Indigenous Space and the Landscape of Settlement: A Historian as Expert Witness

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Abstract: This essay examines my work as expert witness in the case of *U.S. v. Michigan*, a Indigenous use-rights case. I was charged with parsing the intention of a specific article of the 1836 Treaty of Washington compelling land cession by Anishinaabe peoples and with writing a history of land use in the area from that date to the present for the Chippewa Ottawa Resource Authority (my employer). The challenges were not only methodological (how do you estimate use from ownership?) and epistemological (what constitutes proof that will satisfy both historians and lawyers?), but also sociological and psychological: what happens when an associate professor puts her progress toward full professor on hold for the sake of a court case?

Key words: expert witness, litigation support, Indigenous peoples, land-use

It has been over a decade since I committed myself to serving as an expert witness in a treaty-rights case that pitted five federally recognized Michigan Indian tribes against the State of Michigan. Since the conclusion of *U.S. v. Michigan* in 2007, I have spoken publicly only once about my work on behalf of the Little River Band of Ottawa Indians, the Grand Traverse Band of Ottawa and Chippewa Indians, the Little Traverse Bay Bands of Odawa Indians, the Sault Tribe of Chippewa Indians, and the Bay Mills Indian Community. Since my audience for this presentation was primarily graduate students in the Public History Program at Arizona State University, where I teach, I offered my remarks largely in autobiographical form. In

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revisiting here my role in *U.S. v. Michigan,* I have chosen to retain this autobiographical form as the best way of making accessible the complexity of my experience as intellectual problem, political engagement, and fateful career decision.[1]

My story begins in January of 2001, when I received a most peculiar e-mail from someone who identified himself as Riyaz Kanji, an attorney with a law firm in Ann Arbor, Michigan. After repeated attempts to reach me by telephone at my office at ASU, he had been driven to contact me by e-mail. In retrospect, Riyaz's persistence in trying to making contact by telephone was my first warning that working with lawyers would not be the same as working with academics: in general, lawyers hate e-mail and love the telephone, because the former is readily subject to discovery.

Riyaz failed to reach me by telephone at ASU because I was teaching that semester at the John F. Kennedy Institute for North American Studies at the Free University of Berlin, and when we finally connected by e-mail, he insisted on telephoning me there. The upshot of our conversation was that he asked me to serve as an expert witness on the case that became known as *U.S. v. Michigan,* the second and final round of litigation over Indigenous rights arising from the 1836 Treaty of Washington. In this treaty, Ojibwe and Odawa peoples in what was then Michigan Territory were compelled to cede the western half of the Lower Peninsula north of the Grand River and the eastern half of the Upper Peninsula east of the Chocolate River.

"You're nuts," said my husband, who eavesdropped on my Berlin conversation with Riyaz. "What about your own work?" It was a good question and my second warning that, if I took on the job, I would be leaving behind the known world of academia, where scholarly output is supposed to appear at regular intervals and in standardized shapes and sizes.

My best answer at the time to my husband's question was, "but this law suit is all about my work." This remains my best answer today for how I spent what turned out to be more than five years of my life. But, again in retrospect, I would urge anyone contemplating serving as an expert witness who is not a professional—that is, someone employed by a firm whose purpose is fee-for-service testimony—to give more thought than I did about the real life implications of doing two jobs at once. There is a reason that so many historians who serve as expert witnesses are retired or nearing retirement. I, in contrast, was an associate professor near the beginning of work on a second monograph. If judged by the standard of the academic ladder, agreeing to serve as an expert witness for *U.S. v. Michigan* was not a smart career move. So here is the first lesson: should you decide to undertake such labor, do give some consideration to the position from which you will work. If, like me, you hold

1. "Required for Settlement: One Historian as Expert Witness," Arizona State University Public History Brown Bag Presentation, October 2009. Other expert witnesses on treaty-rights cases have adopted this stance for similar reasons. See Arthur J. Ray, *Telling It to the Judge: Taking Native History to Court* (Montreal & Kingston: McGill-Queen's University Press, 2001).

a regular academic appointment and are not a full professor, you may pay a price for what will be a considerable investment of time and energy on your part. My department regarded my work on *U.S. v. Michigan* as a sideline to what it had hired me to do: write books and articles, bring in grants, teach classes, and sit on committees. My expert witness report could not count toward my promotion because it did not constitute the second monograph that is the sine qua non of promotion to full professor for historians. There was even some reluctance to credit the report on my annual performance evaluation because it was unpublished and because I had been paid for my work.[2] In short, in my department's view, my position as an expert witness was that of an independent contractor who had chosen to sweat her labor. Today, the school I now belong to has become far more flexible in its assessment of research projects involving deep public engagement that do not result in conventional books and articles. But an expert witness report, even one as long as mine proved to be, would still not be considered comparable to a monograph, and testimony would not be equated with publication. The monograph remains the standard for promotion and tenure.[3]

Why, then, did I say "yes" to Riyaz Kanji? Doubtless, my husband was right, and I was nuts. But that is not the whole story. Why did I say to my husband that I had to take the case because *U.S. v. Michigan* was all about my work? It was hardly because I am a crusader rabbit, although I could not have devoted myself so wholeheartedly to the case had I not passionately believed that the use-rights established by the Treaty of Washington remained in legal force for the five Odawa and Ojibwe tribes who brought the suit. A brief digression: collectively these tribes are known as CORA—the Chippewa-Ottawa Resource Authority. There is considerable variation in the spelling of Anishinaabemowin, the common language of the Three Fires of the Boodewaadamigg (Potawatomi), Odawa (Ottawa) and Ojibwe (Chippewa). Here I will refer to the peoples associated with CORA as Odawas and Ojibwes

2. My contract with CORA charged me with delivering an expert witness report to the specifications of the attorneys directing the litigation on behalf of the tribes and to work with the attorneys throughout the litigation process. I was paid at a flat hourly rate plus reasonable research expenses, and I was allowed to hire my doctoral student, Brad Gills, as a research assistant, also at an hourly rate. Brad's work for me in effect funded his own dissertation research. Once *U.S. v. Michigan* concluded in 2007, my report became solely my property.

3. At the time that I was working on *U.S. v. Michigan,* many American history departments shared my department's position with regard to expert witnessing and other forms of public scholarly production. This is probably less the case now. In 2010, the Organization of American Historians (OAH), the National Council on Public History (NCPH), and the American Historical Association (AHA) issued a joint report on best practices for evaluating public history scholarship in history departments. The report argues that such non-traditional scholarly productions should be evaluated on their own terms and not by the standards of single-authored monographs and articles. See John Dichtl and Debbie Ann Doyle, "Report Offers Guidelines for Recognizing Public History in Promotion and Tenure," and Working Group on Evaluating Public History Scholarship, "Tenure, Promotion, and the Publicly Engaged Academic Historian: A Report," *Perspectives on History* 48, no. 6 (September 2010): 11-16. Preliminary to their report, the Working Group produced a detailed white paper, "Tenure, Promotion, and the Publicly Engaged Academic Historian," now posted on the NCPH website, www.ncph.org.

because these are the more commonly used terms today. CORA, through the tribal and external attorneys with whom I dealt, was my boss, and CORA paid me for my work. The case that I undertook is known as *U.S. v. Michigan* because the federal government came in on the side of the tribes against the State of Michigan, so there were, in fact, three sets of attorneys—for the tribes, for the federal government, and for the state—and three sets of expert witness reports. My work on the case, however, was unique. The federal witnesses were brought in too late to produce more than cursory reports, and the state neglected to assign someone to do what I did until it was far too late—for them.

A belief in justice for the tribes, however, would not in and of itself have compelled me to take on this project. The compulsion was that what I was asked to do as an expert witness sat literally in the midst of my research, both for my first monograph, *The Yankee West: Community Life on the Michigan Frontier* (University of North Carolina Press, 1996); and for what will soon finally become my second: *Lines of Descent: Family Stories from the North Country* (University of North Carolina Press, forthcoming). Indeed, I would go so far as to say that my work on *U.S. v. Michigan*, while vastly complicating my task, made it possible for me to write *Lines of Descent,* a multigenerational biography of a mixed-heritage (Odawa and white) family in the right way. It opened doors for me in Indian Country that might otherwise have remained closed, and it made me profoundly sensitive to the interconnections among place, space, memory, and narrative.

Article 13

U.S. v. Michigan was the second time that Article 13 of the Treaty of Washington had been litigated in federal court. The article in its entirety reads: "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." Use-rights clauses appear in many Indian treaties, and there have been a number of suits, beginning in the 1970s, involving these use-rights, both in the Great Lakes region and in the Pacific Northwest. Drafted by the federal treaty commissioner, Henry Rowe Schoolcraft, Article 13 is unique among these clauses, however, in linking the viability of use-rights specifically to the absence of white settlement. Thus, the outcome of *U.S. v. Michigan* literally turned on the meaning of the phrase "until the land is required for settlement."

Both sides in the case hired ethnohistorians, anthropologists, and linguists to consider Article 13 from an Indigenous point of view, and both sides were obviously much interested in the actual process of treaty negotiation—what had happened when, and who had understood what when. The centrality of an Indigenous point of view to *U.S. v. Michigan* was in accordance with long-established canons of American Indian law that treaties should be interpreted

as native signatories understood them and thus as favoring Indians even in cases of ambiguous treaty language.[4] This part of the work was in many ways framed by precedent, because the 1836 treaty had been litigated in the late 1970s to the benefit of the tribes. In this suit, Anishinaabe fishing rights on the Great Lakes were at stake. *U.S. v. Michigan* was therefore referred to as the "inland case" because it dealt with hunting and fishing on public lands.[5] Although one of the expert witnesses for CORA, Charles Cleland, had been involved in the original litigation, the CORA attorneys made every effort as a deliberate strategy to hire witnesses who, like me, had never before been involved in treaty-rights cases. Moreover, they would not let us talk to one another, or anybody else except themselves about the case, and they strongly discouraged us from reading the proceedings from the earlier trial. I did not find this gag rule unduly constraining except when I had to describe my work for CORA on my annual ASU performance evaluations. The idea behind these prohibitions was twofold: as new witnesses we would bring a fresh perspective to our interpretation of the 1836 treaty, and we could not be attacked in deposition or on the stand as advocates for the tribes. In contrast, the experts for the state, who were subcontracted by History Associates, a fee-for-service firm with a long history of legal work in Indian country, periodically met together to craft a common argument, and they steeped themselves in the proceedings of the first case.

My job took me further beyond the scope of the earlier case than did the duties of any other witness on either side. My assignment came in two parts. I was charged, first, with determining the intentions of Henry Rowe Schoolcraft, the treaty commissioner, in crafting the language of Article 13, particularly the clause "until the land is required for settlement." Second, I was asked to write a history of land use in the cession from 1836 to the present.[6] These two tasks were inextricably linked, because they both turned on the

4. The canons of American Indian law were first articulated by John Marshall in *Worcester v. Georgia* in 1832. Their development in the twentieth century and to the present day has owed much to the work of Felix S. Cohen in his *Handbook of Federal Indian Law,* first published in 1942, and of Philip P. Frickey, particularly his "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation of Federal Indian Law," *Harvard Law Review* 107 (1993): 381-440. For an overview of Cohen's work, see Jill E. Martin, "The Miner's Canary: Felix S. Cohen's Philosophy of Indian Rights," *American Indian Law Review* 23, no. 1 (1998/99): 165-79. For Frickey, see Sarah Krakoff, "The Last Indian Raid in Kansas: Context, Colonialism, and Philip P. Frickey's Contributions to American Indian Law," *California Law Review* 98, no. 4, Tribute Issue in Honor of Philip P. Frickey (August 2010): 1255-86. For a comprehensive history of American Indian law, see David E. Wilkins and K. Tsianina Lomawaima, *Uneven Ground: American Indian Sovereignty and Federal Law* (Norman: University of Oklahoma Press, 2001).

5. For the litigation history of the 1836 treaty, see Charles E. Cleland, *Faith in Paper: The Ethnohistory and Litigation of Upper Great Lakes Indian Treaties* (Ann Arbor: University of Michigan Press, 2011), 45-100; Matthew L. M. Fletcher, *The Eagle Returns: The Legal History of the Grand Traverse Band of Ottawa and Chippewa Indians* (East Lansing: Michigan State University Press, 2012), 2-55, 108-47.

6. "Article 13 in the 1836 Treaty of Washington and Land Use in the Cession, 1836 to the Present," 2005 report on behalf of the Chippewa Ottawa Resources Authority, *U.S. v. Michigan*, 2007.

historical meaning of the word "settlement." Understanding "settlement" in turn required coming to terms with the ambitions and machinations of Henry Rowe Schoolcraft.

Schoolcraft proved an extremely slippery character. He was a prolific, pompous, and sloppy writer, with his eyes perpetually on the main chance. In 1836, he was agent at Sault Ste. Marie for the Michigan Superintendency of Indian Affairs, and married into the Johnstons, a Metis family who were associated with the fur trade. Indeed, much of Schoolcraft's authority as an expert on Indians and Indian affairs in the Great Lakes rested on the cultural knowledge that his in-laws shared with him.[7] In 1836, Schoolcraft, who was a good Jacksonian Democrat and knew full well that his future as a federal employee depended on political patronage, was casting about for his next appointment. Michigan was about to become a state, and there was considerable political pressure both from Americans living in the territory and from federal officials in Washington to clear the peninsulas of Indian title, even though there were then very few whites in the northern Lower Peninsula or in all of the Upper Peninsula. It was also widely assumed, in accordance with the 1830 Indian Removal Act, that the Anishinaabeg would be relocated west of the Mississippi River once they had ceded their lands in Michigan.

In anticipation of these events, Schoolcraft was angling to become Superintendent of Indian Affairs for Wisconsin, which was then attached to Michigan Territory and would be set off as a territory in its own right after Michigan became a state in 1837. He more or less achieved his aim, thanks to his patron, Lewis Cass, a former territorial governor of Michigan, who was then serving as Andrew Jackson's Secretary of War, an office that included oversight of the Office of Indian Affairs. On the heels of the negotiations for the Treaty of Washington in March of 1836, Cass appointed Schoolcraft Acting Superintendent of Indian Affairs for Michigan and Wisconsin. Schoolcraft would hold this position until 1841, when he was removed by a Whig administration for gross mismanagement and corruption in office. He was therefore directly responsible for the implementation of the 1836 treaty during the crucial first five years after it was signed.

If it was in Schoolcraft's interest to pursue aggressively a treaty with the Michigan Anishinaabeg, he also needed to consider the position of his Ojibwe

7. The best biography of Schoolcraft remains Richard G. Bremer, *Indian Agent and Wilderness Scholar: The Life of Henry Rowe Schoolcraft* (Mount Pleasant, MI: Clarke Historical Library, Central Michigan University, 1987). On the Johnston family, see Karl S. Hele, "The Anishanabeg and Métis in the Sault Ste. Marie Borderlands: Confronting a Line Drawn upon the Water," in Karl S. Hele, ed., *Lines Drawn upon the Water: First Nations and the Great Lakes Borders and Borderlands* (Waterloo, ON: University of Waterloo Press, 2008), 65-84. Also useful is Marjorie Cahn Brazer, *Harps upon the Willows: The Johnston Family of the Old Northwest* (Ann Arbor: History Society of Michigan, 1993). My spelling of Metis follows the guidelines established by Nicole St-Onge, Carolyn Podruchny, and Brenda Macdougall in *Contours of a People: Metis Family, Mobility, and History* (Norman: University of Oklahoma Press, 2012), in recognition that the white fur traders who wed Indigenous women were both French- and English-speaking.

relatives, who were largely concentrated in the Upper Peninsula. Article 13 shows that he did have those relatives in mind. Indeed, as the pivot on which the entire treaty turned, and a provision on which the Indigenous negotiators themselves insisted, the article was intended to protect at least some Anishinaabeg from the threat of removal from Michigan.

Understanding fully the politics of Schoolcraft's language, however, meant coming to terms with a concept that he did not view as political in a formal sense because it was culturally imbued with the unthinking spatial politics of colonization. I refer, of course, to "settlement," the key word in Article 13, an inexorable process leading to the creation of a desirable, because normative, landscape. A "settlement" is a place epitomized by the process. The origins in English of the word "settlement" were coeval with the first European invasions of North America in the fifteenth and sixteenth centuries and were frequently associated with the terms "colony" and "colonization." At its root, "settlement" evokes the notion of dwelling and permanence.

To see how Schoolcraft used the term "settlement," I worked my way through his voluminous narratives of his travels around the present-day Midwest, and I found his usage quite consistent. Settlement for Schoolcraft was not only associated with dwelling and permanence, but with a particular kind of commercial, agrarian landscape, one in which cultivated fields, farms, and towns have replaced the forest primeval. Indeed, wholesale tree removal appears in his writings to define the stage of settlement following the removal of Indian title and Indians from the land.[8]

To see whether Schoolcraft's language was in any way idiosyncratic, I compared it to usages of the term "settlement" in period dictionaries and early nineteenth-century guidebooks and booster literature for the Old Northwest. I found not only that Schoolcraft's usage was utterly orthodox, but that the association of settlement with a commercial, agrarian settlement has run through writings about westward expansion down to the present. And beyond: to this day, the language of settlement pervades state historical

8. Henry Rowe Schoolcraft, *A View of the Lead Mines of Missouri; Including Some Observations on the Mineralogy, Geology, Geography, Antiquities, Soil, Climate, Population, and Productions of Missouri and Arkansaw, and Other Sections of the Western Country* (New York: Charles Wiley & Co., 1819); *Journal of a Tour into the Interior of Missouri and Arkansaw, from Potosi, or Mine à Burton, in Missouri Territory, in a Southwest Direction, toward the Rocky Mountains, performed in the years 1818 and 1819* (London: Richard Phillips & Company, 1821); Mentor L. Williams, ed., *Schoolcraft's Narrative Journal of Travels through the Northwestern Regions of the United States Extending from Detroit through the Great Chain of American Lakes to the Sources of the Mississippi River in the Year 1820* (East Lansing: Michigan State University Press, 1992 [1953]); Henry Rowe Schoolcraft, *Travels in the Central Portion of the Mississippi Valley: Comprising Observations on Its Mineral Geography, Internal Resources, and Aboriginal Population* (Millwood, NY: Kraus Reprint Co., 1975 [1825]); *Narrative of an Expedition through the Upper Mississippi to Itasca Lake, the Actual Source of this River; Embracing an Exploratory Trip through the St. Croix and Burntwood (or Broule) Rivers; in 1832* (Philadelphia: Lippincott, Grambo, and Co., 1855; reprint, Millwood, NY: Kraus Reprint Co., 1973); and *Personal Memoirs of a Residence of Thirty Years with the Indian Tribes on the American Frontier* (Philadelphia: Lippincott, Grambo, and Co., 1851; reprint, New York: Arno Press, 1975).

writings about the Old Northwest.[9] In northern Michigan in the early twentieth century, the language of settlement was used to sell lots of cutover to would-be farmers, boosters expressing vast relief that, the trees having all been cut down, the work of settlement could now properly begin. Such schemes mostly failed, because neither the land itself nor the climate of northern Michigan would sustain mixed-grain agriculture. In Michigan, the language of settlement finally went into decline in the 1920s and 1930s when much of the cutover was reabsorbed into the public domain and reforested. But I am ahead of my story.

That Schoolcraft subscribed to the common American understanding of settlement as an inexorable process resulting in a commercial, agrarian landscape was thus incontestable. Parsing the key clause in Article 13—"until the land is required for settlement"—proved not so straightforward. Schoolcraft experimented with various formulations of the use-rights clause ("until the land is wanted" or "required") over a number of months before the actual treaty negotiations began. Even more problematically from the perspective of the attorneys and expert witnesses for CORA, he and some of his correspondents during this same period also occasionally used the phrase "survey and sale" as an apparent equivalent of "settlement." "Survey and sale" became the centerpiece of the State of Michigan's argument against the five Anishinaabe tribes' claim that their use-rights remained intact in the ceded area. A parcel of land was "settled" if it had passed out of the public domain and into private hands. With the possible exception of a few forty-acre parcels in present-day Hiawatha National Forest in the Upper Peninsula, it could be documented that all of the cession was sold at some point. All of the land, therefore, had been required for settlement, and the use-rights conferred by Article 13 were null and void.

The best evidence against this interpretation of Article 13 turned out to be a draft of a letter that Schoolcraft wrote early in 1836 to Charles Trowbridge, the cashier of the Bank of Michigan in Detroit.[10] At Schoolcraft's behest, Trowbridge was in charge of organizing the journey of an Odawa delegation to Washington for the treaty negotiations. In this draft, Schoolcraft plays with several formulations of the use-rights clause, scratching out one after another until he arrives at "until the land is required for settlement." He stuck to this language thereafter in his correspondence, so his deployment of the same language in Article 13 is hardly surprising. He did not use the phrase "survey and sale" in Article 13 because, after much thought, he had discarded it in favor of "until the land is required for settlement."

9. See, for example, Andrew R. L. Cayton, *Frontier Indiana* (Bloomington: Indiana University Press, 1996); James E. Davis, *Frontier Illinois* (Bloomington: Indian University Press, 1998); and R. Douglas Hurt, *The Ohio Frontier: Crucible of the Old Northwest* (Bloomington: Indiana University Press, 1998). For an excellent account of the nineteenth- and twentieth-century historiography of frontier and settlement for the Lower Great Lakes region, see James Joseph Buss, *Winning the West with Words: Language and Conquest in the Lower Great Lakes* (Norman: University of Oklahoma Press, 2011).

10. Henry Rowe Schoolcraft to C. C. Trowbridge, January 13, 1836, Henry Rowe Schoolcraft Papers, Bound Correspondence, Library of Congress.

The second complication in interpreting Schoolcraft's language in Article 13 was that the Senate modified the Treaty of Washington in a crucial way after the Indigenous delegates had signed it in late March of 1836, forcing Schoolcraft the following summer to seek Anishinaabe approval of a new provision that was not in their interest. By conferring large, permanent reserves of land on the Odawa and Ojibwe signatories, the original treaty guaranteed their continued residence in Michigan. The only reference to removal was the federal government's offer to finance an Anishinaabe expedition should the Indians wish to look for a new homeland west of the Mississippi. In the hands of the Senate, however, the promised permanent reserves became temporary, to be in effect for only five years, or longer at the president's pleasure, while the Anishinaabeg prepared themselves for removal. In council with Odawas and Ojibwes on Mackinac Island in July, Schoolcraft argued that the Indians could tolerate this change in the treaty because of Article 13. That is, the Anishinaabeg could continue to occupy most of the cession "indefinitely" because it lay so far north of the portion of the Lower Peninsula then being transformed by white settlers into a commercial, agrarian landscape.[11] In other writings later that year to Michigan Senator John Norvell about the value of the north country to the new state, Schoolcraft made quite clear that he foresaw its wealth to be derived from timber, copper, and iron, and he distinguished between the extraction of these resources and settlement predicated on agriculture.[12] In other words, Schoolcraft genuinely believed that most of the cession would not be required for settlement for the foreseeable future.

Mapping Settlement

What the attorneys for the state took to calling the "cultural understanding of settlement" became the analytical framework for the second half of my report—a study of land use in the cession from 1836 to the present. This definition of settlement and, indeed, the whole second half of my report, took the attorneys for the state by surprise because their expert witnesses assumed that what Schoolcraft meant by Article 13 was "survey and sale" and never considered the historical meaning of the word "settlement." As a result, the expert witness for the state charged with mapping settlement had a relatively easy job. He used the digitized original land office records for Michigan to generate a series of maps and accompanying statistics down to forty-acre parcels (the smallest unit of sale) showing that virtually all of the land in the cession had at some point been surveyed and sold to somebody.

11. Henry Rowe Schoolcraft to Lewis Cass, July 18, 1836, Michigan Superintendency Mackinac Agency Letters Sent, National Archives Microfilm, M1, Roll 36.

12. John Norvell to Henry Rowe Schoolcraft, August 2, 1836 and Henry Rowe Schoolcraft to John Norvell, August 4, 1836, Henry Rowe Schoolcraft Papers, Unbound Correspondence, Library of Congress.

My standard of settlement of settlement, however, was not ownership but use defined as agriculture, so figuring out which parcels out of several million acres had never been farmed was patently impossible. The methodology I came up with was cluster sampling, but the creation of the data set was complicated and laborious. County-level statistics of agricultural production drawn from state and federal censuses were not helpful because the issue was not what and how much was being grown, but how much land was in farms. I had to find a way to gauge use from ownership and then to demonstrate use in a time series. Moreover, I did not have comparable records for the Upper and Lower Peninsulas, so I had to alter the methodology to account for different base maps. In the Lower Peninsula, I selected five counties in the cession on the basis of soil type as a proxy for suitability for agriculture, using the USDA soil survey maps of the 1920s and 1930s. The counties were then ranked on the basis of their proportion of Type I and II soils, those soils most suitable for grain-based agriculture. These counties also had ownership atlases that appeared at roughly twenty-year intervals from the 1870s to the 1950s. To bring the survey down to the present, I obtained access to land-use statistics generated by the State of Michigan in the 1970s. By then, of course, soil classifications had become much finer-grained, so reconciling them with the older USDA categories became a project in its own right.

The trickiest part of the land-use survey, however, was determining which parcels of land in the county atlases constituted farms. In this regard, I owe an immense debt to my research assistant, Brad Gills, then a PhD candidate in American Indian history at ASU, who did much of the hard work of tabulation. How could we tell if parcel x was a farm or something else? The logic of the tabulations rested on two points. The first is that for my first book, *The Yankee West,* I had figured out what a nineteenth-century mixed-grain farm looked like in the county atlases, as opposed to properties held for speculative purposes. Farmsteads tended to run to standard size, usually 80, 120, or 160 acres. These acreages were consolidated into single parcels, and they contained dwellings. Speculative holdings, in contrast, tended either to be much larger or forties scattered around one or more townships. They did not contain dwellings. The second point is that I knew that most of the non-farmer owners were likely to be lumber outfits great and small, interested only in picking off parcels containing white pine, which grows in pockets and not in large expanses. In addition and of no small moment, a tremendous portion of the cession did not directly pass from the federal government into private hands, but was turned over to the State of Michigan, which in turn used it to promote canal and railroad development. Internal improvement companies then sold the land to lumbermen and the occasional settler. Not infrequently canal and railroad developers were one and the same as the lumbermen. Mapping these enormous federal grants of the cession to the state thus went hand-in-hand with counting farms in the county atlases.

For the portion of the cession in the Upper Peninsula, I had to devise a different methodology because of the paucity of county atlases, itself

a reflection of how little of the land had ever been required for settlement. Here I relied, first, on the maps of the Cleveland Cliffs Company, a huge iron mining enterprise that in the late nineteenth and early twentieth centuries owned the majority of lands in the Upper Peninsula portion of the cession. Cleveland Cliffs engrossed this land for its timber, which supported its mining operation. Much of the land purchased by Cleveland Cliffs never devolved into the hands of modest individual owners. Instead, once the timber had been logged off, the company simply stopped paying taxes on the land, which allowed the federal government to acquire it cheaply in the early decades of the twentieth century. Reforested, the land became the basis of the Hiawatha National Forest. This process whereby public domain became temporarily private property for the purpose of resource extraction and then returned to the public domain occurred everywhere in the northern portion of the cession. Brad Gills's sample of Hiawatha accession records housed at the national forest headquarters in Escanaba showed clearly that the overwhelming majority of forest land was never occupied by white settlers. In the same period, many of what farms there were in northern Michigan were also abandoned and reverted to the public domain for unpaid taxes. By the 1950s, much of the land that had been ceded by the Anishinaabeg in 1836 had become state and federal forest.

Thus the conclusion of Part II of my report: in both the Upper and Lower Peninsulas, most of the land in the cession was never required for settlement in the sense that Henry Rowe Schoolcraft and most Americans, then and later, would have understood. In fact, the land-use survey largely confirmed Schoolcraft's prediction that settlement would only gradually proceed up the Lower Peninsula and into the Upper Peninsula. In effect, it was only the lower third of the cession in the Lower Peninsula, from present-day Grand Rapids north to Manistee, and in the Traverse region around present-day Traverse City, where one could see a majority pattern of land use consistent with the cultural understanding of settlement.

In Retrospect

When it was released during discovery, my report blindsided the attorneys and expert witnesses for the state, not only because they had not done their own land-use study beyond the "survey and sale" tabulations, but because none of their reports even troubled to define "settlement," with the exception of a single footnote in which a witness wrote that he meant what everybody usually meant by the term. There was an attempt to scrounge up new witnesses to rebut not my land-use study, which the state largely conceded, but how I had defined the term "settlement." This did not get very far, either. It also turned out that the three major witnesses for CORA with regard to Indigenous patterns of land use and perspectives on the treaty had all defined white settlement much as I had done. These reports showed definitively the

persistence of Indigenous patterns of land use—a seasonal round of hunting, fishing, sugaring, gardening, and gathering—not only well into the twentieth century, but to some extent down to the present day. Indeed, the seasonal round proved to mesh well with the lumbering economy in northern Michigan, coming under sustained attack only after the wood pulp industry finally played out on the eve of World War II and as Michigan Department of Natural Resources officers began to enforce hunting seasons and game limits in the restored forests of the reformed public domain.[13]

Thus, the CORA attorneys' gamble of bringing in fresh witnesses, keeping them separate from one another, and asking new questions of what seemed to be an old story paid off. In the end, the case did not go to trial, but into arbitration, which resulted in the fall of 2007 in a compact between CORA and the State of Michigan upholding Anishinaabe use-rights on public-domain land in the cession, and carving out a way for Indigenous people to work together with the Michigan DNR to conserve the resources of the forest. I do not know how state officials felt about this accord, but the CORA attorneys and tribal leaders believed that a lasting and just "settlement" had been achieved.[14]

How has working on *U.S. v. Michigan* mattered to me? I would say, first, that it woke me up as a scholar. Suddenly, what I did mattered beyond the tyranny that I exert in the classroom. The case had real, immediate consequences for real people. The facts mattered. Indeed, one of the unforeseen effects of writing a report and undergoing deposition on me as a historian has been to make me hypersensitive about accuracy in footnotes—my own and everyone else's. Lawyers do not care about historiography, although they do understand that different historians argue different things, and that these arguments fall into patterns over time. But in dealing with lawyers, you cannot substitute the reigning historiographic line for evidence. You must argue from specific documents, all of which must be submitted as part of discovery. I would frankly go mad if I had to adhere to this evidentiary standard all of the time, but my experience made me realize just how deceptive scholarly citations can be.

Second, although I know that some scholars are dubious about the ability of lawyers to appreciate the subtlety of historical arguments, insisting as is

13. A good account of the compatibility of the seasonal round of activities with lumbering operations in northern Michigan, which also incorporated Indigenous people as wage workers, may be found in Bradley J. Gills, "The Anishnabeg and the Landscape of Assimilation, 1854-1934," (PhD dissertation, Arizona State University, 2008). For a related argument, see Brian C. Hosmer, *American Indians in the Market Place: Persistence and Innovation among the Menominees and Metlakatlans, 1870-1925* (Lawrence: University of Kansas Press, 1999), 1-108.

14. See, in this regard, a talk by Marc Slonim, one of the lead attorneys for CORA in *U.S. v. Michigan* about the significance of use-rights litigation for the development of conservation practices involving Indigenous people and incorporating Indigenous knowledge in the Great Lakes region. Slonim's talk is posted on the website of the Great Lakes Indian Fish and Wildlife Commission, itself a product of over a generation of treaty-rights litigation in Michigan, Wisconsin, and Minnesota. www.glifwc.org/minwaajimo/speech/Marc%20Slonim.pdf.

their legal wont that things are either x or y, I did not find this to be the case. The people with whom I worked knew a lot of history, and they wanted to learn from me and the other witnesses. We spent literally hours—days—weeks—on the telephone reviewing each other's positions. The lawyers reviewed the experts' reports, most of which, incidentally, were monographic in length—and the experts, in turn, reviewed the pleadings at every stage. It was profoundly collaborative, interdisciplinary work, exactly the kind of endeavor in which my university now strongly encourages its faculty to engage. It was not, however, always comfortable. I frequently felt as though I were taking a final examination in a class for which I had not signed up. Depositions are flat-out adversarial, something I think I felt with particular acuteness as one of only two women experts for the case. Either you like combat or you do not. I found out that I did, so I learned something about myself.

Which brings me, third, to whether I would do this kind of work again, or recommend it to others. Since *U.S. v. Michigan*, I have been approached about serving as an expert witness on three other cases, two of which were sorely tempting because they both involved my old friends the warranty deed and the county atlas. In the interests of getting myself promoted before I retire, I turned down all three requests, but there may be other opportunities and, if the right one comes along, I might say "yes." I do have two limiting conditions on any further work as an expert witness that I think anyone contemplating such a commitment ought to consider: first, since I am not a lawyer, I would not take on a case unless I believed that I was on the side of truth and right. In this I am not alone. Charles Cleland, who worked on a number of important treaty-rights cases while a professor of Great Lakes archaeology at Michigan State University, has told me of a case that he turned down because the evidence simply would not support the position that the Indigenous litigants wanted him to defend. Second and relatedly, I have no interest in becoming a professional hired gun, an option that I could have pursued in the wake of *U.S. v. Michigan.* The possibility of doing what I do under very different professional auspices compelled me to think seriously about how much I had invested in being a professor. It was a useful exercise.

And finally, as a historian, what did I learn from this particular case? In the end, *U.S. v. Michigan* was all about competing Indigenous and white attitudes toward and ways of living on the land. But the portrait of Indian-white relations in northern Michigan that emerged from the case deviated sharply from the standard "two worlds" interpretation of this competition, what Vine Deloria, Jr., witheringly called the "never the twain shall meet" approach to the study of Indigenous histories and cultures. That is, Indian is Indian, and white is white, and never the twain shall meet.[15] Instead, *U.S. v. Michigan* revealed

15. Vine Deloria, *Custer Died for Your Sins: An Indian Manifesto* (Norman: University of Oklahoma Press, 1989 [1969]), 79-86. For a recent collection dedicated to moving beyond "two worlds" thinking, see James Joseph Buss and C. Joseph Genetin-Pilawa, *Beyond Two Worlds: Critical Conversations on Language and Power in Native North America* (Albany: State University of New York Press, 2014).

the development over time of a shared landscape, one from which Indigenous people were never removed and that in many of its essentials remains with us today.

To this landscape, the national narrative of conquest and removal does not apply, which is not a small thing for our larger understanding of the history of Indian-white relations in the United States. It is not too much to say that the cultural understanding of settlement that proved so key to *U.S. v. Michigan* underwrites much of that narrative of conquest and removal in the Old Northwest and elsewhere. Put simply, the cultural understanding of settlement removes Indians along with the trees from the story of white America. Expressed in federal Indian and land policies, settler booster literature, professional histories, and even the sportsman's column in the Saturday newspaper, the cultural understanding of settlement has masked our ability to see the shared landscape, even when we are in the midst of it. To begin to see this shared landscape is also no small thing.

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