UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, on its own behalf and as *parens patriae* for its members,

Plaintiff,

and

THE UNITED STATES,

Plaintiff-Intervenor

vs.

JENNIFER GRANHOLM, Governor of the State of Michigan; MIKE COX, Attorney General of the State of Michigan; JAY B. RISING, Treasurer of the State of Michigan; each in his/her official capacity, and THE STATE OF MICHIGAN,

Defendants

and

THE CITY OF MT. PLEASANT,

Defendant-Intervenor.

and

COUNTY OF ISABELLA,

Defendant-Intervenor.

Case No. 05-10296-BC

Hon. Thomas L. Ludington

THE CITY OF MT. PLEASANT'S RESPONSE TO UNITED STATES' MOTION IN LIMINE TO STRIKE DEFENDANTS' WITNESSES RELATING TO EQUITABLE DEFENSES AND RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT

RESTATEMENT OF ISSUES PRESENTED

I. Are Defendants' equitable defenses of laches, estoppel, and impossibility excluded as a matter of law against the United States because this case concerns federal Indian treaty rights and reservation boundaries?

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Chirico v. Crosswinds Communities, Inc., 474 F.3d 227 (6th Cir. 2007)

City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005)

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943)

Guaranty Trust Co. v. United States, 304 U.S. 126 (1938)

Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984)

Hendrick v. Western Reserve Care Sys., 355 F.3d 444 (6th Cir. 2004)

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990)

*NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887 (7th Cir. 1990)

Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977)

Oneida Nation of New York v. State of New York, 500 F.Supp2d 128 (2007)

Rogers v. Banks, 344 F.3d 587 (6th Cir. 2003)

S.E.R. Jobs For Progress, Inc. v. United States, 759 F.2d 1 (Fed. Cir. 1985)

Spotts v. United States, 429 F.3d 248 (6th Cir. 2005)

Sutherland v. Michigan Department of Treasury, 344 F.3d 603 (6th Cir. 2003)

United States v. Admin. Enterprises, Inc., 46 F.3d 670 (7th Cir. 1995)

United States v. Beebe, 127 U.S. 338, 347 (1888)

United States v. Summerlin, 310 U.S. 414 (1940)

FCRP 56

INTRODUCTION

The United States filed a Motion in Limine seeking to exclude the testimony of approximately thirty (30) witnesses on the grounds that the anticipated testimony of those witnesses are irrelevant and inadmissible because the anticipated testimony from those witnesses support claims of laches, estoppel, and/or impossibility.

Although the United States' Motion is filed as a Motion In Limine, it is essentially a motion for summary judgment seeking to preclude equitable defenses and as such, governed by FRCP 56.

PROCEDURAL HISTORY

The Saginaw Chippewa Indian Tribe ("Tribe") filed this action on November 21, 2005. The Tribe sought prospective, injunctive, and declaratory relief, asserting that an Isabella reservation was established under the 1855 and 1864 treaties, and that five (5) full townships and two (2) half townships in Isabella County constituted "Indian country" as defined by 18 USC § 1151(a) in the Federal law. The Tribe filed a suit against the State of Michigan and some State officials.

The United States was permitted to intervene as a plaintiff on November 1, 2006. Plaintiffs' seek permanent injunction prohibiting the State of Michigan from exercising criminal and civil jurisdiction within the reservation in a manner inconsistent with its "Indian country" status. The State of Michigan has filed affirmative defenses of laches and impossibility, the City of Mt. Pleasant has filed affirmative defenses of laches and estoppel, and the County of Isabella has filed an affirmative defense of laches.

STANDARD OF REVIEW

Summary judgment is appropriate only if the pleadings, the discovery, and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact, and that the movement is entitled to judgment as a matter of law. FRCP 56(c); *Spotts v. United States*, 429 F.3d 248, 250 (6th Cir. 2005).

> An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Hendrick v. Western Reserve Care Sys.*, 355 F.3d 444, 451 (6th Cir., 2004) citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the non-movant, as well as draw all reasonable inferences in the non-movant's favor. See, *Sutherland v. Michigan Department of Treasury*, 344 F.3d 603, 613 (6th Cir., 2003); *Rogers v. Banks*, 344 F.3d 587, 595 (6th Cir., 2003).

In this case, because the Court has essentially prohibited the parties from taking any lay witness depositions, its decision should be based solely on the pleadings and any factual claim raised precludes summary judgment.

LEGAL ARGUMENT

A. Equitable defenses such as laches will not prevent the U.S. from enforcing the terms of its treaty since it was not acting on its own behalf but in order to benefit the tribe.

Despite the repeated assertions by Plaintiffs that equitable defenses such as laches do not apply as a defense against actions by the United States, there is a long history of exceptions to this "general proposition." One of the key exceptions, where the government sues on behalf of a third party whose interest is private rather than public, applies to the facts here.

Defendant accepts the United States' characterization of the doctrine of laches in this Circuit as a negligent and unintentional failure to protect one's rights that requires proof of: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. *See Chirico v. Crosswinds Communities, Inc.*, 474 F.3d 227, 231 (6th Cir. 2007). Defendant also accepts the *general* proposition that laches cannot bar the United States when it asserts its rights in its sovereign capacity. *See e.g., United States v. Summerlin*, 310 U.S. 414, 416 (1940); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132-133 (1938). But as with most general propositions, this one is filled with exceptions.

Both the Supreme Court and federal courts have acknowledged that laches may apply against the United States in cases involving gross delay by the government in enforcing its rights. *See e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943) (United States is not exempt from laches in commercial paper claim, though not applied on the facts); *S.E.R. Jobs For Progress, Inc. v. United States*, 759 F.2d 1 (Fed. Cir. 1985) (refusing to preclude laches against the United States in a government contract case); *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 893-94 (7th Cir. 1990) (laches available against United States for harmful and unjustifiable delay in bringing enforcement action, though not applied on facts). Additionally, as noted by Judge Posner *United States v. Admin. Enterprises, Inc.*, 46 F.3d 670, 672-73 (7th Cir. 1995), the Supreme Court has acknowledged the availability of laches or estoppel against the United States in various circumstances. *See e.g., Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 373 (1977) (delay by Equal Opportunity Commission in enforcement suit; laches acknowledged but

denied on the facts); *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60-61(1984) (delay by Secretary of Health and Human Services in recovering excess funds paid to health care provider; estoppel acknowledged but denied on the facts); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (delay by private party in bringing Title VII claim against United States; equitable defenses of tolling, waiver and estoppel acknowledged but denied on the facts).

More importantly, it has long been held that where the United States seeks to enforce the rights of a third party, and not for the purpose of protecting any public interest, title or property, laches can apply against the United States. In *United States v. Beebe*, 127 U.S. 338, 347 (1888) the United States brought suit in its name to set aside a privately held land patent obtained by fraud. The Supreme Court noted it was proper for the government to bring the claim, as a fraudulent patent would prejudice the interests or rights of the government, and could prevent it from fulfilling an obligation incurred by it, either to the public or an individual. *Beebe*, 127 U.S. at 342. However, the Court also noted that in such a case the government would still be acting for the primary benefit of the private person deprived of title by fraud; that is, the government would not be the real party in interest, and it would have nothing to gain or lose from the outcome. *Beebe*, 127 U.S. at 346. On these circumstances the Court held that laches could apply against the United States just as it could apply against a private party:

> We are of the opinion that when the government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title, or property, but merely to form a conduit through whom one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the

> equities existing between the real parties by any exemption of the government designed for the protection of the rights of the United States alone. The mere use of its name in a suit for the benefit of a private suitor cannot extend its immunity as a sovereign government to said private suitor, whereby he can avoid and escape the scrutiny of a court of equity into the matters pleaded against him by the other party; nor stop the court from examining into and deciding the case according to the principles governing courts of equity in like cases between private litigants. *Beebe*, 127 U.S. at 347.

Beebe raises the question as to whether the Tribal interest asserted here might be a public interest. If it is not a public interest, then the intervention by United States does not change the fact, and laches may apply against the United States. Plaintiffs have two implicit responses to this question in their respective briefs: (1) the United States claims the government is enforcing its sovereign rights, so the question never arises[1], or (2) the Tribe claims this rule does not apply where the government attempts to enforce the interest of a "tribal beneficiary."[2] Both positions fail.

The first position, that the government is attempting to enforce its sovereign interest rather than the Tribe's, is inaccurate.[3] The government may have an interest in the outcome of this lawsuit, indeed may be affected by it, but that does not necessarily make

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[1]United States' Motion in Limine, p. 7.

[2]Tribe's Motion to Strike, p. 6.

[3]This argument also involves questions of fact, rather than law, and may be inapplicable to the question presented as to whether laches may apply against the United States. In addition, the cases cited by the United States in support of its statement that equitable defenses cannot apply where the United States seeks to enforce its Treaty terms or rights, or confirm its jurisdiction over Indian Country, *United States v. Summerlin*, 310 U.S. 414 (1940) and *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917), do not concern either treaty rights or jurisdiction in Indian Country. They concern, in order, an assertion by the United States of an assigned interest in a decedent's estate, and a challenge by the United States against the unauthorized use of "public trust lands" (not Indian Country or reservation lands) by private parties.

it the real party in interest seeking to vindicate its rights.[4] Compare *Beebe*, where the Court granted the United States was properly a party, as the existence of a fraudulent patent "would work prejudice to the interests or rights of the United States, or would prevent the government from fulfilling an obligation incurred by it, either to the public or an individual." *Beebe*, 127 U.S. at 342. But this governmental interest, though sufficient to enable the United States to bring the complaint, was not sufficient to elevate the United States to the status of a truly interested party seeking to vindicate its rights:

> an inspection of the record shows that the government, though in name the complainant, is not the real contestant party to the title or property in the land in controversy. It has no interest in the suit, and has nothing to gain from the relief prayed for, and nothing to lose if the relief is denied. *Beebe*, 127 U.S. at 346.

This is why the Court in *Beebe* was careful to point out that by merely adding its name to a complaint the government did not change the underlying nature of the complaint. *Beebe*, 127 U.S. at 347. Laches therefore remained available regardless of the fact that the government brought the claim.

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[4]The United States attempts to cloud the issue by pointing out that numerous reservation boundary treaty interpretation cases have been decided by the Supreme Court without it applying equitable defenses against the United States. United States Motion in Limine, p. 7. This is hardly surprising, as the United States was not a party in any of the cases, nor were equitable defenses raised at all. *See e.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (United States amicus only, no equitable defenses raised); *Hagen v. Utah*, 510 U.S. 399 (1994) (United States amicus only, no equitable defenses raised); *Solem v. Bartlett,* 465 U.S. 463 (1984) (United States amicus only, no equitable defenses raised); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977) (United States amicus only, no equitable defenses raised); *DeCoteau v. Dist. County Court for Tenth Judicial Dist.*, 420 U.S. 425 (1975) (United States amicus only, no equitable defenses raised); *Matz v. Arnett*, 412 U.S. 481 (1973) (United States amicus only, no equitable defenses raised); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351 (1962) (United States not involved even as amicus, no equitable defenses raised).

The United States can plausibly argue here that it has "interests and rights" which may be affected by the outcome of this litigation, though these are never specified.[5] But as with *Beebe*, such rights and interests are subordinate to the primary claim, and are not enough to make the United States the real party in interest. In the words of *Beebe*, the government here "has nothing to gain from the relief prayed for, and nothing to lose if the relief is denied." *Beebe*, 127 U.S. at 346. The Tribe is the real party in interest, as it seeks jurisdiction over claimed reservation lands. The United States' intervention does nothing to change this fact.

The Tribe's position, that the government is immune to laches where it seeks to enforce the interest of a tribal beneficiary, fails on two counts. First, this is not a complaint seeking to reclaim money on behalf of an individual tribal beneficiary, per the case law cited by Defendant Tribe.[6] This is a complaint by an entire Tribe seeking to claim sovereign jurisdiction over land.

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[5]The United States' argument, that where it seeks to enforce its treaties it "quintessentially acts in its sovereign capacity to enforce sovereign rights" misstates the import of *Grand Travers Band of Chippewa and Ottawa Indians v. Dir., Mich. Dep't of Natural Res.*, 971 F.Supp. 282, 288 (W.D. Mich. 1995). *Grand Traverse Band* simply noted that treaty-reserved rights to access traditional fishing grounds are property rights protected by the Constitution. It did not state the United States was acting in its sovereign capacity to protect a public interest–nor would it, as the sovereign rights at issue belonged to a Tribe, not the general public.

[6]Both cases cited by the Tribe in its Motion to Strike, pp. 6-7, *Board of Comm'rs of Caddo County v. United States*, 87 F.2d 55 (10th Cir. 1936) and *Board of Comm'rs v. Jackson*, 308 U.S. 343 (1939), concern suits by the government to recover illegally collected property taxes on behalf of an Indian ward.

Second, insofar as the interest of the Tribe is a private, rather than public, interest, the rule of *Beebe* applies.[7] And *Beebe* does apply, following the recent holding in *Cayuga Indian Nation of New York v. George Pataki*, 413 F.3d 266 (2nd Cir. 2005). In *Cayuga*, the Cayuga Indian Nation of New York ("Tribe") sought damages for past dispossession from claimed tribal lands, as well as the ejectment of all current owners. The court in *Cayuga*, following the recent Supreme Court decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), permitted the defendants to raise the doctrine of laches against *both* the Tribe *and* the United States, which had intervened on the Tribe's behalf.[8] The court in *Cayuga*, following *United States v. Admin. Enterprises, Inc.*, *supra*, set forth three possibilities when laches might apply against the United States: (1) only in the most egregious instances of laches; (2) where the was no statute of limitations; and (3)

> to draw a line between government suits in which the government is seeking to enforce either on its own behalf or that of private parties what are the nature of private rights, and government suits to enforce sovereign rights, and to allow laches as a defense in the former classes of cases but not the latter. *Cayuga*, 413 F.3d at 279 (internal quotes omitted).

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[7]Additionally, the rule of *Beebe*, that the United States is subject to laches where it seeks to enforce the rights of a third party which is not otherwise in the public interest, runs counter to Defendant's assertion that "the only" exception to laches against the United States is where it acts in a business capacity. See Defendant's Brief, p. 6, fn. 11.

[8]*Sherrill*, discussed further below, permitted laches as a defense against the plaintiff Tribe on a land-based claim. The United States did not intervene in *Sherrill*, but only filed as *amicus*, so there was no issue as to laches applying against it. *Cayuga* extended *Sherrill's* logic to permit laches against both the Plaintiff Tribe and the United States where it intervened on the Tribe's behalf on a land-based claim. As an aside, the statement in Jackson quoted by the Tribe in its Motion to Strike, pp. 6-7, that state laches have no applicability to suits by the federal government, is obviated by *Sherrill* and its subsequent application to the United States in *Cayuga*, as *Sherrill* relies exclusively on *federal* equitable defenses. *See Cayuga*, 413 F.3d at 279.

The court in *Cayuga* stated that it did not have to decide which of the three possibilities governed because all three applied. Id. As to whether the Cayuga Tribe's property-based claims were private rights, the court stated:

> the United States intervened in this case to vindicate the interest of the Tribe, with whom it has a trust relationship. n8
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> n8 Our holding here thus does not disturb our statement in *United States v. Angell*, 292 F.3d 333, 338 (2nd Cir. 2002), that "laches is not available against the federal government when it undertakes to enforce a public right or protect the public interest," inasmuch as this case does not involve the enforcement of a public right or the protection of the public interest.

Likewise, the interest asserted by the Tribe here is a private interest. It is based on an exclusive claim to property-based rights. A Tribe's sovereign, jurisdictional rights are not free-floating; they must be based on real property on which the Tribe can assert an exclusive claim. The jurisdictional rights claimed by the Tribe here are but one stick in their particular bundle of property rights; these rights are not shared with the public, nor do they benefit any party but the Tribe itself. The fact that the United States has intervened on the Tribe's behalf does not change this fact, per *Beebe*. Laches may therefore apply as the United States is intervening here to assert a private interest.

B. *Sherrill* has significantly altered the legal lanscape, and *Cayuga* demonstrates its application to the United States

Sherrill significantly altered the legal landscape of Native American law by forcefully applying the equitable doctrines of laches, acquiescence and impracticability to bar disruptive relief sought by a Tribe in a land-based claim. In *Sherrill* the Oneida Indian Nation of New York ("Oneida") brought suit against the City of Sherrill, New York, to contest the collection of property taxes on certain parcels of property. The parcels were last owned

by the Oneida in 1805, when they transferred them to an individual Oneida member who sold them to a non-Indian in 1807. The lands thereafter remained in non-Indian hands until the Oneida purchased them on the open market in 1997 and 1998. The Oneida claimed that the lands had originally been transferred in violation of federal treaty and statutes, so their aboriginal title had never been extinguished. The Oneida argued that as they had now acquired fee title, both aboriginal and fee title merged into sovereign title, rendering the lands exempt from property taxes. The Oneida sought both declaratory and injunctive relief recognizing their sovereign immunity from property taxation. *Sherrill*, 544 U.S. at 211-213.

The Supreme Court rejected the Oneida's claim on equitable grounds by rejecting the *remedy* sought. The Court began by noting the fundamental difference between the existence of a right of action and its vindication. *Sherrill*, 544 U.S. at 213. That is, the Court recognized the Oneida had a federal claim for violation of their property rights, but the problem was with the specific remedy they sought–the reclamation of sovereign rights. The Court in *Sherrill* further noted (1) the lands at issue had for over two centuries been under the uncontested jurisdiction of both state and local governments, (2) the United States had largely accepted, was indifferent to, or even encouraged attempts to dislodge the Oneida from their lands, (3) the lands had greatly increased in value over time, (4) "justifiable expectations" as to the status of the land were longstanding, and (5) the Oneida did not seek to regain their sovereign rights until recently. *Sherrill*, 544 U.S. at 215-216.[9]

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[9]As an important side note, the Court stated it was not necessary to decide whether the reservation at issue had ever been disestablished by treaty, as the relief sought was the controlling factor. *Sherrill*, 544 U.S. at 216 n.9. As a further aside, Defendant vigorously disputes the Tribe's claim that "[t]he Saginaw Chippewas...never

The Court reasoned, under these circumstances, that the assertion of sovereign immunity would have far too disruptive consequences to such settled practices and expectations:

> This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude OIN from gaining the disruptive remedy it now seeks. *Sherrill*, 544 U.S. at 216-217.

In short, the Court in *Sherrill* held that "standards of federal Indian law and *federal equity practice* preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *Sherrill*, 544 U.S. at 213 (emphasis added, internal quotations omitted). By applying equitable defenses in such a manner to bar specific remedies the Supreme Court in *Sherrill* made an important distinction. Specifically, the Court did not consider the underlying basis of the Oneida's claim (which it acknowledged). Instead the Court focused on the effects of the remedy sought. The Oneida were not seeking monetary redress for past wrongs, but were seeking a *forward-looking* form of relief. And this disruptive remedy could easily multiply in the future, as the Court noted: "[i]f the OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." *Sherrill*, 544 U.S. at 220.[10]

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left their reservation, continue to exercise jurisdiction over it, and have always maintained a vital presence in it" sufficient to permit the Court here, without further discovery, and "relying only on judicially noticeable facts" to distinguish the present case from *Sherrill* and thereby strike Defendants' equitable defenses. *See* Tribe's Motion to Strike, p. 10.

[10]Both the Tribe and the United States in their Motions downplay this possibility, but it is clearly a distinct possibility, and undermines the claims that the Plaintiffs are merely seeking a declaration as to the meaning of treaties. The Tribe is seeking to

Among the equitable doctrines applied against the Oneida's claim in *Sherrill*, the Supreme Court cited laches, acquiescence and impracticability. The Supreme Court gave laches its usual formulation as a "doctrine focused on one side's inaction and the other's legitimate reliance[.]" *Sherrill*, 544 U.S. at 217. What is more interesting, however, is the Court's application of both acquiescence and impracticability–both equitable doctrines feature key conceptual aspects of laches,[11] and their invocation by the Court points to the possibility of a broader application of equitable defenses generally against Tribal claims seeking disruptive remedies.

The holding in *Sherrill* is already affecting current case law development regarding Tribal land claims. In *Cayuga Indian Nation of New York v. George Pataki*, 413 F.3d 266 (2nd Cir. 2005), the Cayuga Indian Nation of New York ("Cayuga") sought monetary damages for past dispossession of Tribal lands as well as ejectment of all current landholders in the claimed area. While the relief sought by the Cayuga differed from that sought by the Oneida in *Sherrill*,[12] the *Cayuga* court noted the import of *Sherrill* is that

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reclaim sovereign rights it has not exercised for considerable time. These rights will have disruptive consequences to settled practices and expectations embodied in both criminal and civil jurisdiction exercised by Defendants for over one hundred years. To claim otherwise is disingenuous.

[11]As regards acquiescence: "[w]hen a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations. *Sherrill*, 544 U.S. at 218. As regards impracticability: "this Court has recognized the impracticability of returning to Indian control land that generations earlier passed into numerous private hands." *Sherrill*, 544 U.S. at 219.

[12]"While the equitable remedy sought in *Sherrill*–a reinstatment of Tribal sovereignty-is not at issue here, this case involves comparably disruptive claims, and other, comparable remedies are in fact at issue." *Cayuga*, 413 F.3d at 274.

"'disruptive,' forward-looking claims, a category exemplified by possessory land claims, are subject to equitable defenses, including laches." *Cayuga*, 413 F.3d at 277.

The Court in *Cayuga* did not hold that the equitable doctrines cited in *Sherrill* could *only* apply to possessory land claims, stating they understood *Sherrill* to hold that such doctrines could be applied to "Indian land claims," of which the Cayuga's possessory claim was one type. *Cayuga*, 413 F.3d at 273, 277. *Sherrill* itself was based on a claim to sovereign rights attached to land. Likewise, the Tribe's claim here is based on a sovereign right attached to land–the right to civil and criminal jurisdiction. This sovereign right is necessarily land-based; it is meaningless without an area in which to apply it. As previously stated, jurisdictional rights are one of the sticks in the Tribe's bundle of property rights.

The general holding in *Cayuga* would be a straightforward application of *Sherrill* if it were not for the fact that the United States intervened on behalf of the *Cayuga*, and the court held that laches could also apply against the United States. As noted above, the court provided three possible scenarios in which laches could apply, including: gross laches, lack of a statute of limitations, and government suit to enforce a private right. *Cayuga*, 413 F.3d at 279. The court concluded on the facts that all three possibilities were applicable. Id. This ruling represented a new development in the law, whereby a court applied laches against both a Tribe and the United States on a Tribal land-based claim seeking disruptive remedies that "project redress for the Tribe into the present and future." *Sherrill*, 544 U.S. at 202.

The holding in *Cayuga* has notably since been recognized and applied in an ongoing Tribal land-based complaint, *Oneida Nation of New York v. State of New York*, 500 F.Supp2d 128 (2007). In *Oneida Nation* the Plaintiff Tribes asserted possessory rights to certain lands in New York, and sought a declaration to that effect, along with injunctive relief to restore possession and damages. The United States intervened on behalf of the Plaintiff Tribes. Defendants had previously attempted to raise the defense of laches, but it had been rejected.

The Defendants in *Oneida Nation* argued that the recent decision by the Supreme Court in *Sherrill*, as extended by *Cayuga*, permitted the application of laches to the Tribe's claims, and asked the court to reconsider its position. *Oneida Nation*, 500 F.Supp.2d at 132-133. The court in *Oneida Nation* acknowledged that both *Sherrill* and *Cayuga* had indeed changed the law and overruled previous standards that laches could not apply to Indian land claim actions. *Id.*, at 133. The *Oneida Nation* court turned to the criteria set forth in *Cayuga* to determine whether laches would be appropriate to the possessory land-based claims set forth by Plaintiffs, and held it would. *Id.*, at 134. The court then dismissed Plaintiffs' possessory land claims on the evidence before it; this dismissal was effective as to both the Tribes and the United States. *Id.*, at 146.

The *Oneida Nation* court noted that the holdings of *Sherrill* and *Cayuga* applied directly to disruptive, forward-looking possessory claims and remedies. *Oneida Nation*, 500 F.Supp.2d at 138. As stated previously, however, neither *Sherrill* nor *Cayuga* ever specifically limited the application of laches to "possessory" land-based claims. Indeed, in *Sherrill* the Tribe's claim was not for possessory rights (which were never at issue, as

they had purchased fee title on the open market) but for sovereign rights. *Cayuga* thereafter recognized the broad scope implicit in *Sherrill* when it noted that *Sherrill* applied to "Indian land claims" of which a possessory claim was an exemplary type. *Cayuga*, 413 F.3d at 273, 277. What unites *Sherrill*, *Cayuga*, and *Oneida Nation* are Tribal property claims with attendant disruptive remedies. *Cayuga* and *Oneida Nation* show one branch of this development from *Sherrill*, where Tribes seek disruptive possessory rights and remedies. *Sherrill* itself, however, is broader in effect, and can (and did) apply to disruptive, forward-looking sovereign claims to land. Sovereign rights, such as the jurisdictional rights claimed by the Tribe here, are broader than mere rights to possession, but they are still necessarily tied to land. *Sherrill* and its progeny therefore stand for the general proposition that *any* disruptive, forward-looking, land-based Tribal claims may be barred by equitable doctrines such as laches. And now, post-*Sherrill*, these equitable doctrines have been applied both against Tribes and against the United States where it has intervened on a Tribe's behalf.

C. *Sherrill* and its Progeny Do Not Limit Equitable Defenses Available to Defendants to Laches Alone, and Open the Door to Equitable Defenses in General, Which Require Factual Development to Determine Their Proper Application.

It should be emphasized that *Sherrill* opened the door to the application of all manner of equitable defenses in Tribal land-based claims. The Supreme Court relied on laches, acquiescence and impossibility in its holding, but did not affirmatively state that these would necessarily be the only equitable defenses available where a disruptive, forward-looking Tribal land claim was involved. The Court in *Sherrill* specifically held that "standards of federal Indian law and *federal equity practice* preclude the Tribe from

rekindling embers of sovereignty that long ago grew cold." *Sherrill*, 544 U.S. at 213 (emphasis added, internal quotes omitted). The court in *Cayuga* affirmed *Sherrill's* broad scope regarding equitable defenses when it stated the import of *Sherrill* is that "'disruptive,' forward-looking claims, a category exemplified by possessory land claims, are subject to equitable defenses, including laches." *Cayuga*, 413 F.3d at 277.

Whether any other equitable defenses are appropriate in this case is a matter of factual development. As a legal issue, equitable defenses are clearly available against both a Tribe and the United States in land-based claims that seek disruptive, forward-looking remedies. Much of Plaintiffs' Motions are based on factual argument as to why a particular equitable remedy should not apply in this case. But that is not the issue before the Court. The issue is whether such defenses may apply at all against Tribes or the United States acting on behalf of a Tribe. Clearly they may. But sufficient factual development will be necessary to determine whether they are actually appropriate here. On this basis alone the Court should deny Plaintiffs' Motions so that factual development may enable the Court to determine whether there is sufficient basis for Defendants' equitable defenses.

D. There are factual issues which preclude the relief requested.

The City of Mt. Pleasant disputes the factual allegations set forth in the Tribe's and U.S. Government's motions and assets that the City has exercised its jurisdiction within the City limits over Tribal members.

The City makes an initial offer of proof as to the chart attached as Exhibit A, which reflects a search of the City's arrest records (on lands which are part of this suit - north of

High St. In the City) from 1950-1980 where police report reflected that the person arrested was Indian. These records reveal that the City and not the Tribe asserted jurisdiction over the land within the City for the time frame indicated. An examination of additional records will support the City's assertion that it has exercised jurisdiction over Tribal members. However, additional factual development through lay witnesses will still be necessary.

WHEREFORE, for the reason set forth herein, the City of Mt. Pleasant requests that this Court deny the U.S. Government's Motion In Limine and for Partial Summary Judgment.

Date: April 28, 2008

Respectfully submitted,

LYNCH, GALLAGHER, LYNCH,
MARTINEAU & HACKETT, P.L.L.C.

/s/ Mary Ann J. O'Neil
John J. Lynch (P16886)
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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2008, I electronically filed **THE CITY OF MT. PLEASANT'S RESPONSE TO UNITED STATES' MOTION IN LIMINE TO STRIKE DEFENDANTS' WITNESSES RELATING TO EQUITABLE DEFENSES AND RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT** with the Clerk of the Court using the ECF system, which will send notification of such filing to the following: William A. Szotkowski, 1360 Energy Park Drive, Suite 210, St. Paul, MN 55108-5252; Patricia Miller, L'Enfant Plaza Station, P.O. Box 44378, Washington, DC 20026-4378; Larry Burdick, 200 N. Main Street, Mt. Pleasant, MI 48858; and Todd B. Adams, 525 W. Ottawa St., Fl. 6, P.O. Box 30755, Lansing, MI 48909.

Date: April 28, 2008

Respectfully submitted,

LYNCH, GALLAGHER, LYNCH, MARTINEAU & HACKETT, P.L.L.C.

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