IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

OTTAWA TRIBE OF OKLAHOMA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 3:05 CV 7272**
	:	
SAMUEL SPECK, DIRECTOR, OHIO DEPARTMENT OF NATURAL RESOURCES,	:	**JUDGE KATZ**
	:	
	:	
	:	
Defendant.	:	

DEFENDANT SAM SPECK'S MOTION TO DISMISS
PLAINTIFF'S AMENDED COMPLAINT

Defendant, Director Sam Speck of the Ohio Department of Natural Resources (ODNR), hereby moves to have this case, in which the Ottawa Tribe of Oklahoma (the "Tribe" or "Plaintiff") seeks recognition of its alleged privilege to fish in Lake Erie free of the regulations that apply to every other individual, dismissed pursuant to Rule 12(b)(1), 12(b)(6), and 12(b)(7) of the Federal Rules of Civil Procedure.

Plaintiff's claims fail for numerous reasons. First, Plaintiff's claims are not justiciable in that it has not established that an actual, rather than theoretical, dispute exists at this time.

Second, this Court lacks subject matter jurisdiction over this action pursuant to the Eleventh Amendment to the U.S. Constitution, which precludes suits against the State of Ohio and its agencies and departments, including suits challenging the State's important sovereign interest in regulating the waters of Lake Erie. Third, the Tribe has failed to join indispensable parties, the United States and the State of Michigan, who are, respectively, the signatory to the treaties with the Tribe's alleged predecessors and a beneficiary of the Treaty of 1807.

Not only are there threshold issues of subject matter jurisdiction and questions regarding whether relief can be afforded based upon the parties before the Court, but there are also serious legal obstacles to the claims asserted in the Amended Complaint. The Ottawa Tribe of Oklahoma has had multiple previous opportunities to seek compensation for the wrongs that its people have allegedly suffered, and has, in fact, sought and received compensation. The Tribe had the opportunity to pursue any claims that it had before the Indian Claims Commission, a federal body created in 1946 through the process set forth in 28 U.S.C. §2415. To the extent that it did not do so, it is now barred by the statutes of limitations set forth in those federal laws. Further, the Tribe did file claims based on its alleged rights Ohio lands with the Indian Claims Commission. Accordingly, the claims set forth in the Amended Complaint are also barred by res judicata, collateral estoppel, and release.

Even if not barred, there are numerous reasons why Plaintiff fails to state a claim here. In the first instance, the treaties in question do not support the current existence of the rights that the Tribe seeks to exercise. At the same time, Plaintiff's alleged hunting and fishing rights have been extinguished by laches, acquiescence, impossibility, and abandonment. *See, City of Sherrill v. Oneida Indian Nation*, 161 L. Ed. 2d 386, 125 S. Ct. 1478 (2005) (the Court unequivocally recognized the validity of these defense to tribal claims). In the intervening centuries, Ohio has

changed from an unsettled wilderness into a populous State, and yet the Ottawa Tribe of Oklahoma seeks, many years after its alleged predecessors abandoned Ohio, to exercise privileges to fish and hunt as if Ohio were still a wilderness in which all fish and game belonged to whoever could take them. It is both impossible and inequitable for this Court to try to turn the hands of time back almost two hundred years.

Accordingly, this case should be dismissed for reasons that are more fully set forth in the attached memorandum of law, which is incorporated herein.

Respectfully submitted,

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I. INTRODUCTION

This case is an attempt by Plaintiff, the Ottawa Tribe of Oklahoma (the "Tribe" or "Plaintiff"), to obtain a declaration that it is permitted to fish Lake Erie free from all regulation by the State of Ohio. This case, along with *Eastern Shawnee Tribe of Oklahoma*, Case No. 05-7267, assigned to Judge Carr, represents the first time that an Indian tribe has sued to assert property or other rights within Ohio.[1] Accordingly, this case raises numerous issues that are of first impression in this State. The purpose of this Motion to Dismiss is to raise the threshold issues of: (1) the lack of case or controversy in this matter given Plaintiff's failure to plead the specific concrete steps that it has taken to establish the privilege or capability to fish commercially; (2) this Court's lack of subject matter jurisdiction over this complaint pursuant to the Eleventh Amendment, because this action, challenging the sovereign power of Ohio to regulate the waters of Lake Erie, is an action against the State of Ohio, no matter how it is captioned; (3) that all indispensable parties are not before the Court, given that the case involves the interpretation of a federal treaty that affects both Michigan and Ohio; (4) that the Tribe has had multiple opportunities to pursue its claims based on these very same treaties and has received compensation, thus barring its claims under statutes of limitations and pursuant to the doctrines of res judicata, collateral estoppel, and release; (5) that the Tribe fails to state a claim for relief for treaty-based privileges, because certain treaties that it relies on do not extend to

[1] In the other case, the Eastern Shawnee Tribe of Oklahoma seeks declaratory relief and damages against the State of Ohio, plus a multitude of Ohio counties, municipalities, and individuals, claiming that the Eastern Shawnee Tribe of Oklahoma was illegally dispossessed of its aboriginal possessory land rights to tens of thousands of acres of land all over Ohio. In addition, the Eastern Shawnee Tribe of Oklahoma seeks access to 7,241,600 acres of land in central and western Ohio including all, or a portion of, 36 counties for hunting, fishing and gathering purposes.

Lake Erie and others limit any privileges granted to such time as long as the land belong to the United States, and the land in question no longer belongs to the United States; and (6) that Plaintiff can obtain no relief because the rights in question have been abandoned, and/or the relief in question is barred by laches, acquiescence, and impossibility.

II. STATEMENT OF THE FACTS

The Ottawa Tribe of Oklahoma filed its original Complaint for Declaratory Judgment on June 30, 2005. In response to the State's Motion to Dismiss that Complaint, pursuant to the Eleventh Amendment and because the Complaint sought fishing rights in Lake Erie pursuant to a treaty that does not encompass any land touching Lake Erie, the Tribe filed an Amended Complaint on September 22, 2005. The sole defendant is now Sam Speck, Director of the Ohio Department of Natural Resources (ODNR), in his official capacity only. The Amended Complaint states that the Tribe intends to exercise its alleged right to establish an unregulated commercial fishery on Lake Erie. Amended Complaint, ¶35. Exhibit B, attached to the Amended Complaint, is a letter from the Tribe to Mr. Speck dated June 2, 2005, advising that its company "is in the process of purchasing fishing boats and gill nets, hiring crews and arranging docking and processing facilities to engage in commercial fishing" in those areas of Lake Erie encompassed within the Treaty of 1805, and requests a map delineating the recreational fishing areas of Lake Erie. In its Amended Complaint, the Tribe seeks a judgment declaring its right to exercise hunting and fishing privileges in all areas of Ohio encompassed by treaties signed in 1805, 1807, and 1808. Amended Complaint, ¶¶30, 31.

There are no federally recognized Indian tribes or federally recognized Indian lands in Ohio. The Ottawa Tribe of Oklahoma, while currently federally recognized, has never been recognized as a tribe in Ohio. Nor was the Ottawa Tribe of Oklahoma a signatory to any of the

treaties that it relies upon. At the time that the treaties were executed, the Ottawa were not united as a "single political entity." 2 Ind. Cl. Comm. 461, 467 (1953) (attached as Exhibit A). No records establish that "there ever existed an over-all Ottawa Nation or Tribe, embracing within its field of Sovereignty all tribes, bands, or groups of Ottawa Indians in the United States," with an existence "which evidenced an exercise of political authority over all Ottawa Indians." *Id.* at 463. Accordingly, the land ceded by the various treaties was not owned "by the Ottawa Nation as a single entity," but rather owned by the "specific bands or groups of Ottawa Indians," and the treaties relied upon by Plaintiff were executed in 1805 and 1807 by "certain groups of Ottawa Indians rather than by an Ottawa Nation or Tribe embracing within its authority all Ottawa Indians in the United States." *Id.* at 464, 467. The Plaintiff does not claim that it was a party to any of these treaties, but instead claims that it is a successor-in-interest to the Ottawa bands that signed treaties with the United States government regarding Ohio lands in 1805, 1807, and 1808. *See* Amended Complaint, ¶28.

As one of the alleged successors in interest to the Ottawa nations that signed treaties in Ohio in 1805, 1807 and 1808, the Tribe asserts that it is entitled to hunt and fish without regulation or restriction by Defendant and "subject only to such restrictions as [the State] shall prove by clear and convincing evidence to be (a) necessary conservation measures, (b) the least restrictive alternatives available, and (c) non discriminatory" pursuant to privileges granted in the federal treaties mentioned in the Amended Complaint. Complaint, ¶31. The treaties cited by the Tribe cede territory from various Indian nations, including an Ottawa tribe, to the United States.

A. The Treaty of Fort Industry.

The first treaty upon which the Tribe relies is the 1805 Treaty of Fort Industry. Amended Complaint, ¶¶8-12. The Treaty of Fort Industry is actually two treaties that were negotiated and

signed concurrently at Fort Industry on July 4, 1805. Two separate treaties were needed because two tracts of land were involved. For one tract, private fee holders would pay the price arrived at through bargaining with the tribes (the "Connecticut Land Company Treaty") and, for the other tract of land, the federal government would bargain with and pay the tribes (the "Federal Treaty"). The federal government was a signatory to both treaties and both treaties were approved by Congress and proclaimed by President Jefferson. The two treaties are expressly linked and each treaty refers to the other. For example, the Federal Treaty (attached hereto as Exhibit B) references the Connecticut Land Company Treaty in Article 5 and the Connecticut Land Company treaty (attached hereto as Exhibit C) refers to the Federal Treaty in its second paragraph.

The Federal Treaty and the Connecticut Land Company Treaty ceded two separate and distinct areas of land. The two ceded areas are easily seen on the map attached as Exhibit D.[2] *H.R. Doc. No. 736*, 56 Cong., 1st Sess. (1899) (This map was created by Charles C. Royce, who created maps to document the territory ceded by Native American tribes through various treaties with the United States). The land ceded in the Federal Treaty is commonly known as Royce Area 54, and is designated as such on Exhibit D. The land ceded in the Connecticut Land Company Treaty is commonly known as Royce Area 53, and is designated as such on Exhibit D.

The Federal Treaty specifically describes the land that is being ceded. The northern border is the "northernmost part of the forty first degree of north latitude." Exhibit B, Article 3. The southern and eastern borders are described as the boundaries established in the 1795 Treaty

[2] This Court may consider the contents of relevant treaties and official maps without converting this motion to a motion for summary judgment because these are public records of which a court may take judicial notice. *See Jackson v. City of Columbus*, 194 F.3d. 737, 745 (6th Cir. 1999) (circumstances under which materials may be attached to a motion to dismiss without requiring conversion); *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 457 (7th Cir. 1998) (treaties are akin to congressional acts).

of Greenville. Exhibit B, Article 3. And finally, the western boundary is described as a north south line due west of the Ohio-Pennsylvania state line. Exhibit B, Article 2. This territory is marked as Exhibit 54 on the map attached hereto as Exhibit D.

Like the Federal Treaty, the Connecticut Land Company Treaty specifically describes the boundaries of the territory ceded. The Connecticut Land Company Treaty's northern boundary is described as "the northernmost part of the forty-second degree and two minutes north latitude." Exhibit C, second paragraph. (It is important to note that the Amended Complaint incorrectly states that the northern boundary is "the border between the United States and Canada, established under the Treaty of Paris." Amended Complaint, ¶9(a).) Its southern boundary is the forty-first degree of north latitude. *Id.* Its western boundary is described as a north-south line 120 miles due west of the Ohio-Pennsylvania state line. *Id.* And finally, the Connecticut Land Company Treaty's eastern boundary is a line west of the river Cayahoga, and the portage between that and the Tuscarawa branch of Muskingum. *Id.* This territory is marked as Royce Area 53 on the map attached hereto as Exhibit D.

Through both its Amended Complaint and the exhibits attached thereto, the Tribe makes it clear that it is particularly interested in commercially fishing the Ohio waters of Lake Erie. The Tribe claims it has fishing and hunting privileges pursuant to Article 6 of the Federal Treaty. Amended Complaint, ¶12. Article 6 provides that "said Indian nations, parties to this treaty shall be at liberty to fish and hunt within the territory and lands which they have now ceded to the United States, so long as they shall demean themselves peaceably." Exhibit B, Article 6. It is important to note that this section applies only to land described in the Federal Treaty (Royce Area 54), land that is miles south of Lake Erie.

The Connecticut Land Company Treaty covers Royce Area 53. See Exhibit D, Royce Area 53. It includes land bordering Lake Erie and islands in Lake Erie. The Treaty states that the Tribe ceded the land in question to the private land companies. Exhibit C, ¶2. The explicit language of this cession treaty makes clear that the signatory tribes do not retain any hunting and fishing rights, or any other right or privilege, with reference to the land in question. The treaty states that the land was ceded free and clear of all hindrances and expressly bars the signatory tribes and their posterity from the ceded lands. Exhibit C, ¶2. The treaty states:

> "That we, the sachems, chiefs, and warriors, of the nations aforesaid, for the consideration of eighteen thousand nine hundred and sixteen dollars and sixty-seven cents, received of the companies aforesaid, by the hands of their respective agents, to our full satisfaction, have ceded, remised, released, and quit claimed, and by these presents do cede, remise, release, and forever quit claim, to the companies aforesaid, and the individuals composing the same, and their heirs and assigns, forever, all the interest, right, title, and claim of title, of said Indian nations, respectively, of, in, and to, all the lands of said companies, lying west of the river Cayahoga, and the portage between that and the Tuscarawa branch of Muskingum, north of the northernmost part of the 41st degree of north latitude, east of a line agreed and designated in a treaty between the United States and said Indian nations, bearing even date herewith, being a line north and south one hundred and twenty miles due west of the west line of the State of Pennsylvania, and south of the northernmost part of the forty-second degree and two minutes north latitude, for them, the said companies, respectively, to have, hold, occupy, peaceably possess, and enjoy, the granted and quit claimed premises, forever, free and clear of all let, hindrance, or molestation, whatsoever; so that said nations, and neither of them, the sachems, chiefs, and warriors thereof, and neither of them, or any of the posterity of said nations, respectively, shall ever hereafter make any claim to the quit claimed premises, or any part thereof; but therefrom, said nations, the sachems, chiefs, and warriors thereof, and the posterity of said nations, shall be forever barred."

Exhibit A, second paragraph (emphasis added).

B. The Treaty of 1807.

The Tribe also claims, as an alleged successor in interest, hunting and fishing rights to a section of land in Ohio ceded in a treaty signed by the United States, bands of Ottawa, and several other tribes on November 17, 1807. Amended Complaint, ¶¶13-15. This treaty is

attached as Exhibit E. The land ceded under this treaty is identified as Royce Area 66 on the map attached as Exhibit D. The land ceded in this treaty consisted of a small portion of northwestern Ohio, and a larger portion of lower Michigan. The land in Michigan borders the western shore of Lake Erie. The land in Ohio borders Lake Erie only at the mouth of the Maumee River. Within the ceded land, the treaty specifies three small sections of land in Ohio to be set aside as reservations for the Ottawa.

Article 5 of the Treaty of 1807 provides that "the said Indian nations shall enjoy the privilege of hunting and fishing on the lands ceded aforesaid, as long as they remain the property of the United States." Exhibit E, Article 5. Although the land ceded by the tribes in that treaty may well have remained unsold and in the public domain for some years after 1807, the land was long ago sold to private individuals or entities, or state or local governmental entities. Any particular plot or plots of land within the ceded area of land that may in fact still belong to the United States, such as the Federal Courthouse in Toledo, are not under the jurisdiction of the Ohio Department of Natural Resources.

C. The Treaty of 1808.

Finally, the Tribe claims hunting and fishing rights as an alleged successor-in-interest to the Ottawa Tribe that signed a treaty November 25, 1808 with the United States and several other Indian tribes. Amended Complaint, ¶¶16-22. In this particular treaty, attached as Exhibit F, the tribes cede two strips of land in Ohio wanted by the United States for roadways. One strip, 120 yards wide and including a mile on either side, went through Indian territory in order to connect Royce Area 53 (the land ceded by the tribes in 1805) to the Royce Area 66 (land ceded by the tribes in 1807). This strip of land is identified as Royce Area 70 on Exhibit D.

The second strip of land ceded in this treaty was a stretch of land that was only 120 yards wide. This land stretched through Indian territory, and connected the above road (Royce Area 70) with United States territory below the Treaty of Greenville line. This land can be seen on Exhibit D starting near what is marked as Freemont, Ohio and running south through Upper Sandusky, Ohio and Marion, Ohio before ultimately touching the southern border of Royce Area 87.

No portion of the land ceded in this treaty touches Lake Erie. Article 4 of the 1808 treaty provided that "the said Indian nations shall retain the privilege of hunting and fishing on the lands given and ceded as above, so long as the same shall remain the property of the United States." Exhibit F, Article 4. The language of this treaty, as did the language of the 1807 treaty, conditions the privilege of hunting and fishing on the ceded land with the qualifier "so long as the same shall remain property of the United States." Again, this privilege would have lasted only for some years in time, until the land was sold by the United States. Therefore, this privilege was extinguished long ago.

D. All Bands of the Ottawa Tribe Ceded Their Remaining Lands in Ohio and Left Ohio.

After the 1808 Treaty, the various bands of Ottawa entered into several other treaties in which they ceded their remaining lands to the United States. The last of the Ohio land held by Ottawa bands was ceded in treaties signed on August 30, 1831 and February 18, 1833. Pursuant to these subsequent treaties, "all of the various bands of Ottawa agreed to cede their remaining lands in Ohio to the United States and to be removed to reservations granted them in areas which later became part of the state of Kansas." Amended Complaint, ¶21.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Plaintiff's claim of hunting, fishing, and gathering rights states a case or controversy.

2. Whether the Eleventh Amendment bars claims challenging the State's sovereign right to control the waters of Lake Erie.

3. Whether the United States is an indispensable party to an action involving the interpretation of treaties between the United States and Indian tribes.

4. Whether the State of Michigan is an indispensable party to an action involving the interpretation of a treaty regarding Michigan and Ohio lands.

5. Whether Plaintiff's claims are barred by the statute of limitations set forth in the Indian Claims Commission Act.

6. Whether Plaintiff's claims are barred or have been released pursuant to the Indian Claims Commission Act.

7. Whether Plaintiff's claims are barred by the statute of limitations set forth in 28 U.S.C. §2415.

8. Whether Plaintiff states a claim for fishing rights on Lake Erie, when the treaties that it relies on do not concern land that even touches Lake Erie, provide that the rights in question exist only until the land is transferred to subsequent landowners, or where later treaties make it clear that all rights under the previous treaties were extinguished.

9. Whether laches, acquiescence, and impossibility bar the Plaintiff's attempt to make claims regarding an interest in land based on treaties signed and other actions taken between 1805 and 1833.

10. Whether Plaintiff's alleged right to hunt, fish, and gather, an interest related to occupancy of the land, was extinguished by proceedings before the Indian Claims Commission or was extinguished through abandonment because the Ottawa bands who signed the treaties agreed to leave the State in the early 1830's and made no attempt in the next 172 years to exercise or claim these rights.

IV. SUMMARY OF ARGUMENT

The Amended Complaint should be dismissed for a number of different reasons. First, Plaintiff does not present a case or controversy sufficient to satisfy Article III of the U.S. Constitution. Plaintiff asserts only a hypothetical dispute based upon the fact that they sent one letter to ODNR expressing their desire to operate a commercial fishery on Lake Erie. They allege no other concrete steps that they have taken in order to begin this process, and thus cannot

demonstrate that this case is no more than an attempt to seek an advisory opinion from this Court. Second, the Eleventh Amendment bars any action against the State, because the unique declarations requested in this case challenge the State's sovereign interest in regulating Lake Erie and thus do not fall within the commonly used *Ex Parte Young* fiction whereby federal courts may issue prospective declaratory and injunctive relief against State officials.

Third, the Tribe has failed to join indispensable parties, the United States and the State of Michigan. The Tribe's alleged claims, which arise from treaties entered into between the United States and bands of Ohio Ottawa, are all claims that cannot be adjudicated in the absence of the United States, who cannot be joined as a party to this case due to its sovereign immunity. Nor should the Tribe be permitted to proceed to adjudicate its alleged interests arising from the Treaty of 1807, which concerned Ohio and Michigan lands, in the absence of the State of Michigan, who also cannot be joined as a party to this case due to its sovereign immunity.

Not only are there threshold issues of subject matter jurisdiction and questions regarding whether relief can be afforded based upon the parties before the Court, but there are also insurmountable legal obstacles to the claims asserted in the Amended Complaint. For example, the Ottawa Tribe of Oklahoma has had multiple previous opportunities to seek compensation for the wrongs that its people have allegedly suffered, and has, in fact, sought and received compensation. The Tribe filed claims based on its claims to Ohio lands with the Indian Claims Commission, a federal body created in 1946 to address any claims that any tribe had against the United States arising from this country's treatment of the Native Americans, forever barring all claims not previously raised. Accordingly, the claims set forth in the Amended Complaint are barred by res judicata, collateral estoppel, and release. And to the extent that claims were not filed with the Indian Claims Commission, they are now barred by the statute of limitations set

forth in the Indian Claims Commission Act, as well as by the statute of limitations set forth in 28 U.S.C. §2415.

Furthermore, the Tribe fails to state a claim upon which relief can be granted, even if this action is not otherwise barred by operation of law. The treaties that it relies on do not extend to Lake Erie and/or limit any privileges granted to such time as the land belongs to the United States, and the land in question has long since been transferred to subsequent owners. Moreover, all of the Ottawa Bands in Ohio ceded their lands and agreed to be removed to reservations outside of Ohio. In addition, the Tribe's claims, which all date back to the 1800's, are barred by laches, acquiescence, and impossibility. In the intervening centuries, Ohio has changed from an unsettled wilderness into a populous State, and persons are no longer free to roam where they wish taking unlimited fish and game. For these and other reasons, it is both impossible and inequitable for the Ottawa Tribe of Oklahoma to ask this Court to try to turn the hands of time back almost two hundred years.

Finally, Plaintiff's alleged hunting and fishing rights, a right related to occupancy, have been extinguished through abandonment when the bands of Ottawa left the State in the early 1830's. For all of these reasons, Plaintiff's Amended Complaint should be dismissed as a matter of law.

V. LAW AND ARGUMENT

A. The Standard of Review.

Jurisdiction to resolve a case on the merits requires a court to have both personal and subject matter jurisdiction over the matter. *Ruhrgas AG v. Marathon Oil Company*, 526 U.S. 574, 577 (1999). Federal Rule of Civil Procedure 12(b)(1) requires a federal court to dismiss an

action "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter."

In this instance, the State Defendant asserts a facial attack on the subject matter jurisdiction of the complaint. *See Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). There are no material issues of fact related to the applicability of the Eleventh Amendment or the justiciability of the current Complaint – the Court can decide these issues based on its review of the Complaint. Accordingly, this Court reviews these issues pursuant to the standard set forth in Rule 12(b)(6), which also applies to this Court's review of those issues whereby Defendant asserts that the Amended Complaint fails to state a claim.

In applying the Rule 12(b)(6) standard, a court must presume all factual allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). The Court need not, however, presume the truth of any legal conclusion, opinion or deduction, even if it is couched as a factual allegation. *Sexton v. Barry*, 233 F.2d 220, 223 (6th Cir. 1956), *cert. denied*, 352 U.S. 870 (1956). Pursuant to this standard, the Complaint must be dismissed for failure to state a claim and for lack of subject matter jurisdiction.

B. The Amended Complaint Does Not Present A Justiciable Dispute Regarding the Tribe's Alleged Rights To Hunt and Fish in Ohio.

The Amended Complaint fails to establish a justiciable dispute regarding the Tribe's rights to commercial hunting and fishing without any permits or licenses, and without complying with any the Ohio laws that regulate the taking of wild animals. As pointed out above, the alleged predecessors of the Tribe left the State in the 1800's. Given that the Ottawa Tribe of Oklahoma has no presence in the State of Ohio, Plaintiff presents no claim to exercise its alleged hunting and fishing rights that is ripe for resolution by this Court. The Amended Complaint

contains absolutely no allegations detailing exactly in what manner the Tribe desires to exercise these rights prospectively or that it is in any position to exercise these alleged rights. Under these circumstances, this dispute is not yet ripe.

Under Article III of the United States Constitution, a plaintiff seeking to invoke the jurisdiction of a federal court must allege an actual case or controversy. *O'Shea v. Littleton*, 414 U.S. 488 (1974). In *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227 (1937), the Supreme Court distinguished a "justiciable controversy" from a "difference or dispute of a hypothetical or abstract character." *Id*. at 241. According to the *Aetna* Court, a "justiciable controversy" must be "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.* "In order to demonstrate standing, a Plaintiff must demonstrate that he has suffered an injury or threatened injury." *County of Mille Lacs v. Benjamin*, 361 F3d 460, 464 (8th Dist. 2004). The question central to the instant motion, then, is whether plaintiff's claim could be properly characterized as a "justiciable controversy."

One of the elements to examine under Article III is whether the case is in fact ripe for judicial review. In order for the case to be ripe, there must exist a "real and immediate" threat of injury, the threat cannot simply be "conjectural or hypothetical." *Id.* at 493-94. The mere existence of a statute or regulation does not necessarily raise a justiciable controversy. *Diebold v. Civil Service Commission of St. Louis County*, 611 F.2d 697 (8th Cir. 1979); *Western Min. Council v. Watt*, 643 F.2d 618 (9th Cir. 1981); *Smith v. Boyer*, 442 F. Supp. 62 (W.D.N.Y. 1977).

This circuit has stated that "[r]ipeness is a question of timing." *City Communications, Inc. v. City of Detroit,* 888 F.2d 1081, 1089 (6th Cir. 1989) *quoting Blanchette v. Connecticut Gen. Ins. Corp.*, 419 U.S. 102 (1974). Under this Circuit's precedent, a court must decide only

"existing, substantial controversies, not hypothetical questions or possibilities." *Id.* Thus, "[r]ipeness becomes an issue when a case is anchored in future events that may not occur as anticipated or at all." *Id.* Even if a claim actually meets the Article III definition of a case or controversy, prudential reasons may exist for calling a case unripe for litigation. *See, e.g., Brown v. Ferro Corp.*, 763 F.2d 798, 801 (6th Cir.), *cert. denied* 474 U.S. 947 (1985). For example, commentators have warned that the prudential basis for the ripeness doctrine is evident in the fact that defendants may be prohibited from litigating cases intelligently because they are forced to "grapple with hypothetical possibilities rather than immediate facts." 13A Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §3532.1 (1984).

Plaintiff has failed to allege an actual case or controversy regarding its alleged prospective right to unregulated commercial hunting and fishing in Ohio. While Plaintiff asks this Court to declare that it has an alleged privilege to fish and hunt without restriction or regulation, it has failed to allege facts sufficient to show a real or immediate threat of injury. Simply informing the Defendant "of its intention to exercise its fishing and hunting rights" and sending a letter to the Defendant "expressing its intention to exercise its fishing privileges in Lake Erie and offering to avoid recreational fishing areas," fails to show that a conflict between the parties is in fact imminent. Amended Complaint, ¶32, ¶35.

The Tenth Circuit decision, *Cheyenne-Arapaho Tribes of Oklahoma v. State of Oklahoma*, 681 F.2d 705 (10th Cir. 1982), further demonstrate that Tribe's claims for hunting and fishing rights are non-justiciable. There, the Cheyenne-Arapaho Tribes contended that the district court had improperly failed to grant them relief with respect to their hunting and fishing rights on non-Indian ceded land. *Id.* at 705-06. The Cheyenne-Arapaho Tribes contended that hunting and fishing in these areas were subject to a system of dual regulation. *Id.* The court of

appeals stated that it "did not know the pertinent facts," *id.*, and that the record demonstrated nothing about the grant or denial of the asserted hunting and fishing rights and nothing about the need for conservation. *Id.* at 706. The court held that determination of the hunting and fishing rights at issue "must await a dispute presenting specific facts." *Id.* The court "decline[d] to enter an advisory opinion." *Id.*

Plaintiff's claim in this matter is virtually identical to the claim considered by the court in *Cheyenne-Arapaho*. Both involve claims for hunting and fishing rights on ceded land. *See* pp. 13-15, *infra*. As in *Cheyenne-Arapaho*, there are no pertinent facts concerning the dispute. For this reason, determination of Plaintiff's hunting and fishing rights "must await a dispute presenting specific facts." *Cheyenne-Arapaho*, at 706. There is simply no "real, substantial controversy," for the Court to resolve, and the Court is being asked to enter an advisory opinion. *See*, *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979).

The Amended Complaint provides only a sentence or two regarding the Tribe's plans to engage in unregulated commercial fishing, and is completely devoid of any allegations regarding the Tribe's intentions to exercise its alleged hunting rights. This is particularly interesting in light of the fact that the vast majority of the areas described by the treaties are land located miles away from Lake Erie. There is no allegation that the State has ever been approached regarding the Tribe's alleged hunting rights. Without more detailed facts or allegations, the Amended Complaint states nothing more than hypothetical possibilities. Because the Plaintiff's claims are not ripe, this Court has no jurisdiction over the Plaintiff's claims.

Plaintiff's request for declaratory judgment is anchored in future events that may not occur as anticipated or may not occur at all. Plaintiff claims that an actual and justiciable controversy exists because Plaintiff "fears that unless this Court declares the rights of the parties

in connection with this controversy, it shall be unable to exercise such privileges without risk of criminal prosecution and/or criminal liability." Amended Complaint, ¶40. However, merely making this statement, without a showing of a real and immediate threat of injury, is not sufficient to demonstrate that the case is justiciable. *See County of Mille Lacs v. Benjamin*, 361 F.3d 460 (8th Cir. 2004).

Further, ODNR is unfairly disadvantaged in this litigation because Plaintiff has failed to allege facts sufficient to take this case out of the realm of presenting more than a hypothetical or conjectural dispute. Without some specific facts or allegations, ODNR is forced to grapple with hypothetical possibilities. Article III of the United States Constitution limits the jurisdiction of the federal courts to actual, ongoing cases and controversies, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992); *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990); *Babbitt v. United Farm Workers National Union*, 442 U.S. at 297-98; *McCollester v. City of Keene*, 668 F.2d 617, 618 (1st Cir. 1982). For this reason, the Court must reject this request and dismiss the Amended Complaint pursuant to Rule 12(B)(1) on the grounds that it fails to present a justiciable case or controversy.

C. The Eleventh Amendment Bars The Ottawa Tribe of Oklahoma's Claims.

1. The Eleventh Amendment applies to tribal litigation

The Eleventh Amendment bars Indian tribal lawsuits against non-consenting states in federal court. The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

The U.S. Supreme Court has unequivocally held that "in the absence of consent, a suit in which the State or one of its agencies or departments is named as the defendant is also proscribed by the Eleventh Amendment. . . . This jurisdictional bar applies regardless of the nature of the relief sought." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 (1984) (citations omitted). Any claims against the State in general or its officials acting in their official capacities are barred by the Eleventh Amendment. *Id.*; *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). State officials acting in their official capacities are deemed to be the State for purposes of litigation. *Pennhurst*, 465 U.S. at 101; *Gean v. Hattaway*, 330 F.3d 758, 777 (6th Cir. 2003). In this case, the State Defendant is named in his official capacity, and thus is the State.

The Tribe asserts that this Court has jurisdiction under 28 U.S.C. §1362, as well as 28 U.S.C. §1331 (federal question jurisdiction) and 28 U.S.C. §§2201-02 (jurisdiction to issue declaratory judgments). Amended Complaint, ¶¶3, 4. The creation of federal question jurisdiction and the enactment of the Declaratory Judgment Act, however, did not abrogate the State's Eleventh Amendment immunity. Nor did 28 U.S.C. §1362. In *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775 (1991), the Supreme Court held that State sovereign immunity under the Eleventh Amendment bars an Indian tribe from suing a State in federal court. The Court stated:

> [S]ince *Hans* v. *Louisiana*, 134 U.S. 1, 33 L. Ed. 842, 10 S. Ct. 504 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty; and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Id. at 779 (internal citations omitted). The Court expressly held that Congress has not abrogated such immunity in 28 U.S.C. §1362. *Id.* at 781-87. *See, also, Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996) (Congress cannot abrogate the States' Eleventh Amendment immunity in the exercise of the Commerce Clause or its other Article I powers). Accordingly, the Eleventh Amendment governs this Court's jurisdiction to determine this action.

Further, neither the State nor any of its officials has waived immunity or consented to be sued in federal court on the claims the Tribe raises in its Amended Complaint. Pursuant to Art. 1, §16 of the Ohio Constitution, only Ohio's General Assembly can waive the State's immunity. The General Assembly has not done so in this case; thus, the State has not consented to be sued in this forum. It follows, then, that the Eleventh Amendment bars the Tribe's claims against the State.

2. *Ex Parte Young* does not apply to this action

Although normally claims seeking only prospective relief against State officials can survive an Eleventh Amendment challenge under the legal fiction enunciated in *Ex Parte Young*, 209 U.S. 123 (1908), that rule does not apply to this action. The *Ex Parte Young* fiction applies only to actions against state officials in their official capacities when the relief sought is strictly prospective and "where the underlying authorization upon which the named official acts is asserted to be illegal." *Papasan v. Allain*, 478 U.S. 265, 277 (1986).

Ex Parte Young does not apply to any of the claims asserted in this case. First, the Oklahoma tribe has not asserted an ongoing constitutional violation. Second, the Plaintiff's claims regarding interests to land are claims against the State, not her officials. However the Oklahoma tribe may choose to characterize its claim, the Amended Complaint is really an action

to declare interests in the land that are contrary to Ohio's sovereign interests in her land. *See Coeur d'Alene*, 521 U.S. at 287 (*Ex Parte Young* does not apply where relief sought is directed to the State's sovereign interest in its lands and waters), described in greater detail in the next section.

3. The Eleventh Amendment bars the Tribe's claims for a declaration of its rights to hunt and fish

The Oklahoma tribe seeks to avoid the Eleventh Amendment bar by claiming that this action seeks only "declaratory and prospective relief regarding the constitutionality of Defendant's threatened actions," and that thus the *Ex Parte Young* fiction applies. Complaint, ¶5. As discussed above, this is not true. In addition, however, due to the special sovereign interests of the State of Ohio on which the Oklahoma tribe seeks to intrude--namely Ohio's right to regulate the use of the waters of Lake Erie--this case is barred by the Eleventh Amendment even though the case is ostensibly captioned as one against the Director of ODNR.

In their letter dated June 2, 2005, Plaintiff advises that its company "is in the process of purchasing fishing boats and gill nets, hiring crews and arranging docking and processing facilities to engage in commercial fishing" in those areas of Lake Erie encompassed within the treaty. Exhibit C to the Amended Complaint. Plaintiff states unequivocally that it seeks "a declaration that Plaintiff has the right to hunt and fish in the Treaty Area without restriction or regulation by Defendant." Amended Complaint, Prayer for Relief. Accordingly, the current dispute between the parties, which as argued above is not justiciable, is limited to the Tribe's asserted right to fish Lake Erie free from the State regulations that apply to everyone else who fishes in Ohio's waters.

The relief requested, a declaration that the Oklahoma tribe may use sovereign waters without abiding by those regulations enacted for the benefit of the public, places this case

squarely within the doctrine espoused by the United States Supreme Court in *Coeur d'Alene*, which holds that *Ex Parte Young* does not apply to declaratory relief that especially implicates the State's sovereign interests.

In *Coeur d'Alene*, the Coeur d'Alene Tribe filed a complaint in federal court that claimed title to the beds and banks of Lake Coeur d'Alene and the navigable rivers and streams in its water system. In addition to its title claims, the tribe sought a declaratory judgment to establish its entitlement to the exclusive use and occupancy and the right to quiet enjoyment of the submerged lands, and a declaration of the invalidity of all Idaho statutes and regulations purporting to regulate or affect the submerged lands. Finally, the tribe sought an injunction prohibiting defendants from regulating, permitting or taking any action in violation of the tribes' alleged rights in the submerged lands. *Coeur d'Alene*, 521 U.S. at 264-66. By the time the case reached the U.S. Supreme Court, the parties had conceded that the title claims were barred by the Eleventh Amendment, and the issue before the Court was limited to whether the tribe's claims for declaratory judgment and injunctive relief were barred. The Court held, in a decision factually on point with this one, that these claims were barred, despite *Ex Parte Young*, due to the nature of the relief requested and the State's special sovereign interest in controlling its navigable waterways.

A majority of the Court recognized that, even when state officials are sued as individuals, the State itself has a continuing interest in the litigation whenever state policies or procedures are at stake. *Id.* at 269. "To interpret *Young* to permit a federal court-action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would be to adhere to an empty formalism and to undermine the principle . . . that Eleventh Amendment immunity represents a real limitation on a federal court's federal-

question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading." *Id.* at 270.

Applying the rationale behind the Eleventh Amendment to the facts before it, the Court determined that the tribe's suit was the functional equivalent of a quiet title action and that it implicated special sovereignty interests "in that substantially all the benefits of ownership and control would shift from the State to the Tribe." *Id.* at 281-82. Justice Kennedy, speaking for the majority of the Court, noted as especially troubling that:

> The suit seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State. The requested injunctive relief would bar the State's principal officers from exercising their governmental powers and authority over the disputed lands and waters. The suit would diminish, even extinguish, the State's control over a vast reach of lands and waters long deemed by the State to be an integral part of its territory. To pass this off as a judgment causing little or no offense to Idaho's sovereign authority and its standing in the Union would be to ignore the realities of the relief the Tribe demands.

Id. at 282. Justice O'Connor, in her concurring opinion, states: "Where a plaintiff seeks to divest the State of all regulatory power over submerged lands—in effect, to invoke a federal court's jurisdiction to quiet title to sovereign lands—it simply cannot be said that the suit is not a suit against the State." *Id.* at 296.

This case is on point with *Coeur d'Alene* in two ways. First, it too concerns the State's sovereign right to control the use of navigable waterways. Second, the Ottawa of Oklahoma, like the Coeur d'Alene, seek a declaration that their use of the waters is not subject to state regulation.

This case without a doubt implicates the State's important sovereign interest in navigable waterways. Submerged lands are "lands with a unique status in the law and infused with a public trust the State itself is bound to respect." *Id.* at 283. State ownership of such lands is

"considered an essential attribute of sovereignty." *Id.* (citation omitted). Under the doctrine of "equal footing," which provides that all States enter the union with the same incidents of sovereignty enjoyed by the already existing States, Ohio became the owner in trust of the portions of Lake Erie in question when she became a State in 1803, and her ownership arises not from an act of Congress, but from the Constitution itself. *See id.* at 283; *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 434-35 (1892). *See* R.C. 1506.10 (The waters of Lake Erie within the boundaries of the State of Ohio belong to the State "as proprietor in trust for the people of the state, for the public uses to which they may be adapted subject to the powers of the United States government, to the public rights of navigation, water commerce, and fishery, and to the property rights of littoral owners . . .").

Under American law, the navigable waterways within each State's territory are owned and held by the State in trust for the use of the public as a whole. Indeed, the United States Supreme Court recognized over a hundred years ago that the Great Lakes are "inland seas" governed by the same rights of sovereignty that apply to the tide waters of the oceans. *Illinois Central Railroad Co. v. Illinois*, 146 U.S. at 435-37. As such the State has "a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein freed from the obstruction or interference of private parties." *Id.* at 452. The State can no more abdicate its trust over the navigable waters than it could "abdicate its police powers in the administration of government and the preservation of the peace." *Id.* at 453. Thus, this case implicates the same sovereign interests at issue in *Coeur d'Alene*, with the exception that Ohio's sovereign interest in regulating Lake Erie is arguably stronger than Idaho's interests in regulating its inland lake, due to the unique status accorded the Great Lakes under admiralty law. *See, also, Maine v. Norton*, 257 F. Supp. 2d 357

(D. Me. 2003); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994) (a state has a sovereign interest in managing its own natural resources and enacting and enforcing its own legal code).

Second, the Tribe, like the Coeur d'Alene, expressly seeks a declaration that it has a property interest that places it beyond the State's power to regulate submerged lands. The Tribe seeks a declaration not to simply use Lake Erie, which of course its members may do, on the same terms that apply to every other member of the public, but to do so "without restriction or regulation by the Defendant." Complaint, Prayer for Relief. Thus, the Tribe, like the Coeur d'Alene, "seeks, in effect, a determination that the lands in question are not even within the regulatory jurisdiction of the State" and "to divest the State of all regulatory power over submerged lands." *Coeur d'Alene*, 521 U.S. at 282; *id.* at 296 (J. O'Connor, concurring). Accordingly, the relief requested implicates the sovereign interests of the State of Ohio.

When presented with circumstances that fit squarely within the facts of *Coeur d'Alene*, as do the facts of this case, the circuits have applied the Court's reasoning and held that certain Indian claims, including claims for hunting and fishing rights, do not fall within the *Ex Parte Young* exception due to the importance of the sovereign interests at stake and the nature of the relief sought. For example, in *Western Mohegan Tribe and Nation v. Orange County*, 395 F.3d 18 (2nd Cir. 2004), the court held that an action in which the Mohegan Tribe sought "a declaration of plaintiff's ownership and right to possess their reservation lands in the State of New York" fell within *Coeur d'Alene*. *Id.* at 20. Although the Mohegans argued that they were seeking only Indian title,[3] which they described as the right to "'camp, to hunt, to fish [and] to use the waters and timbers,'" the court concluded that the Mohegans were seeking a declaration

[3]"Indian title" has been determined to be synonymous with "aboriginal title." *See Oneida Indian Nation v. New York*, 860 F.2d 1145, 1150 (2nd Cir. 1988), *cert. denied*, 493 U.S. 871.

that was "fundamentally inconsistent with the State of New York's exercise of fee title over the contested areas." *Id*. at 22, 23. Accordingly, the court held that the action fit squarely within *Coeur d'Alene* and affirmed the dismissal of the complaint.

Likewise, in *Ysleta Del Sur Pueblo v. Raney*, 199 F.3d 281 (5th Cir. 2000), the court applied the reasoning of *Coeur d'Alene* to hold that it could not adjudicate a claim that Texas had violated the Trade and Intercourse Act, commonly referred to as the Indian Non-Intercourse Act. That act provides that no purchase, grant or conveyance of land from any Indian nation is valid unless made by treaty of the federal government. The court determined that a finding of a violation of that act would mean that the landowners did not have valid title over the lands in question. Essentially, the court found, the claim was an action to quiet title, which *Coeur d'Alene* prohibited.

The Sixth Circuit has applied *Coeur d'Alene* in at least two cases. In *MacDonald v. Village of Northport*, 164 F.3d 964 (6th Cir. 1999), private property owners filed an action asking the district court to vacate a beach access right-of-way adjacent to their property on Lake Michigan and to declare that a portion of the right-of-way was their property. In finding that the relief requested was similar to a quiet title action and thus barred, the Court held that "the state of Michigan has a great interest in maintaining public access to the Great Lakes." *See, also, Barton v. Summers*, 293 F.3d 944 (6th Cir. 2002) (an attempt to force the allocation of state funds implicates core sovereign interests and thus falls within *Coeur d'Alene*).

This case is on all fours with *Coeur d'Alene* and its progeny. The Tribe seeks a declaration that it possesses an unlimited right to hunt and fish, activities traditionally regulated by the State, on Lake Erie. Thus, its claims implicate the sovereign interests of the State of Ohio and, no matter how captioned, are claims against the State as a sovereign, which are barred by

the Eleventh Amendment. For these reasons, the Tribe's claims must be dismissed as a matter of law.

D. The Court Should Dismiss the Plaintiff's Amended Complaint For Failure to Join Indispensable Parties.

In this case, the Tribe asserts that it has retained hunting and fishing rights under four different treaties, and that the State of Ohio is unlawfully interfering with the exercise of its rights. In each instance, the treaties in question, which form the basis for the claims, are treaties between Indian tribes and the United States. Consequently, the United States is an indispensable party to any action based on these treaties. And, at least one of these treaties concerns lands that are now part of the State of Michigan, so the State of Michigan is also so situated that she is an indispensable party to this action.

Under Rule 19, the Court must dismiss an action in the absence of an indispensable party. This Circuit applies a three-step process to determine whether an absent party is indispensable. *Local 670 v. International Union, United Rubber, Cork, Linoleum and Plastic Workers of America*, 822 F.2d 613, 618 (6th Cir. 1987), *cert. denied*, 484 U.S. 1019 (1988). First, the court must determine whether a person is necessary to the action and should be joined if possible. A party is deemed a necessary party when one of the following three elements is satisfied: 1) "complete relief cannot be accorded among those already parties" in that party's absence; 2) the absentee has an "interest relating to the subject of the action;" or, 3) nonjoinder leaves "any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."

Second, the court must determine whether the absent party can be brought before the court. Under Rule 19(a), joinder is not feasible when joinder of the absent party destroys subject matter jurisdiction, the court does not have personal jurisdiction over the party, or if the absent

party objects to improper venue. Third, if the absent party cannot properly be brought before the court then the court must analyze the factors set forth in Rule 19(b) to determine whether the court may proceed without the absent party, or must dismiss the case because the party is indispensable.

A four-factor test guides the court's determination as to whether the Court should dismiss the action or proceed without the absent necessary party. *See Provident Tradesmens Bank & Trust v. Patterson*, 390 U.S. 102 (1968). First, the court must consider the plaintiff's interest in a forum. Second, the court must consider the defendant's wish to avoid multiple litigation, inconsistent relief, or sole responsibility for liability he shares with another. The third factor is the interest of the nonparty whom it would have been desirable to join. The fourth factor is the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. *Id.* In this case, the second, third, and fourth factors all necessitate a finding that the United States and Michigan are indispensable parties.

In the present cause of action, complete relief "cannot be accorded" between the parties in the absence of the United States for several reasons. First, the United States, as Plaintiff alleges, negotiated and entered into the treaties with the Tribe. In addition, the United States has "an interest relating to the subject of the action" and nonjoinder "as a practical matter [may] impair or impede [its] ability to protect that interest." The United States may find itself subject to obligations with which it does not agree depending upon this Court's interpretations of its treaties. For all of these reasons, the United States is a necessary party to this action.

Not only is the United States a necessary party, but it is also indispensable. The United States cannot be joined as a party because of its sovereign immunity. However, the interests of the United States, the interests of Ohio and her citizens, and the courts' interest in complete and

efficient resolution of disputes all indicate that this action should not go forward in the absence of the United States.

A number of circuits have determined, in similar circumstances to this case, that the United States is an indispensable party. First, in *Nichols v. Rysavy*, 809 F.2d 1317 (8th Cir. 1987), the Eighth Circuit determined that the United States was an indispensable party in an action filed against the United States, South Dakota, and a county. In that case, the plaintiffs sued alleging that certain fee simple patents that their ancestors received from the United States were illegally issued, and that thus all later transfers of the property were void. The Court found that the action could not proceed against the United States due to its Sovereign immunity. The court then concluded that the United States was an indispensable party because, if the land patents were reversed, the United States could be liable for claims of damages by current owners and "the result of this suit, on the merits, would depend entirely on whether the United States acted legally or illegally in granting fee patents under [its] policy." *Id.* at 1333. Finally, the court determined that the courts and the public had an interest in complete, consistent, and efficient settlement of the controversy which had "far reaching social, economic, and political ramifications." *Id.* This was so because the finding urged by the plaintiffs in that case would have clouded the title to millions of acres of land, and placed the entire United States land title system in jeopardy. *Id.*

Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455 (10th Cir. 1987) also supports the proposition that the United States is an indispensable party in the present cause of action. In that case, the Navajo tribe sought equitable title and monetary damages from New Mexico when an executive order reallocated land from the Navajo tribe to the public domain. *Id.* at 1458, 1462. Finding the trial court's reasoning dispositive, the court noted that the Navajo tribes' claims "are,

in reality, challenges to the validity of the transactions by which the United States assumed title to the subject land." *Id.* at 1471. Applying Rule 19(a)(2)(i), the court concluded that the government claimed an "interest relating to the subject of the action and is so situated that the disposition of the action in [its] ability to protect that interest . . . " *Id.* at 1471.

The court also applied the above-cited four factor test and concluded that prejudice to United States is clear, "prejudice could not be lessened or avoided either through protective provisions in the judgment or through the shaping of relief," judgment in the United States' absence would be inadequate, and even if the plaintiff would not have an adequate remedy if the action was dismissed, that factor alone doesn't prevent the court from finding that the United States is not an indispensable party. *Id.* at 1472, 1473. The court further concluded that if the United States is not an indispensable party a tribe could "avoid the admittedly catastrophic effects under the ICCA [the Indian Claims Commission Act, see discussion below] of sleeping on its pre-1946 claim by simply waiting until the United States transfers title and then bringing suit against the successors in interest to the United States –even though suit against the United States itself is barred." *Id.* at 1473. Therefore, that particular result "would undermine the very intricate and exclusive remedial scheme that Congress created in the ICCA." *Id.* Consequently, in "equity and good conscience," the court concluded that the cause of action should not proceed. *Id.*

So, too, with this case. The Tribe is attempting to obtain a court-ordered interpretation of treaties entered into by the United States government, without including the United States in the lawsuit. The interpretation the Tribe seeks would affect the rights of the United States, the rights of Ohio and her political subdivisions as well as many present day landowners in Ohio. Such an attack cannot proceed in equity and in good conscience in the absence of the United States.

At the same time, the State of Michigan's rights under the Treaty of 1807 are such that Plaintiff's claims based on that treaty cannot be adjudicated without the State of Michigan. First, most of the land mass ceded in that treaty is now in the State of Michigan, not Ohio. Accordingly, the determination that the Treaty of 1807 creates usufructuary rights that survive to the modern day may "as a practical matter impair or impede Michigan's ability to protect" its own interests. Second, to the extent that the Tribe argues that it has continuing rights to fish in western Lake Erie, under the Treaty of 1807 or any other treaty, the exercise of those rights in Ohio will affect the State of Michigan, which controls the immediately adjacent portion of the lake.

For all of the above reasons, the United States and the State of Michigan are indispensable parties to this action.

E. Plaintiff's Claims Are Barred By The Statute Of Limitations Set In The Indian Claims Commission Act.

Plaintiff's claims, which are all based on treaties between the United States and certain groups of Indians, are barred by the statute of limitations set forth in the Indian Claims Commission Act ("ICCA").

In 1946, Congress enacted the Indian Claims Commission Act. Its purpose was to provide a forum for the resolution of all claims Indian tribes may have had prior to 1946 based on their dealings with the United States. "The ICCA's purpose, explicit provisions, and legislative construction clearly demonstrate that the 'chief purpose of the [ICCA was] to dispose of the Indian Claims problem with finality.'" *Catawba Indian Tribe of S. Carolina v. United States*, 24 Cl. Ct. 24, 29 (U.S. Claims Ct. 1991) (quoting *United States v. Dann*, 470 U.S. 39, 45 (1985) and H.R. Rep. No. 1466, 79th Cong., 1st Sess. 10 (1945)).

The Indian Claims Commission ("ICC") had jurisdiction to determine claims "against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska." §2 of ICCA, 60 Stat. 1049, 1050 (1946). The types of claims covered include:

> (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President;
>
> (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit;
>
> (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity;
>
> (4) claims arising from the taking by the United States, whether as a the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and
>
> (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

Id.

Section 12 of the ICCA, 25 U.S.C. §70(k) provided as follows:

> The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

The legislative history of the ICCA reflects that Congress intended that the Act "would require all pending Indian claims of whatever nature, contractual and noncontractual, legal and nonlegal, to be submitted to this fact-finding body within 5 years, and would outlaw claims not so submitted." H.R. Rep. No. 1466, 1946 U.S. Cong. Service, 1347, 1349.

In this case, the Tribe's alleged claims are unlawful interference with hunting and fishing privileges relating to (1) Royce Areas 53 and 54 encompassing the northern and southern portion of a rectangular tract of land including 2,589,807 acres located in the north-central portion of the State of Ohio (42 Ind. Cl. Comm. 264, 266) ceded to the United States and Connecticut land companies at the Treaty of Fort Industry 1805; (2) Royce Area 66 encompassing a portion of northwestern Ohio and southeastern portion of Michigan (30 Ind. Cl. Comm. 388, 408) ceded to the United States in the Treaty of 1807; and (3) Royce Area 70 and the "Scarlet Line" encompassing land in lower Sandusky ceded in the Treaty of 1808. All of these claims could have been presented to the Indian Claims Commission, and are therefore now time-barred.

Although the ICC heard and determined only claims against the United States, the statutory bar applies in actions brought against the innocent third parties who received the land from the United States. In cases, like this one, where Indian tribes sue States based on their interpretation and application of federal treaties, the tribes' claims "against the remaining defendants are, in reality, challenges to the validity of the transactions by which the United States assumed title to the subject land." *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1471 (10th Cir. 1987). *See, also, Oglala Sioux v. Homestake Mining Co.*, 722 F.2d 1407, 1411 (8th Cir. 1983) (court notes that in a previous appeal it specifically asked the parties to brief whether the remedy provided by the ICCA extinguished claims against private defendants, and then affirmed judgment as to the private defendants, impliedly rejecting the argument that the ICCA did not extinguish claims against parties other than the United States).

In this case, the Tribe's claims, for the allegedly unlawful interference with hunting and fishing privileges relating to Royce Areas 53, 54, 66, 70, and the "Scarlet Line" are all claims that could have been brought against the United States pursuant to the ICCA. And, as is set forth

in the next section, all of these claims except for those relating to Royce Area 70 and the Scarlet Line (from the Treaty of 1808) were in fact made to that body, and thus are barred on other grounds. However, to the extent that the Tribe now asserts these claims against Ohio, the claims are barred not only by res judicata, collateral estoppel and/or release, but also by the statute of limitations set forth in the ICCA. According to that Act, these claims, which all accrued in the 1800s, should have been filed with the ICC not later than 1951.

F. Plaintiff's Claims Are Barred By Res Judicata, Collateral Estoppel, And/Or Release Because The Ohio Ottawa Have Been Compensated By The Indian Claims Commission.

Not only did the Ohio Ottawa have the opportunity to pursue claims before the Indian Claims Commission, but they did pursue such claims, both as to Royce Areas 53 and 54 (North-central Ohio) and Royce Area 66 (Northwest Ohio). *See* Exhibit D, which outlines the Royce Areas within the State of Ohio.

The Indian Claims Commission made the following findings (which are binding against the Plaintiff, who was a party to those proceedings, but not the Defendants because they were not parties to that proceeding):

> As of the Treaty of Fort Industry, four bands of the Ottawa: the Maumee, Blanchard's Fork, AuGlaize and Roche de Boeuf had recognized title to an undivided one-fifth interest in Royce Areas 53 and 54 along with the Delaware, Wyandot, Potawatomi, and Chippewa tribes. 30 Ind. Cl. Comm. 8, 21-22.
>
> Except for a six mile area ceded to the United States during the 1795 Treaty of Greenville, Royce Areas 53 and 54 "was the scene of joint use and occupancy by several Indian tribes and groups." *Id.* at 34.
>
> In the territory encompassing Royce Areas 53 and 54, "there were no large regions used and occupied by any particular tribe or group to the exclusion of others." *Id.* at 35.
>
> The Ottawa Indians who signed the Treaty of 1807 were the Ottawa bands of the Maumee, Blanchard's Fork, AuGlaize and Roche de Boeuf. 30 Ind. Cl. Comm. 388, 392.

> There was no basis for the contention of the Ottawa plaintiffs that the entire central portion of Royce Area 66 was Ottawa territory. *Id.* at 398.
>
> The Ottawa held recognized title to 469,116 out of 5,611,532 acres in Royce Area 66. 41 Ind. Cl. Comm. 327, 353.

The ICC addressed claims by a number of different tribes to Royce Areas 53 and 54 (which include large portions of north-central Ohio). *Strong v. United States*, 30 Ind. Cl. Comm. 8. The ICC concluded that the four Ottawa bands, the Maumee, Blanchard's Fork, AuGlaize, and Roche de Boeuf had recognized title to certain lands that had been violated by the United States. The ICC found that the Ottawa had a 1/5th interest in Royce Areas 53 and 54 (in which four other tribes and their respective bands also had interests), and valued that interest at $563,624.21. *Ottawa v. United States*, 42 Ind. Cl. Comm. 352 (1978).

In addition, the Ohio Ottawa's claims to Royce Area 66 were compromised and settled as a result of the proceedings before the ICC. *Ottawa Tribe and Guy Jennison v. United States*, 42 Ind. Cl. Comm. 163 (1978), attached as Exhibit G. Pursuant to the settlement of their claims with the United States, four different bands of the Ottawa: the Maumee, Blanchard's Fork, AuGlaize, and Roche de Boeuf received $579,308.00, which was approved by the tribes. *Id.* In return for this compensation, the parties entered into a stipulation that provides that this award was " . . . a final award in full satisfaction of all claims against the defendant in Docket 133-B . . . ." In 1978, the final award was reported to Congress "and certified for payment to the Claims Division, General Accounting Office, under date of August 31, 1987." *Saginaw v. United States*, 43 Ind. Cl. Comm. 678 (1978), attached as Exhibit H.

Payment of a claim under the ICC is a full discharge "of all claims and demands touching any of the matters involved in the controversy," and all other matters that could have been claimed but were not. *United States v. Dann*, 470 U.S. 39 (1985) (quoting §22a of the ICCA).

In addition, although the ICC resolved only claims against the United States, the fact that a tribe received payment from the Commission precludes it from re-litigating the same issues against a State. *Western Shoshone National Council v. Molini*, 951 F.2d 200, 202 (9th Cir. 1991). *See, also, United States v. Pend Oreille Public Utility District No. 1*, 926 F.2d 1502, 1507 (9th Cir. 1991). Proceedings under the ICC extinguish all claims to title, including hunting and fishing rights, whether aboriginal or treaty-recognized. *Western Shoshone National Council v. Molini*, 951 F.2d at 203.

Accordingly, all of the matters sought to be litigated by the Ottawa have been released and/or are barred by res judicata or collateral estoppel.

G. Plaintiff's Claim is Barred by 28 U.S.C. §2415.

Not only does the ICCA statute of limitation bar these claims, but so too does the statute of limitation set forth in 28 U.S.C. §2415. In 1982, by amendment to 28 U.S.C. §2415, "Congress for the first time imposed a statute of limitations on certain tort and contract claims brought by Indians and Indian tribes." *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 242-43 (1985). Congress directed the Secretary of the Interior to publish in the Federal Register a list of all Indian claims to which the limitations period of §2415 applied. *Id.* at 243. Thereafter, Indians were given an opportunity to submit additional claims that had been left off of the original list and these additional claims were then to be published in the Federal Register in a second list. *Id.* Pursuant to §2415, any claim not set forth on either list was barred if an action was not commenced within 60 days of the publication of the second list. *Id.* And, the statute of limitations set forth in 28 U.S.C. §2415 is applicable to claims filed by Indian tribes, and not merely to claims brought by the United States on behalf of Indians or Indian

tribes. *See Captain Grande Band of Mission Indians v. Helix Irrigation Dist.*, 514 F.2d 465 (9th Cir.), *cert. denied*, 423 U.S. 874 (1975).

The first list was published on March 31, 1983 in 48 Fed. Reg. 13698. The second list was published on November 7, 1983 in 48 Fed. Reg. 51204. No group of Ottawa asserted any Ohio claims on either list. See Exhibits I and J, which are the pages of these lists listing claims in the Eastern area, which would include Ohio. Because the Ottawa Tribe of Oklahoma's claims were not brought within 60 days of the publication of the second list, as required by §2415, they are now barred.

H. The Ottawa Tribe of Oklahoma's Amended Complaint Fails to State a Claim For Which Relief Can be Granted, And Thus Must Be Dismissed.

The Amended Complaint asserts claims for hunting and fishing rights on several treaties negotiated and signed by several Indian Tribes and the United States government: the two 1805 Treaties of Fort Industry, the Treaty of 1807 and the Treaty of 1808. None of these treaties establish the rights asserted in the Amended Complaint.

1. The 1805 Treaties of Fort Industry

As explained above, two treaties were negotiated and signed concurrently at Fort Industry on July 4, 1805. The Tribe has failed to state a claim upon which relief can be granted with regard to either of these treaties.

a. The Connecticut Land Company Treaty

Pursuant to the Connecticut Land Company Treaty, the signatory tribes ceded the land identified as Royce Area 53. *See* Exhibit D. As explained above, the boundaries of the land ceded in this treaty included land abutting Lake Erie as well as a significant portion of the lake itself. The Tribe has failed to state a claim upon which relief can be granted with regard to this treaty because the specific language of the treaty itself makes it clear that the signatory tribes

ceded all rights and privileges to the area in question. Exhibit C, second paragraph. The treaty states that the land was ceded free and clear of all hindrances and expressly bars the signatory tribes and their posterity from the ceded lands. Exhibit C, ¶2. The treaty states:

> "That we, the sachems, chiefs, and warriors, of the nations aforesaid, for the consideration of eighteen thousand nine hundred and sixteen dollars and sixty-seven cents, received of the companies aforesaid, by the hands of their respective agents, to our full satisfaction, have ceded, remised, released, and quit claimed, and by these presents do cede, remise, release, and forever quit claim, to the companies aforesaid, and the individuals composing the same, and their heirs and assigns, forever, all the interest, right, title, and claim of title, of said Indian nations, respectively, of, in, and to, all the lands of said companies, lying west of the river Cayahoga, and the portage between that and the Tuscarawa branch of Muskingum, north of the northernmost part of the 41st degree of north latitude, east of a line agreed and designated in a treaty between the United States and said Indian nations, bearing even date herewith, being a line north and south one hundred and twenty miles due west of the west line of the State of Pennsylvania, and south of the northernmost part of the forty-second degree and two minutes north latitude, for them, the said companies, respectively, to have, hold, occupy, peaceably possess, and enjoy, the granted and quit claimed premises, forever, free and clear of all let, hindrance, or molestation, whatsoever; so that said nations, and neither of them, the sachems, chiefs, and warriors thereof, and neither of them, or any of the posterity of said nations, respectively, shall ever hereafter make any claim to the quit claimed premises, or any part thereof; but therefrom, said nations, the sachems, chiefs, and warriors thereof, and the posterity of said nations, shall be forever barred."

Id. (emphasis added).

Because the direct language of this treaty forever bars the signatory tribes and their posterity from the ceded land, this claim should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

b. The Federal Treaty

Pursuant to the Federal Treaty, the signatory tribes ceded the land identified as Royce Area 54. *See* Exhibit D. As explained above, the land ceded in this treaty is located south of the land ceded in the Connecticut Land Company Treaty (Royce Area 53). While the Tribe claims it is entitled to both hunting and fishing rights, the Amended Complaint and the exhibits attached

thereto, as discussed above in the justiciability section, allege, at best, a dispute related to fishing rights on Lake Erie. *See* Amended Complaint, ¶35; Amended Complaint Exhibit B.

Because the tract of land in the Federal Treaty is land-locked, miles away from Lake Erie, and the Tribe appears to be seeking only the right to commercially fish in Lake Erie, this treaty is irrelevant to Plaintiff's claims. Accordingly, this claim should be dismissed.

2. The Treaty of 1807

The Tribe has also failed to state a claim for which relief can be granted with regard to the Treaty of 1807. As explained above, the Tribe claims, as an alleged successor in interest, hunting and fishing rights to a section of land in Ohio ceded in a treaty signed by the United States, bands of Ottawa Indians, and several other groups on November 17, 1807. Amended Complaint, ¶¶13-15. This treaty is attached as Exhibit E and concerns lands identified as Royce Area 66 on the map attached as Exhibit D.

Article 5 of the Treaty of 1807 specifically provides that "the said Indian nations shall enjoy the privilege of hunting and fishing on the lands ceded aforesaid, as long as they remain the property of the United States." Exhibit E, Article 5. Thus, this provision granted this privilege only until the land was transferred from the United States to other owners. The bulk of the land would have been sold to private individuals, entities, or state or local governmental entities at least a full century ago. Any claims related to particular plot or plots of land within the ceded area of land that may in fact still belong to the United States, such as the federal courthouse in Toledo, are not under the jurisdiction of the Ohio Department of Natural Resources and could not proceed in the absence of the United States as a party. And at any rate, Plaintiffs do not seek to hunt or fish on any federally owned plots of land. Therefore, this claim should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

Additionally, Plaintiff fails to mention an additional fifth treaty signed by the Ottawa residing in Ohio and the United States in 1831. That treaty is attached as Exhibit K. The treaty of 1831 provides for the cession by the Ottawa of four reservations in Ohio. Two of those reservations, at Roche de Boeuf and Wolf Rapids, were established by the Treaty of 1807. Article 17 of the Treaty of 1831 states in full: "On the ratification of this convention, the privileges of every description, granted to the Ottoway nation within the State of Ohio, by the treaties under which they hold the reservations of land herein ceded, shall forever cease and determine." Exhibit K, Article 17. Hunting and fishing rights are clearly defined in Article 5 of the Treaty of 1807 as a privilege, and thus would be included in "the privileges of every description" granted under the 1807 treaty. These privileges ceased with the Treaty of 1831.

3. The Treaty of 1808

Finally, the Tribe has failed to state a claim for which relief can be granted with regard to the Treaty of 1808. As explained above, the Tribe claims hunting and fishing rights as an alleged successor-in-interest to bands of Ottawa that signed a treaty on November 25, 1808 with the United States and several other groups of Indians. Amended Complaint, ¶¶16-22. In this particular treaty, attached as Exhibit F, the tribes cede two strips of land in Ohio wanted by the United States for roadways. One strip, 120 yards wide and including a mile on either side, went through Indian territory in order to connect Royce Area 53 (the land ceded by the tribes in 1805) to the Royce Area 66 (land ceded by the tribes in 1807). This strip of land is identified as Royce Area 70 on Exhibit D.

The second strip of land ceded in this treaty was a stretch of land that was only 120 yards wide. This land stretched through Indian territory, and connected the above road (Royce Area 70) with United States territory below the Treaty of Greenville line. This land can be seen on

Exhibit D starting near what is marked as Freemont, Ohio and running south through Upper Sandusky, Ohio and Marion, Ohio before ultimately touching the southern border of Royce Area 87.

No portion of the land ceded in this treaty touches Lake Erie. And, Article 4 of the 1808 treaty provided that "the said Indian nations shall retain the privilege of hunting and fishing on the lands given and ceded as above, so long as the same shall remain the property of the United States." Exhibit F, Article 4. The language of this treaty, as did the language of the 1807 treaty, conditions the privilege of hunting and fishing on the ceded land with the qualifier "so long as the same shall remain property of the United States." Again, this privilege may have existed for some time, until the land ceased to be the property of the United States. As explained earlier, however, the lands in question no longer belong to the United States and any privilege thus ceased to exist long ago. Accordingly, this claim, too, must be dismissed for failure to state a claim. And, as none of the treaties cited in the Amended Complaint establish that the Ottawa Tribe has any currently existing right to operate a commercial fishery on Lake Erie, the Amended Complaint must be dismissed for failure to state a claim.

I. The Plaintiff's Claims Are Barred By Laches.

The Supreme Court's recent decision in *City of Sherrill v. Oneida Indian Nation*, 161 L. Ed. 2d 386, 125 S. Ct. 1478 (2005), has dramatically altered the legal landscape against which this Court must consider Plaintiff's claims. *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2005). In *Sherrill*, the Supreme Court found that the equitable doctrines of laches, acquiescence and impossibility can be applied to Indian land claims in appropriate circumstances. *See City of Sherrill v. Oneida Indian Nation*, 125 S. Ct 1478 (2005). In its Amended Complaint, the Tribe claims that it is entitled to commercially hunt and fish in all areas

of Ohio encompassed in the Treaties of Fort Industry, the Treaty of 1807 and the Treaty of 1808. Amended Complaint, Prayer for Relief ¶¶2, 3. Because the equitable defenses of laches, acquiescence and impossibility apply equally to these claims, the Amended Complaint fails to state a claim upon which relief may be granted.

Sherrill concerned claims by the Oneida Indian Nation, that its "acquisition of fee title to discrete parcels of historic reservation land revived the Oneidas' ancient sovereignty piecemeal over each parcel" and that, consequently, the Tribe need not pay property taxes to the City of Sherrill. *Sherrill*, 125 S. Ct. at 1483. The Supreme Court rejected this claim, concluding that "the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue." *Id.* Pursuant to *Sherrill* then, equitable doctrines, such as laches, acquiescence, and impossibility, can, in appropriate circumstances, be applied to Indian land claims.

Laches is a "'negligent and unintentional failure to protect one' rights.'" *Coalition for Government Procurement v. Federal Prison Industries, Inc.*, 365 F.3d 435 (6th Cir. 2004). Laches applies when there has been "(1) unreasonable delay in asserting one's rights; and (2) a resulting prejudice to the defending party." *Id.* at 437. Acquiescence occurs when a party "belatedly asserts a right to present and future sovereign control over territory . . . " that is contrary to "longstanding observances and settled expectations" that flow from prior observance of a boundary." *Sherrill*, at 1492. Finally, impossibility occurs when intervening changes in circumstances render the equitable remedy sought impossible to provide. *Id.* at 1492, 1493.

In *Sherrill*, the Court applied these three doctrines because "[t]he distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the City of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in

governance this suit seeks unilaterally to initiate." *Id.* at 1494. The Court found that "the [Oneidas'] claim concerns grave, but ancient, wrongs, and the relief available must be commensurate with that historical reality." *Id.* at 1491, n. 11. While the Supreme Court did not identify a formal standard for assessing when equitable defenses apply, the broadness of the Supreme Court's statements indicates "that *Sherrill*'s holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking a revival of sovereignty, but rather, that these equitable defenses apply to 'disruptive' Indian land claims more generally." *Cayuga*, 413 F.3d at 274.

While the equitable remedy sought in *Sherrill*, a reinstatement of Tribal sovereignty, is not at issue here, this case involves comparably disruptive claims. The Tribe's Prayer for Relief specifically asks this court to declare that it is entitled to exercise its hunting and fishing privileges in all areas of Ohio encompassed by the Treaties of Fort Industry, the Treaty of 1807 and the Treaty of 1808. Amended Complaint, Prayer for Relief, ¶2. These declarations are clearly disruptive in that they ask this Court to alter years of settled land ownership and property rights. *Sherrill*, at 1492. The Tribe is calling into question the extent of the current land owners' property interests by seeking an untrammeled right to go forward on the land and waters to take fish and game. Accordingly, the Tribe's claims for this relief are subject to the equitable defenses recognized by the United States Supreme Court earlier this year in *Sherrill*.

The present case must be dismissed because the same considerations that doomed the Oneidas' claim in *Sherrill* apply with equal force here. These considerations include the following: "generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation," *Sherrill*, 125 S. Ct. at 1483; "at least since the middle years of the 19th century, most of the [Tribe] have resided elsewhere," *Id.*; "the

longstanding, distinctly non-Indian character of the area and its inhabitants," *Id*.; "the distance from 1805 to the present day," *Id*. at 1494; "the [Tribe's] long delay in seeking equitable relief against [the State] or its local units," *Id*.; and "developments in [the area] spanning several generations." *Id*.; *see, also, id*. at 1492-93 ("[T]his Court has recognized the impracticability of returning to Indian control land that generations earlier passed into numerous private hands.") (citing *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357, 71 L. Ed. 294, 47 S. Ct. 142, 63 Ct. Cl. 671 (1926) ("It is impossible . . . to rescind the cession and restore the Indians to their former rights because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers . . . .")).

The doctrine of laches, acquiescence and impossibility bar the hunting and fishing claims presented by the Tribe. Accordingly this action should be dismissed.

J. The Plaintiff Has Abandoned Any Rights That It May Have Had To Ohio.

The Tribe asks this Court to "find that Plaintiff is entitled to exercise its hunting and fishing privileges in all areas of Ohio encompassed by the aforementioned Treaty of Fort Industry, the Treaty of 1807 and the Treaty of 1808." Amended Complaint, page 9.

Whatever rights to hunt, fish, and gather that the bands of Ottawa may have had in the years immediately following the signing of these treaties, however, have long since been abandoned. The United States Supreme Court has previously addressed the nature of the rights reserved under a similar treaty, the Treaty of Greenville, which encompasses a large portion of southern Ohio. In *Williams v. Chicago*, 242 U.S. 434 (1917), the Powatomie asserted that the Treaty of Greenville had granted them an interest in lands to the west and north of the treaty line, and that somehow a portion of the City of Chicago, by virtue of previously having been submerged under Lake Michigan, had never been properly ceded. The Court concluded,

regarding the nature of the alleged property rights reserved in the treaty, that "[w]e think it entirely clear that this treaty did not convey a fee simple title to the Indians; that under it no tribe could claim more than the right of continued occupancy; and that when this was abandoned all legal right or interest which both tribe and its members had in the territory came to an end." *Id.* at 437-438. If this is true regarding a tribe's interest in the lands expressly reserved for Indian occupancy, it must be equally true for the related right to continue to peaceably hunt and fish in the adjoining lands which were otherwise ceded to the United States. This interest may have been abandoned when the bands of Ottawa were given specific reservations, but if not then, was conclusively abandoned when the Ottawa tribe agreed to cede these reservations and agreed to leave Ohio. Amended Complaint, ¶21. *See, also, Oregon Dep't of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 774 (1985) (recognizing that ICC provided an opportunity to recover additional compensation for ceded lands, and finding that the fact that the Tribe failed to mention hunting and fishing rights in those proceedings consistent with a finding that those rights were previously extinguished.) Under these circumstances, whatever hunting and fishing rights were granted under any of these treaties have been long extinguished through either abandonment or legally and equitably because of the failure to assert these rights in any fashion over the past 150 years. *See, e.g., Western Shoshone National Council v. Molini*, 951 F.2d at 203.

VI. CONCLUSION

For the foregoing reasons, Defendant Speck respectfully requests this Court to dismiss Plaintiff's Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2005, a copy of Defendant's Motion to Dismiss was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by regular U.S. mail upon all parties for whom counsel has not yet entered an appearance and upon all counsel who have not entered their appearance via the electronic system.

/s/ Damian W. Sikora ____
DAMIAN W. SIKORA