UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN

BRENDA TURUNEN,
Plaintiff,

v. File No. 2:13-CV-00106
Hon. Gordon J. Quist

KEITH CREAGH, DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES, and JAMIE CLOVER ADAMS, DIRECTOR, MICHIGAN DEPARTMENT OF NATURAL RESOURCES.
Defendants.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

The Defendants do not dispute and cannot dispute that the 1842 Treaty reserved to Plaintiff and her tribe, the Keweenaw Bay Indian Community (KBIC) certain usufructuary rights in the territory ceded. Defendants do not even dispute that Plaintiff has a right to engage in a form of agriculture they label "gardening" pursuant to the 1842 Treaty. Their only contention is that the usufructuary rights reserved do not include a right to commercially farm or commercially raise domestic animals. In support of this assertion they concoct a so-call "test" for the existence of treaty reserved usufructuary rights, instructing their expert witness to narrowly focus on the historic activities of one small group of Chippewa in one small geographic area and ignore to broader geographical,

family, clan, kinship, band and tribal connections. Then, based on their perceived scarcity of written records in a frontier area that had a small and widely dispersed population (of Indians and non-Indians alike) they argue that there is no evidence to support Plaintiff's claim to a Treaty right to farm.

All the while the defendants utterly ignore the actual legal test set forth by the United States Supreme Court generations ago, that is, the well established doctrine that Indian treaties are to be construed favorable towards the Indians, and all ambiguities and doubtful phrases are to be liberally construed in their favor, and that they are to be construed as the Indians would have understood them.[1]

When one examines the actual factual, historical background and legal history and properly place the events leading up to the signing of the 1842 Treaty in that context, he or she is left with one clear and compelling conviction: Not only did the tribal signatories to the 1842 Treaty believe that through that Treaty they had reserved the right to engage in commercial farming activities, including animal husbandry, upon the territory ceded therein, *they were expected to do so by the United States itself*.

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[1]Defendants' expert made no attempt whatsoever to determine the understanding of the tribal signatories to the 1842 treaty, or any other treaty she examined in her research. Apparently she was instructed to focus solely on what the L'Anse Chippewa were doing in one isolated area without regard to any ethnohistorical context. See, EXHIBIT 8, pp. 23-24, 45, 63.

To avoid the inescapable conclusion truth that ALL parties to the 1842 Treaty contemplated that the Indian signatories would be farming on the ceded territory the Defendants fire off breathtaking shotgun blast of alternative legal theories to deny Plaintiff her day in court to vindicate her legal rights. Most outrageous of all they seek the equitable relief of laches with hands that are far, far from clean. The remainder of Defendants' arguments are equally merit-less and will not detain this Court for long. For all the reasons discussed below, this Court should deny defendants' motion for summary judgment and, after notice and hearing pursuant to Fed.R.Civ.P. 56(f), enter summary judgment in Plaintiff's favor, declaring that her farming activities are among the "usual privileges of occupancy" reserved to the Indian signatories by the 1842 Treaty and enter an injunction prohibiting Defendants from further interfering with her federally protected farming rights.

II. STATEMENT OF FACTS

Millennia before contact with Europeans, Native Americans were accomplished traders. They developed and used extensive trade routes for a system of inter-tribal commerce that stretched across the continent. 5,000-8,000 years ago copper from the Keweenaw Peninsula and Isle Royal was in wide circulation. Copper from this area was used in various artifacts throughout the Midwest, into the Delaware valley and mid-Atlantic region and New England. Non-local cherts (fine grained crystals or rocks) have appeared in the Upper

Peninsula as a result of this trade. Obsidian rock from the Rocky Mountains, couch shells from the Gulf Coast and crystals from Arkansas have been found in burial mounds stretching from modern-day Ohio, Indiana and Illinois all the way to the Gulf of Mexico. The native American trade that supplied these items to and from such far-flung locales extended right up to the time of European contact. [Affidavit of Misty May Jackson, Ph.D., EXHIBIT 1, p. 2.]

Algonquian Natives in the Northeast, predecessors to the Chippewa, Ottawa, Potawatomi and Winnebago, were already trading meat and furs for agricultural surpluses as early as 1620. The Europeans did not create the trade routes, mechanisms of exchange nor even the Native trade items upon their arrival in North America, these things already existed and were widespread long before European contact. [EX. 1, p. 3.]

One group of Algonquin Indians, the Anishnabeg, migrated to the Great Lakes region centuries ago. [Affidavit of Richard Allen Carlson, Jr., Ph.D., EXHIBIT 2, p. 3, ¶9.] This group eventually splintered into three separate, friendly and closely related tribes, the Chippewa, the Ottawa and the Potawatomi, know as the "Three Fires".

> [Chippewa and Ottawa] Indians were traders, of course, even before European contact. As previously stated, the word "Ottawa" means "trader." One of the principal trade centers in the treaty area was at the Straits of Mackinac. Early trade routes extended from Montreal down to the Gulf of Mexico and were dependent upon the Great Lakes and the Mississippi River for transportation. After European contact, trading by the Indians continued and expanded because the Indians were then

> able to obtain manufactured goods like iron kettles, hooks, axes, hatchets, needles, awls and firearms.

United States v. Michigan, 471 F. Supp. 192, 220-221 (1978).

"The Chippewa relied on hunting and gathering for their subsistence. They harvested resources for their own immediate, personal use and for use as trade goods in commerce." Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1424 (W.D. Wis. 1987).

> The Lake Superior Chippewa were engaged in the fur trade long before non-Indians came to Wisconsin to trade. From 1634 through the treaty period, when the Chippewa hunted on the lands ceded by the 1837 and 1842 treaties, they did so to meet their immediate personal needs and for the fur trade, both of which were factors in their subsistence.
>
> Throughout the nineteenth century, the Chippewa were participants in an international market economy; they were the producers of commodities, primarily furs, and they controlled the resources that flowed into this economy. The exchange of commodities, furs in particular, was a way of life for both the Indians and non-Indians in the nineteenth century.

Lac Courte Oreilles, *supra*, 653 F. Supp. at 1428.

The People of the Three Fires, including the Chippewa, had been engaged in successful inter-tribal commerce for centuries. Indeed, their annual rounds of hunting, fishing, gathering and gardening involved a strategy of creating a surplus that pre-adapted them to participating in and benefitting from the European market and later the American economy. [Affidavit of Charles E. Cleland, Ph.D., EXHIBIT 3, ¶ 17.] They traded virtually everything they produced from their environment whether grown, hunted, fished, trapped or otherwise harvested. This included their agricultural

products, as early as the mid-1600's the Chippewa were trading their agricultural surpluses for goods they desired from French and other European traders. [EX. 3, ¶¶ 12-13. Rebuttal Report of Richard Allen Carlson, Jr., Ph.D. and Misty May Jackson, Ph.D., EXHIBIT 4, pp. 18-19.]

The Chippewa, Ottawa and Potawatomi, already accomplished traders amongst themselves and with other tribes for centuries, adapted readily to the European markets and later to the American markets.

> In general, the Indians traded furs and food products to the traders. In return, they received a wide variety of goods: cloth, trinkets, blankets, shawls, kettles and other cooking utensils, gillnet twine, beads, jewelry, sewing utensils, guns and other weapons, combs, lead for making bullets, fire steels, and metal tools. The Indians traded most often for articles that were improvements on things they already had, or that offered more efficient ways of hunting and gathering and otherwise met their needs.
>
> The Chippewa were aware of the principles of the Euro-American market economy. They understood competition and the ramifications of the fluctuations of supply and demand, as well as the value of tangible goods and services and labor.

Lac Courte Oreilles, *Id.*

Their commerce, whether in furs, fish or agricultural products was not restricted to EuroAmerican concepts of a cash market, although the Chippewa were no strangers to the concept of monetary exchange. However, cash was quite rare on the frontier and commerce for the Chippewa, as well as for the non-Indians in the area, usually involved a system of trade and/or barter. U.S. v. Michigan, *supra*, 471 F. Supp. at 221. Indeed, the Chippewa understood

EuroAmerican concepts of monetary exchange well enough to explicitly equate wood, fish, potatoes, and sugar with the white man's money. [February 1836 diary of Edmund F. Ely; Minnesota Historical Society Manuscripts Collection, A. E52, Box 1; Cotte discussion on Wednesday March 9, EXHIBIT 5, pp. 33-34, May 31 {Interleaf}. See also, Plaintiff's Exhibit 8, Deposition of Dr. Greenwald; "WE DON'T WANT THEM TO HOLD THEIR HANDS OVER OUR HEADS", THE ECONOMIC STRATEGIES OF THE L'ANSE CHIPPEWAS; 1830-1860. -Robert Doherty. Michigan Historical Review, Vol. 20, No. 2, American Indians, (Fall, 1994), pp. 47-70. EXHIBIT 6, p. 57.]

The Chippewa maintained close family, kinship and clan ties with each other and with the other Three Fires People throughout the Upper Peninsula of Michigan extending as far west as Fond du Lac in Minnesota and from the Straits of Mackinac south into Northern Ohio. The Chippewa moved freely throughout these areas, maintaining communication and family relations with one another. [EX. 2, *passim*.]

The Chippewa were farmers. Although the Ottawa, Potawatomi and Chippewa residing south of the Mackinac Straits were more heavily dependent on agriculture, nonetheless the Chippewa cultivated vast agricultural fields, even in the colder region of the Upper Peninsula. In 1836 Henry R. Schoolcraft personally conducted a census of agricultural plots in the middle to eastern Upper Peninsula and documented hundreds of acres of currently cultivated

fields, hundreds more he classified as "old" and thousands he classified as "ancient". [EX. 4, p.14-15.]

The Chippewa's farming methodology differed from European and American agricultural practices. The Chippewa were less sedentary than EuroAmerican farmers, they traveled on so-called "seasonal rounds". [Ex. 3, ¶ 15.] A family or group of families would plant their fields with squash, beans, corn and, later, with potatoes. They would temporarily leave the sowed fields and move on to another area in order to harvest other crops. [EX. 4, pp. 19-20. Report of Emily Greenwald, Ph.D., EXHIBIT 7, pp. 12-13.]

For example, families maintained rice fields they would harvest, always making sure they left enough seeds behind to grow and propagate new rice crops for the next year. [EX. 4, p. 20.] They maintained family groves of maple trees that they would return to annually to harvest sap for the manufacture of maple sugar. [*Id.* EX. 5, p. 12.] They would move to fishing spots and hunting spots in order to harvest fish and game. Eventually they would return to their planted fields and harvest the produce that their fields had grown, storing the surplus nearby. [EX. 3, ¶ 15. Ex. 7, p. 13.] Nothing about this native method of farming made its agricultural products unfit for consumption, trade or commerce. [Deposition of Emily Greenwald, Ph.D., EXHIBIT 8, pp. 60-61.]

The Constitution of the United States gives the federal government exclusive authority over the Indian tribes and peoples

within its borders and territories. U.S. Const. Art. I, Sec. 8, Cl. 3. Congress asserted this exclusive authority and expressed its policy towards Indian tribes and people early in this nation's history. It exercised that supremacy by imposing its Indian policy upon the government of the territory that would one day become the State of Michigan in the Northwest Ordinance:

> The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorised by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them and for preserving peace and friendship with them.

Article 3, Northwest Ordinance, July 13, 1787. [EX. 4, p. 3.]

Congress and the President further asserted federal supremacy over Indian affairs through the negotiation and ratification of treaties with American Indian tribes. Treaties rank supreme in relation to state law:

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

U.S. CONST., art. VI, cl. 2. In 1789 the United States entered into a treaty with the Wyandot, Delaware, Ottawa, Chippewa, Potawatomi and Sac Indian tribes. In this treaty the United states explicitly asserted federal authority over Indian affairs by prohibiting the sale of any of the subject Indian lands to any sovereign power, or

person, other than the United States itself, Art. IV., and by requiring anyone desiring to trade with the Indian to obtain a federal license before doing so, Art. VI. [Treaty of Fort Harmar, January 9, 1789, 7 Stat. 28, EXHIBIT 9.] The 1789 Treaty recognized the crucial importance of domesticated animals to all the parties, Indian and non-Indian alike, using the harshest language to address and condemn the theft of horses on both sides. [EX. 9, Art. V.]

The most dominant theme running throughout early federal Indian policy was the notion that Indians must become farmers after the American style, even though Indians were highly accomplished agriculturalists in their own fashion. [EX. 4, p. 18.] Thomas Jefferson was perhaps the most recognizable proponent of the consensus among the early American policy makers that Indians should give up their traditional lifestyles and farming practices in favor of the more sedentary form of farming practiced by non-Indians. Animal husbandry was considered fundamental to this federal policy and accordingly the wealth generating benefits of domesticated animals was frequently advocated among the Indians. [Report of Misty May Jackson, Ph.D., EXHIBIT 10, pp. 8-9.]

Non-Indian frontier farmers introduced Algonquin Indians to animal husbandry in the 1760's. The economies of the frontier Indians and non-Indians grew increasingly more similar as the tribes added significant numbers of horses, pigs and cattle to their villages and both groups subsisted on hunting, agriculture

and grazing. Even Chippewa who were not themselves raising cattle or swine would have been aware of their relatives and neighbors who were. [Ex. 10, pp. 3-4. See also, May 29, 2013 Report/Affidavit of Richard Allen Carlson, Jr., Ph.D., (hereafter Carlson Report), which was attached to Plaintiff's Brief In Opposition To Defendant's Motion To Dismiss; ¶8.] Since ancient times the Chippewa had kept domestic animals, dogs, as both hunting companions and as a food source. Chickens and hogs were the next domestic animals since they were easily transported and could forage for themselves. [EX. 3, ¶15.]

For non-Indian farmers on the American frontier farming was both a commercial and a subsistence activity. Farms specializing in cotton and tobacco existed entirely for economic gain, however even for smaller farms in the 17th Century the goal was to produce surpluses for trade and economic gain. Non-Indian American farmers who engaged in animal husbandry preceded those who tilled the soil. By the close of the war of 1812 huge droves of cattle and swine were being driven from Ohio to eastern markets. Frontier farmers increasingly supplied the growing cities of the eastern United States and farmer's production of surpluses for commerce in Michigan followed that trend. This was true of Indians as well, the For example, the main village of the Wea branch of the Miami Tribe was a regional source of foodstuff, impressing William Clark (of Lewis and Clark fame) with their wealth, which included large

quantities of agricultural products, oil, hogs and cattle. [EX. 10, pp. 4-5.]

In 1795 the United States negotiated another Treaty with the Chippewa, Ottawa, Potawatomi and other tribes in the Great Lakes region, including the Wea and other Miami tribes. [Treaty of Greenville, August 3, 1795, 7 Stat. 49, EXHIBIT 11.] That treaty explicitly recognized the importance of farming to the signatory tribes by acknowledging their current practices on their lands, claims to which were relinquished by the United States. "... The Indian tribes who have a right to these lands are quietly to enjoy them, hunting, planting and dwelling thereon so long as they please, without any molestation from the United States ..." [EX. 11, Art. V.] The predominant federal policy of promoting farming and animal husbandry is also evident in Article IV of the 1795 Treaty. That article describes the lands ceded to the United States and the payments that were to be made by the United States for those lands. That Article contains a proviso:

> *Provided*. That if either [*sic*] of the said tribes shall hereafter at an annual delivery of their share of the goods aforesaid, desire that a part of their annuity should be furnished in domestic animals, implements of husbandry, and other utensils convenient for them, and in compensation to the usefull artificers who may reside with or near them, and be employed for their benefit, the same shall at the subsequent deliveries be furnished accordingly.

[EX. 11, Art. IV.] Given the enormous wealth accumulated by their Wea neighbors, such a proviso was surely attractive to the other signatories. One Lake Superior Chippewa Chief, probably from a much

larger delegation of the Chippewa from the Lake Superior region, was present and signed this treaty. [Carlson Report, ¶13, fn. 5.]

The federal policy aimed at making Indians into farmers in the EuroAmerican tradition was expressed in numerous other treaties entered into between Indian people and the United States government which explicitly dealt with farm animals. For example, Article XII of the 1790 Treaty with the Creeks states "That the Creek nation may be led to a greater degree of civilization, and to become herdsmen and cultivators, instead of remaining in a state of hunters, the United States will from time to time furnish gratuitously the said nation with useful domestic animals and implements of husbandry." 7 Stat. 35, 37.

In Article 3 of the 1823 Treaty with the Florida Tribes of Indians, 7 Stat. 224, the United States promises to distribute to the Indians "... implements of husbandry, and stock of cattle and hogs" for the next twenty years. In Article 4 of the 1825 Treaty with the Osage, 7 Stat. 240, the United States promises to furnish the signatory tribes with "... six hundred head of cattle, six hundred hogs, one thousand domestic fowl, 10 yoke of oxen ..." and miscellaneous farming utensils. In Article 4 of the 1825 Treaty with the Kansa, 7 Stat. 244, the United States promises to supply "... three hundred cattle, three hundred hogs, five hundred domestic fowl" and various "Implements of agriculture." [Carlson Report, ¶42, fn. 68.]

Congress continued to assert its authority over Indian affairs and to advance the federal policy of moving Indians towards American style farming and animal husbandry. In addition to ratifying treaties negotiated by the President that promoted farming among Indians, Congress also enacted a series of so-called trade and intercourse acts which asserted regulatory control over all non-Indians who wished to trade or have other intercourse with the Indians. The very first such Act affirmatively promoted the dominant federal farming policy towards Indians:

> Sec 13. *And be it further enacted*, That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and with implements of husbandry, and with goods or money as he shall judge proper, and to appoint such persons from time to time, as temporary agents, to reside among the Indians, as he shall think fit: *Provided*, that the whole amount of such presents, and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

[*An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontier*. March 30, 1802. 2 Stat. 139. EXHIBIT 12.]

In the Michigan territory that would become the State of Michigan, the federal supremacy over Indian affairs and the policy promoting farming continued to be asserted by the President and Congress. In the 1807 Treaty with the Ottawa, Chippewa, Potawatomi and Wyandot the United States obtained land cessions in exchange for "money, goods, implements of husbandry, or domestic animals".

[1807 Treaty, 7 Stat. 105, EXHIBIT 13, Art. II. See also, Carlson Report, ¶14, fn. 7.]

> The United States, to manifest their liberality, and disposition to encourage the said Indians in agriculture, further stipulate, to furnish the said Indians with two *blacksmiths*, one to reside with the Chippeways, at Saguina, and the other to reside with the Ottaways, at the Miami, during the term of ten years; said blacksmiths are to do such work for the said nations as shall be most useful to them.

[EX. 13, Article IV (emphasis in the original).]

In the 1825 Treaty of Prairie du Chien all the tribal signatories, including the Chippewa, Ottawa and Potawatomi, recognized that federal authority over their affairs was supreme: "All the tribes aforementioned acknowledge the general controlling power of the United States and disclaim all dependence upon, and connection with, any other power." 7 stat. 272, 274-275. [See also Carlson Report, ¶ 14.] Article 12 of the 1825 Treaty explicitly recognized that the Chippewa in particular were widely dispersed throughout the region. 7 Stat. 272, 275. The Treaty of 1825 was followed by another in 1826, 7 Stat. 290, and still another in 1827, 7 Stat. 303. These treaties ceded little or no land but were attended by Chippewa from throughout the Great Lakes region, including Lake Superior.

The 1795 Treaty, the 1807 Treaty, indeed every Indian treaty, were major, notable events for all the parties, they were carried out in a tempered, sacred and solemn tone and attended with much ceremony. [Carlson Report, ¶15. EX. 8, pp. 25-26.]

The last of the so-called Trade and Intercourse Acts was passed on June 30, 1834. The same Congress on the same day in a separate Act created the federal "department of Indian affairs", precursor to the modern-day Bureau of Indian Affairs. [*An act to provide for the organization of the department of Indian affairs*. June 30, 1834, 4 Stat. 735. EXHIBIT 14.] In this Act, Congress sets the compensation for and duties of the federal superintendents of Indian affairs, including specifically the Governor of the then-territory of Michigan. *Id*. How annuities payable pursuant to treaty provisions are to be handled is also set forth in detail by Congress and as to the tribes who had not yet signed treaties:

> Sec. 15. *And be it further enacted*, That the president shall be, and he is hereby, authorized to cause any of the friendly Indians west of the Mississippi river, and north of the boundary of the Western territory, and the region upon Lake Superior and the head of the Mississippi, to be furnished with useful domestic animals and implements of husbandry, and with goods, as he shall think proper: *Provided*, That the whole amount of such presents shall not exceed the sum of five thousand dollars.

[EX. 14, Sec. 15.]

In 1836 the United States concluded a major land cession treaty with the Chippewa and the Ottawa Indian tribes. The land ceded encompassed roughly the eastern half of the Upper Peninsula and the northern half of the Lower Peninsula of Michigan. The 1836 Treaty continued the federal policy of promoting EuroAmerican style farming and husbandry among the Indian signatories by providing for agricultural implements, cattle, mechanics' tools, blacksmith shops

and farmers to train the signatories in American style farming techniques. [1836 Treaty with Ottawa and Chippewa Indians, March 28, 1836, EXHIBIT 15. See also, EX. 7, p. 6; Carlson Report, ¶16.] Article Thirteenth of this Treaty stated "The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement." Contemporaneously, Henry Schoolcraft explained that the purpose of that clause from the government's side was to reserve for the Chippewa "the usufructuary right of living and hunting upon, and cultivating the ceded portions of the soil, until it was actually required for settlement." [EX. 4, p. 4.] The border established for the western end of the 1836 Treaty area was arbitrary. The Chippewa moved freely and frequently back and forth across this imaginary line, which was not created for any political purposes but rather was geomorphological as it followed the edge of the Canadian Shield and separated related Chippewa groups. [Ex. 1, p. 6. EX. 2, *passim*. EX. 8, p. 39.]

By the time of the 1836 Treaty the Chippewa of Lake Superior were no strangers to EuroAmerican farming and animal husbandry techniques. By the early 1800's their neighbors in the Lower Peninsula had adopted animal husbandry, including pigs, cattle horses and chickens. [Ex. 1, p. 5.] Their nearby Ottawa brethren were also well advanced in such practices. Henry Schoolcraft visited their villages in 1832 and found that they had well kept

and extensive fenced gardens and fields, cattle, horses, pigs and poultry. They also produced sufficient surpluses to acquire comfortable houses, clothing guns and tools. [EX. 3, ¶11.] During his visit, the Ottawa informed Schoolcraft that they and their Chippewa relations had actually been familiar with agricultural production for a very long time, at least as far back as 1679 when LaSalle was purchasing corn from an Ottawa woman. [EX. 1, pp. 5-6.] In 1832 a Methodist mission was established at L'Anse on the Keweenaw Peninsula where EuroAmerican farming techniques were taught to the Chippewa residing there. There were cattle in L'Anse at least by 1837 and local chiefs were serving as role models by taking up such activities. [Ex. 4, pp. 8-10. Carlson Report, ¶43.]

In 1837 another land cession treaty was concluded with the Chippewa, this time ceding much of what is now northwestern Wisconsin and a large part of the middle of modern-day Minnesota. This Treaty continued the policy of promoting agriculture among the tribal signatories by promising blacksmiths, farmers, grain seed and whatever else was necessary to carry on their agricultural pursuits. Article 5 of the 1837 Treaty reserved usufructuary rights: "The privileges of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians, during the pleasure of the President of the United States." [Treaty with the Chippewa, July 29, 1837, 7 Stat. 536, EXHIBIT 16.]

In order to acquire timber and minerals on the large swath of modern-day Wisconsin and Michigan land remaining in Chippewa ownership after the 1836 and 1837 treaties, the United States concluded yet another treaty with the Chippewa. [Treaty with the Chippewa, October 4, 1842, 7 Stat. 591, EXHIBIT 17.] The 1842 Treaty explicitly asserted federal supremacy and control over all trade and intercourse with the Chippewa signatories and reserved for them usufructuary rights in the land they had ceded:

> The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the white, until otherwise ordered by Congress.

[EX. 17, Article II.] The L'Anse and Ontonagon Bands of Chippewa Indians were signatories to the 1842 Treaty. The modern-day Keweenaw Bay Indian Community is the successor in interest of these historical bands. Keweenaw Bay Indian Community v. Naftaly, 452 F.3d 514, 516 (6th Cir. 2006).

After minerals and timber, the primary goal of the 1842 treaty was to further promote farming and animal husbandry among the Chippewa signatories. Article IV of the 1842 Treaty thus provides money for farmers, blacksmiths and an agricultural fund to assist them in their agricultural pursuits. [Carlson Report, ¶22.] Long before the 1842 Treaty was negotiated and signed the Lake Superior Chippewa Indians were expending their farming practices to include EuroAmerican plants and animals provided by government agents and

missionaries. [EX. 3, ¶14.] This farming expansion was present in L'Anse where the missionary influence as growing, an influence deliberately calculated to encourage the Chippewa to embrace EuroAmerican farming and animal husbandry practices. At least three very influential Chippewa Chiefs at L'Anse were successfully engaged in such activities contemporaneously with the 1842 Treaty. [Carlson Report, ¶¶23-24. EX. 4, pp. 6-7.]

In the minds of non-Indian observers of the time, the L'Anse Chippewa had rapidly adapted to non-Indian notions of civilization. They were described by Lyman Warren of the American Fur Company as distinctly "progressive" [EX. 6, pp. 53.] and by Commissioner Henry Gilbert as being "further advanced in civilization than any other Indians" [EX. 6, p. 61.] and as having acquired the white man's propensity for sharp dealing. [EX. 6, p. 65.]

It is undisputed that subsequent to the 1842 Treaty, the Chippewa signatories grew rapidly more involved in EuroAmerican style farming and animal husbandry, [EX. 7, pp. 16, 19. Carlson Report, ¶¶ 24, 27, 29,]

In 1854 the United States entered into yet another treaty with the Chippewa, including the L'Anse and Ontonagon Bands. While this was a land cession treaty, it also reserved permanent reservations for the Chippewa signatories. The federal farming policy towards Indians was continued in this Treaty as it provided for the usual blacksmiths, agricultural implements, and cattle. The 1854 treaty

makes no mention of revoking usufructuary rights from prior treaties, instead it reserves further usufructuary rights in the newly ceded territory. [Treaty With the Chippewa, September 30, 1854, 10 Stat. 1109, EXHIBIT 18.] Notwithstanding the creation of permanent reservations, the federal policy of promoting agricultural activities among the Chippewa continued unabated throughout the 19th and into the 20th Century. [EX. 10, p. 10. Carlson Report, ¶¶39-41.] These farming and animal husbandry activities were occurring both on the Reservations, and outside the reservations on the ceded territories. The federal government was financially sanctioning off-reservation purchases at farm to enable the Chippewa to have better access to markets for their agricultural products. [Carlson Report, ¶¶45, 47.]

Plaintiff Brenda Turunen is a member of the Keweenaw Bay Indian Community. [Deposition of Brenda Turunen, EXHIBIT 19, p. 72-73.] Since at least the early 1990's she has been a farmer and raised pigs and other livestock. [EX. 19, p. 17.] In 2012 she received a license from the Keweenaw Bay Indian Community Tribal Council authorizing her to engage in farming activities pursuant to the 1842 Treaty, including specifically animal husbandry. KBIC regulations concerning the operation of her farm are set forth in the body of that license. [EX. 19, p. 66. KBIC TREATY FARMING LICENSE, EXHIBIT 20.] Officials from the KBIC Department of Natural resources have crossed her property and have monitored the water

quality of a creek adjacent to her farm. [EX. 19, pp. 69-70, 121-122.]

In 2010 the Michigan DNR issued an Invasive Species Order (ISO) placing the following animals on the State of Michigan's invasive species list and thereby prohibiting their possession: "Wild boar, wild hog, wild swine, feral pig, feral hog, feral swine, Old world swine, razorback, eurasian wild boar, Russian wild boar (*Sus scrofa Linnaeus*). This subsection does not and is not intended to affect *sus domestica* involved in domestic hog production". On December 13, 2011 the Plaintiffs issued a declaratory ruling (DR) interpreting the ISO. The DR sets forth identification techniques the DNR would use to determine whether or not a specific pig is a prohibited species. The declaratory ruling listed nine phenotypical characteristics and provided that "one or more" of these characteristics could be used to find that a particular animal is illegal. The ISO has been determined by the 25th Circuit Court for Marquette County to be unconstitutional. [DECISION AND ORDER ON MOTIONS FOR SUMMARY DISPOSITION, Johnson, et al. v. Stokes, et al., Marquette Cir. Ct. File No. 12-50150-CZ, et al. (Consolidated cases), March 21, 2014. EXHIBIT 21] The Michigan DNR has admitted on the record in open court that the purpose of the ISO was to put Plaintiff and others like her out of business. [Transcript of Preliminary Injunction Hearing, Hal Martin quote, EXHIBIT 22.] The DNR has reversed its position on what actually

constitutes an illegal pig from one litigation to another. [Transcript of Baker Hearing. Hal Martin quote. EXHIBIT 23.]

III. STANDARD OF REVIEW

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56©. The Court must view the facts and all of the inferences drawn therefrom in the light most favorable to the nonmoving party." Keweenaw Bay Indian Community v. Naftaly, *supra*, 452 F.3d at 521.

When interpreting an Indian treaty, this Court must give effect to the terms used as the Indian signatories would have understood them. Minnesota v. Mille Lacs Band of Chippewa Indians, 562 U.S. 172, 196 (1999). An Indian treaty must be liberally interpreted in favor of the Indians and any ambiguities in that Treaty must be resolved in their favor. *Id.* at 200.

IV. ARGUMENT

A. Putting the 1842 in the Proper Historical Context Reveals That Both The Indian Signatories and the United States Government Understood That the 1842 Treaty Reserved The Tribal Signatories The Right to Farm Free From State Interference.

The Sixth Circuit Court of Appeals has explained:

[T]hat there was a "deeply rooted" policy of preventing a

> state from asserting jurisdiction or otherwise interfering with American Indians. Id. at 168 (citation omitted). Indeed, in *Worcester v. Georgia*, "Chief Justice Marshall held that Indian nations were 'distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.'" ... The notion that American Indians constituted a separate entity not subject to the laws of the state was known as the Indian sovereignty doctrine.
>
> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. Indians today are American citizens. . . . But it is nonetheless still true . . . that "(t)he relation of the Indian tribes living within the borders of the United States . . . (is) an anomalous one and of a complex character. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided ...
>
> Treaty construction in favor of American Indians has a well-established pedigree. In The Kansas Indians, the Supreme Court noted: Enlarged rules of construction are adopted in reference to Indian treaties. In speaking of these rules, Chief Justice Marshall says: "The language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of their treaty.

Keweenaw Bay Indian Community v. Naftaly, *supra*, 452 F.3d at 522-523 (citations omitted).

Article II of the Treaty of 1842 contains the following language:

> The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, with respect to trade and intercourse with the whites, until otherwise ordered by Congress.

The crux of this case lies in the answer to two quite simple questions: (1) Does the historical record demonstrate that the Indians who signed the 1842 Treaty would have understood farming, including animal husbandry, to be a usual privilege of occupancy that they could engage in on the territory ceded? (2) Would they have understood they could engage in those activities on a commercial basis. These are quintessentially factual questions, and the preceding statement of facts quite literally speaks for itself.

Long before contact with the Europeans, the Chippewa were engaged in robust and far-flung commerce. They and other Native American Indian tribes had trade routes that cris-crossing most of the continent on this side of the continental divide. One group of Algonquin Indians, the Anishnabeg, migrated to the great Lakes region many centuries ago where they split into three closely related tribes, the Ottawa, Chippewa and Potawatomi. These people were so thoroughly immersed in their own inter-tribal commerce that the very name “Ottawa” means “trader”. As shown above, they were prepared to sell (i.e., trade), and they did sell, everything they harvested from their environment or otherwise acquired.

Before European contact they were also farmers, harvesting corn, squash, pumpkins, beans, maple sugar, and wild rice. The

Defendants try to characterize the later two of these activities as "gathering" but the facts tell a different story. It is not mere gathering when a family maintains its own maple groves, tends to the trees and returns year after year to exploit that resource with supplies they have kept nearby. That was a recognized agricultural operation then, just as it is recognized by the USDA as an agricultural operation today. Further, when they harvested wild rice from their traditional, designated rice fields, they were careful to leave seeds behind to ensure future regrowth of the field for the next season. This sowing of the fields is precisely what farmers throughout the world have done for thousands of years. Nor can the thousands of acres of once cultivated fields owned by the Chippewa be dismissed as mere "gardening". Clearly such fields were grown to create a surplus, and any surplus to a commercial people like the Chippewa is rife with opportunities to exchange that surplus for items that may be currently scarce of otherwise desirable.

The notion that the Chippewa would never have comprehended that they could sell or trade their agricultural products is simply illogical. Especially when they were be actively encouraged to do so by no less figures that Thomas Jefferson himself. Remember, Thomas Jefferson's speeches to the Ottawa and Chippewa described above, he extolled the wealth generating possibilities of agriculture and animal husbandry and wished they could do the same.

Jefferson was no subsistence farmer, he operated a plantation where crops were grown purely for cash and trade.

The Chippewa were no strangers to domestic animals, they had kept dogs for hundreds of years. Pigs and chickens were easy substitutes because they could fit in canoes and forage for their own foods without the vast investment in time and capital it took to keep cattle. Thus we see that many southern Ottawa and Chippewa were maintaining these domestic animals long before the 1842 Treaty. Defendants dismiss these instances as irrelevant because they are not occurring at L'Anse, but that misses the point entirely. It is beyond denial that one of the main goals of the federal government when entering the 1842 treaty, or any of the numerous other Indian treaties of that era, was to encourage the Indian signatories to radically change their lifestyles and settle down to the sedentary agricultural and husbandry practices of the non-Indian farmers. A simple perusal of the language of the treaties attached to this pleading is proof positive of that assertion. It once again defies logic to believe that in the face of such constant and forceful pressure from government and missionaries alike, the tribal signatories would NOT have understood they could farm in the euroAmerican fashion upon the very same lands they had also reserved the right to hunt, fish, gather trap and garden on.

The extent which the Chippewa moved around is also highly

significant. Those living at L'Anse were not isolated. On the contrary, it is undisputed that they roamed freely throughout the Great Lakes region, interacting with Chippewa, Ottawa and Potawatomi as well as other tribes. The frequent treaty caucuses held in the region, and the fact that numerous Chippewa attended at these highly ceremonial solemn and sacred occasions compels the conclusion that they were highly talked about by those who attended as well as those who did not. The federal policy promoting non-Indian agriculture and animal husbandry could not have been lost upon the Indians of the region, as it was not as demonstrated by the reams of historical evidence attached to this pleading. The federal government wanted the Indians to settle down and "act like white men", and that is precisely what more and more of the Indians believed they would have to do. And what were the "white men" of the day doing? Farming for a profit.

The Defendants attempt to dismiss the crystal clear evidence from L'Anse, where three important chiefs were complaining that they were "just now beginning to settle down and act like white men" and were unwilling to leave their hogs and other livestock behind. This is an ethnocentric view of time. Consider the recollections of William Warren in Exhibit 2, who considers three centuries 'comparatively few generations back". The statement of "just now" beginning to act like white men is more likely referring to a number of years than to the few months asserted by the

defendants.

To argue that the Chippewa would not have understood their farming could have a commercial aspect ignores their very character. The work of Robert doherty is quite instructive. See, EXHIBIT 6. At one point, the Chippewa hunted fur bearing animals for their own use and for trade with other Indians. Along came the Europeans with their fur trade and the Chippewa quickly and readily adapted to commercially exploit that market. When furs became scarce the Chippewa realized their was a market for fish and they began to sell (trade) fish to the American traders to acquire things they needed, more commerce. There is no dispute that they sold vast amounts of maple sugar, but the state ignores reports in the very same sentences about potatoes, dismissing clear evidence of commercial agricultural because of its location in the paragraph. The huge commercial importance of wild cannot be overstated and was another market quickly and readily exploited by the Chippewa. Doherty tells of a Chippewa who discussed the sale of land to Reverend Ely in 1836, only to eventually demand rent for the land. Even a potential market in real estate is recognized and exploited commercially by the Chippewa. To conclude that when it came to agriculture and animal husbandry the chippewa would somehow fail to grasp the commercial potential is simply unreasonable and ignores the historical record.

Finally, while it is clear that then Indians would have

understood that the other privileges of occupancy would mean they could farm commercially or otherwise, on the ceded territory, there was another player involved. It simply cannot be denied, and it is not denied by Defendants, that the overriding, predominant federal policy at the time of the 1842 Treaty was to "civilize" the Indians by making them farmers after the EuroAmerican fashion (i.e., to grow comfortable and wealthy through agricultural pursuits). It is also clear that the federal government intended for this farming activity to occur on the ceded land, why else did they encourage and financially support the purchase of off-reservation farms near the Bad River Reservation many years after the even the 1854 treaty was ratified? The intentions of the federal government play no small role here:

> Treaties and Congressional acts involving Native Americans are meant to be construed to effect the purposes for which they were executed or enacted. "The underlying premise is that Congressional intent will control." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586, 51 L. Ed. 2d 660, 97 S. Ct. 1361 (1976).

Sokaogan Chippewa Community v. Exxon Corp., 805 F. Supp. 680, 693 (E.D. Wis. 1992). While the facts of this case make it clear that the Indian signatories would have understood they could farm, commercially or otherwise, on the territory ceded, even if they did not have that understanding, it was the intention of the federal government that they should do so and that overriding federal policy still controls.

B. Laches Is No Bar To Plaintiff's Action Because The

Defendants Do Not Come To This Court With Clean Hands.

Defendants rely on the case City of Sherill v. Oneida Indian Nation, 544 U.S. 197 (2005) and assert that even if Plaintiff has a legitimate claim, which the facts clearly demonstrate she does, the nonetheless her claim is barred by laches. That case is inapposite. Sherrill is a complicated land claims case that morphed from claims for monetary relief into claims reasserting aboriginal title to land and immunity from state taxation and other regulatory control on its newly re-acquired lands. For centuries the state of New York had exercised control over the subject parcels, notwithstanding the fact that they had purchased them in violation of the federal trade and intercourse act. Central to the decision in that case was the long standing, legitimate reliance of the State of New York on its sovereign control over the property in question.

Nothing could be further from the facts of the instant case. Plaintiff herein is not asserting sovereign control over state lands or landowners titles, as were the Oneidas in Sherrill, she is simply seeking to protect her farm and way of life by asserting the existence of her treaty right. Such treaty rights have been held to be reconcilable with state authority and sovereignty. Minnesota v. Mille Lacs Band of Chippewa Indians, *supra*, 562 U.S. at 204-205. Clearly the actions of the Oneidas were not reconcilable with such state interests. Further, the Oneidas were well aware that their

land and sovereign control over that land had been lost for 200 years. These are dramatic, obviously harmful acts one would be expected to respond to in order to protect one's rights. In the instant case what is the impetus to assert a treaty claim when no one is interfering with her ability to exercise that right? It was only when the Defendants set out to enforce a regulation in 2012 that was intended to and would destroy her farm and her pigs that she took action to protect those rights. Waiting a few months before bringing suit is a far cry from waiting over 200 years.

It should also be noted that federal policy encourages the vindication of Indian treaty rights, not their extinguishment. See, e.g. Mille Lacs Band of Chippewa Indians v. Minnesota Dept. of Nat. Res., 853 F.Supp. 1118, 1125 (D.C. Minn. 1994). There is, however, another dramatic difference between the cases, that is, the actions of the Defendants. Here the Defendants are seeking equitable relief, primarily in the form of a laches claim, when they do not have the necessary "clean hands" that would allow this Court to provide them with such equitable relief.

> The maxim that one "who comes into equity must come with clean hands" is "the expression of one of the elementary and fundamental conceptions of equity jurisprudence." 2 Pomeroy's Equity Jurisprudence, ch. I, § 397, p. 90, § 398 p. 92 (1941). The courts of this state have held similarly. Justice Cooley wrote for a unanimous Court in *Rust v Conrad*, 47 Mich 449, 454; 11 NW 265 (1882). [I]f there are any indications of overreaching or unfairness on [an equity plaintiff's] part, the court will refuse to entertain his case, and turn him over to the usual remedies.

> Writing even more pointedly and echoing Pomeroy, we have reiterated this rule more recently, stating in a succinct formulation of the doctrine "that one who seeks the aid of equity must come in with clean hands." *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW2d 529 (1975), quoting Charles E. Austin, Inc. v Secretary of State, 321 Mich 426, 453; 32 NW2d 694 (1948). The *Stachnik* Court aptly described the scope and purpose of the clean hands doctrine as "a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, *however improper may have been the behavior of the defendant.* That doctrine is rooted in the historical concept of the court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' *Bein v Heath*, [47 US] 6 How. 228, 247[, 12 L.Ed 416 (1848)]." *Precision Instrument Manufacturing Co. v Automotive Maintenance Machinery Co.*, 324 US 806, 814; 65 S.Ct 993; 89 L.Ed 1381 (1945). [Id., at 382; 230 NW2d 529 (emphasis added). *Rose v National Auction Group, Inc.*, 466 Mich 453; 646 NW2d 455 (2002).

The claim that the Plaintiff has waited too long to present this suit, is not supported in any way by prior fact or law leading up to the filing of this lawsuit. For the 23 years that the State refers to in which the Plaintiff had been farming, the Plaintiff was not accused of having feral and/or wild animals. It was only after the State, through its own inequitable activity, started leveling these accusations against the Plaintiff, she determined that she had to exercise her treaty rights.

In the ongoing State Court cases where the DNR is attempting to force the Plaintiff's husband and those similarly situated, out of business, the DNR's conduct clearly reveals that it has not had clean hands. It is not the State Defendants, but individuals

similarly situated to the Plaintiff who have gained equitable relief from State Courts in their battles against the unreasonable attempt to exercise power by the DNR to extinguish the livelihood of Michigan citizens.

State Court Judge Thomas Solka ruled that it was the DNR, and not the similarly situated farmers, that was involved in unconstitutional enforcement activity against these farmers. The ISO and DR violate the Equal Protection and Due Process clauses of the United States and Michigan Constitutions, denying equal protection of the laws, without a rational basis, to these Appellees and others owning hybrid pigs. [EX. 21, p. 3]. There is no genuine issue of material fact that the animals in the possession of the Appellees meet the exemptions set forth in the ISO for *Sus scrofa domestica*. [EX. 21, p. 3].

On December 13, 2011, the DNR generated a declaratory ruling (DR) saying that it would use phenotypes to identify *Sus scrofa* to distinguish illegal invasive swine from legal swine. One or more of these characteristics may be used to identify a prohibited animal. [EX. 21, p. 5].

The DR also incredibly reached so far as to provide that: "Other characteristics not currently known to the MDNR that are identified by the scientific community, could be utilized to identify a prohibited animal." [EX. 21, p. 6].

The DNR's own experts testified that non-feral, domestic swine

may also possess "one or more" of these phenotypes and the public was thus at risk of being singled out for felony prosecution as a result of their domestic hog production, such as that undertaken by the plaintiffs in that action. [EX. 21, p. 6]. This left the ISO and the DR clearly open to selective enforcement in that an owner possessing an animal with "one or more of these phenotypes would be subject to prosecution or civil action by the State". EX. 21, p. 7].

The DNR has relied primarily on expert witnesses, Dr. John Mayer, Dr. Ronald Bates, and Thomas Guthrie. [EX. 21, p. 7]. The DNR's expert, Mayer, concluded that: "The identification of completely reliable defining characteristics for the three forms of [prohibited animals] has yet to achieved." [EX. 21, p. 8]. The DNR's expert, Mayer, in an authoritative article, concluded that: "The ability to distinguish among the three forms of wild *Sus scrofa* in the United States has improved over the past 50 years, but still remains somewhat insufficient."

Completely contrary to the DNR's foundation for its ISO is the conclusion reached by their own expert, Mayer, that: "Domestic swine and wild swine are related, both descendants of the Eurasian wild boar." [EX. 21, p. 8]. Understandably, the terminology utilized by the DNR in its effort to create two species, is not accepted by the DNR's own experts, including most notably, Mayer. The term *Sus domestica* used in the ISO and DR is not recognized by

Mayer and Mayer's taxonomic term for domestic swine is *Sus scrofa domestica*, and Mayer's taxonomic term for the Eurasian wild boar is *Sus scrofa scrofa*. [EX. 21, p. 8]. Thus, both the DNR's alleged illegal animals and legal animals obviously can be identified by one or more of the same DR characteristics since they are of the same species. They both share phenotypes that: "Any one or more of which 'may be used to identify a prohibited animal." [EX. 21, p. 8].

The DNR's expert, Gutherie, testified that any of the 126 breeds of domesticated swine (*Sus scrofa domestica*), have potential of causing the same environmental damage as *Sus scrofa scrofa* on escaping from a farm confinement and becoming free-ranging. Gutherie testified that a "feral pig" is any free-roaming pig, not a particular breed of pig. [EX. 21, p. 8].

There is only one single species, *Sus scrofa* and *Sus scrofa scrofa* and *Sus scrofa domestica* are subspecies of *Sus scrofa*. [EX. 21, p. 9].

The Interagency Taxonomic Information System (ITIS) describes the DNR's term *Sus domesticas* as "invalid" and as simply a "junior synonym" of *Sus scrofa*. EX. 21]. The ISO, under the Invasive Species Act, subjects an individual to felony prosecution for possessing a pig that may be a hybrid or genetic variant of a combination of pigs that can only be identified by one or more of eight specific physical characteristics, any one or more of which

may be shared by *Sus scrofa domestica* involved in domestic hog production. [EX. 21, p. 10].

The DNR admits that not every phenotype characteristic is unique to *Sus scrofa Linnaeus* and that some of the characteristics in the DR may be shared by some breeds of the species *Sus domestica*. [EX. 21, p. 10].

A farmer or game rancher has no reasonable direction as to whether or not they are committing a felony in violation of the ISO pursuant to the criteria that has been established in the ISO and DR by the DNR. [EX. 21, p. 10].

Repeatedly used throughout the staff recommendations to the DNR director in the ISO are the terms "wild" and "feral" swine. The ISO makes illegal all swine that are "wild" or become "feral" including hogs involved in domestic hog production, however, the DNR would declare illegal swine on the subject farm, even though they are under farming husbandry and in captivity, because the animals share "one or more phenotypes with legal swine". EX. 21, p. 10].

In summary, the DNR cannot now argue that it has clean hands after attempting to classify these farmers as felons based on unconstitutional, ambiguous, and selective classifications. Other prior State Court proceedings clearly reveal that the State does not have clean hands and, as such, the State is not entitled to any sort of equitable relief in this matter.

In a hearing on a Motion for Summary Disposition before the Honorable Thomas L. Solka on October 15, 2012, where Judge Solka asked of the DNR the following question:

> And so let's say we're in this courtroom here, and we have a jury trial, and the jury is sitting in the jury box, and I have to fashion an instruction to the jury that the defendant is charged in this information with having possession of an invasive species, specifically a Russian boar. And then I have to instruct the jury what the elements are of a Russian boar. What do we tell the jury?

After a long pause, counsel for the DNR answered as follows:

> I assume that we would instruct the jury that, based on the proofs presented and the expert testimony presented, that these are the characteristics. An animal with these eight characteristics would be a Russian boar. There are some of those characteristics that are distinctive, bristle tip coloration, dark dorsal regions of the animal. Based on the expert testimony in front of them, whether or not the animal--the evidence presented supported that this animal fell within Russian boar--the category of Russian boar.

[Transcript, October 15, 2012 Hearing on Motion for Summary Disposition, Marquette Cir. Ct. File No. 12-50150-CZ, et al. (Consolidated cases). EXHIBIT 22, pp. 50-51.] The eight characteristics that counsel is referring to are, of course, the eight characteristics articulated in the DR.

In an April 23, 2013 hearing on a Motion for Summary Disposition, the Honorable Charles R. Goodman had invited the plaintiff to make a Motion for Injunctive Relief if the DNR was unwilling to allow him to sell his animals. Judge Goodman, realizing that without a reasonable agreement the DNR would

eventually win by starving the plaintiff out. Judge Goodman, at page 60 of the hearing, stated the following:

> So, the--the--especially if he's been doing it for twenty some years, you know. If he started last night, ah, I'd probably have a different opinion; but, you know, I certainly can empathize with that. All of a sudden if they passed a law saying the practice of law was illegal, I'd like to think they gave us some time to kind of re-adjust, you know.

At that hearing, Judge Goodman articulated, on pages 46-49, his concerns as follows:

> I'm cognizant of where the Plaintiff is, and I'm cognizant of Mr. O'Leary's indications on behalf of his client, and they're justifiable because too long a delay would be a defacto, basically, ah, submission by the Plaintiff that the act is appropriate. I mean, if this case went on for three years, and downstate they do sometimes I gather, um, and in the meantime the enforcement was occurring, and you--the case was proceeding for a three year period, Mr. Turunen would be out of business. So without having a judicial determination, the state would, in fact, be successful, defacto, which is inappropriate.
>
> So that's why Mr. O'Leary and Mr. Smith asked for an expedited trial, so that wouldn't occur, to protect his client's interest, which I'm sure the state can understand.
>
> So what I'm saying is, so that the issues can be address (sic) appropriately, especially this issue that deals with your motions, um, can some resolution be reached between the parties which would provide Mr. Turunen with the ability to farm as he has without another week causing additional financial distress, et cetera, et cetera, et cetera. And, ah, my understanding from your comments, and they're appreciated, um very much, um, Mr. Turunen could sell out of state, that's fine, Pennsylvania, New York, but you don't want sales in Michigan because of your position. Ah, but obviously, that's an aspect of his business that he needs in order to survive and support himself and his family. Which the length of a lawsuit should not, in my opinion any way,

jeopardize. I mean, maybe ultimately, I don't know what the end result of this will be, but maybe ultimately this law will be determined to be a fine law, constitutional and all respects, and apply to him; and Mr. Turunen, at that pint in time, will have to deal with it. But we're not there yet. We haven't made those kinds of decisions.

So the result of the law as the case is pending may not or should not or potentially, ah, would not affect him as if the law was determined to be valid. You see what I'm saying? So what I'm asking is, can the state, and I'm putting it in a can at this point in time, ah, allow Mr. Turunen to function so that this lawsuit can proceed appropriately, rather than in a heightened sense of urgency, ah, and without having to say we need a trial in thirty days because to go sixty days would be a financial detriment to my client. Can the matter proceed in a more appropriate way? I mean, car accident cases sometimes take more time. Um, so can we do that? Or are you in a position to say?

MS. ALLISON-YOKOM: I'm not in the position right now to have authority to say that we could work something out. I'm not saying that it would be impossible to do, but I don't have a client with me who can give me that kind of authority right now.

THE COURT: Because let me say this to give you maybe some guidance. Now, if Mr. Turunen's--I've read a lot, and I understand the allegations, these animals may be diseased and cause problems to humans, that's one of your claims, right?

MS. ALLISON-YOKOM: That feral pigs do, yes, Your Honor.

THE COURT: Yeah. And escapes and create havoc on the countryside type of thing. Now, if Mr. Turunen's pigs are diseased ridden and causing all sorts of problems, okay, I understand. Um, if his pigs are getting out and just reeking havoc on the countryside, and if that was an allegation; but I didn't see that. I saw there was one indication that they got out, and the answer was they got right back in. Ah, so you know, if there was some significant danger, not even of a significant amount, but some danger to public health safety welfare in the way Mr. Turunen is operating his establishment, then I could see where, ah, you know, let's not let him do what Mr. Turunen would normally be doing. But if Mr. Turunen is

> operating his facility in an appropriate way, it's properly penned, ah, the animals aren't running around with disease, ah, that's going to affect my family and myself, nor any other family, ah, in Baraga County, et cetera, ah, I think that would be a consideration in permitting him potentially to continue his endeavors while the case is looked at.
>
> Now if you got a defendant or a plaintiff, and the pigs are running ramped and foam is coming out of their mouths, okay. **But I don't see that here.** I mean, I see the act, and you're saying the act applies to him, but I don't see that any claim that he's being reckless, for example.

[Transcript, Motion for Summary Disposition, Roger Turunen v. Stokes, et al., Baraga Conty Cir. Ct. File No. 12-6259-CZ, April 23, 2013. EXHIBIT 23, pp. 46-49, 53-54, 57, 60.] The DNR, of course, never agreed, in any fashion, to that Plaintiff-Turunen, being able to conduct business. It was necessary to file a Motion for Injunctive Relief, which Judge Goodman promptly granted. The DNR then filed an Application for immediate review by this Court, which this Court granted, and then this Court promptly denied the DNR's request to have Judge Goodman reversed on December 6, 2013.

At page 53, in response to the DNR claiming that the Appellee's pigs may get out, Judge Goodman appropriately responded that: **"My dog gets out occasionally, too."**

At page 54, Judge Goodman asks the DNR the following astute question regarding the DNR's knowledge and information of the various domestic animal facilities across the state:

> Do you keep track of that, I mean, the facilities that are, for lack of a better word, appropriately run as compared to those that you have a problem with? Is there

> some--I mean, has the state enforced this to the degree where you know there are facilities that are run in an inappropriate manner, as compared to facilities that are run appropriately where there's not diseased animals, where they are properly penned. Do you know?
>
> MS. ALLISON-YOKOM: Well, no, Your Honor, 'cause one of the issues, one of the reasons that the invasive species order came into being is because there was no regulation at these facilities.

At page 57, Judge Goodman further expressed his concern as follows, and asked whether the DNR could inspect potential facilities that Mr. Turunen could sell his animals.

> THE COURT: Four. Okay. Four. All right. Now, so we have a limited number. Can the Defendant, the state, for example, inspect those four facilities to see if they are run appropriately, if they're not depopulated yet, and it seems like we got four that aren't depopulated for whatever reason, can the state examine those facilities to see whether or not they're appropriately run in a reasonable, prudent and appropriate manner, and for the interim of this case, be that whatever, ah, or at least for a reasonable period of time. If the state feels it's unreasonable, come to court and say this gotta stop. But for a period of time permit that to continue while this case pends **so we don't have a citizen of the state who is financially bankrupted by a law that's still under review?** And I don't mean to, you know, **overstress you**. Ah, but it's a rational question.

[EX. 23.] The DNR refused to consent to any business being conducted by Mr. Turunen even though the DNR's ISO and DR were very likely, at that point, unconstitutional. The DNR had no regard for the well being of one of the citizens of the state or his family.

In response to the DNR's absolute refusal to enter into any kind of agreement that would allow the plaintiff's business to survive, they were forced to file a Motion for Injunctive Relief.

The Court heard that Motion on July 15, 2013, and granted the Motion so that he could continue to conduct business while this matter was ongoing.

The DNR, being disappointed that Mr. Turunen, had an opportunity to survive, filed a Motion to Clarify the Court's Order Granting Injunctive Relief in favor of Mr. Turunen. That Motion was heard on August 12, 2013. It should be noted that even though Judge Goodman did his level best in allowing Turunen, to stay in business, the damage done by the DNR's unconstitutional ISO and DR had already significantly been suffered by Mr. Turunen and other plaintiffs as a result of many animal owners similarly situated having already gone out of business under the DNR's threat of criminal felony prosecution. This, in effect, significantly destroyed the marketplace, which apparently has been the DNR's goal all along. The DNR has promulgated unconstitutional law, and with its vast resources, has forced many businesses, unconstitutionally, to succumb.

Counsel for the DNR, Assistant Attorney General, Harold J. Martin, at the August 12, 2013 hearing, beginning at page 11, made it absolutely clear that the DNR was engaged in a tactic of unconstitutional selective enforcement:

> Your Honor, you know, I appreciate the Court's solicitousness of, you know, the farming tradition and the hard work that goes into being a farmer. I suggest that this is a highly unusual case. These, you now, may be animals and they may be raised on a farm. They're--So maybe they're farm animals, at least until the time they

> leave Mr. Turunen's facility, but highly unusual in terms of an agricultural commodity. They are actually being sold to places for people to shoot at.
>
> So, you know, as I went through the materials last night and this morning that I was given, I was kind of struck by Counsel as saying, and Plaintiffs are saying, "Well, these aren't feral pigs. They're, you know, they're good natured pigs, you know, well behaved, and all that," and I'm sure that Jeff DeBacker probably doesn't make a good living from selling opportunities to come out and shoot well behaved farm animals, you know, so there's a little dichotomy there that, you know, they're boars or they're Porky Pig. You know, I don't know, but I would suggest that Your Honor consider that carefully in terms of, you know, considering the status of the Turunen and their farm operation exactly what it is they're doing.
>
> You know, when it comes down to **brass tacks, Your Honor, the fact of the matter is yes, the intent of this Order is to put that business** and nodding to Roger Turunen or Mark Baker or anybody else, but **to eliminate that business**, and, of course, we wait for the Courts to determine whether that Order is valid and legal, but, you know, there's no getting around the fact that **that is, indeed, what DNR hopes to accomplish.**

[Transcript, Motion for Preliminary Injunction, Roger Turunen v. Stokes, et al., Baraga Conty Cir. Ct. File No. 12-6259-CZ, August 12, 2013. EXHIBIT 24, pp. 11-14.] On February 26, 2014, additional nonsensical admissions were made by the DNR. Mark Baker, having suffered damages for years, was prepared to go to trial against the DNR in early 2014, likewise challenging the constitutionality of the ISO and DR.

> THE COURT: But that's really I think the posture that we're all in here today, is the DNR is saying we don't intend to apply the ISO to Mr. Baker's current herd.
>
> MS. HALLEY: Well, and as I have said, I agree that it doesn't apply to the herd as it is today. What if Mr. Baker buys a Russian boar tomorrow, then what? We're

supposed to start all over?

THE COURT: Well, and if the DNR chooses to enforce that we certainly have a ripe question.

MS. HALLEY: But I would argue that we still have a ripe question, maybe. I mean, their assertion that Russian boar is regulated by the ISO really is one of the critical issues here, and nothing in their briefing and nothing that Mr. Martin said today makes me think any differently. He did not address in any way the issue of Russian boar hybrids.

THE COURT: They have always asserted that though, that's part of their pleadings, that's part of the ISO, is that Russian boar hybrids apply, and now they are telling us--and I trust, Mr. Martin, you are not contending that there aren't Russian hybrids on the farm?

MR. MARTIN: Your Honor, the understanding that I have, and its strictly off the grapevine, is that there is something like 1/7th.

THE COURT: Sorry?

MR. MARTIN: That the make-up of the herd is generally 1/7th Russian boar at the most. That's what I have heard. I don't know that that's on the record. All I can tell you, your Honor, is that the ISO we don't believe covers the herd as it is today.

THE COURT: All right. Thank you.

MR MARTIN: I'm not even--I apologize for going on, your Honor. I'm not even saying that we don't intend to apply the ISO. I am saying the ISO doesn't apply.

THE COURT: All right. Ms. Halley, does that raise some questions?

MS. HALLEY: It does.

THE COURT: Your expression tells me it does.

MS. HALLEY: I think that is not an accurate representation of the make-up of the herd. **Most of the herd consists of about at least 25 percent Russian boar. So I don't know if that changes Mr. Martin's mind about**

> **what makes a hybrid and what doesn't, but from a factual perspective the herd contains Russian boar hybrid pigs. There is no doubt in my mind about that, and no doubt in Mr. Baker's mind about that.** Therefore--
>
> THE COURT: **Nor in mine I might add, at least from what's been represented to me.**
>
> MS. HALLEY: Yeah. Therefore, my concern is that the declaratory ruling is still applicable I suppose, and that if Mr. Baker or any other pig farmer is trying to figure out if their pigs are legal or not, you know, just look at these pictures, we've got pigs that look illegal, how are we supposed to know when that coin is flipped? How will we know? [Exhibit A, Missaukee Circuit Court Transcript of February 26, 2014, pp. 13-16].

[Transcript, Motions, Baker, et al. v. Stokes, et al., Missaukee County Cir. Ct. File No. 12-8087-CZ, February 26, 2014, EXHIBIT 25, pp. 13-16.]

In essence, the Court, DNR attorney, Harold Martin, and Mark Baker's attorney all agree that Mark Baker possessed Russian boar hybrids at the time that the DNR was refusing to enforce and/or apply the ISO to Mr. Baker's herd. Mark Baker's attorney volunteered that the herd was at least 25 percent Russian boar.

> MR. MARTIN: But, you know, I'm a little perplexed, your Honor. We say the ISO doesn't apply to Mr. Baker's herd. She says the ISO doesn't apply to Mr. Baker's herd. What are we going to try?
>
> MS. HALLEY: **But he has Russian boar hybrids, that's ripe.**
>
> THE COURT: **I know he does.**
>
> MS. HALLEY: **There's no doubt about that being included in the ISO.**
>
> THE COURT: And Mr. Martin as the representative of the

> DNR has said that this is dismissed with the understanding that the ISO doesn't apply to his herd as presently constituted. He said that several times. I forced him into it at first, but he has agreed with me several times.
>
> MS. HALLEY: I understand, and I am perplexed by that comment. They know-
>
> THE COURT: **It's inconsistent with their position up until now, I agree with you there.**
>
> MS. HALLEY: Exactly. That's exactly right. I don't want my client to pay the price for their inconsistency, if and when he wants to have a Russian boar, even though Russian boars are not listed as a species, a breed, affected under the ISO. I don't want my client to go through this again.
>
> THE COURT: I agree. All right. Thank you. Mr. Martin, anything else?
>
> MR. MARTIN: I think not, your Honor. [Exhibit A, Missaukee Circuit Court Transcript of February 26, 2014, pp. 16-18].

Thus, even with the Court concluding that the DNR's actions were inconsistent and with the Court concluding that Mark Baker had Russian boar hybrids, counsel for the DNR had nothing to add. This, again, is unconstitutional selective enforcement and also recognition on the part of the DNR that their scheme of characterizing animals would never be upheld by a trier-of-fact. **The DNR is doing nothing more but unconstitutionally and unconscionably forcing a slow death upon the businesses of Mr. Turunen and others similarly situated.** Again, this Honorable Court should summarily affirm the Decision and Order of Judge Solka and, further, judicially impose sanctions upon the DNR to the fullest

extent allowed by law.

In summary, concerning the DNR's request for equitable relief, the DNR is in no position to make such a request. The DNR's prior conduct is clearly established time after time with the result being that the DNR is operating with unclean hands.

C. The State Cannot Regulate Plaintiff's Treaty Rights Because the State Cannot Show a "Conservation Necessity".

It is well established that States cannot regulate rights reserved to Indian tribes. "Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making. U.S. Const., Art. VI, cl. 2. Mille Lacs, *supra*, 562 U.S. at 204-205. States can regulate such treaty rights only in the interest of conservation and only through reasonable and necessary, nondiscriminatory regulations. *Id.* The discussion in the preceding section demonstrate that such is not the case here.

D. The 1854 Treaty Did Not extinguish the Rights Reserved By Article II of the 1842 Treaty.

The Defendants again trot out an argument that failed them in their previous motion to dismiss. They simply misapprehend the import of the Sokaogon case, which this Court has already correctly determined is inapplicable to the instant case. Regardless,

> If the United States had intended to abrogate Chippewa usufructuary rights under the 1837 Treaty, it almost certainly

> would have included a provision to that effect in the 1854 Treaty, yet that Treaty contains no such provision. To the contrary, it expressly secures new usufructuary rights to the signatory Bands on the newly ceded territory." Mille Lacs, *supra*, 562 U.S. at 199.

What is true for the 1837 Treaty is true for the 1842 Treaty. The 1854 treaty is silent about revoking any usufructuary rights and such revocation cannot be implied.

E. 25 U.S.C. § 181 Is Inapplicable To The Instant Case Because It Was Passed To Prevent Misappropriation Of Real Property Allotments Under the Dawes Act.

Defendants' reliance on 25 USC §181 is misplaced and offensive. That statute was passed as a fix to certain administrative problems perceived with the so-called Dawes Act, 24 Stat. 388. The Dawes Act purported to break the communal nature of tribal societies by breaking up reservations into small parcels, called allotments, which were then deeded to the heads on Indian households. The Dawes Act was a disaster for Indian country and resulted in the loss of millions of acres of Indian lands. 25 USC §181 was passed to prevent non-Indian control of tribal property. It is an antiquated statute that flies in the face of federal enactments meant to protect the institution of marriage. Defendants' interpretation of that statute has absurd results. Must Plaintiff's husband surrender his interest in their home? In their cars? In their pets? The statute was never intended to apply to anything other than allotments of land and Defendants' efforts to do so are without merit. In any event, the Dawes Act never applied

to the Keweenaw Bay Indian Community Reservation:

> The record, however, contains absolutely no evidence that L'Anse reservation land was ever allotted under the Dawes Act. Indeed, although all three experts, Cleland, Gulag, and Greenwald, agreed that reservation land was allotted pursuant to the 1854 Treaty, none of the experts claimed that reservation land was allotted pursuant to any other law.

Naftaly, *supra*, 452 f.3d at 532.

F. The Defendants' cannot regulate away Plaintiff's treaty Protected Property.

Defendants' final argument, that even if a treaty right to farm exists, they can still destroy that right be regulating her property, must fail for the same reasons advanced in Section C, *supra*.

Respectfully submitted,

Date: MARCH 12, 2015

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