post, operated under a license granted by the U.S. Commissioner of Indian Affairs. Id. at 686. The Court found the state tax invalid because comprehensive and existing federal statutes precluded the state from imposing a tax on Indian traders. Id. at 688. Because of the existing comprehensive statutory framework, the Warren Court determined that there was "no room . . . for state laws imposing additional burdens" on the tribe. Id. at 690. Moreover, the Court explained that collecting a tax from the corporation (although non-Indian) would financially burden the Navajo tribe, and therefore "disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair to Indians." Id. at 691. Therefore, the Court found that Arizona had no privilege to levy a 2% gross profits of sales or gross income tax on the non-Indian company. Id. 691.

In this case, under a preemption analysis, the state tax is not warranted because state tax would obstruct federal Indian policies of self-determination sought under the Indian Reorganization Act (IRA) of 1934. The IRA is the federal scheme that precludes the state of New Dakota's transaction privilege tax (TPT). See 25 U.S.C.A. §§ 5101, 5114 (West 2020). The IRA is meant to promote tribal self-government and encourage economic development

by creating provisions for tribal companies to incorporate and conduct business (Section 17). See H.R. Rep. No. 73-1804, at 1 (1934); 25 U.S.C.A. § 5124 (West 2020) (requires a tribe to obtain a federally licensed charter from the Bureau of Indian Affairs to incorporate). The IRA allows tribes to foster a reliable economy for themselves. Additionally, the IRA operates "to exempt lands or rights from state and local taxation only if title to the land or right is taken in the name of the United States in trust for the Indians." Bd. of Equalization for Borough of Ketchikan v. Alaska Native Bhd. & Sisterhood, Camp No. 14, 666 P.2d 1015, 1021 (Alaska 1983) (holding the state tax did not infringe on the tribes authority to self-government because there was no evidence suggesting the tax would substantailly impact the tribes ability to provide governmental services to its members). However, Indian land not yet taken in trust does not automatically subject it to state and local taxation if tribal sovreighty is affected. See id.; J.A. 8 ("Wendat Band recognizes that the land it has purchased in the Topanga Cession has not been taken into trust . . . ."). That is, the state's TPT is still precluded because it undercuts the historical federal policy of Indian self-determination, which promotes tribal self-sufficiency and encourages tribes to control their business and economic affairs. See H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934) (discussing the purpose of the Indian Reorganization Act of 1934 "'to rehabilitate the Indian's economic life and to give [them] a chance to develop the initiative destroyed by a century of oppression and paternalism.'").

Here, Section 17 operates in an analogous fashion to the comprehensive and existing federal Indian trader statutes outlined in Warren that precluded the state from imposing a tax on Indian traders. Moreover, unlike the holding in Borough of Ketchikan, the state TPT at issue here substantially interferes with the WCDC's provision of governmental services.

Borough of Ketchikan, 666 P.2d at 1015. And unlike Borough of Ketchikan, here there is specific evidence that the State of New Dakota's TPT would severely hamper the Wendat's ability to create an ironclad economy for themselves by taking away 3% of the WCDC's projected annual revenue of $80 million dollars, totaling $2.4 million dollars. J.A. 7–8. That is, the Wendat would have to divert its hard-earned revenues used for essential government services to the payment of the state tax. The TPT would unfairly preclude the Wendat from taking care of their members—providing low-income housing and a nursing care facility for their elders. J.A. 7–8. As such, collecting the TPT from the Wendat corporation, as the Warren Court stated, would "disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair to Indians." See Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 691 (1965). That is, the plan to promote tribal self-government and encourage economic development for tribes. And "this policy must be given broad preemptive effect." Crow Tribe of Indians v. State of Mont., 819 F.2d 895, 898 (9th Cir. 1987), aff'd sub nom. Montana v. Crow Tribe of Indians, 484 U.S. 997 (1988).

To illustrate, the present case rests on a similar crux as Cabazon, where the balance of interests leaned in favor of the tribe. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 219–20 (1987) superseded by statute Indian Gaming Regulatory Act (IGRA) 102 Stat. 2467, 25 U.S.C. § 2701 et seq. In Cabazon, the Court found that the tribes' investment in its gambling bingo facilities distinguished the case from earlier decisions that upheld state taxes to cigarettes and smoke shops. Cabazon, 480 U.S. at 219–20. The Cabazon Court distinguished the case from Washington v. Confederated Tribes of Colville Indian Reservation, which held that the State could tax cigarettes sales of tribe-owned smoke shops

(but only to non-Indians) even though it would eliminate the tribe's competitive advantage and substantially reduce revenues used to provide tribal services. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 136 (1980). In Colville, the tax was found permissible because "the value marketed by the smokeshops to [non-Indians] coming from outside [the reservation] is not generated on the reservations by activities in which the Tribes have a significant interest." Id. at 155. However, in Cabazon, like the present case, the Court determined that the tribes were not "merely importing a product onto the reservations for immediate resale to non-Indians" as in Colville. Cabazon, 480 U.S. at 219 (1987). Instead:

> [t]hey have built modern facilities [providing] recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have a strong incentive to provide comfortable, clean, and attractive facilities and well-run games in order to increase attendance at the games.
>
> Id. at 219–20.

The Cabazon Court also found that the tribal bingo enterprise was similar to the on-reservation resort complex in New Mexico v. Mescalero Apache Tribe whereby the Mescalero Apache Tribe operated through "concerted and sustained" management. Id. at 220. In Mescalero—similar to the Wendat development—the tribal resort complex generated funds for essential tribal services and provided employment for tribal members. Id. The Cabazon and Mescalero Courts demonstrate that a state tax is precluded when a tribe is "generating value on the reservations through activities in which they have a substantial interest." Cabazon , 480 U.S. at 219–20.

Analogous to Cabazon and New Mexico, the State of New Dakota's TPT would substantially affect the Wendat's ability to offer governmental services and to develop tribal

resources. Not only will the residential and commercial development include public housing units for low-income tribal members, a nursing care facility for elders, a tribal cultural center, a tribal museum, and a shopping complex with a café serving traditional Wendat cuisine, a grocery store offering both fresh and traditional foods to help prevent the area from becoming a food desert, a salon/spa, a bookstore, and a pharmacy. J.A. 7–8. Without those revenues, the Wendat tribal government may not be able to perform those functions. J.A. 8. The WCDC would generate substantial revenues—more than $80 million annually—for the social and economic benefit and welfare of the Wendat citizens and elders. J.A. 8. And 100% of those corporate profits are remitted quarterly to the tribal government, which allows it to perform essential government functions. J.A. 8. But the TPT would undercut those essentail governmental fuctions. Moreover, at the very least, the state does not have the ability to assess or collect the TPT on the Wendat development that is located within the reservation, owned by the tribe, and from any sales made by Indians to Indians. See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 483 (1976).

Without those revenues from non-Indians, tribal self-governance would be greatly undermined because the TPT impedes Congress' objectives through the IRA. Ultimately, the Wendat Tribe demonstrates that the TPT imposed by the state will interfere with the policies underlying the IRA. As such, the TPT is subject to preemption, and this Court should affirm the Thirteenth Circuit's decision.

B. The State of New Dakota's TPT is invalid under the infringement doctrine because the state's interests are not narrowly tailored and because the TPT undermines the principles of self-determination of the Wendat tribe.

Under the infringement doctrine, a state tax is invalid if the state tax oversteps or affects tribal self-government. Crow Tribe of Indians v. Montana, 819 F.2d 895, 902–903

(9th Cir. 1987), aff'd, 484 U.S. 997 (1988). A state tax may be valid only if there are legitimate state interests in the taxed activity and the tax is narrowly tailored to meet that state's legitimate interest. Id. Moreover, there is a presumption against finding a legitimate state interest. Crow Tribe, 819 F.2d at 901. And, to determine whether a tax is narrowly tailored, good indicators include the manner in which the tax revenues are used and the legislative intent for the tax. Crow Tribe, 819 F.2d at 901.

To illustrate, in Crow Tribe, Montana law imposed a 30% severance and gross receipts tax upon coal mined from reservation lands. Id. The Ninth Circuit struck down the tax under both preemption and infringement doctrines. Id. Under the doctrine of Indian infringement, the Ninth Circuit concluded that there may or may not be legitimate interest in taxation even though Montana argued it needed the tax revenues due to the increased demand for the coal mined on the reservation as well as for environmental remediation costs associated with the mining activity. Id. The Ninth Circuit rejected the lower court's finding of a legitimate state interest although the costs of the state services "could not be documented precisely and were unquantifiable." Crow Tribe of Indians v. State of Mont., 819 F.2d 895, 900 (9th Cir. 1987), aff'd sub nom. Montana v. Crow Tribe of Indians, 484 U.S. 997 (1988). Just as in Crow, New Dakota does neither provides evidence "quantify[ing] or forecast[ing] the current or future costs resulting from [the] . . . development." Id. at 901. As such, New Dakota will "charge a heavy tax for indeterminable future costs, imposing on the Tribe the burden of the doubt." Id.

Furthermore, in Crow, the state interests were not narrowly tailored because the taxes collected went to a trust fund and a state general fund, which did not directly serve the

interests that the state proffered. Id. Moreover, the Ninth Circuit—relying on Cabazon—found that:

> [Coal provides] the sole source of revenues for the operation of the tribal governments and the provision of tribal services. [It is] also the major source[] of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests.

Id. at 901 (quoting California v. Cabazon Band of Mission Indians, 480 U.S. 202, 218–19 (1987), superseded by statute Indian Gaming Regulatory Act (IGRA) 102 Stat. 2467, 25 U.S.C. § 2701 et seq.).

In this case, like Crow, the State of New Dakota's TPT is "paid into the state's general revenue fund for the purpose of maintaining a robust and viable commercial market within the state including funding for the Department of Commerce, funding for civil courts which allow for the expedient enforcement of contracts and collection of debts, maintaining roads and other transport infrastructure which facilitate commerce, and other commercial purposes." 4 N.D.C. § 212; J.A. 6. These interests—possibly legitimate—are too broad because there is no explicit or precise quantification in the record here demonstrating that the TPT achieves the State of New Dakota's interests. But the purposes of funding for civil courts and enforcement of contracts and collection of debts clearly have no link or demonstratable justification for taxing the WCDC who does not benefit from those activities and are in no way connected to transacting in the state. As such, it is unclear—and demonstratably unlikely—that New Dakota's interests are legitimate. Just like the Ninth Circuit chastised the state in Crow for using the tax to profit off of the tribe's valuable resources, in this case, New Dakota does the same. Crow Tribe, 819 F.2d at 901. New Daktota will use the TPT to profit from the Wendat's valuable revenue from the WCDC.

Even if the state's interests are found to be legitimate, those interests are not narrowly tailored because the TPT infringes upon the one of the only income streams for the Wendat to provide essential government services and employment for its members. J.A. 7–8. Here, just as in Cabazon and Crow—the Wendat Tribe will generate on-reservation value and construct on-reservation facilities, which will be vital sources of revenue and tribal member employment. J.A. 8. And just like in Crow, there is no apparent other significant revenue stream for the Wendat government besides this development. The WCDC will be vital to the economic development of the Wendat Tribe. Moreover, the state-imposed TPT on an Indian-owned corporation evinces an even greater reason against the TPT because it is blatant disregard of tribal self-governance. And the Wendat must "'receive . . . the benefit of whatever profit [the development] is capable of yielding.'" Cf. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 149 (1980). Even more, the Wendat are not receiving the "privileges" of doing business in the state, as the tribe is transacting on the reservation itself—not in the state. As such, New Dakota's TPT interests are not narrowly tailored to justify the tax on the WCDC.

And even if the WCDC does not fall within the 4 N.D.C. § 212(4) exemption, the State of New Dakota must still remit to the tribe the proceeds under the TPT under both of the doctrines, and still may not assess or collect the TPT on the Wendat development that is located off of the reservation, owned by the tribe, and from any sales made by Indians to Indians. See Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 483 (1976).

Because of these weighty tribal interests of self-determination, the State of New Dakota does not overcome its heavy burden by proffering these blanket interests justifying

the tax on the Wendat. And even if this Court find those interests to be legitimate, there is no evidence suggesting that those interests are narrowly tailored to justify taking away the sole revenue stream for the Wendat tribe.

CONCLUSION

In conclusion, Congress considered the conflict between locating the Wendat Reservation east of the Wapakoneta, following the river's move, and the Maumee's treaty right to the land that became the Topanga Cession and chose to abrogate the Treaty of Wauseon. The Maumee further cannot claim ownership to the Topanga Cession because Congress diminished the eastern quarter of the Maumee Reservation, further reducing its boundaries. In contrast, although Congress opened the western half of the Wendat Reservation to non-Indian settlement, it did not diminish its boundaries. Thus, the Topanga Cession is firmly within the boundaries of the Wendat Reservation and the Maumee Indian Tribe claim to the lands must fail. Furthermore, the doctrines of preemption and infringement preclude the State of New Dakota's transaction privilege tax (TPT) on the WCDC. Preemption bars the tax because there is an existing federal scheme –the Indian Reorganization Act. The infringement doctrine prohibits the tax, too, because the state's interests are not narrowly tailored to justify imposing the tax. As such, this court should affirm the Thirteenth Circuit voiding the state's TPT on the Wendat tribe.

APPENDIX

CONSTITUTIONAL PROVISIONS

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

Treaty of Wauseon, Oct. 4, 1801, 7 Stat. 1404.

Treaty with the Wendat, March 26, 1859, 35 Stat. 7749.

STATUTORY PROVISIONS

25 U.S.C.A. § 5124 provides: "The Secretary of the Interior may, upon petition by any tribe, issue a charter of incorporation to such tribe: *Provided,* That such charter shall not become operative until ratified by the governing body of such tribe. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law; but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years any trust or restricted lands included in the

limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress."

4 N.D.C. § 212 provides: (1) Every person who receives gross proceeds of sales or gross income of more than $5,000 on transactions commenced in this state and who desires to engage or continue in business shall apply to the department for an annual Transaction Privilege Tax license accompanied by a fee of $25. A person shall not engage or continue in business until the person has obtained a Transaction Privilege Tax license. (2) Every 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. Licensees with more than one physical location must report which tax came from which location so the proceeds can be appropriately parceled out to local partners. (3) The proceeds of the Transaction Privilege Tax are paid into the state's general revenue fund for the purpose of maintaining a robust and viable commercial market within the state including funding for the Department of Commerce, funding for civil courts which allow for the expedient enforcement of contracts and collection of debts, maintaining roads and other transport infrastructure which facilitate commerce, and other commercial purposes. (4) In recognition of the unique relationship between New Dakota and its twelve constituent Indian tribes, no Indian tribe or tribal business operating within its own reservation on land held in trust by the United States must obtain a license or collect a tax. (5) In further recognition of this relationship, the State of New Dakota will remit to each tribe the proceeds of the Transaction Privilege Tax collected from all entities operating on their respective reservations that do not fall within the exemption of §212(4). While the Department of Revenue recognizes that each Tribe could collect this tax itself, the

centralization of collection and enforcement by the State of New Dakota is the most efficient means of providing these funds to tribes. (6) Door Prairie County. In recognition of the valuable mineral interests given up by the Maumee Indian Nation, half of the Transaction Privilege Tax collected from all businesses in Door Prairie County that are not located in Indian country (1.5%) will be remitted to that tribe. (7) The failure to obtain a license or pay the required tax is a class 1 misdemeanor.

OTHER

The Maumee Allotment Act of 1908, P.L.60-8107 (May 29, 1908) Sec. 1 provides: Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of the Interior is hereby authorized and directed, to first survey the entire Maumee Indian Reservation into townships. After the survey is complete the Secretary shall permit the Indians to select their individual allotments in the western three quarters of the reservation under the following formula: 160 acres for each head of household, 80 acres for each single adult, and 40 acres for each child under eighteen years of age as of the time of this enactment. Unclaimed lands in the western three-quarters of the reservation shall continue to be reserved to the Maumee. The Indians have agreed to consider the entire eastern quarter surplus and to cede their interest in the surplus lands to the United States where it may be returned the public domain by way of this act.

The Maumee Allotment Act of 1908, P.L.60-8107 (May 29, 1908) Sec. 3 provides: That the price of said lands entered as homesteads under the provisions of this Act shall be fixed by

appraisement as herein provided, the full price being due to the local agent at Fort Crosby at time of entry. The President of the United States shall appoint a commission to inspect, appraise, and value all of said lands that shall not have been allotted in severalty to said Indians, or reserved by the Secretary of the Interior or otherwise disposed of, excepting sections sixteen and thirty-six in each of said township. That said commissioners shall then proceed to personally inspect, classify, and appraise, in one hundred and sixty acre tracts each, all of the remaining lands embraced within each reservation as described in section one of this Act. In making such classification and appraisement said lands 14 shall be divided into the following classes: Division of lands. First, agricultural land of the first class; second, agricultural land of the second class; third, grazing land; fourth, timber land; fifth, mineral land, if any, the mineral land not to be appraised.

The Wendat Allotment Act, P.L. 52-8222 (Jan. 14, 1892) Sec. 1 provides: Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Indian Agent at Fort Crosby shall, as soon as practicable, formally continue the surveying of the western half of the lands reserved by the Wendat Band in the 1859 Treaty. After the survey is complete the Commissioners shall give every adult reservation Indian one year from which to pick an allotment of 160 acres for themselves; and one parent or guardian may select an allotment of their choosing of 40 acres for each minor not yet an adult. All lands not selected within one year of the survey's completion shall be declared surplus lands and open to settlement. The eastern half of the lands reserved by the Wendat Band in the 1859 Treaty shall continue to be held in trust by the United States for the use and benefit of the Band.