UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PHILIP C. BELLFY, *pro per*
MONICA CADY, *pro per*
JAMES A. LEBLANC, *pro per*
DIEDRE J. MALLOY, *pro per*
NATHAN J. WRIGHT, *pro per*
and John Does,
and Mary Does,

Plaintiffs, *pro se* litigants

Case No. _____

HON. _____

Oral Argument requested.

v.

KEITH CREAGH,

Defendant
_____/

EX-PARTE MOTION FOR PRELIMINARY INJUNCTION
WITH SUPPORTING BRIEF

US District Court Clerk's Office
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Grand Rapids MI 49503

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PLEASE NOTE:
PLAINTIFFS BRING THIS ACTION PURSUANT TO 28 U.S. CODE § 1331.

STATEMENT OF GROUNDS FOR INJUNCTION

Plaintiffs, and at least 50,000 other members of the affected class of American Indians, acting as *pro se* litigants, respectfully moves this Court for a preliminary injunction ordering the

Director of the Michigan Department of Natural Resources, to bar said Director from approving a land-transfer agreement, that would forever remove from the public domain over 11,000 acres in the Eastern Upper Peninsula. All of the land being considered for transfer to Graymont Mining Co. is wholly within the boundaries of the 1836 Ceded Territory, as that Territory is defined in the 2007 Inland Consent Decree. As set forth in the accompanying Brief in support of this Motion, the MDNR Director‘s pending action would be contrary to Defendant's authority under the US Constitution. Plaintiffs are likely to succeed on the merits of its claims against the MDNR Director, and the Plaintiffs would be irreparably harmed by the MDNR Director's unconstitutional actions. Additionally, the public interest would not be harmed by the issuance of the injunction. The Court should therefore issue a preliminary injunction requiring that the Director stay his decision to transfer land out of the public domain, land that is also, most importantly, designated as 1836 Ceded Territory pursuant to the 2007 Inland Consent Decree. The MDNR has reported that the Director may make his decision at the March 19, 2015, meeting of the Michigan Natural Resources Commission.

Plaintiffs respectfully request that the Court hear oral argument on this Motion.

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PLAINTIFFS' MOTION FOR EX PARTE PRELIMINARY INJUNCTION WITH SUPPORTING BRIEF

OVERVIEW OF COMPLAINT

The land transfer in question is wholly within the boundaries of the 1836 Ceded Territory as mapped by the 2007 Inland Consent Decree ("Decree"). According to "I: Jurisdiction" of the Decree, jurisdiction rests in this court.

The State of Michigan, acting through the apparent authority of the Defendant, is considering a land transaction --the Graymont-Rexton Project-- involving over 11,000 acres of land in the Eastern Upper Peninsula of Michigan. The entirety of the proposed Project area lies within the 1836 Treaty of Washington "Ceded Territory." Article XIII of the 1836 Treaty of

Washington states that "The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy." Article XIII of the 1836 Treaty is a direct reference to the usufructuary rights of the original occupants ("Indians") of that Ceded Territory. Additionally, the extent of these "Article XIII" rights were "conclusively resolved" in the 2007 Inland Consent Decree, signed by both the State of Michigan and the federally-recognized tribes with claims under the 1836 Treaty of Washington.

The Plaintiffs, all of whom are American Indians with Article XIII Treaty Rights throughout the Ceded Territory, are concerned that the proposed transfer of over 11,000 acres of the Ceded Territory will adversely affect the usufructuary "occupancy" rights recognized by 1836 Treaty of Washington, and the reaffirmation of those Rights through the 2007 Consent Decree, as the lands of the proposed Project area would no longer be considered "public lands" (nor would they be considered "private lands required to be open to the public" as defined by the Consent Decree), and could, therefore, be closed to the Plaintiffs, and all others so affected by such a closure (Natives and non-Natives, alike).

The aspect of this proposed land transaction that is most troubling to the Plaintiffs is that it is being considered under a Michigan law that gives the Director of the MDNR, the Defendant in this case, a state-level political-appointee, the sole authority to sell and/or transfer lands that are part of the "1836 Ceded Territory," which will result in the abrogation of Tribal members' usufructuary "occupancy" rights, an action that the Courts have repeatedly and consistently stated is the sole prerogative of the US Congress.

Plaintiffs wish to make it clear to the Court that they are not asking the Court to declare MCL xxx.xx unconstitutional, but only to issue an injunction barring its application to lands

within the boundaries of the 1836 "Ceded Territory."

MOTION FOR EX PARTE PRELIMINARY INJUNCTION

Plaintiffs move the Court for a preliminary injunction pursuant to Fed. R. Civ. P. 65 and Section 27.4.d. of the 2007 Inland Consent Decree. Plaintiffs make this motion on the grounds that:

1. Plaintiffs are likely to prevail on the merits of their claim;
2. Plaintiffs will suffer irreparable harm if preliminary relief is not granted;
3. Third parties will not be harmed by the relief sought; and
4. The public interest will be served by granting the relief sought.

Plaintiffs specifically requests that the Court issue a preliminary injunction to:

1. The Court should immediately preliminarily enjoin Defendant, or other State of Michigan officers, employees, agencies, subdivisions, successors, or assigns, from approving the land transactions involved in the Graymont-Rexton Project. *Ex parte Young*

2. The Court should also immediately preliminarily enjoin Defendant, or other State of Michigan officers, employees, agencies, subdivisions, successors, or assigns, from approving any land transactions that adversely affect the usufructuary, occupancy, or any other rights of American Indians throughout the 1836 Ceded Territory, throughout the extent of that Territory as it is detailed in the 2007 Inland Consent Decree. *Ex parte Young*

3. Grant Plaintiffs costs and other and further relief as may be just and proper.

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Questions Presented:

1. Whether the Court should preliminarily enjoin Defendant from approving the land transactions involved in the Graymont-Rexton Project.

2. Whether the Court should preliminarily enjoin Defendant from approving any land transactions that adversely affect the usufructuary "occupancy" rights of Tribal members throughout the 1836 Ceded Territory as defined in the 2007 Inland Consent Decree.

TABLE OF AUTHORITIES:

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I. INTRODUCTION

The Defendant does not have authority to unilaterally abrogate the "occupancy" rights of Indigenous people, in this case, Plaintiffs and others who will be affected by such an abrogation. In fact, according to centuries-long practice during the "Age of Discovery," such "occupancy rights" are inherent sovereign rights, and cannot be abrogated by any "nation-state." *Cherokee Nation v. Georgia.* 5 Peters, 1 (1831).

The Defendant does not have authority to unilaterally abrogate Article XIII rights as recognized in the 1836 Treaty of Washington. *U.S. Constitution, Article VI, Section 2*.

Also, as a matter of Constitutional due process, the Defendant does not have the authority to unilaterally abrogate Plaintiffs' and other American Indians' usufructuary "occupancy" rights without due process. *U.S. Constitution, Fourteenth Amendment*.

The Defendant also does not have authority to unilaterally abrogate, alter, or diminish Article XIII rights, as the extend of those Rights have been "conclusively resolved" by the 2007 Inland Consent Decree, signed by the State of Michigan, and forever binding upon its "officers, employees, agencies, subdivisions, successors, and assigns," including the Defendant. *"Consent Decree"*

Plaintiffs are filing a motion for immediate preliminary relief for themselves and all affected Tribal members who have usufructuary "occupancy" rights, Article XIII rights, and other rights and interests, in the 1836 Ceded Territory as delineated by the 2007 Inland Consent Decree.

II. PLAINTIFFS

Plaintiffs have standing to bring this suit. All Plaintiffs are federally-recognized American Indians, wishing to exercise their usufructuary "occupancy" rights, and other Treaty Rights within the boundaries of the 1836 Ceded Territory. The boundaries of the Ceded Territory are detailed in the 2007 Inland Consent Decree. *"Consent Decree"*

The Courts have long held that references to "Treaty Rights" are nothing more than a collective term used to refer to the rights of individual Indians. In recognition of this "individual right," Article XIII of the 1836 Treaty of Washington states that "the Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy." Those who drafted the Treaty could have said that "the *Tribes* stipulate ..." but they did not. According to the "canons of treaty interpretation," the courts must interpret the treaty language as the Indians would have interpreted it at the time of the signing. In this light, quite obviously everyone agreed that individual "Indians" were in possession of the "usual privileges of occupancy," not the Tribes in question. *United States v. Winans*, 198 U.S. 371 (1905).

Furthermore, and within this same context, it is also equally apparent that representatives of several more "Tribes" than are currently "federally-recognized" signed the 1836 Treaty of Washington, including (but not limited to) the Mackinac Bands, the Burt Lake Bands, the Grand River Bands, and the Batchewana and Garden River First Nations.

III. BACKGROUND

In November of 2013, Graymont Mining submitted proposals to the Michigan Department of Natural Resources (MDNR) that sought over 11,000 acres of public land for a

limestone mining operation, called the Rexton Project. The entirety of the Project area is within the 1836 Ceded Territory. Over 1700 acres of the proposed Project is federal land, which, of course, complicates the Defendant's ability to transfer federal rights in this land-transaction as the Defendant is a State of Michigan political appointee.

The State of Michigan law that Graymont is relying on for the proposed "land transaction" is predicated on the proposition that certain state lands can be declared "surplus" by the Director of the MDNR, and therefore, can be sold if: "The sale will promote the development of … the mineral extraction and utilization industry in this state." *MCL 324.2131(1)(d)(iii)* In regard to the proposed "development" of the limestone mining "industry"in the area, Graymont Mining has stated publicly that their "Project" may create "five or six full-time local jobs." *[http://tinyurl.com/pxhxp3g]*

According the MDNR "Graymont Proposal Fact Sheet," the Defendant (the MDNR Director) may make his decision at the March 19, 2015, meeting of the Michigan Natural Resources Commission. Hence, the "threat of immediate irreparable harm" prompts Plaintiffs to file for an *ex parte* immediate injunction. *Ex parte Young*

IV. ARGUMENT

The Defendant does not have authority to terminate Plaintiffs' "rights of occupancy" as detailed in *Johnson v. M'Intosh* [21 U.S. (8 Wheat.) 543 (1823)

The "Doctrine of Discovery" was expressed by the US Supreme Court in J*ohnson v. M'Intosh*, thusly:

> The Indians "were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but … their power to dispose of the soil at their own will to whomsoever they pleased was denied by the original fundamental principle that discovery gave exclusive title to those who made it…. [While the Europeans] respected the right of the natives as occupants, they asserted the ultimate dominion to be in themselves, and claimed and exercised … a power to grant the soil while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy. *Johnson v. M'Intosh*, emphases added.

As can be seen by this excerpt from *Johnson v. M'Intosh*, "the Indian right of occupancy" lays the foundation for the entire principle of land tenure in these United States (internationally, as well). The Defendant, a state-level political appointee, shows a stunning ignorance of the "law of the land" (both figuratively and literally) by his seeming willingness to violate both the "rights of occupancy" held by the Plaintiffs, but also by his willingness to violate the fundamental principles underlying all property rights in the US.

The issuance of the injunction sought by the Plaintiffs in this action before this honorable Court will bar the Defendant from taking actions that will call into question the complete rationale behind European expansion during the "Age of Discovery" as detailed in the "Doctrine of Discovery" and as expressed in *Johnson v. M'Intosh*, something Plaintiffs would expect this Court to be extremely hesitant to do.

The Defendant does not have authority to terminate Plaintiffs' usufructuary "occupancy" and Treaty rights.

Plaintiffs wish the Court to consider the basis for the recognition of "the rights of occupancy" as they would have been acknowledged by the European powers at the dawn of the "Age of Discovery." The 1455 Papal Bull, *Romanus Pontifex*, set the state for this "Age of Discovery." Due to the dictates of this Papal Bull, it became well established, internationally, that Indigenous People (not "Tribes," it should be noted) simply enjoyed the rights of occupancy of the land, not ownership of that land. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823)

In other words, "the usual privileges of occupancy," to use the language of the 1836 Treaty of Washington, recognized rights that predate even the Papal Bulls of the 15th Century, which, quite obviously as well, pre-date the establishment the French, Spanish, Portuguese, and British, and other European "Empires" and "colonies" in the New World. Equally as obvious, these "occupancy rights" pre-date the United States.

In fact, bringing the history of "occupancy rights" into the current context of this request for an injunction, the 1836 Treaty of Washington, with its Article XIII "usual privileges of occupancy" language, pre-dates the establishment of the State of Michigan, as Michigan was admitted to the Union in 1837.

Further, Plaintiffs refer this honorable Court to the "Supremacy Clause" of the US Constitution, which states that: "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (*Article VI, Section 2*). Consequently, it is plainly unconstitutional for Michigan state law to, in any way, impinge on the Plaintiffs' usufructuary, occupancy, and Treaty rights. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 8 L.Ed. 483 (1832).

Additionally, a number of federal cases have held that individual and "Tribal" usufructuary, occupancy, and Treaty rights can only be abrogated, altered, or diminished by US Congressional action. *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *United States v. State of Mich.*, 471 F. Supp. 192 (W.D. Mich. 1979); *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 175 (1999); *Lac Courte Oreilles Indians V. State of Wisconsin*, 775 F.Supp. 321 (1991); *Fond Du Lac Band of Chippewa Indians V. Carlso*n, 68 F.3d 253 (8th Cir. 1995). *United States v. Felter,* 752 F.2d 1505, 1509 (10th Cir. 1985). *United States v. Brown* (MLW No. 67430/Case No. 13-3800) (U.S. Court of Appeals, 8th Circuit) 2014. *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).

Lastly, the MDNR and its Director are bound by the terms of the 2007 Inland Consent Decree, which vests jurisdiction over Article XIII Rights in the federal court which "conclusively resolved" those Article XIII Rights in favor of "the Indians" in the exercise of their "usual privileges of occupancy." *United States, et al. v. Michigan, et al*., United States District Court for the Western District of Michigan File No. 2:73-CV-26 ("Consent Decree"), I.1.3, II.

A. STANDARD FOR GRANTING PRELIMINARY INJUNCTION

Plaintiffs satisfy the standard for obtaining a preliminary injunction because (1) Plaintiffs have a strong likelihood of success on the merits; (2) the Plaintiffs will be irreparably harmed if a preliminary injunction is not issued; (3) an injunction in favor of Plaintiffs will not cause substantial harm to others; and (4) an injunction in favor of Plaintiffs serves the public interest.

In the present case, the equities weigh solidly in favor of granting immediate preliminary relief to ensure that the Plaintiffs and other federally-recognized Indians do not lose their

usufructuary, occupancy, and Treaty rights. Plaintiffs estimate that there are over 50,000 federally-recognized "Jane Does" and "John Does" likely to be affected if this honorable Court does not grant the injunction sought.

1. Plaintiffs are likely to prevail on the merits of their claims

If the Injunction is not granted, the Defendant is poised to violate the Plaintiffs' "right of occupancy" as set out in the Papal Bulls of the 15th Century that established those "occupancy rights, which, in turn, inaugurated the centuries-long "Age of Discovery." It should be noted that these "occupancy rights" stand in stark opposition to the rights to own the land in question, which was clearly not recognized by any of the European powers during the centuries-long "Age of Discovery."Consequently, if the injunction sought by the Plaintiffs is not granted, the Court risks nullifying the entire "occupancy versus ownership" of Indigenous land that underpins the modern international "nation-state" structure. *Johnson v. M'Intosh*

If the Injunction is not granted, the Defendant is poised to violate Plaintiffs' Constitutional right as expressed in *Article VI, Section 2*, which states (in part): "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."

Clearly, under the "Supremacy Clause" quoted above, the state law that purports to give the MDNR Director the right to abrogate Plaintiffs' usufructory, occupancy, and Treaty rights is, without question, unconstitutional.

Furthermore, under the due process clause of the Fourteenth Amendment to the United States Constitution, Plaintiffs have the right to a meaningful notice and an opportunity to be heard before their usufructuary, occupancy, and Treaty rights are abrogated under state law. Plaintiffs, and other affected federally-recognized Indians, were afforded no opportunity to challenge the state law mentioned above. Consequently, the Plaintiffs' only recourse is the filing of this lawsuit.

2. Plaintiffs will suffer irreparable injury if a preliminary injunction is not granted in this case.

The facts in the Plaintiffs' Complaint, together with the decisional law, establish that the Plaintiffs, and affected federally-recognized Indians, will suffer immediate and irreparable harm unless an *ex parte* preliminary injunction is issued.

Properly stated, the definition of irreparable harm is whether there is, or will be, a "wrong which cannot be adequately redressed by relief on the merits." *N.Y. Pathological and X-Ray Laboratories, Inc., v. Immigration and Naturalization Service*. Once the land-transfer is approved by the MDNR Director, which may come as early as March 19, 2015, it would be next to impossible to reverse that decision.

Additionally, failure of the Court to intervene in this instant case would give the Defendant a "green-light" to approve any and all land-transfers, pending or yet to be proposed, throughout the 1836 Ceded Territory, further eroding Tribal usufructuary rights and Article 13 rights under the 1836 Treaty of Washington.

Plaintiffs wish to draw the Court's attention to the Resolution passed by CORA on October 23, 2014, in opposition to this proposed land transfer. (Exhibit A) In part, the Resolution states: "the sale of the land to Graymont ... makes likely the initiation of the Consent Decree's dispute resolution mechanism, leading to a lengthy and adversarial process." This quote is provided to the Court due to the simple fact that, if Plaintiffs' motion is not granted, the Court will undoubtedly be asked to sit in judgment during that " lengthy and adversarial process"; granting Plaintiffs' motion would result in a "process" that is neither long nor adversarial.

3. An injunction in favor of Plaintiffs will not cause substantial harm to others

Issuing an injunction against any land-transfers throughout the 1836 Ceded Territory will simply maintain the *status quo*. Consequently, no harm, substantial or otherwise, will be suffered by Plaintiffs, the Defendant, or other third parties through the maintenance of the *status quo.* Plaintiffs, again, wish to draw the Court's attention to the CORA Resolution; through it, the CORA Tribes are expressly stating that a <u>failure to enjoin the Defendant</u> will, indisputably, cause substantial harm to Tribal interests, which are supplemental to the interests of the Plaintiffs, and the Plaintiff class, in this case.

4. Granting temporary and preliminary relief is in the public interest

The harm suffered by the Plaintiffs, and tens-of-thousands of other affected American Indians, may not be remedied by any but the most immediate and comprehensive action by this Court. If the Defendant approves the transfer of the land out of the "public domain" on March 19, 2015, Plaintiffs, and members of the Plaintiff class, will be forever denied the exercise of

their usufructuary, occupancy, and Treaty rights –denied the "usual privileges of occupancy," in the words of the 1836 Treaty of Washington. *"Treaty of Washington"*

Furthermore, such an action would also be an abridgment of the non-Native public's interests, as well, as the land in question would forever pass out of the "public domain." Therefore, an order protecting Plaintiffs, and all other affected American Indians, from Defendant's unconstitutional termination of their usufructuary, occupancy, and Treaty rights, and violations of their Constitutional right to due process, is clearly in the public interest (that of individual American Indians, non-Native people, and the Tribes).

Furthermore, the Michigan Constitution mandates that the MDNR must manage the natural resources of the state under the "public trust" doctrine, insuring that any MDNR "conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction" (emphasis added). *Natural Resources and Environmental Protection Act of 1994, MCL 324.1701*. This language is mirrored by the language of the 2007 Inland Consent Decree, to wit: "and to provide for the protection of the resources in the 1836 Ceded Territory." *Consent Decree, Findings C.*

Plaintiffs argue that the transfer of the land may very well violate that constitutional "public trust" doctrine, and the "protection of the resources," as it has not been shown that the proposed mining activity will not "impair or destroy" the natural resources of the area. The CORA Tribes also express this concern in its Resolution. (see bottom of p.1, Exhibit A).

V. CONCLUSION

For the foregoing reasons, the prerequisites to issuance of an immediate preliminary injunction are met in this case, and the immediate preliminary injunctive relief specifically set forth below should be granted.

1. The Court should immediately preliminarily enjoin Defendant, or other State of Michigan officers, employees, agencies, subdivisions, successors, or assigns, from approving the land transactions involved in the Graymont-Rexton Project. *Ex parte Young*

2. The Court should also immediately preliminarily enjoin Defendant, or other State of Michigan officers, employees, agencies, subdivisions, successors, or assigns, from approving any land transactions that adversely affect the usufructuary, occupancy, or any other rights of American Indians throughout the 1836 Ceded Territory, throughout the extent of that Territory as it is detailed in the 2007 Inland Consent Decree. *Ex parte Young*

RESPECTFULLY SUBMITTED

_____ Date: _____
PHILIP C. BELLFY

_____ Date: _____
MONICA CADY

_____ Date: _____
JAMES A. LEBLANC

_____ Date: _____
DEIDRE J. MALLOY

_____ Date: _____
NATHAN J. WRIGHT

_____ Date: _____
MARTIN JAMES REINHARDT

EXHIBIT A

CHIPPEWA OTTAWA RESOURCE AUTHORITY

RESOLUTION NO. 10-23-14

OPPOSITION TO SALE OR EXCHANGE OF PUBLIC LANDS TO GRAYMONT AS PROPOSED IN REVISED SUBMISSION DATED OCTOBER 2014

The CORA Tribes are as follows:

- **Bay Mills Indian Community,**
- **Grand Traverse Band of Ottawa and Chippewa Indians,**
- **Little River Band of Ottawa Indians,**
- **Little Traverse Bay Bands of Odawa Indians,**
- **Sault Ste. Marie Tribe of Chippewa Indians.**