Expert Witness Rebuttal Report regarding the 1836 Treaty of Washington

prepared for the case of
United States v. Michigan, Civil No. 85-335 (W.D. Michigan)
delivered to the Indian Resources Section,
Environment and Natural Resources Division, U.S. Department of Justice

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I. Introduction

Per my contract I am, "[u]pon completion of the work parallel to that outlined in Task A by the experts retained by other parties to the case [i.e. the expert witness reports], . . . review said work (a) for my assessment of its accuracy and (b) in order to assist attorneys in the Division prepare questions for the deposition of said experts. My review shall focus on the methodology used in the preparation of the report, the sources used in the preparation of the report, the analyses undertaken, and the conclusion derived."

In the sections that follow I offer specific comments about the work of the other experts retained for work on this litigation: experts retained by the State of Michigan whose work I disagree with and experts retained by the Tribes and the State of Michigan whose work offers further support for the basic thesis of the analysis offered in my expert witness report.

However, I begin this report by focusing in on what I understand to be the fundamental issue in this case. I suggest why an alternative position, such as the one both explicitly and implicitly forwarded by the State of Michigan experts, does not appear credible to me. In re-stating my position on this issue I also summarize the data from my report relative to it.

As all parties to this case acknowledge, the key issue is the interpretation and understanding of the final clause of Article 13th of the 1836 Treaty of Washington–"until the land is required for settlement." Within this clause, the term "land" refers to the territory subject to the Treaty and whose boundaries are described elsewhere in the Treaty; geographically this area represents approximately one-third of the state of Michigan. The reserved rights noted in the opening part of Article 13th, "the rights of hunting" and "other usual privileges of occupancy" are

conditioned by the limitations of the final clause. One of the main contentions among the parties is the trigger for the act of conditioning.

As I read the reports of the State of Michigan experts, their opinions are that Tribal reserved rights are conditioned "until the land is required," and that the explicit evidence of "the land" being "required" is the actions of survey and sale under the laws and administrative procedures of the period. In part, this explains the degree of detail provided by Squires in his examination of the surveying process during the Treaty period.[1/]

My opinion is that this represents an incomplete and, in fact, fundamental misreading of the construction and intent of the Article 13th clause. The clause does not end with the concept of "required." The construction of the clause shows clearly that it must be read so that "land is required" *for something*. And that something, according to the clause, is "settlement."

From my point of view the key issue is understanding what constituted an understanding of "settlement" at the time the Treaty was negotiated. Because, according to this reading of the clause, if Tribes have, are going to, or will lose their reserved rights under Article 13th, it will be when "the land is required <u>for settlement</u>" (emphasis added).

In my report, I offer forth the opinion and analysis that "settlement" had a very specific, policy-based definition at the time of the Treaty negotiations and signing. From the point of view of the U.S. government and the State of Michigan, "settlement" meant only two things: the use of land in agriculture, and the use of land for urban areas (hamlets, villages, cities). Among these two uses, the dominant expected use was agriculture. This definition of settlement was explicit and from the point of view of the state of Michigan continued, often despite strong

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[1/] Roderick Squires, Alienation of Land in the 1836 Ceded Area

ecological and social evidence to the contrary, to dominate policy discourse for over one hundred years.

In my report,[2] I support this line of opinion and analysis in many ways. Some of my key points include:

1) that in a set of opinions prepared by U.S. Attorney General Butler over the period 1836-1838 having to do with preemption rights on lands in the public domain, he makes it very clear that "pre-emption rights are not established by acquisition, nor are they established by improvement absent cultivation, and they are not established by residency absent cultivation. And in fact, cultivation is so key that pre-emption claims can be justified by cultivation absent residency, as long as said cultivation is under the direction of the claimant." [3]

2) that pioneers to Michigan, in line with earlier pioneers from more eastern forested states, experienced the native forests as an impediment to settlement. Forests were to be cut down to provide the conditions for agriculture, which was understood as settlement.[4]

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[2] Harvey M. Jacobs, Understanding the meaning of "until the land is required for settlement" in the 1836 Treaty of Washington: a land policy analysis of State of Michigan and federal policy from 1836 to the present (2004).

[3] Id., at 18.

[4] Id. at 19-21.

3) that when the State of Michigan advertised sales of its public lands, it stated explicitly that lands were to be used in agriculture, "and not for timber, mines, salines, &c."[5/]

4) that the State of Michigan established an office whose role was to attract new immigrants to come to the state for the purpose of cutting the forests and establishing new farms.[6/]

5) that in the late 1890s and early 1900s the Michigan State Legislature adopted innovative laws which brought abandoned cut-over land into public ownership. In considering what to do with the disposition of these land the Legislature decided expressly that the purpose of the land was to promote agricultural use in the northern part of the state, and land was not available to prospective owners for other purposes.[7/]

6) that it was not until the dawn of the Second World War that the State of Michigan came to accept as reality what the scientific and "settler" community seemed to have known for decades – the lands of northern Michigan could not support agriculture, and in so doing shifted their attention from the use of the northern Michigan for agriculture to the management of northern Michigan forests as forests.

[5/] Jacobs, at 24 (quoting the Michigan State Land Office brochure of 1858).

[6/] Id, at 25, 46 - 48.

[7/] Id., at 36 - 40.

In summary, the central line of reasoning in my report is that during the treaty period, and continuing for over 100 years following, there was no abstract notion of settlement, no notion of settlement tied only or solely to land acquisition through the acts of survey and sale. Instead, "settlement" was a specific concept tied to the acquisition of land for the purposes of the use of that land for agricultural production. This is clear in the policies of both the U.S. government and the state of Michigan.

II. Roderick Squires' "Alienation of Land in the 1836 Treaty Area"

I have read and reviewed the above noted report prepared by Prof. Squires, and offer the following comments about it.

1) The bulk of this report focuses on the descriptive and technical aspects of how the federally supervised surveying process was undertaken in the decades immediately following the 1836 Treaty of Washington signing.

2) The secondary focus of this report is on the disposition, or in the terms of the report the "alienation," of the land subsequent to the process of federally supervised surveying.

3) Very little of the report takes up the substantive policy issues addressed in my report: "Understanding the meaning of 'until the land is required for settlement' in the 1836 Treaty of Washington: a land policy analysis of State of Michigan and federal policy from 1836 to the present," that is, the matter of how the phrase in Article 13th of the Treaty impacts on an understanding and interpretation of the use of land following the Treaty signing.

4) Prof. Squires offers five "major opinions" in his introduction.[8] Of the five "major opinions" two of these are either strongly or partially contestable. Squires opines that "Settlement of the area ceded in the 1836 treaty was the outcome of a process through which the United States first extinguished the aboriginal title in the area, then surveyed the land, and finally conveyed title to the surveyed land not only to individuals but also to the state of Michigan."

This opinion is strongly contestable. My basis for this statement is the way the opinion is framed. The opinion appears to be premised–linguistically and conceptually–on the opening clause arguing that the "[t]he United States first extinguished the aboriginal title in the area . . ." It is my opinion, as well as the opinion of other scholars, policy analysts, and jurists, that the 1836 Treaty, like other treaties of the period did not extinguish aboriginal title. Instead, what the Treaty did was transfer a specific set of rights in the property bundle as part of a contractual relationship (i.e. the Treaty). Rights not specifically transferred were retained by the tribes at the time of the signing, and the modern-day heirs. This point is taken up very specifically in the 1978 Fox decision (U.S. v Michigan 471 F. Supp. 192), and is addressed in my report in section I.C.1.[9]

Specifically, the Court noted that:

> [c]entral to the plaintiffs' contentions . . . is the concept that under the treaty the Indians were the grantors of a significant land cession and the United States was the grantee. As in any land transaction (not just those involving the Indians), the grant extends only to those interests and rights specifically conveyed and to none others. When the Indians granted to the United States their ownership in the land and waters of the Great Lakes described in Article First of the 1836 treaty, they

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[8] Squires, at 1-2.

[9] Jacobs, at 4.

> retained all those rights not specifically conveyed (U.S. v Michigan 471 F. Supp. 192, 212-213).

The Court emphasized this point: "The Indians gave up some rights, reserving all those not specifically conveyed" (U.S. v Michigan 471 F. Supp. 192, 213), and "[t]he grant from the Indians must be narrowly construed. . . ."(U.S. v Michigan 471 F. Supp. 192, 254). Therefore "[I]ndians retain whatever rights they possess which are not relinquished by treaty or taken by Congress. Rights are reserved by implication if they are not expressly relinquished . . ." (U.S. v Michigan 471 F. Supp. 192, 257).

Prof. Squires seems to provide no acknowledgment of this point. Instead, he asserts an alternative "older" interpretation about understanding the act of treaty signing (I take this up in my report in section II.A[10/]). In so doing, at no point in his report does Prof. Squires provide data or analysis to bolster this assertion.

Squires also states that "Through this well-regulated and very visible processes, title to virtually all of the land in the ceded area left federal ownership and control."[11/]

This opinion is partially contestable. The basis of contestation has to do with how Prof. Squires uses the term and the concept "title." Taken superficially the opinion appears correct. That is, the federal government did act to transfer land that it acquired under the terms of the Treaty to private individuals and the state of Michigan. However, as stated, the opinion does not acknowledge the existence of reserved rights on the part of the tribes to the Treaty under the terms of the Treaty, especially the rights reserved under Article 13th. So the issue is what is

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[10/] Jacobs, at 12-14.

[11/] Squires, at 1-2.

meant and/or implied by the term "title." If Prof. Squires means to imply that all the rights in the property bundle were acquired by the federal government as part of the Treaty negotiation and subsequently transferred by them to others (private individuals and state of Michigan), then this point is contestable, and requires substantial clarification as to Prof. Squires's meaning. (See also the comment about major opinion number one below.)

5) Prof. Squires offers seven findings as conclusions to his research.[12/] Two of these findings require comment.

> "1. The United States government determined in 1785 that it would divest itself of title to land in the public domain. The 1785 Land Ordinance and the 1796 Land Act established the principles that became the foundation for American land policy: (1) subdividing the public domain into clearly identifiable parcels through rectangular surveys, and (2) conveying title to those parcels to individuals, states, and corporations in order to generate revenue and facilitate economic growth."

With a significant exception, the bulk of this finding is non-contestable. The data Prof. Squires offers in this report supports this finding and is in line with scholarly and professional understanding of the matter. The reservation I have has to do with the way Prof. Squires means to use and implications thereof of the term "title." The gist of my concern is detailed in my comment about his major opinion #5, discussed above.

> "5. The federal government conveyed title to individuals who used the land for various purposes: producing agricultural crops for personal consumption and for the emerging urban settlements; cutting timber to satisfy the demands for

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[12/] Squires, at 36-37.

> construction material from those same urban centers; extracting minerals to satisfy the demands of the emerging industrial, and largely urban, markets; and even holding the land for speculative purposes."

With a significant exception, the bulk of this finding is non-contestable. The data Prof. Squires offers in this report supports this finding and is in line with scholarly and professional understanding of the matter. The reservation I have has to do with the way Prof. Squires means to use and implications thereof of the term "used." If Prof. Squires is just describing what happened when land came into the possession of non-Indians, his description is correct. However, if Prof. Squires is intending to imply that the diversity of use he outlines was the goal of the federal and state governments when it acted to convey land in the Treaty area then his assertion is strongly contestable.

The foundational premise of my report is that the goal of the federal and state governments was to convey land for the purpose of fostering agricultural use in the Treaty area. Other uses of land, such as cutting timber, were understood at the time as necessary precursors to the initiation of agriculture, not land uses that were desirable in and of themselves (with the exception of the creation of urban settlements). See the discussion in this report in section IV and even Prof. Squires's acknowledgment of this point as noted below.[13/]

6) In the body of the report Prof. Squires makes some statements, assertions, and/or comment which require comment from me. Prof. Squires states "Once individuals acquired title, they could occupy and use the land surface as they saw fit—to farm, to cut trees, to mine, to

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[13/] Squires, at 4.

build railroads, or even to build towns (Figure 2)."[14/] My comment here is reflective of my comment above about finding #5. If Prof. Squires is *describing* what occurred then his description is correct. If Prof. Squires is speaking to the *intent* of federal and state policy with regard to land use for the land in the ceded area, then his statement is incomplete at best, or misleading. Either way, he provides no analysis to clarify whether he is providing a description or referring to intent. If it is the latter, he provides no data to back up this formulation.

As noted above, the gist of my report is based on the explicit intent of state and federal policy for the land in the ceded territory for the period 1836 - ~1950. During this period, first the federal government and then the state government strove with all diligence to consistently, firmly, and cyclically establish agriculture as the principal land use activity of the area.

In addition, Prof. Squires statement makes no recognition of the conditioned, reserved rights of the Indian signatories to the Treaty. Prof. Squires describes the principle and the process that underlay federal alienation of land from the ceded territory.[15/] His comments here are summarized in his findings.[16/] With the exceptions noted above with regard to Prof. Squires' findings, the principle and process as described is one that I would agree with.

Prof. Squires provides explicit acknowledgment that the active agricultural use of the land was the central point of federal legislation during the Treaty period.[17/] The point made here by Prof. Squires is the point stressed throughout my report. In discussing preemption in footnote

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[14/] Id., at 3.

[15/] Squires, at 3-4.

[16/] Id., at 36-37.

[17/] Id. at 4-5, fn. 10.

10 Prof. Squires acknowledges that it was residency for agriculture that was key to establishing rights in land.

Prof. Squires closes this section by stressing the important role of formal surveying for land to leave federal ownership. He also asserts that the acquisition of title provided those acquiring title ". . . the right to occupy and use the land in various ways . . . "[18/] I partially agree with him about the important role of formal surveying. However, he appears to conflate the way land *was used* with the *intent* of the federal and state governments for the use of land. As noted above, Prof. Squires himself acknowledges in the sentence that ends with footnote 10 that it was agriculture that was the focus of the preemption acts.

Prof. Squires broaches the idea that federal policy was formulated from the perspective that Indian title ". . .was extinguished . . ."[19/] But, Prof. Squires provides no evidence for this point. And yet, it appears to be the key point in this litigation. My report is prepared from the premise that the Indian title was not extinguished, but rather that a specific set of rights were transferred in a property contract relationship. The details of my comments on this point are noted above when I discuss his major opinions # 1 and #5.

Prof. Squires closes this section in a Summary paragraph. In this paragraph he closes his description-argument about federal land acquisition and conveyancing processes.[20/] What Prof. Squires says in this paragraph is correct as far as it goes. What it does not do, however, is provide any acknowledgment of the existence and place of reserved rights of Indian nations in

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[18/] Id, at 5.

[19/] Squires, at 6.

[20/] Id., at 8.

land acquired by federal government. As written, the statement seems to imply that the land acquired was acquired "fee simple." My comments here are in line with those when I discuss Prof. Squires's comment about "extinguishment" of Indian title.

Squires also discusses the lag between the act of surveying and the sale of land and attributes it to factors such as: allowing pioneers to take advantage of the Preemption Act, lack of accurate information, the late completion of surveys, weather and travel difficulties, and defective surveys.[21/] As a reference source for this characterization he draws entirely from the work by Jones (1952), a work prepared under the supervision of Paul W. Gates, one of the preeminent public lands historians of the period, and the author of the landmark work History of Public Land Law Development, (Gates 1968). Squires's characterization of the lag is fully correct in as far as he presents it.

However, Jones makes clear in his own presentation and analysis that it was not these factors alone which contributed to the lag in surveying and selling. According to Jones, the lag in surveying and selling (either or both factors) is attributable *in addition to the factors* identified by Squires to:

- the government pushing for surveys at a rapid pace and fixed-price low cost, which resulted in defective surveys (Jones 1952: 66, 68-69); surveyors found that they could not make money conducting surveys in the Treaty area at the fixed-price cost because of the topography and geographic conditions of the region and thus they economized in their work.

[21/] Id., at 27.

- a widespread perception among government officials and surveyors of the poor quality of the land in the Treaty area *for agriculture*. According to Jones (1952: 67-68) "Undoubtedly, the belief that the country would never be settled caused many surveyors to perform their duties improperly. Especially . . . in the area north of the Grand River, for most of the country was one vast region of swamps, lakes, and dense forests; a country that had no value when measured by agricultural standards of the day."

III. "Settlement" and its relationship to "survey and sale"

Karamanski (2004), Kelly (2004), and Squires (2004), to one degree or another, adopt the position that "settlement" is an action and activity that necessarily follows the formal acts of survey and sale. In fact, it is the very premise of the centrality of survey and sale that is the basis of Squires's report; Kelly also addresses this point [22/]

This position by these experts does not comport with the complexity of the settlement process in the Treaty area.

Most importantly, it does not address the role of squatting and pre-emption, the expectations of squatters and pre-emptors, and lastly the legal opinions offered about squatters and pre-emptors by the U.S. Attorney General's office during the Treaty period.

In general, there were multiple ways for land in the Treaty area to pass from the control of the U.S. Government, who acquired it subject to reserved rights by the Tribes, to individuals. One of these ways is the way ascribed by Kelly and Squires – i.e., a contract would be let to a

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[22/] Lawrence C. Kelly, A Report on the 1836 and 1855 Federal Treaties with the Ottawa and Chippewa Indians of Michigan, at 107.

registered surveyor, the land would be surveyed, the results of the survey would be posted at a U.S. Lands Office, and a date would be set for bids on the land (see generally Jones 1952 for a detailed description of this process).

However, as noted by Jones (1952), in addition to this "logical" method of land acquisition, there were many settlers in the Treaty area who squatted on land and then hoped and expected that their existing use right would be recognized through the passage of a federal pre-emption act. As detailed by Gates (1968) in his major scholarly work (referenced by all experts retained in this case) and Dowd [23/] this had occurred in years past for other Indian treaty areas, so squatters entered the Treaty area with every reason to believe it would happen again. When a right of pre-emption was recognized by the U.S. Congress, the settlement process could be one of settle, survey, sale (the latter two steps becoming a recognition of settlement, rather than a pre-condition for settlement). In fact, Dowd makes the point that " . . . 'settlement' was then (and generally still is) commonly understood to mean the actual occupation and inhabiting of a plot of land. The Indians understood Article 13 to mean the latter, actual settlement."[24/]

This line of argument and understanding is similar to that put forth by Dowd,[25/] when he details how the notion of "actual settlement" was distinguished from any theoretical concept of "settlement," see section VI below.

[23/] Gregory E. Dowd, The Meaning of Article 13 of the Treaty of Washington, March 28, 1836, at 260-261 (2004).

[24/] Dowd, at 266.

[25/] Id., at 279 - 289.

IV. "Settlement" as activity other than agriculture and urban development

In his report, Karamanski argues that settlement is something other, and additional to, the active cultivation of the land in agriculture and the use of the land for urban areas as villages. Specifically, he includes in the concept of settlement the appropriation of resources.[26/]

First, I must note that Karamanski makes this assertion without providing any scholarly or research data (i.e. no citations).

Substantively, my opinion is that Prof. Karamanski is confusing the issue of the use of land with whether the land was "settled" under the goals and objectives of the federal and state governments. That is, he is confusing an informal use of the term with a policy-specific use of the term. (I make a similar point with regard to Prof. Squires argument; see my comment on Prof. Squires finding #5, above.)

Without argument the land in the treaty area was *used* for resource extraction– specifically logging (in the whole treaty area) and mining (in much of the Upper Peninsula). However this does not mean that the use of the land for these purposes constituted a policy-specific understanding of settlement.

As is detailed in my report,[27/] logging was an activity that in the period immediately following the treaty was not seen as having any economic value in and of itself. When logging did emerge as a viable economic activity, the state of Michigan was quite clear in its

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[26/] Theodore J. Karamanski, The Historical and Ethnohistorical Context of Hunting and Fishing Treaty Rights in Western and Northern Michigan, at 111, 138, 165 - 171.

[27/] Jacobs, at 19-20.

understanding that the primary benefit of logging was that it cleared the land so that it could be use for agriculture, which would then constitute settlement.

Therefore, while land was used for the appropriation of resources, under the long-standing policies of the federal government and the goals and expectations of the then-new state of Michigan, none of these uses of land were "settlement." For the period 1836 to ~1950 "settlement" was the use of land for agriculture and/or the creation of urban areas.

V. Understandings about the potential for agriculture in the Treaty area

In my report,[28] I draw from the Fox decision in which the Court notes several assertions by Schoolcraft about Article 13th, among them: (i) that its inclusion was critical to obtaining the signatures of the Indian parties to the Treaty; and (ii) "since much of the ceded land was uninviting to agriculturalists, it would not be settled and the Indians could use the resources of this land Indefinitely."

In his time, Schoolcraft was not alone in his opinion about the quality of the land in the Treaty area and thus its likely desirability and usability for agriculture. In his report, Cleland offers several examples of then-contemporary opinions about the land in the Treaty area.[29] Michigan Governor Mason described the Upper Peninsula as "destined . . . to remain forever a wilderness." And Horace Greeley wrote as late as 1859 that northern Michigan was "cold, uninteresting to the cultivator, . . . sterile . . . (with) dense forests."[30]

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[28] Jacobs, at 4.

[29] Charles E. Cleland, Report on the Treaty Relations Between the Ottawa and Chippewa of Michigan and the United States, at 88-92 (2004).

[30] Id.

What is interesting about these characterizations is not only that they comport with Schoolcraft's view, but that Greeley is focused on the utilization of the area for agriculture–not for timbering, not for mining, not for other natural resource extraction activities.

Even one of the State's expert witness makes this point. In his report, Prof. Squires provides an extended quote from GLO Commissioner Whitcomb in 1837, which notes that with regards to the ceded lands "[t]here would be little or no immediate demand."[31/] Prof. Squires continues making this point when he references the master's thesis of Jones.[32/] In fact, as noted above in the extended discussion about Prof. Squires's report, Jones made a similar point when he discussed why surveying was done so poorly in the Treaty area. As noted, Jones (1952: 67) suggested that it was "the belief that the country would never be settled [that] caused many surveyors to perform their duties improperly."

This is exactly the point that the Court made when it noted Schoolcraft's assurances to the Tribes about the lands in the ceded area. *It was the undesirability of the land in the ceded area for agriculture that was the reason the land was seen as undesirable.*

VI. The opinions of U.S. Attorney General B. F. Butler

In my report, I discuss the contemporary opinions of the U.S. Attorney General which bear upon understanding the phrase of Article 13th. .[33/] In this section, I make several conclusions about the opinions offered by the Attorney General in the period 1836-1838, only

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[31/] Squires, at 18.

[32/] Squires, at 19, fn. 76.

[33/] Jacobs, at 12-14.

one of which is directly related to the Treaty area, but all of which bear on issues in the Treaty area. These conclusions are:

- that in none of these opinions does Attorney General Butler actually agree with Schoolcraft's assertion in his letter of February 27, 1837 regarding the act of survey and sale terminating Indian reserved rights to the lands in the Treaty area;
- according to Attorney General Butler, pre-emption rights on any lands in the public domain, *to which pre-emption applies by the passage by Congress of a pre-emption law*, are acquired only through the active act of cultivation. These rights are not acquired by improvement absent cultivation and they are not established by residency absent cultivation.

Analysis and conclusions offered by other experts to the case affirm and expand upon these points. So, for example,

- Gray makes clear that pre-emption law, and thus rights for pre-emption to lands in the treaty area, did not exist at the time of the treaty. Lands in the treaty area were clearly public domain lands. Pioneers were *hoping* that the U.S. Congress would pass a pre-emption law establishing the legitimacy of their squatting behavior, and giving them pre-emption (first in line to purchase) rights, but this law was not in place in 1836, and did not appear until 1841.[34/]
- Gray notes that in Butler's opinion of April 20, 1837 directly responding to Schoolcraft's forwarding of the request for clarification by the three citizens of

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[34/] Susan E. Gray, Article 13 in the 1836 Treaty of Washington and Land Use in the Cession, 1836 to the Present, at 34-35 (2004).

the region, Butler i) never uses the term "settlement" except in quoting Article 13th, ii) never directly responds to Schoolcraft's assertion about survey and sale, and iii) uses the occasion of the opinion to continue his legal and policy argument against validating the rights of preemptionists.[35/]

VII. "Settlement" as agriculture

One of the key points I seek to make throughout my report is that "settlement" was not an abstract term, but a policy-specific one that was understood to be directly related to the use of the land in agriculture.[36/] As part of this reasoning, I contend that land used in the Treaty area for agriculture at one time, but subsequently abandoned (one or more times) would not be considered "settled" under the terms of the Treaty. That for the concept of "settlement" articulated in the Treaty, land had to be in active, agricultural use.

Several points made by the Tribe's experts reinforce this analysis.

- In his report, Cleland brings forth the very interesting point about how 19th century land law treated rights of access to land.[37/] According to Cleland, Michigan law of the time allowed open access to forests and meadowlands, land he characterizes as "unoccupied lands." Nineteenth century law and institutions recognized cultivated land as "settled" and all others lands–forests and meadowlands in Cleland's terms–"were open . . .to grazing . . . (and) the full-range of hunting, fishing, and gathering activities of Indians and non-Indians

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[35/] Gray, at 40-42.

[36/] See for example, Jacobs, at 18.

[37/] Cleland, at 92.

alike." Cleland's point – and my point – is that non-cultivated lands are not "settled."

- Valentine and Corbiere's linguistic analysis provides another way of understanding one of my key points. Valentine and Corbiere carefully examine the meaning of the term "settlement."[38/] In so doing, they make clear that "settlement" from the point of view of the Treaty has to do with the related concept of permanence. Valentine and Corbiere argue carefully that *the attempt to settle* is not settlement, as settlement "must be achieved by surmounting a probationary period," in which, then, "actual settlement . . . (is) effected." [39/]

Valentine and Corbiere's analysis adds further weight to the argument in my report about how to view the sale and use of the land in the Treaty area when said land was used in agriculture but than abandoned–in the period immediately following the Treaty signing, but most especially in the late 19th and early 20th centuries during the so-called cutover period. I argue, and Valentine's analysis provides a strong supporting position, that these were attempts at settlement, but not settlement per se, since settlement–*understood specifically as agricultural or urban use of the land in the Treaty area*–was not the permanent use of the land.

[38/] J. Randolph Valentine & Mary Ann Corbiere, Linguistic Analysis and Ojibwe Translations Pertaining to the Interpretation of Article 13 of the Treaty of Washington, 1836, at 57-61, 64 (2004)

[39/] Id, at 59, 61.

VIII. Conclusions

The key clause for this case is the closing clause of Article 13th: "until the land is required for settlement." The key concept for this clause is understanding what constitutes "settlement."

Based on my analysis, and supported by additional evidence from both the Tribes and States' experts, "settlement" is the permanent use of land in the Treaty area in agriculture or in urban use.

When agriculture or urban use of land in the Treaty area exist, the reserved rights for hunting and the "other usual privileges of occupancy" become extinguished.

However, when agriculture or urban use of land in the Treaty area have never existed, or when agriculture or urban uses of land in the Treaty area have been attempted but have subsequently been abandoned (such as through the experience of attempted farming in the cut-over region), reserved rights are retained and subject to be exercised by the Tribes under the terms of the Treaty.

IX. References

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