UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SAGINAW CHIPPEWA INDIAN TRIBE

Plaintiff,

and

THE UNITED STATE OF AMERICA

Intervenor-Plaintiff

v.

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

Defendant,

and

THE COUNTY OF ISABELLA and THE CITY OF MT. PLEASANT

Intervenor-Defendants.
_____/

Case No. 05-10296-BC
Honorable Thomas L. Ludington

ISABELLA COUNTY'S COMBINED RESPONSE TO THE UNITED STATES AND THESAGINAW CHIPPEWA INDIAN TRIBE'S MOTIONS TO STRIKE AND THE UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

CONCISE STATEMENT OF ISSUES PRESENTED

Testimony from the Defendants' lay witnesses is not only relevant and admissible to provide evidence regarding the longstanding exercise of jurisdiction by the state and local units of government in the contested areas of land, but also necessary to provide evidence regarding the disruptive effect the Plaintiffs' requested relief would have on private land owners and occupants in the contested areas of land. Disruptive possessory land claims are subject to equitable doctrines, specifically laches, and in certain situations, laches is available against the government.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Anderson v Liberty Lobby, Inc., 477 U.S. 242 (1986)

Cayuga Indian Nation of New York v Pataki, 413 F.3d 266 (2d Cir. 2005), *cert denied*, 126 S.Ct. 2021, 2022, 164 L. Ed. 2d 780 (2006)

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

Clearfield Trust Co. v United States, 318 U.S. 363 (2006)

Elvis Presley Enters., Inc. v Elvisly Yours, Inc., 936 F.2d 889 (6th Cir. 1991)

Gardner v Panama R.R.Co., 342 U.S. 29 (1951)

Hatchett v United States, 330 F.3d 875 (6th Cir. 2003)

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

Herman Miller, Inc., v Palazzatti Import and Exports, Inc., 270 F.3d 298 (6th Cir. 2001)

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

Matsushita Elec. Indus. Co. v Zenith Radio Corp., 475 U.S. 574 (1986)

New York v Shinnecock Indian Nation, 400 F.Supp. 2d 486 (E.D.N.Y. 2005)

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

Stevens v Tennessee Valley Auth., 712 F.2d 1047 (6th Cir. 1983)

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

Fed. R. Civ. P. 12(f)

Fed R. Civ. P. 56(c)

INTRODUCTION

Through their respective motions, the United States and the Saginaw Chippewa Indian Tribe ("Tribe") seek to have barred the testimony of the Defendants' lay witnesses relating to the equitable defenses of laches, estoppel, and impossibility, and those equitable defenses barred altogether, arguing that such equitable defenses and lay testimony is not relevant or admissible as a matter of law. However, testimony from the Defendants' lay witnesses is not only relevant and admissible to provide evidence regarding the longstanding exercise of jurisdiction by the state and local units of government in the contested areas of land, but also necessary to provide evidence regarding the disruptive effect the Plaintiffs' requested relief would have on private land owners and occupants in the contested areas of land.

The Supreme Court recently held in *City of Sherrill v Oneida Indian Nation*, 544 U.S. 197 (2005), that equitable doctrines, such as laches, acquiescence, and impossibility, can, in appropriate circumstances, be applied to Indian land claims. The Court in *Sherrill* held that the defenses of laches bars remedies in ancient possessory claims that are disruptive in nature, *i.e.* remedies that "project redress for the Tribe into the present and future." *Id.* at 202. Following the *Sherrill* decision, the Second Circuit in *Cayuga Indian Nation of New York v Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2021, 2022, 164 L. Ed. 2d 780 (2006), held that disruptive possessory land claims are subject to equitable doctrines, specifically laches, and that in certain situations, laches is available against the government. *Id*. at 278. The Court in *Cayuga* held that "*Sherrill's* holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking revival of sovereignty, but rather, that these equitable defenses apply to 'disruptive' Indian land claims more generally." *Id*. at 274.

The Court in *Sherrill* gave several factors to be considered when determining if equitable doctrines apply to Indian land claims, including the following: "generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation," *Sherrill* at 202; "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 221; "the [Tribe's] long delay in seeking equitable relief against New York or its local units," *id*.; and "developments in [the area] spanning several generations." *Id.*

In the case at hand, the Defendants' lay witnesses will provide evidence regarding the distinctly non-Indian character of the area and its inhabitants; evidence regarding the longstanding exercise of jurisdiction by the state and local units of government in the contested area; and testimony regarding the urban character of portions of the contested area and the disruptiveness that would result if the state and local units of government were disallowed from exercising jurisdiction in the area. In addition to a declaratory judgment, the Tribe seeks injunctive relief prohibiting the Defendants from taking any action against "the Tribe or Tribal members" within the contested land area. The United States argues that the Tribe does not seek remedies related to the Tribe's jurisdiction over non Indians within the contested land area. However, currently there are local zoning laws and other regulatory controls that protect *all* landowners and residents in the contested area. If the injunctive relief requested by the Tribe is granted - - that the State could not take action against, or regulate the actions of, tribal members in the contested land area - - the "justifiable expectations" of non Indian residents in the area would be seriously disrupted. *See Sherrill* at 215.

I. STANDARD FOR GRANTING MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is proper if the non-moving party has failed to raise a genuine issue of material fact as to any element of the claim, and the moving party is thereby entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The facts must be construed most favorably to the non-moving party. *Matsushita Elec. Indus. Co. v Zenith Radio Corp*., 475 U.S. 574, 586 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v Liberty Lobby, Inc*., 477 U.S. 242, 251-52 (1986).

II. STANDARD FOR GRANTING MOTIONS TO STRIKE

Fed. R. Civ. P. 12(f) provides that upon the motion of a party, or upon the court's own initiative, "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike affirmative defenses under Rule 12(f) are addressed to the court's discretion, although they are generally disfavored. *Ameriwood Industries International Corp. v Arthur*, 961 F.Supp. 1078, 1083 (W.D. Mich. 1997). Such motions are to be considered carefully and not freely granted; striking an affirmative defense "is a drastic remedy to be resorted to only when required for the purposes of justice." *Brown & Williamson Tobacco Corp. v United States*, 201 F.2d 819, 822 (6th Cir.1953); *Kelley v Thomas Solvent Co.*, 714 F. Supp 1439, 1442 (W.D.Mich. 1989). Thus, such a motion should only be granted "when the pleading to be stricken has no possible relation to the controversy." *Brown* at 822.

III. GENERAL STANDARDS FOR LACHES

The existence of laches is a question primarily addressed to the discretion of the trial court which must consider the equities of the parties. *Gardner v Panama R.R. Co.*, 342 U.S. 29, 30-31(1951) (per curiam). In this circuit, laches is understood to be "a negligent and unintentional failure to protect one's rights." *Elvis Presley Enters., Inc. v Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991). "A party asserting laches must show: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it." *Herman Miller, Inc. v Palazzatti Import and Exports, Inc.*, 270 F.3d 298, 320 (6th Cir. 2001). Thus:

> [L]aches does not result from a mere lapse of time but from the fact that, during the lapse of time, changed circumstances inequitably work to the disadvantage or prejudice of another if the claim is now to be enforced. By his negligent delay, the plaintiff may have misled the defendant or others into acting on the assumption that the plaintiff has abandoned his claim, or that he acquiesces in the situation, or changed circumstances may make it more difficult to defend against the claim.

11A Charles Alan Wright, Arthur R. Miller, & May Kay Kane, *Federal Practice and Procedure* Sec. 2946 at 117 (2d ed. 1995)(quoting de Funiak, *Handbook of Modern Equity* § 24 at 41 (2d ed.1956)).

When considering laches, the court should look at "the length of the delay, the reasons therefor, how the delay affected the defendant, and the overall fairness of permitting the assertion of the claim" in determining whether laches acts to bar an action. *Stevens v Tennessee Valley Auth.,* 712 F.2d 1047, 1056 (6th Cir. 1983). The government generally is exempt from a laches defense so that the broader public interests protected by the government are not undermined by the deficient conduct of individual employees. *Hatchett v United States*, 330 F.3d 875, 887 (6th Cir. 2003). However, as discussed below in section "VI," although the United States has not traditionally been subject to the defense of laches, the Second Circuit in *Cayuga Indian Nation of New York v Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2021, 2022, 164 L. Ed.

2d 780 (2006) nevertheless held that the defense of laches should be invoked in tribal law suits such as these.

IV. IT WOULD BE IMPROPER TO STRIKE LACHES DEFENSE AT THIS JUNCTURE

The Seventh Circuit has held that laches is a factual question which generally is not subject to resolution at the summary judgment stage let alone at the pleadings stage. See *Jeffries v Chicago Transit Authority*, 770 F.2d 676, 679 (7th Cir. 1985), *cert. denied*, 475 U.S. 1050, 106 S.Ct. 1273, 89 L.Ed.2d 581 (1986). The issue of laches raises significant questions of fact that cannot be resolved on a motion to dismiss. *See e.g. New York v Shinnecock Indian Nation*, 400 F.Supp.2d 486, 496 (E.D.N.Y. 2005) (recognizing that the question of whether a particular set of facts presents a "disruptive" claim barred by *Sherrill* involves "factual and legal determinations which may only be resolved at trial."). In the case at hand, several questions have not yet been answered, such as why has the Tribe waited this long? Has their delay been unreasonable? Have the Defendants been materially prejudiced by any unreasonably or inexcusable delay? These are factual questions that have not yet been answered and thus summary judgment dismissal of the Defendants' equitable defenses is not appropriate.

V. SHERRILL DID DRAMATICALLY ALTER THE LANDSCAPE OF INDIAN LAND CLAIMS

In *City of Sherrill v Oneida Indian Nation of New York*, 544 U.S. 197 (2005), the Supreme Court rejected the Oneida's claim of sovereign immunity from local real property taxes on former tribal lands that the Oneidas had recently acquired in the open market. The Court held that the equitable doctrines of laches, acquiescence, and impossibility barred the long-delayed

assertion of sovereignty. *Id*. at 202-03, 221. The *Sherrill* Court relied on a host of equitable considerations to reject the Oneida's attempt to assert sovereignty over newly acquired land in its historic land claim area. Those considerations included "generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation," *Id.* at 202; "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 221; "the [Tribe's] long delay in seeking equitable relief against New York or its local units," *id*.; and "developments in [the area] spanning several generations." *Id.*

The Plaintiffs argue that *Sherrill* was decided on a unique set of facts, which is true, as is true of all Indian land claims cases. However, the Court in *Sherrill* gave several factors to consider in such cases in determining whether equitable doctrines apply. One of the factors that the Court in *Sherrill* considered was that most of the Oneidas had resided elsewhere since the mid 19th century. The Court found that the contested area was overwhelmingly populated by non Indians. *Id*. at 219. The Court further stated:

> A checkerboard of alternating state and tribal jurisdiction in New York State -- created at OIN's behest -- would seriously burden the administration of state and local governments and would adversely affect landowners neighboring the tribal patches. If 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* at 219-220.

In the case at hand, according to the 2006 census, American Indian and Alaska Native

persons represent only 3 % of Isabella County's population.[1] According to the State of Michigan's listed witness, Kenneth Darga, the population of American Indians in the contested land area is significantly lower than 3%. *See* State of Michigan's Supplemental Witness List, February 29, 2008. Clearly, in the instant case, the contested land area is "overwhelmingly populated by non Indians."

Another *Sherrill* factor is "the developments in [the area] spanning several generations. *Sherrill* at 221." In the instant case, the most significant urban development has occurred within the City of Mt. Pleasant whose northern half falls within the northern portion of Union Township. The City of Mt. Pleasant was incorporated over 100 years ago. The portion of the City of Mt. Pleasant that falls within Union Township consists of residential neighborhoods, businesses, and streets which are subdivided into blocks and lots. All the townships in question, including the portion of the City that lies within Union Township borders, are subject to state and local zoning laws and regulations regarding land use - - which apply to all landowners equally. A determination by this Court that the disputed townships are "Indian country" and thus tribal members located within the area are not subject to the State's jurisdiction, would result in a situation that would significantly disrupt the uniform application of zoning and other land use regulations, and would seriously disrupt the justifiable expectations of non Indian landowners.

Another *Sherrill* factor is the "distance between 1805 to the present day," and the Tribe's long delay in seeking relief. In *Sherrill*, the Court found that from the early 1800's into the 1970's, the United States accepted, or was indifferent to, New York's governance of the lands in

---

[1]U.S. Dept. of Commerce, Census Bureau 2006, Isabella County QuickFacts, available at **http://quickfacts.census.gov/qfd/states/26/26073.html.**

question. *Id*. at 214. The Court found it notable that "it was not until lately that the Oneidas sought to regain ancient sovereignty over land converted from wilderness to become part of cities like *Sherrill*." *Id*. (citations omitted).

In the instant case, it was not until 1991 that the United States first sought injunctive and declaratory relief on behalf of the Tribe, asserting that the land in question was exempt from state property taxes. *United States on behalf of Saginaw Chippewa Indian Tribe v Michigan*, 882 F.Supp. 659 (E.D. Mich 1995). In that case, the United States sought declaratory relief as to all tribally-owned property and property owned by individual tribal members located within the area which the United States claimed as the Tribe's reservation under the Treaties of 1855 and 1864. In 1992, the Tribe intervened and adopted and asserted each of the tax exemption claims pleaded by the United States, but additionally sought a declaratory ruling as to the jurisdictional boundaries of the Isabella Reservation. The Tribe requested the Court to declare that the Reservation included all of the lands within the townships described in the two treaties. In 1997, the Sixth Circuit held that the land in question was exempt from state property taxes, but declined to address the boundary issue. *United States on behalf of the Saginaw Chippewa Indian Tribe v State of Michigan, et al.*, 106 Fed. 3rd 130, 135 (6th Cir. 1997).

Furthermore, it was not until 1992 that the State's authority to exercise criminal jurisdiction over tribal members in the disputed land area was challenged in the case of *People v Bennett,* 195 Mich App 455 (1992). In *Bennett*, the defendant, who was a Saginaw Chippewa tribal member, was arrested in Chippewa Township, Isabella County for driving under the influence of liquor, third offense and prosecuted in state court. The defendant moved in circuit court to quash the information on grounds that the state court lacked jurisdiction over him

because he had been arrested within the boundaries of the Isabella Indian reservation. The Court of Appeals considered whether the defendant's offense occurred in "Indian country," and concluded that it did not. The area in which the defendant was arrested had been patented to non Indians in July 1857 pursuant to cash purchases made in 1854. The Court of Appeals reviewed the two treaties in question and concluded that the "parties intended for the previously sold lands to be excluded from the reservation, because the Chippewas were granted all the 'unsold' lands within the six townships." *Id*. at 458.

The holding of the *Bennett* case went unchallenged until 2005, when another Saginaw Chippewa tribal member challenged the state's authority to prosecute him within the "exterior boundaries of the Isabella Indian Reservation" as determined by the treaties in question. *Moses v Department of Corrections*, 274 Mich App 481 (2007). In *Moses*, the defendant committed a criminal sexual conduct offense in Nottawa Township, Isabella County, on lands that had been patented to the State of Michigan by the United States pursuant to a swampland patent. The Court of Appeals concluded that the State had jurisdiction to prosecute the defendant because the area in which he committed his offense had been patented to the State of Michigan before the treaties of 1855 and 1864.

The state has exercised its criminal jurisdiction over this area for over a hundred years. The exercise of state criminal jurisdiction in the townships in question went unchallenged until 1992 (*Bennett*), and then not again until 2005 (*Moses*). The County of Isabella has hundreds of records of unchallenged state prosecutions over tribal defendants for crimes which took place in the townships in question throughout the 1960's, 1970's, 1980's, 1990's, and 2000's. Exhibit A is a mere sampling of such prosecutions and the resulting convictions, the entire set too voluminous

to attach at this juncture. Exhibit B is another sampling of Native American individuals prosecuted in the 1990's and 2000's in state court for offenses that took placed in the challenged townships.

Following *Sherrill*, in *Cayuga Indian Nation of New York v Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 126 S.Ct. 2021, 2022 (2006), the Second Circuit held that *Sherrill* "has dramatically altered the legal landscape" for Indian land claims. *Id*. at 273. The *Cayuga* Court held that "*Sherrill's* holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking a revival of sovereignty, but rather . . . these equitable defenses apply to 'disruptive' Indian land claims more generally." *Cayuga*, 413 F.3d at 274. Based on "the same considerations that doomed the Oneidas' claim in *Sherrill*," the *Cayuga* Court dismissed the Cayugas' and the United States' land claims seeking both possession and monetary relief stemming from ancient Cayuga conveyance to the State of New York. *Id*. at 277. These considerations, including the longstanding non-Indian character of the area and its inhabitants, the impossibility of returning to Indian control land that passed into numerous private hands generations earlier, and the tribes' inordinate delay in seeking relief against New York, establish that a damages judgment, premised as it must be on a continuing right of possession, would, as in *Sherrill*, "seriously disrupt the justifiable expectations of the people living in the area." *See Sherrill*, 544 U.S. 197 at 215 (quoting *Hagen v Utah*, 510 U.S. 399, 421 (1994)).

VI. THE UNITED STATES IS SUBJECT TO LACHES

Although the United States has traditionally not been subject to the defense of laches, "this does not seem to be a *per se* rule." *Cayuga Indian Nation of New York v Pataki*, 413 F.3d 266, 278 (2d Cir. 2005), *cert. denied*, 126 S.Ct. 2021, 2022 (2006), citing *Clearfield Trust Co. v*

United States, 318 U.S. 363, 369 (1943) (holding that laches is a defense to the United States in its capacity as hold of commercial paper). There is strong support for the notion that the United States is subject to laches: three United States Supreme Court decisions, all of which were relied upon by Judge Posner of the Seventh Circuit. The Court in *Cayuga* stated:

> Judge Posner has aptly noted that "the availability of laches in at least some government suits is supported by Supreme Court decisions, notably *Occidental Life Ins. Co. v EEOC*, 432 U.S. 355, 373, 97 S.Ct. 2447, 53 L.Ed 2d 402 (1977); *Heckler v Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60-61, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984); and *Irwin v Department of Veterans Affairs*, 498 U.S. 89, 95-96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990), that refuse to shut the door completely to the invocation of laches or estoppel (similar doctrines) in government suits." *United States v Administrative Enterprises, Inc.*, 46 F.3d 670, 672-73 (7th Cir. 1995). Indeed, the Seventh Circuit has made clear that, in appropriate circumstances, laches can apply to suits by the federal government. *See NLRB v P*I*E Nationwide, Inc.*, 894 F.2d 887, 894 (7th Cir. 1990) ("Following dictum in *Occidental Life* and the general principle noted earlier that government suits in equity are subject to the principles of equity, laches is generally and we think correctly assumed to be applicable to suits by government agencies as well as by private parties.") (internal citations omitted). *Cayuga* at 278.

The Court in *Cayuga* found three main possibilities for when laches may apply against the United States: first, "that only the most egregious instances of laches can be used to abate a government suit"; second, "to confine the doctrine to suits against the government in which ... there is no statute of limitations"; and third, "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 in the nature of private rights, and government suits to enforce sovereign rights, and to allow laches as a defense in the former class of cases but not the latter." *Administrative Enterprises*, 46 F.3d at 673 (internal citations omitted). *Id.* The *Cayuga* Court found that its case fell within all three circumstances. *Id*. "First, given the relative youth of this country, a suit based on events that occurred two hundred years ago is about as egregious an instance of laches on the part of the

United States as can be imagined; second, though there is not a statute of limitations, *see* 28 U.S.C. Sec. 2415(a), there was none until 1966 - - *i.e.*, until one hundred and fifty years after the cause of action accrued; and third, the United States intervened in this case to vindicate the interest of the Tribe, with whom it has a trust relationship. Accordingly, we conclude that whatever the precise contours of the exception to the rule against subjecting the United States to a laches defense, this case falls within the heartland of the exception." *Id*. at 279

In the case at hand, the Plaintiffs have waited over a hundred years before pursuing this action. The *Cayuga* Court held in its case that a delay of one hundred and fifty years "is about as egregious an instance of laches on the part of the United States as can be imagined." *Cayuga* at 279. Secondly, in the instant case, there is no statute of limitations. And third, in the instant case, it can only be said that the United States is seeking to enforce either on its own behalf or that of private parties what are in the nature of private rights. The United States claims that they intervened to enforce its sovereign rights pursuant to the treaties in question, and, therefore, laches does not apply. However, it is apparent that the United States' intervention is best understood as protecting a private and not a public right. In circumstances such as these - - where the United States acts based on its fiduciary relationship with a tribe - - to the extent laches is a bar to the tribes' possessory claim, it also bars the United States' identical claim. *Cf. Thompson v County of Franklin*, 15 F.3d 245, 252 (2d Cir. 1994) ("invalidation of land treaties under the [NIA] involves the vindication of rights that are exclusively tribal in nature."). The *Cayuga* Court specifically noted that its holding did not disturb its statement in *United States v Angell*, 292 F.3d 333, 338 (2d Cir. 2002), that "laches is not available against the federal government when it undertakes to enforce a public right or protect the public interest," *Cayuga* at

278, fn. 8. The Court reasoned that "this case does not involve the enforcement of a public right or the protection of the public interest." *Id.* In addition, the *Cayuga* Court acknowledged that an action by the United States can be precluded by laches, even when the United States is acting in its sovereign capacity. *Occidental Life Ins. Co v EEOC*, 432 U.S. 355, 373 (1977) ("inordinate EEOC delay" in bringing Title VII enforcement action may preclude relief).

VII. THIS CASE INVOLVES A POSSESSORY LAND CLAIM

The United States argues that this suit does not involve a claim for Indian lands unlawfully dispossessed and that neither the United States nor the Tribe allege that the Defendants unlawfully possess Indian lands. In addition to seeking a declaratory judgment, the Tribe seeks an injunction prohibiting the Defendants from taking any action against the "Tribe or Tribal members" within what the Tribe considers the "historic Isabella Reservation" in a manner inconsistent with the Reservation's status as "Indian country." However, the Tribe's request for injunctive relief against the Defendants is a possessory claim, in that their requested relief seeks to require "State officials to recognize the history Isabella Reservation as Indian country under federal law, and prohibiting such officials from enforcing Michigan state law against the Tribe and its members within the historic Isabella Reservation in violation of the Constitution and laws of the United States.[2] The Tribe seeks "to be free from unlawful state and local government regulation, and to protect the civil rights of its enrolled members to be governed by their elected government free from unlawful interference . . . and regulation by state or local governments."[3]

---

[2]See Saginaw Chippewa Indian Tribe's Complaint, Sec. I., "Nature of the Complaint"

[3]See Saginaw Chippewa Indian Tribe's Complaint, Sec. II, "Jurisdiction"

Further, the Tribe pleaded in its Complaint, that there is "no adequate remedy at law because the damages caused by Defendants' actions cannot readily be measured by monetary relief . . . there is no monetary relief available."[4] Thus, the Tribe's request for injunctive relief is, in essence, a possessory claim in that any relief would flow directly from a finding that the Defendants are prohibited (i.e. "ejected") from enforcing state laws within the alleged "historic Isabella reservation."

VIII. DISCOVERY SHOULD NOT BE STRICTLY LIMITED

The Tribe argues that the Defendants' lay witness evidence should be "strictly limited" because this testimony would be regarding the "effects" and "potential impact" of a ruling. However, this is exactly the kind of evidence that the *Sherrill* and *Cayuga* Courts relied upon in their rulings that equitable defenses can apply against the government in disruptive possessory land claims. The factors considered by the *Sherrill* and *Cayuga* Courts included the longstanding non-Indian character of the area and its inhabitants, the impossibility of returning to Indian control land that passed into numerous private hands generations earlier, the tribes' inordinate delay in seeking relief, and the serious disruption of the justifiable expectations of the people living in the area that would result. The Defendants' lay witnesses would provide testimony regarding the above-mentioned factors in support of the Defendants' asserted equitable defenses.

The Plaintiffs also argue that the equitable defenses of impossibility and acquiescence do not apply in this suit. However, in *Sherrill*, the Court defined acquiescence in the context of Indian land claims as "[w]hen a party belatedly asserts a right to present and future sovereign

[4]See Saginaw Chippewa Indian Tribe's Complaint, Sec. VI, "Historical Facts", para. 45.

control over territory, longstanding observances and settled expectations are prime considerations." *Sherrill* at 218. The *Sherrill* Court also held that the impossibility doctrine was available, finding that ". . . the unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences . . . to initiate the impossibility doctrine." *Id*. at 219. "If 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." *Id*. at 220 (citations omitted).

CONCLUSION

For the reasons stated above, equitable defenses can, and should, bar the United States under the circumstances in this case. The equitable defenses and the Defendants' lay witnesses should not be stricken or limited in any way. The United States' motion for partial summary judgment to dismiss the equitable defenses should be denied, as well as the Tribe's motion to strike the equitable defenses and motion to limit discovery.

Date: May 28, 2008

s/Larry J. Burdick (P31930)

Prosecuting Attorney for Isabella County
200 N. Main St.
Mt. Pleasant, MI 48858
Telephone: (989) 772-0911 ext. 311
lburdick@isabellacounty.org

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2008, I electronically filed Isabella County's Combined Response to the United States and the Saginaw Chippewa Indian Tribe's Motions to Strike and the United States 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: Sean J. Reed, 7070 E. Broadway Rd., Mt. Pleasant, MI 48858; 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; and Todd Adams, 525 W. Ottawa St., Fl. 6, P.O. Box 30755, Lansing, MI 48909.

Date: May 28, 2008

s/Larry J. Burdick (P31930)
Prosecuting Attorney for Isabella County
200 N. Main St.
Mt. Pleasant, MI 48858
Telephone: (989) 772-0911 ext. 311
lburdick@isabellacounty.org