UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

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

Plaintiff,

and

THE UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v

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

CITY OF MT. PLEASANT and COUNTY OF ISABELLA,

Defendant-Intervenors.
_____/

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

State Defendants' Response to Plaintiff Saginaw Chippewa Indian Tribe's Motion to Strike Defenses or Limit Discovery

Concise Statement of Issues Presented

1. A Fed R Civ P 12(f) motion to strike is a "drastic remedy" that should be applied when, as a matter of law, the defense cannot succeed under any circumstances. State Defendants have pled defenses that can succeed. Should the Saginaw Chippewa Indian Tribe's motion to strike be denied?

2. The United States Supreme Court has recently ruled that states and other defendants can assert laches, impossibility, and acquiescence as equitable defenses against disruptive, forward-looking American Indian land claims. State Defendants asserted laches as an equitable defense to the Tribe's land disruptive, forward-looking land claims. Should this equitable defense be allowed?

3. At least three Circuits, including the Sixth Circuit, have held that laches can apply to the United States when the United States stands in the shoes of a private party and under other exceptions. The United States is standing in the shoes of a private party and also meets the other exceptions. Can laches apply to the United States?

4. The impossibility defense may bar the United States from pursuing a claim. State Defendants have pled an impossibility defense. Should the State Defendants' impossibility defense be struck?

Controlling or Most Appropriate Authority for the Relief Sought

1. **Standards on Fed R Civ P 12(f).**

Brown & Williamson Tobacco Corp v United States, 201 F2d 819 (CA 6, 1953).

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

2. **Whether this case is a forward-looking, disruptive land claim that laches can apply to.**

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

Cayuga Indian Nation of New York v Pataki, 413 F3d 266 (CA 2, 2005), *cert den*, 547 US 1128 (2006).

New York v Shinnecock Indian Nation, 400 F Supp 2d 486 (ED NY 2005).

3. **Whether laches can apply to the United States.**

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

United States v Mandycz, 447 F3d 951 (CA 6, 2006), *cert den* 127 S Ct 414 (US 2006).

Cayuga Indian Nation of New York v Pataki, 413 F3d 266 (CA 2, 2005), *cert den*, 547 US 1128 (2006).

4. **Whether impossibility applies.**

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

Yankton Sioux Tribe v United States, 272 US 351 (1926).

INTRODUCTION

In *City of Sherrill v Oneida Indian Nation of New York*,[1] the United States Supreme Court held that the defenses of laches, impossibility, and acquiescence are available to states in lawsuits by American Indian tribes. Subsequent cases have applied this decision broadly to preclude American Indian land and other claims. These cases are similar to this one. Jennifer Granholm's, Mike Cox's, and Jay B. Rising's (State Defendants') equitable defenses should not be struck.

The Saginaw Chippewa Indian Tribe (Tribe) also seeks to limit the number of witnesses presented by State Defendants despite the Tribe adding 12 new witnesses on March 17, 2008, including a proposed new expert.[2] State Defendants' witnesses are necessary to make out the defenses of laches and impossibility because of the forward and backward looking nature of the Tribe's claims after *Sherrill*.

STATEMENT OF FACTS

The Tribe seeks a declaratory judgment "declaring that the six township historic Isabella Reservation, as established by Executive Order and Treaty in 1855 and affirmed by Treaty in 1864, exists today as an Indian reservation and is Indian country pursuant to federal law."[3] The Tribe also seeks an injunction

> permanently enjoining Defendants, their officers, agents, servants, employees and attorneys, and anyone acting in concert with them: 1) from asserting criminal jurisdiction over the Tribe or Tribal members within the historic Isabella Reservation in a manner that federal law would not allow in Indian country; 2) from asserting civil regulatory jurisdiction over the Tribe or Tribal members within the historic Isabella Reservation in a manner that federal law would not allow in Indian country; and 3) from taking any actions within the historic

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[1] *City of Sherrill v Oneida Indian Nation of New York*, 544 US 197 (2005).
[2] Saginaw Chippewa Supplemental Witness List (March 17, 2008).
[3] Saginaw Chippewa Indian Tribe, Amended Complaint, Prayer for Relief, p 11.

Isabella Reservation that would interfere with the rights of the Tribe and its members under federal law relating to Indian country.[4]

The State Defendants pled the affirmative defenses of laches and impossibility.[5]

ARGUMENT

I. A Fed R Civ P 12(f) motion to strike is a "drastic remedy" that should be applied when, as a matter of law, the defense cannot succeed under any circumstances. State Defendants have pled defenses that can succeed. Therefore, the Tribe's motion to strike should be denied.

Federal Rule of Civil Procedure 12(f) states that upon the motion of a party, "the court may order stricken from any pleading any insufficient defense."[6] The court has discretion in ruling on a motion to strike, but it is a "drastic remedy" that should be "sparingly used."[7] An affirmative defense should be struck "if, as a matter of law, the defense cannot succeed under any circumstances."[8] "The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy."[9]

"A motion to strike admits the well-pleaded allegations of the pleading asked to be stricken."[10] The Tribe tries to avoid this rule by asserting that the Court can take judicial notice of certain facts. For example, the Tribe asserts that "the Tribe's reservation was established and confirmed by treaties in 1855 and 1864."[11] Defendants have disputed this since the beginning of this case and its two historical experts support that no reservation was established and confirmed

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[4] Tribe, Amended Complaint, pp 11-12.
[5] The Tribe concedes this in its response to State Defendants' motion for leave to amend its answer to the Tribe's amended complaint.
[6] Fed R Civ P 12(f).
[7] *Brown & Williamson Tobacco Corp v United States*, 201 F2d 819, 822 (CA 6, 1953).
[8] *Smith v Blue Ribbon Transp*, 2007 US Dist LEXIS 19200 (WD Mich, March 19, 2007) (internal quotation marks omitted) *quoting, Ameriwood Indus. Int'l Corp v Arthur Anderson & Co*, 961 F Supp 1078, 1083 (WD Mich, 1997) (attachment 1); *United States v Am Elec Power Serv Corp*, 218 F Supp 2d 931, 936 (D Ohio, 2002).
[9] *Brown & Williamson*, 201 F2d, at p 822.
[10] *Brown & Williamson*, 201 F2d, at p 821.
[11] Tribe, Memorandum in Support of Tribe's Motion to Strike and Limit Discovery, p 11.

by treaties in 1855 and 1864.[12] The Tribe also asserts the Tribe never left its reservation, but the State Defendants have asserted that the Tribe ceased to exist as a Tribe.[13] The rest of the facts the Tribe wants the Court to take judicial notice of are events after 1979,[14] are not probative of what happened before, and are not the full story of what is happening on the alleged "historic Isabella reservation." That's why fact witnesses are needed.[15]

A noted treatise states that "a motion to strike for insufficiency was never intended to furnish an opportunity for determination of disputed and substantial questions of law; these questions quite properly are viewed as determinable only after discovery and a hearing on the merits."[16] This avoids the danger of advisory opinions. It avoids a second danger. "Close or new questions of law should not be resolved on a motion to strike which is ordinarily not appealable and which, if appealed pursuant to 38 USC § 1292(b), would create piecemeal litigation."[17] As shown below, *Sherrill* is a relatively new 2005 case whose implications, while favoring the State Defendants, are not yet fully explored. Therefore, the motion to strike should be denied.

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[12] State Defendants, Answer to Amended Complaint, Affirmative Defenses, paragraph 2.
[13] State Defendants, Answer to Amended Complaint, Affirmative Defenses, paragraph 3.
[14] Tribe, Memorandum, p 11.
[15] The Tribe stipulated that "[t]he laches defense raised in the Defendant's Answer is fact based, requiring extensive development of the historical record related to the merits of this case." Joint Stipulation Narrowing Issues Related to Jurisdictional Defenses, paragraph 7, p 3.
[16] 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1381, 800-01 (footnotes omitted).
[17] *Mohegan Tribe v State of Conn*, 528 F Supp 1359, p 1362 (D Conn, 1982) (internal citations omitted); *see also*, *Beattie v Centurytel, Inc*, 234 FRD 160, p 174 (ED Mich, 2006) ("If the sufficiency of the defense depends upon disputed questions of law or fact, then a motion to strike should be denied.")(internal citations omitted).

II. *Sherrill* allows states and other defendants to assert laches, impossibility, and acquiescence as equitable defenses against disruptive, forward-looking American Indian land claims. State Defendants have asserted laches as an equitable defense to the Tribe's disruptive, forward-looking land claims. This equitable defense is available and should not be struck.

State Defendants pled laches in response to the Tribe's Complaint.[18] After *Sherrill*, this defense is available to states to defend against disruptive, forward-looking American Indian land claims and has been applied in cases similar to this one. The Tribe's motion to strike State Defendant's equitable defense of laches, therefore, should be denied.

The Second Circuit has found that *Sherrill* "has dramatically altered the legal landscape against which we consider" Indian land claims.[19] *Sherrill* allows the State Defendants to assert laches and impossibility as defenses to the Tribe's claims. In *Sherrill*, the Oneida Indian Nation purchased land on the free market that was once contained within the Oneidas' reservation[20] and to which they claimed aboriginal title.[21] For two centuries, the State of New York and its county and municipal units had governed the area where the land was located.[22] The Oneidas argued, nevertheless, that the purchase of the land "revived the Oneidas' ancient sovereignty piecemeal over each parcel" and, therefore, made the property exempt from the local unit's property taxes.[23]

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[18] The Tribe also argues that equitable estoppel does not apply. Tribe, Memorandum, pp 4-5. State Defendants do not make this argument. Instead, they argue that collateral estoppel and *res judicata* bars the relitigation of certain claims by the Tribe.

[19] *Cayuga Indian Nation of New York v Pataki*, 413 F3d 266, 273 (CA 2, 2005), *cert den*, 547 US 1128 (2006).

[20] *Sherrill*, 544 US, at p 202.

[21] *Sherrill*, 544 US, at p 213.

[22] *Sherrill*, 544 US, at p 202.

[23] *Sherrill*, 544 US, at p 202.

The Supreme Court rejected the Oneidas' argument. It found that:

> the 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.[24]

In *Cayuga Indian Nation of New York v Pataki*, the Second Circuit held that the defense of laches applies to "disruptive, forward-looking," possessory land claims, whether in law or equity.[25] The Cayugas initially sought ejectment,[26] technically a legal remedy, of numerous land owners, but the District Court, rejecting ejectment as a remedy, substituted a damage remedy.[27] Finding that "the same considerations that doomed the Oneidas' claim in *Sherrill* apply with equal force here," the Second Circuit dismissed the case.[28] These considerations included the passing of generations during which non-Indians owned the area comprising their historic reservation, the residence of most of the Tribe elsewhere, "the longstanding, distinctly non-Indian character of the area and its inhabitants," the Tribe's "long delay in seeking equitable relief against New York or its local units," and "the developments in [the area] spanning several generations."[29]

A remedy can be forward-looking and disruptive solely from the remedy's effect on zoning laws. In *New York v Shinnecock Indian Nation*,[30] the Shinnecock Indian Nation wanted to build a casino on land it owned.[31] The state of New York and the local units of government

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[24] *Sherrill*, 544 US, at p 221.
[25] *Cayuga*, 413 F3d, at p 275.
[26] Among other remedies. *Cayuga*, 413 F3d, at p 280 (Hall, J, dissenting).
[27] *Cayuga*, 413 F3d, at pp 274-275.
[28] *Cayuga*, 413 F3d, at p 277.
[29] *Cayuga*, 413 F3d, at p 277 (internal quotations omitted and material in brackets in original), *quoting*, *Sherrill*.
[30] *New York v Shinnecock Indian Nation*, 400 F Supp 2d 486 (ED NY, 2005).
[31] *Shinnecock Indian Nation*, 400 F Supp 2d, at p 488.

sued to stop it because the casino violated zoning and other laws.[32] The Shinnecock Indian Nation defended on the grounds that its aboriginal title had not been extinguished.[33] The *Shinnecock* Court considered the effect of *Sherrill* on this claim.[34] It found that "a remedy may also be disruptive in cases similar to the one at bar, where dispossession is not an issue and only neighboring landowners will be affected by the Indians' claims."[35]

Here, the Tribe seeks a forward-looking, disruptive remedy applying to lands within the alleged Saginaw Chippewa Indian Tribe's Isabella reservation. Specifically, the Tribe seeks injunctive relief to stop the State Defendants "from asserting any criminal jurisdiction over the Tribe or Tribal members within the historic Isabella Reservation,"[36] from asserting "civil regulatory jurisdiction over the Tribe or Tribal members within the historic Isabella Reservation,"[37] and "from taking any actions within the historic Isabella Reservation that would interfere with the rights of the Tribe and its members under federal law relating to Indian country."[38] These forward-looking claims are disruptive because they would alter the long existing pattern of jurisdiction over the Tribe and its members. For example: state and local prosecution of Tribal members would be prohibited anywhere within the alleged Isabella Reservation, creating the "checkerboard of alternating state and tribal jurisdiction" found disruptive to local and state units of government in *Sherrill*.[39] Which police agency had jurisdiction would depend on whether a Tribal member was involved.

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[32] *Shinnecock Indian Nation*, 400 F Supp 2d, at p 488.
[33] *Shinnecock Indian Nation*, 400 F Supp 2d, at p 495.
[34] *Shinnecock Indian Nation*, 400 F Supp 2d, at pp 495-496.
[35] *Shinnecock Indian Nation*, 400 F Supp 2d, at p 496, n 6.
[36] Amended Complaint, at pp 11-12.
[37] Amended Complaint, at p 12.
[38] Amended Complaint, at p 12.
[39] *Sherrill*, 544 US, at pp 219-20.

The state and local units of government also could not assert their tax laws, zoning laws, environmental laws, or traffic laws over the Tribe or its members. The *Sherrill* Court specifically found that the inability to apply tax laws to property owned by American Indians or their Tribe was disruptive.[40] In this case, the Tribe seeks relief from the requirement to pay income taxes, but not property and sales taxes.[41]

Zoning would become dependent on who owned the land at the time: if the Tribe or a Tribal member owned the land then it would not be subject to local zoning; if a non-member owned the land it would be. "If avoidance of taxation is disruptive, avoidance of complying with local zoning and land use laws is no less disruptive. In fact, it is even more disruptive. The Supreme Court clearly expressed its concern about the disruptive effects of immunity from state and local zoning laws [in *Sherrill*]."[42] Jurisdiction over zoning and other laws would change depending on who owned the property, creating great confusion from year-to-year and from property-to-property. One year the property would be exempt from state and local laws under the Tribe's theories; the next year it might not be.

The effect of the Tribe's desired relief on environmental laws would be equally disruptive. It does not matter where the pollution comes from. If a tribal member discharges untreated wastewater to a stream, river, or lake, then the stream, river, or lake is polluted for all.

The Tribe's requested injunction would prohibit the State Defendants and local units of government from enforcing traffic laws against the Tribe and its members on state and federal

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[40] *Sherrill*, 544 US, at p 220.
[41] Joint Stipulation Narrowing Issues Related to Jurisdictional Defenses, paragraph 5, p 2.
[42] *Cayuga Indian Nation of New York v Village of Union Springs*, 390 F Supp 203, p 206 (ND NY, 2005), *followed*, *Seneca-Cayuga Tribe of Oklahoma v Town of Aurelius*, 233 FRD 278, pp 281-282 (ND NY, 2006).

highways. At traffic stops, police officers would have to wait for the proper police agency with jurisdiction to appear.

Finally, the Tribe seeks an injunction prohibiting State Defendants from taking any actions within the historic Isabella Reservation that would interfere with the rights of the Tribe and its members. What this means is unclear, but it is broad enough in itself to include everything previously discussed. It would also likely include issues about who protects children and who determines whether a child is adopted.

It is also fair to consider the effect of future suits by the Tribe on Isabella County if the Court grants the Tribe's requested relief. In *Sherrill* the Court evaluated the potential future effects of granting a declaration of Indian country to Oneida Indian Nation and chose to "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."[43] Here, the Tribe could seek to exempt land owned in fee simple by the Tribe or its members from local property taxes. As in *Sherrill,* the "decree prayed for in this case, if granted, would offer a distinct encouragement to . . . similar claims."[44]

The Tribe seeks to distinguish this case from *Sherrill* and its progeny by arguing this case involves treaty rights.[45] They base their argument entirely on cases decided before *Sherrill.* Furthermore, since *Sherrill*, one United States District Court has applied laches to treaty-based claims. In *Ottawa Tribe of Oklahoma v Ohio Department of Natural Resources*,[46] the Court

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[43] *Sherrill*, 544 US, at p 220.
[44] *Sherrill*, 544 US, at p 220 (internal quotation marks omitted), *quoting Felix v Patrick,* 145 US 317, p 335 (1892).
[45] Tribe, Memorandum, p 7.
[46] *Ottawa Tribe of Oklahoma v Ohio Dept of Natural Resources*, 2008 US Dist LEXIS 27224 (ND Ohio, March 31, 2008) (attachment 2).

found laches barred treaty based fishing rights on inland lakes.[47] *Sherrill* also did not make any distinctions between treaty rights and non-treaty rights. Instead it focused on the consequences of granting the requested relief. Asserting alleged, ancient treaty rights can be as disruptive as those rights emanating from sources other than treaties. State Defendants have been unable to find any cases distinguishing themselves from *Sherrill* based on treaty rights being involved.

Sherrill "dramatically altered the legal landscape" of American Indian law by allowing states to assert laches, acquiescence, and impossibility as defenses to Indian land claims. State defendants have pled laches as a defense to the Tribes' claims. The motion to strike the defense of laches should be denied.

III. At least three circuits, including the Sixth Circuit, have held that laches can apply to the United States when the United States stands in the shoes of a private party and under other exceptions. The United States is standing in the shoes of a private party and also meets the other exceptions. Therefore, laches can apply to the United States.

State Defendants argue that laches can apply in this case. The Tribe, taking the position of the United States, argues that laches cannot apply to the United States.[48] At least three circuits,[49] have held that laches can apply to the United States when the United States stands in the shoes of a private party. Here, the United States is standing in the shoes of a private party. It

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[47] *Ottawa Tribe*, 2008 US Dist LEXIS 27224, *40.
[48] Tribe, Memorandum, pp 5-6.
[49] Two district courts in the Ninth Circuit have also applied *Sherrill* in cases not involving the United States. *See Paiute-Shoshone Indians v City of Los Angeles*, 2007 US Dist LEXIS 10590, *33 (ED Cal, Feb 14, 2007) ruling that defenses based on *Sherrill* must go to trial) (attachment 3); *Wells Fargo Bank, NA v Gila River Indian Cmty (In re Schugg)*, 2000 US Dist LEXIS 27334, *34 (D Ariz, Feb 12, 2008) (granting public road access due to tribe's laches under *Sherrill*) (attachment 4). In the Seventh Circuit, the Court in *Oneida Tribe of Indians v Hobart*, 2008 US Dist LEXIS 25169 (ED Wis, 2008) granted summary judgment rejecting claim that village had no jurisdiction over reservation land (attachment 5). A district court in the Tenth Circuit has considered, in *dicta*, the effect of *Sherrill*. *Murphy v Sirmons*, 497 F Supp 1257, p 1289, p 1290 (ED Okla, 2007).

also meets the other exceptions listed by the Seventh and Second Circuits. Therefore, laches can apply to the United States in this case.

The circuits have split because the United States Supreme Court has left the issue open on several occasions.[50] The United States Supreme Court has made broad statements in the past that the rule *nullum tempus occurit regi*, literally meaning "no time runs against the king,"[51] applies in the United States. "It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights."[52] Several reasons have been advanced for the rule. The rule "rests on the public policy of protecting the domestic sovereign from omissions of its own officers and agents whose neglect, through lapse of time, would otherwise deprive it of rights."[53]

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[50] Two recent Supreme Court decisions have left the issue of estoppel against the United States open. In *Occidental Life Insurance Co of California v EEOC*, 432 US 355 (1977), the Court considered whether a defendant to an equal opportunity enforcement that federal courts have "discretionary power to locate 'a just result's in light of the circumstances peculiar to the case . . . when the EEOC is plaintiff." *Occidental Life Insurance*, 432 US, at p 373.

In *Heckler v Community Health Services*, *Heckler v Community Health Services*, 467 US 51 (1984). The Supreme Court refused to hold that estoppel was never available against the United States. *Heckler*, 467 US, at pp 60-61.

[51] *Black's Law Dictionary*, p 1669 (7th Ed, 1999).

[52] *United States v Summerlin*, 310 US 414, p 416 (1940); *see also, e.g.*, *United States v Nashville, Chattanooga & St. Louis Railway Co*, 118 US 120, p 125 (1886) ("It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations."), *United States v Thompson*, 98 US 486, 489 (1878) ("The rule of *nullum tempus occurit regi* has existed as an element of the English law from a very early period.")

[53] *Guaranty Trust Co v United States*, 304 US 126, 141 (1938).

From as early as 1888, however, the United States Supreme Court has recognized exceptions to the general rule.[54] In the 1888 case *United States v Beebe*,[55] the Court held 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 which 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.[56]

In the 1938 case *Guaranty Trust Co v United States*,[57] the Court held that the United States was subject to a state statute of limitations where it was the assignee of certain rights of the Russian government.[58] The *Guaranty Trust* Court found that applying the state statute of limitations "deprives the United States of no right, for the proof demonstrates that the United States never acquired a right free of a pre-existing infirmity, the running of limitations against its assignor, which public policy does not forbid."[59]

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[54] In the case *Clearfield Trust Co v United States*, 318 US 363 (1943), the United States was possibly subject to laches in connection with a forged check. State Defendants do not allege that the United States is acting in connection with commercial paper in this case.
[55] *United States v Beebe*, 127 US 338 (1888).
[56] *Beebe*, 127 US, at p 347.
[57] *Guaranty Trust Co. v United States*, 304 US 126 (1938).
[58] *Guaranty Trust Co.*, 304 US, at p 130.
[59] *Guaranty Trust Co.*, 304 US, at p 142.

In *United States v Mandycz*,[60] the Sixth Circuit held that "[t]he ancient rule *quod nullum tempus occurit regi*—that the sovereign is exempt from the consequences of its laches . . . has enjoyed continuing vitality for centuries."[61] Nevertheless, it held there was at least one exception "when the government stands in the shoes of a private party, as opposed to when it acts in its sovereign capacity."[62]

The Second Circuit in *Cayuga Indian Nation of New York v. Pataki*,[63] following the Seventh Circuit,[64] noted courts have "draw[n] 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."[65] Using this standard, the *Cayuga* Court held that the United States was subject to laches in a case very similar to this one.[66] In both cases the United States, acting as trustee, intervened to vindicate a right of a tribe against state and local units of government.[67]

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[60] *United States v Mandycz*, 447 F3d 951 (CA 6, 2006), *cert den*, 127 S Ct 414 (US, 2006).
[61] *Mandycz*, 447 F3d, at p 964 (internal quotation marks removed and ellipses in original), *quoting, United States v Peoples Household Furnishings, Inc.*, 75 F3d 252, 254 (CA 6, 1996) (quoting *Guaranty Trust*, 304 US, at p 132); *see also Hatchett v United States*, 330 F.3d 875, 887 (CA 6, 2003), *cert den*, 541 US 1029 (2004)("It is well established that the Government is exempt from the consequences of its laches."); *United States v Weintraub*, 613 F2d 612, 618 (CA 6, 1979)("The [*Costello v United States*, 365 US 265(1961)] language quoted above admits to no exceptions to the rule that laches cannot defeat the government.").
[62] *Mandycz*, 447 F3d, at p 964.
[63] *Cayuga Indian Nation,* 413 F3d 266.
[64] *Cayuga Indian Nation*, 413 F3d, at pp 278-79.
[65] *Cayuga Indian Nation*, 413 F3d, at pp 278-79 (inner quotation remarks removed), *quoting, United States v Admin Enters, Inc*, 46 F3d 670, pp 672-73 (CA 7, 1995).
[66] *Cayuga Indian Nation*, 413 F3d, at p 279 (inner quotation remarks removed), *quoting, United States v Admin Enters, Inc*, 46 F3d, at pp 672-73.
[67] *Cayuga Indian Nation*, 413 F3d, at p 279, (inner quotation remarks removed), *quoting, United States v Admin Enters, Inc*, 46 F3d, at pp 672-73.

As in *Guaranty Trust*, an adverse decision in this case will deprive the United States of no rights. Whether the United States wins or loses will not affect any rights that the United States has in the five townships and two half-townships of the alleged "historic Isabella reservation."

The fact that the United States has a trust relationship with the Tribe does not change the analysis. "The question is whether the exemption of the United States from the consequences of the neglect of its own agents is enough to relieve it from the consequences" of the Tribe's failure to prosecute its own claim.[68] The United States has no rights superior to that of the Tribe whose interest the United States is seeking to vindicate.[69] The United States is a mere "conduit" of the Tribe's interest.[70]

Public policy after *Sherrill* does not forbid the defense of laches against the Tribe. The United States is suing on behalf of the Tribe. Therefore, the defense of laches can apply to the United States.[71]

The Second Circuit also identified two other circumstances in which laches might also apply against the United States. Following the Seventh Circuit, the *Cayuga* Court held that laches might apply to the United States in "the most egregious instances of laches."[72] The *Cayuga* Court found in the case before it that "given the relative youth of this country, a suit

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[68] *Guaranty Trust*, 304 US, at pp 141-142.
[69] *See Guaranty Trust*, 304 US, at p 142 ("It deprives the United States of no right, for the proof demonstrates that the United States never acquired a right free of a pre-existing infirmity, the running of limitations against its assignor, which public policy does not forbid.")
[70] *Beebe*, 127 US, at p 347.
[71] The following cases stating that laches cannot prevent the United States from acting on behalf of an American Indian tribe are all pre-*Sherrill*. *Mille Lacs Band of Chippewa Indians v Minnesota*, 853 F Supp 1118, p 1124 (D Minn, 1994), *aff'd*, 124 F3d 904 (CA 8, 1997), *aff'd*, 526 US 172 (1999); *United States v Ahtanum Irrigation Dist*, 236 F2d 321, p 334 (CA 9, 1956) *cert denied*, 352 US 998 (1957); *Swim v Bergland*, 696 F2d 712, p 718 (CA 9, 1983); *United States v Washington*, 157 F3d 630, p 649 (CA 9, 1998).

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."[73] In this case, State Defendants allege that the Tribe and United States have waited over one hundred years to bring the Tribe's claims.[74] This long wait is egregious.

The *Cayuga* Court "confine[d] the doctrine to suits against the government in which . . . there is no statute of limitations."[75] There is no statute of limitations in this case.

In *Mandycz*, the Sixth Circuit held that laches could apply to the United States where it stands in the shoes of a private party as it does in this case. The United States is suing on behalf of the Tribe to whom laches can apply. Further, the persuasive authority of the Second Circuit in *Cayuga* directly supports applying laches to the United States.

IV. The impossibility defense can bar the United States from pursuing a claim. State Defendants have pled an impossibility defense. Therefore, the State Defendants' impossibility defense should not be struck.

The Tribe argues that State Defendants cannot assert the impossibility defense in this case because it "is a defense to breach-of-contract claims . . . and has no application to the Plaintiffs' treaty claims."[76] However, the Supreme Court has twice applied the impossibility doctrine, which "recognize[s] the impracticability of returning to Indian control land that generations earlier passed into numerous private hands,"[77] against an American Indian tribe. The impossibility doctrine can apply to the Tribe and to the United States.

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[72] *Cayuga Indian Nation*, 413 F3d, at p 279.
[73] *Cayuga Indian Nation*, 413 F3d, at p 279.
[74] State Defendants' Answer to United States' Complaint, Affirmative Defenses, paragraph 4.
[75] *Cayuga Indian Nation*, 413 F2d, at p 279 (internal quotation marks omitted), *quoting United States v Admin Enters, Inc*, 46 F3d, at pp 672-673.
[76] Tribe, memorandum, p 7, n 15.
[77] *Sherrill*, 544 US at p 219, quoting *Yankton Sioux Tribe v United States*, 272 US 351 (1926).

The United States Supreme Court first applied the impossibility doctrine against a tribe in *Yankton Sioux Tribe v United States*.[78] Pursuant to a treaty, the Yankton Sioux claimed ownership of certain land in fee simple.[79] The Court agreed,[80] but also held that "[i]t is impossible, however, 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."[81]

In *Sherrill,* the Court stated that, "the unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences similar to those that led this Court in *Yankton Sioux* to initiate the impossibility doctrine."[82]

The impossibility defense can apply to the United States. There is no doctrine that states that an impossibility defense cannot apply to the United States. The impossibility defense is not based on the actions or inactions of the agents of the United States as is laches. Instead it is based upon the situation on the ground. This situation is the same whether the United States or the Tribe is the plaintiff. The same disruptive practical consequences will occur.

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[78] *Yankton Sioux Tribe v United States,* 272 US 351 (1926).
[79] *Yankton Sioux Tribe*, 272 US, at pp 353-354.
[80] *Yankton Sioux Tribe*, 272 US, at p 357.
[81] *Yankton Sioux Tribe*, 272 US, at p 357.
[82] *Sherrill*, 544 US, at p 219.

The State Defendants have pled a valid impossibility defense. The Court in *Sherrill* listed several facts that warranted its application of the impossibility doctrine, including disputed lands in possession of numerous innocent purchasers, reliance by those purchasers in building on those lands, "development of every type imaginable . . . ongoing for more than two centuries," and the "overwhelmingly" non-Indian population of the area that would "adversely affect landowners neighboring the tribal patches" by creating a checkerboard pattern of jurisdiction.[83] In a reservation diminishment case analogized in *Sherrill,*[84] the Supreme Court pointed out that, "When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments."[85]

These facts from *Sherrill* are duplicated within the Saginaw Chippewa's alleged "reservation," where innocent purchasers have relied on the treaty area's non-reservation status by building in and developing the area for over 100 years, and where the vast majority of the area's population is non-Native American. Reinstatement of tribal sovereignty would create an impossibly confusing patchwork of constantly shifting tribal and non-tribal control that would burden the administration of state and local governments as previously discussed.[86] Accordingly, the impossibility doctrine as applied in *Sherrill* also applies here.

In summary, the impossibility doctrine as applied in *Sherrill* is an affirmative defense that examines the future effects of the relief sought and forecloses such relief if those effects would

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[83] *Sherrill*, 544 US, at p 219, quoting *Hagen v Utah,* 510 US 399, p 421 (1994) (internal citation omitted).
[84] *Sherrill*, 544 US, at p 215.
[85] *Solem v Bartlett,* 465 US 463, pp 471-472, n 12 (1984).
[86] *See*, part II, p 6, above.

have disruptive consequences on the surrounding area. This doctrine has been applied to American Indian claims by the Supreme Court and should be applied here as well against both the Tribe and the United States.

V. Future effects of a ruling are relevant to the impossibility defense. State Defendants alleged an impossibility defense. Future effects of a ruling in favor of the Tribe are, therefore, relevant.

The Tribe argues that witnesses who testify about the future effect of a ruling in the Tribe's favor are irrelevant to any defense pled by the State Defendants.[87] The Tribe has simply, however, ignored or misread *Sherrill*. The future effects of a ruling in the Tribe's favor are clearly relevant under *Sherrill.*

As previously discussed,[88] *Sherrill* looked to the "disruptive practical consequences" of "the unilateral reestablishment of present *and future* Indian sovereign control . . . ."[89] The *Shinnecock* Court noted that "both the Supreme Court in *Sherrill* and the Second Circuit in *Cayuga* analyzed the issue of the disruptive impact of the underlying land claims based upon potential future disruptiveness that would result from a decision in favor of the tribe."[90] The State Defendants' witnesses will testify to the effect on law enforcement of declaring six townships of Isabella County "Indian Country," the effect of dual sovereignties on zoning and other local matters, the economic effects of suspending collection of income tax and other taxes in Isabella County, and the percentage of Native Americans in Isabella County—all factors in *Sherrill*.

The Tribe also complains about the number of witnesses that the defendants anticipate calling. State Defendants will reexamine the witnesses that they anticipate calling to avoid duplication.

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[87] Tribe, Memorandum, p 16.
[88] *See,* part IV, p 16, above.
[89] *Sherrill*, 544 US, at p 219 (emphasis added).
[90] *Shinnecock Tribe*, 523 F Supp 2d, at p 282 (ED NY, 2007).

Respectfully submitted,

Michael A. Cox
Attorney General

/s/ Todd B. Adams
Todd B. Adams (P36819)
Assistant Attorney General
Environment, Natural Resources,
and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
517/373-7540
E-mail: adamstb@michigan.gov

Loretta S. Crum (P68297)
Special Assistant Attorney General

Counsel for State Defendants

Dated: April 28, 2008
s:cases/2005/saginaw chippewa/response to Tribe's motion limit discovery

PROOF OF SERVICE

On the date below, I directed my secretary, Robbin S. Clickner, to electronically file the following document with the Clerk of the Court, U.S. District Court, Eastern District, using the ECF system, which will send notification of such filing to all counsel of record.

State Defendants' Response to Plaintiff's Saginaw Chippewa Indian Tribe's Motion to Strike Defenses or Limit Discovery

April 28, 2008

/s/ Todd B. Adams
Todd B. Adams