UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PHILIP C. BELLFY, ARTICLE 32.ORG, pro per; MONICA CADY, pro per; WILLIAM J. PERAULT, pro per; MARTIN REINHARDT, pro per; NATHAN J. WRIGHT, HERBAL LODGE, pro per; John Does; and Mary Does,

Plaintiffs, pro se litigants

v

KEITH CREAGH,

Defendant.

No. 1:15-cv-00282

HON. PAUL L. MALONEY

MAG. ELLEN S. CARMODY

EXPEDITED CONSIDERATION REQUESTED

/

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PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

EXPEDITED CONSIDERATION REQUESTED

Standing: "The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to **every individual Indian**, as though named therein. They imposed a servitude upon **every piece of land** as though described therein." *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089. Emphasis added throughout.

The question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). *Allen v. Wright*, 468 U.S. 737 (1984) at 752.

Individual Indians may bring suit under § 1983 asserting violation of treaty-secured rights. 42 U.S. Code § 1983 - Civil action for deprivation of rights. *Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York,* 278 F.Supp.2d 313 (N.D.N.Y. 2003);*Oyler v. Finney,* 870 F.Supp. 1018 (D.Kan. 1994), *aff'd,* 52 F.3d 338 (10th Cir. 1995) (unpublished table decision); *Mille Lacs Band of* *531531 *Chippewa Indians v. Minnesota,* 853 F.Supp. 1118 (D.Minn. 1994), *aff'd,* 124 F.3d 904 (8th Cir. 1997), *aff'd,* 526 U.S. 172,119 S.Ct. 1187, 143 L.Ed.2d 270(1999); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin,* 663 F.Supp. 682(W.D.Wis. 1987), *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *Voigt,* 700 F.2d 341,343 (7th Cir. 1983); *Sohappy v. Smith,*302 F.Supp. 899 (D.Or. 1969), *aff'd in part,* 529 F.2d 570 (9th Cir. 1976) (per curiam).

We, the Plaintiffs in this case, assert that we have standing to bring this suit before the court based on the above and following rationale. According to William Canby, Jr., who is a Judge on the United States Court of Appeals for the Ninth Circuit and former professor of law at Arizona State University, treaties are to be construed as they were understood by the tribal representatives who participated in their negotiation. *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942). Judge Canby

further explains that they are to be liberally interpreted to accomplish their protective purposes, with ambiguities to be resolved in favor of the Indians. *Carpenter v. Shaw*, 280 U.S. 363 (1930).

The rule of sympathetic construction is important in deciding this case. "Two circuits have held that the canon of sympathetic construction also overcomes the rule of deference to an administrative agency's interpretation of a statute that it administers—a rule that is something more than a mere interpretive aid." *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir.1997); *Albuquerque Indian Rights v. Lujan, 930 F.2d 49, 59 (D.C.Cir.1991)*; contra *Williams v Babbitt*, 115 F.3d 657, 663 n.5 (9th Cir.1997).

In *Menominee Tribe v. United States*, 391 U.S. 404 (1968), the U.S. Supreme Court found that although the U.S. Congress had passed legislation that terminated the special relationship between the federal government and the Menominee Tribe, hunting and fishing rights for citizens of that tribe guaranteed by the Treaty of 1854 still existed. In this case, multiple tribes that fall under the Treaty of 1836 have indicated their opposition to the proposed sale of "public" land to Graymont. As individual Tribal citizen Plaintiffs, all of us being members of federally recognized tribes, with rights guaranteed to us by Treaty, we have the right to ask the federal Court to protect our individual Treaty interests.

Regarding the interpretation of terminology in the Treaty of 1836, it should begin with an analysis of how our ancestors most likely understood the terms of the Treaty at the time it was written. The terms include "until the land is needed for settlement." The key terms here are "land" and "settlement" both are ambiguous and both should be interpreted liberally in favor of the Plaintiffs' side of this case. In the Plaintiffs' language, the Anishinaabemowin term for land is "aki." This is often accompanied by "ngashe," which means mother. If you put them together, it becomes Ngashe-Aki, or Mother Earth. This speaks volumes to the understanding among those on the Indian side of the Treaty negotiation. It requires us to consider the spiritual and cultural relationship between the Indian people and the land to be akin to that between a mother and her children. Anishinaabe-izhitwaawin (traditional

cultural teachings) regarding mino-bimaadiz (the good life) require us to respect our Sacred Mother Earth and protect her from destruction. This is how we reciprocate the gift of life that we have received from her. She has provided what we need to live, and has nurtured us through that land, and it is our Sacred duty to live in a way that honors this original gift.

The second term must be understood, then, in its relationship to the first term. Our Anishinaabe ancestors would most likely have understood this term differently than non-Indian people at this time. To live in an area would have meant that all who lived here were to live on that land according to the established Sacred relationship that we as Anishinaabe people had with Mother Earth. Living in a way that honored the original gift of life and protecting Sacred Mother Earth from destruction would have been key to our understanding of"settlement." It would not have included intensive mining operations, but would certainly include humans living in the area in a respectful way. Just like we would not shoot a rifle near a residence in our established communities, we would not engage in this type of behavior near someone's home in this area if they were settled here. But that is not the case here. What is being proposed is an industrial operation that has little, if anything, to do with people living in a respectful Sacred way with Mother Earth, be they Native or non-Native.

"I am sure that the importance of treaty reserved rights to Indian tribes and their members has been expressed in testimony before this Subcommittee [on Interior, Environment. and Related Agencies, US House of Representatives] many times, but that importance can never be overstated. Treaty hunting, fishing and gathering rights were essential to the existence of our ancestors and continue to be essential to our existence as Indian people: they preserve our access to culturally significant resources which are intimately connected to traditional ways of life. This importance is not symbolic; tribal members continue to rely on the ability to harvest natural resources for both subsistence and commercial purposes. It is our life way. The tribes have always believed that these treaty reserved rights continue to exist, and were not extinguished or diminished by any act of the

federal government. Unfortunately that was not a belief shared by the State of Michigan, which prosecuted tribal members for hunting. fishing and gathering at times or with methods which State law prohibited. This situation continued until the United States filed suit against the State of Michigan in 1973. It resulted in a decision in United States v. Michigan in 1979 (issued by this Court] upholding the right to fish in the ceded waters of the Great Lakes." *Testimony of Levi D. Carrick, Sr.,* Chairman, Great Lakes Resources Committee of The Chippewa Ottawa Resource Authority, Before the Committee on Appropriations, Subcommittee on Interior, Environment, and Related Agencies, United States House of Representatives, March 24. 2015.

So, with the preceding discussion in mind, we return to the Defendant's binding judicial admission, wherein he states: "The maximum impact to Tribal treaty rights is 2681 acres." "Binding Judicial Admission," Docket #54, Ex. 1. Given that this entire case is based on the claim by the Plaintiffs that the Defendant's proposed action will undoubtedly impact the Plaintiffs' Treaty rights, and our spiritual and Sacred rights and relationships to the land, Plaintiffs have shown, and based on his binding judicial admission, the Defendant agrees, that, through the proposed sale/disposition, the Plaintiffs will indeed suffer an "injury in fact." There is no genuine dispute of this material fact. Fed. R. Civ. P. 56(c)

Plaintiffs possess a Treaty-protected interest in the land proposed to be sold/disposed of, a right that is shown to be concrete and particularized through reference to the Defendant's binding judicial admission that: "The maximum impact to Tribal treaty rights is 2681 acres." Obviously, and again based the Defendant's concrete and particularized binding judicial admission, the threat to Plaintiffs Treaty-protected interests posed by this pending sale of Ceded Territory is imminent.

Secondly, and again based the concrete and particularized binding judicial admission of Director Creagh, the threat to Plaintiffs Treaty-protected interests is directly traceable to the approval of the proposed disposition of Ceded Territory by Defendant Creagh.

Third, it is manifestly evident that the imminent injury to the Plaintiffs' Treaty rights posed by the proposed disposition of any portion of the 1836 Ceded Territory will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

The Defendant's First Binding Judicial Admission; the "impacted acres" letter:

In their Motion for Reconsideration, Plaintiffs have submitted to this Court "new evidence" in the form of a letter signed by the Defendant, DNR Director Creagh, wherein he stated that: "The maximum impact to Tribal treaty rights is 2681 acres." Docket #54, Ex. 1.

DNR Director Creagh's "impact to Treaty rights" letter is a (1) deliberate, (2) clear, (3) unequivocal, (4) statement by the Defendant, (5) about a concrete fact –the impact to Plaintiffs' Treaty rights-- (6) which falls squarely within the Defendant's peculiar knowledge, given that he wrote the binding judicial admission letter. *Hansen v. Ruby Construction Co.* 155 Ill. App.3d 475 (Ill. App. Ct. 1987).

Consequently, the Defendant's "impact to Treaty rights" letter is a binding judicial admission by the Defendant that the Plaintiffs' 1836 Treaty of Washington Article XIII "usual privileges of occupancy" Treaty rights will be irreparably impacted and harmed by the Defendant's proposed sale/disposition of 1836 Ceded Territory to Graymont, LLC. *Crest Hill Land Development Llc v. City of Joliet*, 396 F. 3d 801. *Keller v. United States*, 58 F. 3d 1194. *Ahqhazali v. Secretary of Health & Human Services*, 867 F.2d 921 (6th Cir. 1989). *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir. 1972). *United States v. McKeon*, 738 F.2d 26, 33 (2d Cir. 1984). *Medcom Holding Co. v. Baxter Travenol Lab.*, 106 F.3d 1388, 1404 (7th Cir. 1997). *Purgess v. Sharrock*, 33 F.3d 134, 143–44 (2d Cir. 1994). *Lungren v. Deukmejian*, 45 Cal.3d 727 (1988) 755 P.2d 299, 248 Cal. Rptr. 115. *MacDonald v. GMC*, 110 F.3d 337, 340 (6th Cir.1997). *Oscanyan v. Arms Co.*, 103 U.S. 261, 263, 13 Otto 261, 26 L.Ed. 539 (1880). *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir.1972)

In their Response to this "binding judicial admission new evidence" Rule 60 Motion, Defendant's counsel failed to object to, or refute, or deny the contents of that "new evidence" letter. Federal Court Rules make clear that an allegation in a responsive pleading not expressly denied is deemed admitted. FED. R. CIV. P. 8(b)(6). The failure of the Defendant's counsel to deny or refute Director Creagh's "tribal Treaty impact" statement in their Response constitutes a non-rebuttable formal judicial admission. *Fleischmann v. Stern* 90 N.Y. 110, 115 (1882). This binding judicial admission cannot be rebutted by contrary testimony. *Armour v. Knowles*, 512 F.3d 147, 154 (5th Cir. 2007).

Additionally, through their Response, the Defendant's counsel has failed to offer the Court any new evidence or any argument to refute the claim that the Plaintiffs have made. That is, the Defendant's Counsel has merely repeated the frivolous and vexatious "public right arguments" presented earlier in this case, but, with one rather new and novel and indefensible twist –Defendant's Counsel now claims that the Plaintiffs, while clearly and simply quoting the Defendant, Director Creagh, are "misrepresenting" him by quoting him. It's a bizarre "defense," and one that is clearly no defense at all. That is, this "misrepresentation claim" is an obvious, clear, unmistakable, manifest, and plain "palpable defect" in the Defendant counsel's "defense." *Scozzari v. City of Clare*, 723 F. Supp. 2d 974 (E.D. Mich. 2010).

Plaintiffs refute this "palpable defect" thusly: The Defendant has written that "The maximum impact to Tribal treaty rights is 2681 acres." Clearly, this binding judicial admission by Director Creagh provides this Court with irrefutable evidence that the Plaintiffs' claim has been correct from the very first day they filed this action, and this "new evidence" of a binding judicial admission by Director Creagh constitutes a palpable defect in his earlier "defense."

Through his binding judicial admission, DNR Director Creagh has agreed that the proposed disposition of Ceded Territory will impact Plaintiffs' Treaty rights. There is no dispute of this material

fact. And, while we have stated this repeatedly throughout the course of this controversy, we will do so once again –**the Plaintiffs are Anishnaabeg people, with Treaty rights that are constitutionally distinct from the "rights" enjoyed by "the public."**

This distinct status is stated explicitly in Article XIII of the 1836 Treaty of Washington: "The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy." It is beyond incomprehensible that the Defendant's counsel now comes before this Court and denies that Tribal members have any right to exercise those "usual privileges of occupancy" by insisting that they are mere members of "the public," while his client, the Defendant, simultaneously admits that "the Graymont deal" will impact Plaintiffs' Constitutionally-protected, Treaty-affirmed, Court-upheld, 1836 Treaty of Washington Article XIII "usual privileges of occupancy" rights. *United States Constitution*, Article VI, Section 2. *United States Constitution*, Fourteenth Amendment. *Standing Bear v. Crook,* 25 Fed (as No. 14891 [1899]). *Cherokee Nation v. Georgia*. (5 Peters), 1 (1831). *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. 8 Wheat. 543 543 (1823). *Worcester v. Georgia*, 31 U.S. (6 Pet.) 8 L.Ed. 483 (1832). *Treaty with the Ottawa, etc*. May 28 1836, 7 Stat 491 ("Treaty of Washington"). *People v. LeBlanc*, 399 Mich. 31 (1976), 248 N.W.2d 199. *United States v. State of Mich*., 471 F. Supp. 192 (W.D. Mich. 1979). *United States, et al. v. Michigan, et al.*, US Dis. Court. MI Western Dis., File No. 2:73-CV-26. *United States v. Winans*, 198 U.S. 371 (1905). *United States v. Washington* ("Martinez Decision"), No. CV R 9213RSM, 2007 WL 2437166 (W.D. Wash.). *Menominee Tribe v. United States*, 391 U.S. 404 (1968). *Lac Courte Oreilles Indians V. State of Wisconsin*, 775 F.Supp. 321 (1991). *Fond Du Lac Band of Chippewa Indians V. Carlson*, 68 F.3d 253 (8th Cir. 1995). *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175 (1999). *United States v. Brown*, No. 13-3800 (8th Cir. 2015). *United States v. Felter,* 752 F.2d 1505, 1509 (10th Cir. 1985). *Hackford v. Babbit*, 14 F.3d 1457, 1467 (10th Cir. 1994). *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 181 (1973). *Mason v. Sams*, 5 F.2d 255, 258 (W.D.Wash. 1925).

Natural Resources and Environmental Protection Act of 1994, MCL 324.1701. Lac Courte Dreilles Band of Lake Superior Chippewa Indians v. *Voigt,* 700 F.2d 341, 343 (7th Cir. 1983) *Tulee v. Washington*, 315 U.S. 681 (1942) *Winters v. United States,* 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908); *Dick v. United States*, 208 U.S. 340, 28 S.Ct. 399, 52 L.Ed. 520; *Seufert Bros. Co. v. United States*, 249 U.S. 194, 39 S.Ct. 203, 63 L.Ed. 555; *Tulee v. Washington,* 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115. *United States v. Fox*, 573 F.3d 1050 (10th Cir.2009) (**rejecting government's argument that hunting right was not a right enjoyed by the tribal member but rather a treaty communal right**).

"A [Treaty] right to a common is **the right of an individual [Indian]** of the community". An individual Indian enjoys a right of user in tribal property derived from the legal or equitable property right of the Tribe of which he is a member. *Mason v. Sams*, 5 F.2d 255, 258 (W.D.Wash.1925) at 258. Treaty rights to hunt and fish are **rights of the individual Indian**. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 181, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).

An individual Indian enjoys a right of user in tribal property derived from the legal or equitable property right of the Tribe of which he is a member. See F. Cohen, Handbook of Federal Indian Law 185 (1945).

A Treaty may provide for usufructuary fishing rights that survive the conveyance of the original possessor's title to the land. *Minnesota v Mille Lacs Band of Chippewa Indians*, 526 US 172 [1999]).

If a tribe has a treaty-reserved usufructuary right of indefinite duration, that right can continue to exist even if the tribe cedes its right of occupancy in the same land on which the use right runs. *Menominee Indian Tribe of Wisconsin v. Thompson*, 922 F. Supp. 184 (W.D. Wis. 1996).

Such a right can be terminated or abrogated only by explicit language in a later treaty or by congressional action evidencing governmental intent to end the right. *Id.* at 356 (citing *Menominee Tribe v. United States,* 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968).

There is no evidence to support a finding that the Chippewa understood at treaty time those

[usufructuary rights reserved in the 1837 and 1842 Treaties] could be diminished. . . by some amorphous aggregate of sporadic non-governmental decisions by individuals to acquire private ownership of parcels of the ceded territory . . . To construe the treaties as embodying some such potential for de facto diminution in response to non-Indian settlement is totally at odds with the rule that these treaties must be construed consistently with the Chippewa's understanding of their meaning. *Lac Courte Oreilles Band v. Wisconsin*, 653 F. Supp. 1420, 1433 (W.D. Wis. 1987).

And as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation, and, when so ascertained, must prevail over inconsistent state enactments …. Treaties are to be liberally construed so as to effect the apparent intention of the parties .... When a Treaty provision fairly admits of two constructions, one restricting. the other enlarging. rights which may be claimed under it, the more liberal interpretation is to be preferred." *Nielsen v. Johnson,* 279 U.S. 47 (1929)at 279.

United States v. Taylor, 3 Wash. Terr. 88 (1887) states: "The appellee further claims that even if the above position is correct, and the Indians were entitled by said treaty to the rights claimed, still that such rights do not now exist as against the defendant, as by the act of Congress subsequently passed, under which he has taken this land, such treaty has, as to him, been repealed; but with this position we cannot agree, as these laws simply authorize the appropriation by the settler of unappropriated lands, and only authorize the extinguishment of the title which the government holds at the time of the appropriation, and **if the land selected by the settler has at such time any servitude or easement impressed upon it, he takes subject thereto**." United States v. Taylor, 3 Wash. Terr. 88 (1887).

"We are bound to construe the Treaty to reserve to the Tribes [and their members] all rights necessary to effectuate the purpose of the Treaty." *Swim v. Bergland,* 696 F.2d 712, 716 (9th Cir. 1983) at

716.

"The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, **to every individual Indian**, as though named therein. They imposed a servitude **upon every piece of land** as though described therein. ... The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land, the right of crossing it to the river, the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And **the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees**." *United States v. Winans,* 198 U.S. 371 (1905), at 381-2.

"Moreover, if there be a **conflict between such a treaty and the provisions of a state constitution or statutory enactment, whether enacted prior or subsequent to the making of a treaty, the treaty will control**." *State v. Arthur,* 261 P.2d 135 (Idaho 1953), at 138. *State v. Arthur* further states: ""a treaty entered into in accordance with the requirement of the Constitution has the force and effect of a legislative enactment and is for all purposes equivalent to an Act of Congress, becoming the law of the United States and of such state, and **is binding upon each sovereignty,** anything in the Constitution or laws of any state to the contrary notwithstanding," *State v. Arthur,* 261 P.2d 135 (Idaho 1953), at 138.

"We are not here concerned with the wisdom of the provisions of the treaty under present conditions nor with the advisability of imposing upon the Indians certain regulatory obligations in the interest of conserving wild life; that is for the Federal Government, the affected tribe, and perhaps the State of Idaho to resolve under appropriate negotiations; our concern here is only **with reference to protecting the rights of the Indians** which they reserved under the Treaty of 1855 to hunt upon open and unclaimed land without limitation, restriction or burden .... We hold that the rights reserved by the Nez Perce Indians in 1855 which have never passed from them, to hunt upon open and unclaimed land still exist unimpaired and that they are entitled to hunt at any time of the year **in any of**

the lands ceded to the federal government though such lands are outside the boundary of their reservation." *State v. Arthur,* 261 P.2d 135 (Idaho 1953), at 142.

"Aside from the duty imposed by the constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact that the honor of the government and people of the United States is involved in every inquiry **whether rights secured by such stipulations shall be recognized and protected."** *Chew Heong v. United States,* 112 U.S. 536 (1884), at 540.

"A treaty entered into in accordance with the requirement of the Constitution has the force and effect of a legislative enactment and is for all purposes equivalent to an Act of Congress, becoming the law of the United States and of such state, and is binding upon each sovereignty, anything in the Constitution or **laws of any state to the contrary notwithstanding."** *State v. Arthur,* 261 P.2d 135 (Idaho 1953), at 137.

So, based on the above, and on Fed. R. Civ. P. 56(c), and L.C.R. 7.4(a), Plaintiffs argue that their request for a Preliminary Injunction should now be granted due to the simple fact that the Defendant has now been shown to state in a binding judicial admission that the Plaintiffs will suffer immediate irreparable harm to their 1836 Treaty of Washington Article XIII "usual privilege of occupancy" rights unless the Injunction is issued.

The Defendant's Second Binding Judicial Admission, the LTA's listing of impacted acres:

Despite the Defendant's counsel's oft-repeated demurrer that the number of acres impacted by Director Creagh's pending disposition of Ceded Territory would be zero, Plaintiffs quote from the LTA, signed by the Defendant on May 26, 2015, to validate their claim that "the Graymont deal" consists of:

- Tract A, this transaction constitutes a disposition and sale under MCL Section 324.503 and a negotiated sale of surplus land pursuant to MCL Sections 324.2131 and 324.2132. *Tract A = 1,006.8 acres.*
- Tract B, this transaction constitutes a disposition and exchange under MCL Section 324.503 and an exchange of land pursuant to MCL Section 324.2104. *Tract B = 671.19 acres.*
- Tract C, this transaction constitutes a disposition and exchange under MCL Section 324.503 and an exchange of land pursuant to MCL Section 324.2104. *Tract C = 159.61 acres.*
- Tract D, this transaction constitutes a disposition and sale under MCL Section 324.503 and a negotiated sale of surplus land pursuant to MCL Sections 324.2131 and 324.2132. *Tract D = 7,026.57 acres.*
- Tract E, this transaction constitutes a disposition and sale under MCL Section 324.503 and a negotiated sale of surplus land pursuant to MCL Sections 324.2131 and 324.2132. *Tract E = 778.19 acres.*
  Taken from Exhibit 1 of this Motion.

The total number of acres disposed of, sold, transferred, and/or exchanged, according to the language of the LTA as signed by the Defendant and detailed above is, therefore, *9,642.36 acres*. Plaintiffs beg this honorable court to compare this to Mr. Golder's claim that "the deal was reduced from roughly 10,000 acres to around 2,000 acres." Docket #54, Ex. 2. Consequently, and citing acreage directly from the LTA signed by the Defendant, DNR Director Creagh, on May, 26, 2015, Plaintiffs stand by their claim that the Defendant, through his counsel and Public Information Officer, has misrepresented "the deal" to this honorable Court.

Such a misrepresentation constitutes a clearly palpable defect that has now been corrected by the judicially binding admission into evidence of the LTA, signed by the Defendant, DNR Director Creagh, on May 26, 2015.

In summary, the Defendant's side of this issue has claimed at least four differing "impacted acres" numbers. Of course, none of this is of any consequence to either the Plaintiffs or to this Court. It is an undisputed fact that the proposed sale will impact Plaintiffs' Treaty rights, despite the fact that the Defendant, his counsel, and his Public Information Officer cannot agree on the number of acres that will be impacted.

The Court should disregard this "number of acres" dispute and focus on the simple undisputed issue of material fact that the Defendant has stated that the balance of harm –the impact on their treaty

rights-- the only harm, in fact, engendered by a disposition of Ceded Territory, will fall to the Plaintiffs.

Furthermore, and based on the Defendant's own binding judicial admissions, albeit one that is denied by Defendant's Counsel, that any sale of land to Graymont, LLC, will impact their Treaty rights, Plaintiffs argue, and the Defendant agrees, that there is an absolute certainty that they are entitled to an Injunction by law, and that they will succeed on the merits of the case, and that the "Treaty rights interest" of the Tribal member Plaintiffs will quite obviously be favored by the granting of the injunction.

All questions **with respect to rights of occupancy** in land, the manner, time and conditions of extinguishment, diminishment, or abrogation of, or impact upon Treaty rights are solely under the purview of Congress, not the MI-DNR Director. *United States v. Oklahoma Gas & Elec. Co.*, 127 F.2d 349, 352 (10th Cir. 1942). Only Congress, not the politically-appointed Director of the Michigan Department of Natural Resources, has the power to take action that will impact the Plaintiffs' Article XIII "usual privileges of occupancy" Treaty rights. *United States v. White*, 508 F.2d 453, 456 (8th Cir. 1974). A Treaty right may be abrogated by a subsequent, superseding act of Congress, but not through action by a lone state-level appointee, like the MI-DNR Director Creagh. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 23 S. Ct. 216, 47 L. Ed. 299 (1903); *Head Money Cases*, 112 U.S. 580, 5 S. Ct. 247, 28 L. Ed. 798 (1884). Rights secured by Treaty will not be deemed abrogated, modified, or impacted absent a clear expression of Congressional purpose. *United States v. Winnebago*, 542 F.2d 1002, 1005 (8th Cir. 1976). The intention to abrogate or impact a Treaty right "is not to be lightly imputed to Congress," and, quite obviously, not to be lightly imputed to an action by a lone "state actor," as well. *Menominee Tribe v. United States*, 391 U.S. at 413, 88 S. Ct. at 1711.

Treaties made by the United States with Indian tribes are not to be construed narrowly, but rather in the sense in which naturally the Indians would understand them. Subject to the conditions imposed by the treaty, the ... Tribe had the right that has always been understood to belong to Indians,

undisturbed possessors of the soil from time immemorial. The Court held that, as against the purchaser from the wrongdoers, the United States was entitled to possession. It was not there decided that the tribe's **right of occupancy in perpetuity** did not include ownership of the land or mineral deposits or standing timber upon the reservation, or that the tribe's right was the mere equivalent of, or like, the title of a life tenant. The lower court **did not err in holding that the right of the Shoshone Tribe included the timber and minerals** within the reservation. As transactions between a guardian and his wards are to be construed favorably to the latter, doubts, if there were any, **as to ownership of lands, minerals, or timber would be resolved in favor of the tribe**. *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (1938)

Minerals and standing timber are constituent elements of the land itself. *United States v. Cook*, 19 Wall. 591. Grants of land subject to the Indian title by the United States, which had only the naked fee, would transfer **no beneficial interest**. *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 92 U. S. 742-743; *Beecher v. Wetherby*, 95 U. S. 517, 95 U. S. 525. The right of **perpetual and exclusive occupancy of the land** is not less valuable than full title in fee. *Holden v. Joy*, 17 Wall. 211, 84 U. S. 244; *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U. S. 540, 195 U. S. 557.
The **tribe's right of occupancy was incapable of alienation … that right is as sacred**, and as securely safeguarded as is fee simple absolute title. *Cherokee Nation v. Georgia*, 5 Pet. 1, 30 U. S. 48; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 8 L.Ed. 483 (1832).

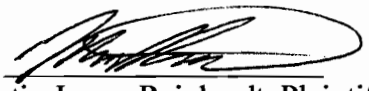
RELIEF REQUESTED

Tribal member Plaintiffs pray this honorable Court will recognize that the Defendant's binding judicial admission provides it with an undisputed issue of material fact: Plaintiffs are not mere members of "the public," and the proposed disposition of Ceded Territory will impact Plaintiffs' 1836 Treaty of Washington Article XIII "usual privileges of occupancy" Treaty rights. Both the Defendant and the Plaintiffs agree; this material fact is not in dispute.

Tribal member Plaintiffs also pray this honorable Court will recognize that the Defendant's binding judicial admission provides it with another undisputed issue of material fact: "the Graymont deal" will impact the Plaintiffs' 1836 Treaty of Washington Article XIII "usual privileges of occupancy" Treaty rights on "roughly 10,000 acres." Both the Defendant and the Plaintiffs agree; this material fact is not in dispute.

Based on the above undisputed issues of material fact, Plaintiffs pray this honorable Court will impose a Preliminary Injunction restraining the Defendant from in any wise disposing of any portion of the "roughly 10,000 acres" of 1836 Ceded Territory lands in question, as detailed above, pending the final decree, and to take any other action that this honorable Court deems just and appropriate, including, but not limited to, the reversal of any disposition of Ceded Territory acreage that may have already taken place.

Respectfully Submitted on March xx, 2016

/s/ 
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