UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Saginaw Chippewa Indian Tribe of Michigan, et al.,

Plaintiffs,

v.

Jennifer Granholm, et al.,

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

Defendants,

Saginaw Chippewa Indian Tribe's Motion to Strike Defenses or Limit Discovery

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The Saginaw Chippewa Indian Tribe of Michigan respectfully requests that this Court strike the equitable defenses of laches, estoppel, and impossibility under Fed. R. Civ. P. 12(f) from the Answers of the State of Michigan, County of Isabella, and City of Mt. Pleasant.[1] These defenses are immaterial to this action because:

1. The general rules that laches and estoppel cannot bar claims by the United States are applicable to this case;
2. The general rule that equitable defenses cannot bar treaty-based claims by Indian Tribes is applicable to this case; and
3. *City of Sherrill v. Oneida Nation* does not apply and change these general rules in the present case where judicially noticeable facts demonstrate that the Saginaw Chippewa Indian Tribe of Michigan has been present at and exercised jurisdiction over the

[1] The State of Michigan has moved for leave to add the defense of acquiescence to its answer to the Tribe's complaint, and the Tribe opposes that motion. Were it to be added, it should be stricken as well.

Isabella Reservation since its establishment.

In the alternative, if the State, County, or City are able to maintain any of their asserted equitable defenses, the Saginaw Chippewa Indian Tribe of Michigan respectfully requests that this Court enter an order limiting discovery under Fed. R. Civ. P. 26(b) and (c) by 1) barring discovery regarding the future-effects testimony of the City's lay witnesses and discovery regarding the testimony of the County and State's future-effects witnesses; 2) striking from the State and Counties' witness lists the eight future-effects witnesses; and 3) barring from introduction at trial any testimony or other evidence regarding the future effects of a ruling in this case.

On April 3, 2008, the Tribe contacted counsel of record to seek concurrence with this motion and to resolve this dispute without court action. The parties have not concurred with the motion, and court action is necessary to resolve the dispute.

WHEREFORE, the Saginaw Chippewa Indian Tribe of Michigan respectfully requests that this Court grant its motion to strike defenses or limit discovery. A supporting memorandum and exhibits are filed with this motion.

Dated: April 4, 2008

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN

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Defendants,

Memorandum in Support of Motion to Strike Defenses or Limit Discovery

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Laches cannot be asserted against the U.S. unless it is acting in a business capacity, and estoppel cannot be asserted against the U.S. unless the government has engaged in affirmative misconduct. The Defendants have not asserted that the U.S. is acting in a business capacity, nor have they averred that it has engaged in affirmative misconduct. Should the Court strike the Defendants' laches and estoppel defenses as legally insufficient?

2. Equitable defenses cannot bar claims by Tribes based on treaty rights. All of the Tribe's claims are based on federal treaties. Should the Court strike the Defendants' equitable defenses pleaded against the Tribe?

3. The Supreme Court held in *City of Sherrill v. Oneida Nation* that where a tribe had ceded its reservation to a state and been virtually absent from the state for many years, laches could bar its claims that the cessions were made without Congressional approval. The Tribe has always been present on its reservation and made no cessions to the State of Michigan. Does *Sherrill* apply in this case?

4. Equitable defenses, by their nature, look at past conduct. The Defendants are attempting to introduce numerous witnesses to discuss future effects of a ruling in Plaintiffs' favor as part of their presentation of equitable defenses. Assuming the Court does not strike the defenses, should it limit the Defendants' evidence to past and present events?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Standards for Motion to Strike

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

Glover v. Elliott, No. 1:07-cv-648, 2007 WL 2904050 (W.D. Mich. Oct. 2, 2007), attached as Exhibit A.

Inapplicability of Equitable Defenses against the U.S.

Office of Personnel Management v. Richmond, 496 U.S. 414 (1990)

United States v. Thompson, 98 U.S. 486 (1878)

Board of Comm'rs v. Jackson, 308 U.S. 343 (1939)

Inapplicability of Equitable Defenses against the Tribe

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985)

Swim v. Bergland, 696 F.2d 712 (9th Cir. 1983)

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

Standards for Limiting Discovery

Fed. R. Evid. 401.

Fed. R. Civ. P. 26(c).

Seales v. Macomb County, 226 F.R.D. 572 (E.D. Mich. 2005).

Eschenberg v. Navistar Int'l, 142 F.R.D. 296 (E.D. Mich. 1992).

INTRODUCTION

The Court may strike affirmative defenses from a pleading on its own motion, or upon the motion of a party.[1] At the recent status conference in this case, the Court expressed its willingness to entertain motions to test the legal sufficiency of the Defendants' equitable defenses before permitting additional discovery on them. Noting that "[t]he United States Government and the Saginaw Chippewas maintain that the laches issue raises solely a question of law that can be resolved with a motion in limine," the Court altered (and later suspended) discovery.[2] Upon reflection, the Tribe believes a motion to strike is a more appropriate mechanism for disposing of the Defendants' equitable defenses because one "purpose of a motion to strike under Rule 12(f) is to test the legal validity of a defense."[3] To prevail, "a plaintiff must show that there is no issue of fact that might allow the defense to succeed, nor any substantial question of law."[4] As will be demonstrated below, that is precisely the situation before the Court, and the Court should strike the Defendants' equitable defenses.

In the alternative, at minimum, if the Court finds that any of the equitable defenses could possibly apply to the treaty-based claims of the U.S. and the Tribe, it should severely limit discovery on them. All three defendants have listed witnesses whose testimony has no legal relevance to the pleaded equitable defenses.

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[1] Fed. R. Civ. P. 12(f).
[2] *See* Order Amending Scheduling Order and Setting a Briefing Schedule at 2 (Feb. 25, 2008) and Order Amending the Court's February 25, 2008 Order.
[3] *Glover v. Elliott*, No. 1:07-cv-648, 2007 WL 2904050 at *2 (W.D. Mich. Oct. 2, 2007), Exhibit A.
[4] *Id.* (citing *EEOC v. Bay Ridge Toyota, Inc.*, 327 F. Supp. 2d 167, 170 (E.D.N.Y. 2004).

ARGUMENT

I. EQUITABLE DEFENSES CANNOT BAR CLAIMS BROUGHT BY THE UNITED STATES, SO THE COURT SHOULD STRIKE THEM.

As a general rule, estoppel and laches cannot be asserted against the U.S. These rules have ancient origins, but many modern applications. Absent a clear showing of affirmative misconduct by the U.S., it cannot be estopped. And so long as the U.S. is acting in a sovereign (as opposed to a business) capacity, its claims cannot be barred by laches. No Defendant has alleged affirmative misconduct on the part of the U.S., and the U.S. has brought suit as a sovereign on its own behalf and in its role as sovereign trustee for the Tribe, so the general rules apply here to defeat the Defendants' laches and estoppel defenses as a matter of law. The Court should therefore strike these defenses.

A. As a general rule, U.S. claims cannot be defeated by estoppel.

The rule that litigants cannot assert estoppel against the government is long-entrenched in U.S. law. In *Office of Personnel Management v. Richmond*, the Supreme Court noted the "strict rule against estoppel" had been applied as early as 1813.[5] The only possible exception to the rule is for "affirmative misconduct" of government officials, but the Court has set a very high bar for such misconduct, noting relatively recently that it "has reversed every finding of estoppel that [it has] reviewed."[6] The Sixth Circuit has held that "affirmative misconduct" is "an act by the government that either intentionally or recklessly misleads the claimant. The party asserting estoppel against the government bears the burden of proving an intentional act by an agent of the

[5] 496 U.S. 414, 426 (1990) (finding that government could not be estopped in suit to recover Navy benefits where Navy employee relations personnel had given claimant erroneous advice).
[6] *Id.* at 422.

government and the agent's requisite intent."[7] In this case, none of the Defendants has even *pleaded* any affirmative misconduct, so the defense should be stricken from their answers.

B. As a general rule, U.S. claims cannot be defeated by laches.

The rule that claims brought by the U.S. cannot be time-barred has ancient origins in English law.

> Limitations derive their authority from statutes. The king was held never to be included, unless expressly named. No laches was imputable to him. These exemptions were founded upon considerations of public policy. It was deemed important that, while the sovereign was engrossed by the cares and duties of his office, the public should not suffer by the negligence of his servants.[8]

The Supreme Court began applying the rule to the U.S. government at least as early as 1824.[9] And courts continue to apply the rule today. In 2006, the Sixth Circuit applied the rule in a case where the U.S. sought to de-naturalize a citizen, noting "'[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.'"[10] So even if the U.S. could be said to have

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[7] *Michigan Express, Inc. v. United States*, 374 F.3d 424, 427 (6th Cir. 2004) (finding that letter by assistant U.S. attorney informing plaintiffs that they would not face federal penalties for food-stamp trafficking did not estop government from imposing fines for selling their business while business was disqualified from issuing food stamps).

[8] *United States v. Thompson*, 98 U.S. 486, 489 (1878) (finding that laches could not bar U.S. claim to recover money a government agent had converted to his own use).

[9] *United States v. Kirkpatrick*, 22 U.S. 720, 735 (1824) ("The general principle is, that laches is not imputable to the Government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy."). *See also Chesapeake & Del. Canal Co. v. United States*, 25 U.S. 123, 125 (1919) ("It is settled beyond controversy that the United States when asserting 'sovereign' or governmental rights is not subject to either state statutes of limitations or to laches.").

[10] *United States v. Mandycz*, 447 F.3d 951, 964 (6th Cir. 2006) (quoting *United States v. Peoples Household Furn., Inc.*, 75 F.3d 252, 254 (6th Cir. 1996) (ellipsis in original).

unreasonably sat on its sovereign rights to enforce the treaties of 1855 and 1864, that delay cannot bar its claims.[11]

C. Courts have applied the no-laches-against-the-government rule in cases where the U.S. brings suit or intervenes in a suit to protect tribal property or tribal jurisdiction.

As discussed, the rule against permitting laches to defeat government claims is based on the notion that a government agent's actions should not be able to frustrate the public good by preventing the government from pursuing claims. The rule has extra force when the U.S. is enforcing rights on behalf of a tribal beneficiary. In a suit to recover illegally collected property taxes on behalf of an Indian "ward" to whom land had been improperly deeded in fee under an allotment act, an Oklahoma county argued that laches should bar the suit because the U.S. was really representing an individual's interests, and not its own. The Tenth Circuit rejected that argument, noting "[t]hat the United States as guardian of the Indian ward is a party in interest with the right to maintain the action cannot be doubted," and that "the doctrine of laches has no application in a case of this kind."[12]

In a similar case to recover illegally collected property taxes on behalf of an Indian ward, the Supreme Court ruled that

> Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated; but in defining the extent of that right its relation to the operation of state laws is relevant. The state will not be allowed to invade the immunities of Indians, no matter how skillful its legal manipulations. . . . *State notions of laches*

[11] The only exception to the rule, i.e. that laches may be asserted against the U.S. when it is acting in a business capacity, is not applicable here. *See, e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943) (where U.S. is a "drawee of commercial paper" it is no different from other drawees for purposes of laches); *Chesapeake & Del. Canal*, 250 U.S. at 126-127 (finding that U.S. claims to recover dividends on capital stock the government owned were not barred by laches because U.S. was acting as a sovereign, not a business).

[12] *Board of Comm'rs of Caddo County v. United States*, 87 F.2d 55, 57 (10th Cir. 1936).

> *and state statutes of limitation have no applicability to suits by the Government, whether on behalf of Indians or otherwise*.[13]

Here, where the United States is suing to enforce treaty rights, which can only be abrogated by express Congressional action, it would be particularly unjust to permit a laches defense to be asserted.

II. EQUITABLE DEFENSES CANNOT BAR A TRIBE'S TREATY-BASED CLAIMS.

The Tribe has pleaded claims for declaratory and injunctive relief, asking the Court to recognize the boundaries of the Tribe's six-township Indian reservation, which were established in the Treaty of 1855 between the United States and the Tribe and confirmed in the Treaty of 1864. In response, the Defendants have alleged not only that the Tribe's reservation was somehow diminished or disestablished (despite the fact that Congress has not acted to diminish or disestablish it), but also that the Tribe's claims are barred by various equitable defenses, including laches and estoppel.[14] But traditionally, equitable defenses cannot bar tribal treaty-based claims, and the Court should not consider them in this case.[15]

The U.S. Supreme Court has repeatedly held that only Congress can abrogate treaties, and that when doing so, it must do so explicitly.[16] In *County of Oneida v. Oneida Indian Nation*, a case in which a tribe sought damages for land that passed out of tribal ownership without

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[13] *Board of Commr's v. Jackson*, 308 U.S. 343, 350-351 (1939) (emphasis added).
[14] *See* State's Answer at ¶¶ 4,5 (laches and estoppel); County's Answer at ¶¶ 4, 5 (laches and estoppel); City's Answer at ¶¶ 4,5 (laches and estoppel). The State has now moved for leave to add the defenses of impossibility and acquiescence to its answer to the Tribe's Complaint. *See* State's Proposed Amended Answer at ¶ 4.
[15] This is true of Defendants' impossibility defense, too. Impossibility is a defense to a breach-of-contract claim, *see infra* at 15, and has no application to the Plaintiffs' treaty claims.
[16] *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be 'clear and plain.'") (citing *United States v. Celestine*, 215 U.S. 278, 285 (1909); *United States v. Dion*, 476 U.S. 734, 738-739 (1986)).

requisite congressional approval, the Supreme Court did not reach the issue of whether a federal common-law laches defense could have barred the Tribe's claims (because the State dropped it on appeal), but it noted that "it is far from clear that this defense is available in suits such as this one."[17]

Many other cases answered the question the Supreme Court avoided in *County of Oneida*, and held that laches and estoppel could not bar tribal treaty-based claims. For example, in a case in which two tribes had not exercised their treaty-based grazing rights for more than 70 years, the Ninth Circuit refused to apply equitable defenses:

> The failure of the Tribes to exercise their grazing rights from 1907, when local Forest Service officials ousted them, to 1978 has no effect on the vitality of their [treaty] rights. Laches or estoppel is not available to defeat Indian treaty rights. *Board of Comm'rs v. U.S.*, 308 U.S. 343 (1939); *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956). This is true even where the Indians have long acquiesced in use by others of affected lands or have purported to grant away their occupancy and use rights without federal authorization. *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 699 (9th Cir. 1976).[18]

This rule—that equitable defenses cannot be asserted to defeat tribal treaty-based claims—applies in cases where the tribe is the sole plaintiff[19] and in cases where the U.S. is also a plaintiff.[20] It should be applied in this case, too, and Defendants should not be permitted to pursue their asserted equitable defenses against the Tribe.

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[17] 470 U.S. 266, 244 (1985).

[18] *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983). *See also United States v. Washington*, 157 F.3d 630, 649 (9th Cir. 1998) (refusing to apply laches against Tribe's treaty-based fishing-rights claim even though tribe "waited 135 years to assert their shellfishing right"). *Cf. Catawba Indian Tribe of South Carolina*, 865 F.2d 1444, 1448 (4th Cir. 1989) ("Except where Congress provides otherwise, claims based on Indian title are not subject to state law defenses such as statutes of limitations, adverse possession, or laches.")

[19] *E.g., Williams v. Clark*, 742 F.2d 549, 554 (9th Cir. 1984) (refusing to apply laches to treaty rights in suit by tribe against the Secretary of the Interior).

[20] *E.g., United States v. Washington*, 157 F.3d at 649 (refusing to apply laches to suit by U.S. and tribes to enforce treaty-based fishing rights); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118, 1124 (D. Minn. 1994), *aff'd* 124 F.3d 904 (8th Cir. 1997), *aff'd* 526 U.S. 172 (1999) (same).

III. THE SUPREME COURT'S DECISION IN *CITY OF SHERRILL V. ONEIDA INDIAN NATION* DOES NOT CHANGE THE COURT'S ANALYSIS HERE.

Although none of the defendants has pleaded it as such, it is clear from their statements to the Court that they believe the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation* altered the rule that equitable defenses cannot bar treaty-based claims.[21] The issue in *Sherrill* (where, notably, the U.S. was not a party) was whether the Oneida Indian Nation possessed tax immunity from city property taxes on lands it had recently purchased that were within its historic reservation boundaries because they constituted "Indian country." The Court did not disturb the Second Circuit's finding that the Nation's reservation still existed, though it did rule that the Nation was precluded from asserting its tax immunity due to laches, acquiescence, and impossibility. But *Sherrill* was based on a very unique set of facts—the tribal plaintiff had voluntarily given up its land base to the State of New York and had neither occupied nor exercised jurisdiction over the lands at issue in nearly 200 years—and does not alter the rule in this case.

The Oneida Nation's reservation was created by a 1788 treaty between the Nation and the State of New York, and confirmed by a 1794 treaty the Nation and the U.S. After the 1794 treaty, the Nation entered into a series of treaties with the State of New York in which it progressively ceded vast portions of its reservation. And despite the fact that the Non-Intercourse Act provided that such sessions were unlawful without Congressional approval, U.S. agents did nothing to stop them.[22]

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[21] 544 U.S. 197 (2005) (finding that laches precluded tribe from asserting Indian tax immunity on lands they had not occupied or exercised jurisdiction over for nearly 200 years).
[22] *Id* at 203-205.

The lands at issue in the case, acquired by the Nation in 1997 and 1998, had passed out of Indian ownership in 1805. By the mid-1840's, most of the Oneidas had left New York and by 1920, the Oneidas held only 32 acres in the entire state.[23] It was this unique history—and not a sea change in Indian-law principles—that drove the Court's decision.

Throughout its decision, the Court pointed out the long history of the Nation's complete lack of exercising jurisdiction on the Oneida reservation:

- [S]ince the middle years of the 19th century, most of the Oneidas have resided elsewhere. Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.[24]
- There is no dispute that it has been two centuries since the Oneidas last exercised regulatory control over the properties here or held them free from local taxation.[25]
- The relief [the Nation] seeks—recognition of present and future sovereign authority to remove land from local taxation—is unavailable because of the long lapse of time, during which New York's governance remained undisturbed . . . ..[26]

The Saginaw Chippewas, in contrast, never left their reservation, continue to exercise jurisdiction over it, and have always maintained a vital presence in it. Without any discovery, and relying only on judicially noticeable facts, this Court can easily distinguish this case from *Sherrill*, and strike the Defendants' equitable defenses as inapplicable to the Tribe's and the U.S.'s treaty-based claims.

[23] *Id.* at 199, 202, 216 n. 10.
[24] *Id.* at 202-203.
[25] *Id.* at 218.
[26] *Id.* at 215 n.9.

As noted above, the Tribe's reservation was established and confirmed by treaties in 1855 and 1864.[27] The Tribe never left its reservation, and chose to organize its government under the Indian Reorganization Act in 1937.[28] At least as early as 1979, the Bureau of Indian Affairs operated a Court of Indian Offenses on the Isabella Reservation,[29] and since 1983, the Tribe has operated its own Tribal Court on the reservation.[30] In addition, the U.S. has prosecuted crimes on the reservation.[31] These facts—which Defendants cannot deny—demonstrate that the Tribe's situation is light years distant from the Oneidas, where the tribe had voluntarily ceded its reservation to the state and been gone from the ceded area for 200 years before bringing its claim. Absent those extreme circumstances, and given the U.S.'s presence in this case, this Court need not wade into the surfeit of fact witnesses the Defendants say they need to prove their asserted equitable defenses.

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[27] Treaty with the Saginaw, Swan River, and Black Creek Bands of Chippewa, 1855 (11 Stat. 633). The Defendants dispute this fact, but since the equitable defenses are only relevant to this litigation if the six-township reservation exists, the Court can assume it exists for the purposes of this motion.

[28] Constitution of the Saginaw Chippewa Indian Tribe of Michigan, Art. II and Certificate of Adoption, Exhibit B at 1, 6.

[29] 25 CFR 11.1(a)(6) (1979), Exhibit C. This was the first year the Department of the Interior specifically listed the reservations on which there were courts of Indian offenses. In earlier years, the Department's regulations simply said "[t]he regulations in this part relative to Courts of Indian Offenses shall apply to all Indian reservations on which such courts are maintained." *E.g.*, 25 CFR § 11.1(a) (1958), Exhibit D.

[30] 49 Fed. Reg. 7365 (Feb. 29, 1984) (removing Isabella Reservation from list of reservations where courts of Indian offenses operate because the Tribe had adopted a tribal law and order code), Exhibit E.

[31] *See, e.g., United States v. Manier*, No. 77-20066 (E.D. Mich. Oct. 13, 1977) (no Westlaw cite available) (denying motion to dismiss based on defendant's claim that Saginaw Tribe's reservation had been diminished and therefore federal court lacked subject-matter jurisdiction over crimes committed within reservation boundaries), Exhibit F; *United States v. A.F.F.*, 144 F. Supp. 2d 797 (E.D. Mich. 2001) (regarding murder charged as federal crime on Saginaw Tribe's reservation); *United States v. Peltier*, 344 F. Supp. 2d 539 (E.D. Mich. 2004) (regarding federal drug prosecution under the Indian Major Crimes Act on Saginaw Tribe's reservation); and *McCray v. United States*, Nos. 03-20030 and 04-10286, 2007 WL 1835560 (E.D. Mich. Jun. 25, 2007) (regarding ineffective-assistance-of-counsel claim arising from federal Indian prosecution on Saginaw Tribe's reservation), Exhibit G.

III. EVEN IF *SHERRILL* APPLIED AND THE COURT WERE TO PERMIT DISCOVERY ON DEFENDANTS' EQUITABLE DEFENSES, DISCOVERY SHOULD BE STRICTLY LIMITED.

The County and City recently disclosed 15 lay witnesses never before identified in this case.[32] These 15 witnesses join the nine other lay witnesses disclosed by the State in its most recent witness list.[33] The 24 total lay defense witnesses are offered to discuss demographic and jurisdictional issues.[34] Of this cast of characters, the City, County, and State expect *seven* witnesses[35] to testify *in part* about, and another *eight* witnesses[36] to testify *solely* about, the speculative future "effects" of a favorable judgment for the Saginaw Chippewa Tribe.

For example, Sheriff Leo Mioduszewski is offered by the County to testify "regarding the *effect* on law enforcement in [sic] declaring six townships in Isabella County 'Indian Country.'" (emphasis added). Julie Warner is offered by the State to discuss "the *effect* on children's protective services in [sic] declaring six townships in Isabella County 'Indian Country.'" (emphasis added). And the County offers Nancy Ridley to testify "[r]egarding the City's collection of fines, fees, and taxes within the city limits including the enforcement thereof, and the *potential impact* of a ruling declaring the six townships Indian Country." (emphasis added).

The law, though, is concerned with what is and has been. Speculative testimony about the "effects" or "potential impact" of a ruling is not relevant to this action, and discovery regarding

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[32] County Witness List, Document 55; City Witness List, Document 57 (amended at Document 59).
[33] State Witness List, Document 56.
[34] *See* Documents 55, 56, and 59.
[35] *See* Document 59 (describing the expected testimony of William Yeagley, Nancy Ridley, Duane Ellis, Tony Kulick, Paul Preston, Brian Kentch, and William J. Shirley for the City) (collectively, the "Future Effects Testimony of the City's lay witnesses").
[36] *See* Document 55 (describing the expected testimony of Sheriff Leo Mioduszewski, F/Lt. Stolicker, Julie Warner, and Tim Nieporte for the County) and Document 56 (describing the expected testimony of Scott Darragh, Maj. Anthony Gomez, Lt. Gregory Zartoney, Paul LeBlanc, F/Lt. Christopher Stolicker, and Julie Warner for the State) (collectively, the "County and State's Future Effects Witnesses").

these matters should not be had. Even if the Defendants could show some minimal relevance of entertaining this future "effects" discovery, the Court should protect against discovery of these speculations because the burden posed by the discovery is undue.

A. The Defendants' proposed future "effects" discovery is not relevant to this action, and should not be had.

1. Under the Federal Rules, a court should not allow discovery of matters not relevant to the parties' claims or defenses.

Under the Federal Rules of Civil Procedure, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party[.]"[37] A matter is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[38] Thus, "the relevance of the materials sought depends on the nature of the actions before this Court[.]"[39] Matters that do not tend to prove or disprove any element of a claim or defense at issue are not relevant.[40]

A trial court is well within its discretion to protect against discovery of irrelevant matters,[41] and the Sixth Circuit has noted that "the Advisory Committee amended Rule 26(b) in both 1983 and 1993 to afford district courts greater discretion in restricting the scope of

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[37] Fed. R. Civ. P. 26(b)(1).
[38] Fed. R. Evid. 401.
[39] *Compuware Corp. v. Moody's Investors Serv., Inc.*, 222 F.R.D. 124, 127 (E.D. Mich. 2004).
[40] *See, e.g. Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 982 (6th Cir. 2003) (discussing why settlement negotiations between manufacturers of a heating system and manufacturers of a rubber hose manufacturer were not relevant to third party homeowners' complaints against the heating system manufacturer, and prohibiting discovery).
[41] *E.g. Szarka v. Ohio Transmission Corp.*, 132 Fed. Appx. 581, 581, 2005 WL 1313525, at *1 (6th Cir. 2005) (upholding district court's decision to limit discovery and require the requesting party to "show[] that broader discovery requests bore some relevance to disputed issues.") Exhibit H; *Goodyear Tire*, 332 F.3d at 982 (upholding prohibition of discovery where, *inter alia*, the requesting party "has not presented any evidence that the alleged statements are *relevant* to his Colorado case") (emphasis in original).

discovery."[42] On appeal, the district court decision will only be disturbed for abuse of discretion.[43]

To manage discovery, it is proper to strike a witness where that witness's proposed testimony has no relevance to the proof of any claim or defense at issue in a case.[44] It is also appropriate to bar discovery of irrelevant matters and to bar references to those matters at trial.[45] For example, in *Eschenberg v. Navistar International*, over objection the district court allowed deposition of the plaintiff's counsel regarding subjects related to the case, but not relevant to a claim or defense of any party. The plaintiff moved in limine to exclude the deposition testimony from introduction at trial, and the Court revisited its initial decision to allow the discovery. On reconsideration, the Court determined that in light of the claims and defenses asserted, the deposition testimony "is not relevant and therefore not admissible." The court barred the introduction of the evidence at trial, but further held that because it should have been clear when the plaintiff first objected to the deposition that "the information sought was irrelevant and not discoverable[, . . . t]he deposition of plaintiff's counsel should never have been permitted."[46]

2. The equitable defenses asserted in Defendants' answers all look to what has happened, not what may happen.

Through expert discovery, the parties have completed discovery regarding the Defendants' asserted historical defenses. The lay witnesses identified by the Defendants are

[42] *Surles v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir. 2007)
[43] *Id.* at 304.
[44] *E.g., Fairland, Inc. v. United States Fidelity & Guarantee Co.*, No. 05-CV-71491, 2007 WL 603377, at *2 (E.D. Mich. Feb. 22, 2007) (striking witness where that witness would only testify regarding the foundation for materials previously ruled inadmissible); Exhibit I.
[45] *E.g., Eschenberg v. Navistar Int'l*, 142 F.R.D. 296 (E.D. Mich. 1992).
[46] *Id.* at 299, 302.

instead focused toward the Defendants' asserted equitable defenses—laches,[47] estoppel,[48] and impossibility.[49] The elements of each of these defenses are:

- Laches: "The laches defense has two elements: (1) unreasonable delay in asserting one's rights; and (2) a resulting prejudice to the defending party."[50]

- Estoppel: "First, the party to be estopped must have used conduct or language amounting to a representation of material fact. Second, that party must have been aware of the true facts. Third, that party must have had an intention that the representation be acted on, or have conducted himself in such a way toward the party asserting the estoppel that the latter had a right to believe that the former's conduct was so intended. Fourth, the party asserting estoppel must have been unaware of the true facts. Finally, the party asserting estoppel must have detrimentally and justifiably relied on the representation."[51]

- Impossibility: The doctrine of impossibility is a defense to breach-of-contract claims. Under this doctrine, "when, due to circumstances beyond the control of the parties the performance of a contract is rendered impossible, the party failing to perform is exonerated."[52]

- Acquiescence: "Acquiescence consists of assent by words or conduct on which the other party relies."[53]

All of the elements of *each* of these defenses looks backward to what has happened and whether the past events make prosecution of the suit unjust. The future "effects" of a decision in this case are not relevant to the determination of any element of any of the defenses asserted by the Defendants.

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[47] State Answer Aff. Def. ¶ 4, City Answer Aff. Def. ¶ 4, County Answer Aff. Def. ¶ 4.
[48] City Answer Aff. Def. ¶ 4.
[49] State Answer to Intervenor Compl. Aff. Def. ¶ 4. On March 18, 2008, the State sought leave of the Court to amend its answers to add the defense of acquiescence to its Answers to the Complaint of the Tribe and the Complaint in Intervention of the United States. (See Documents 62 and 63.) The Tribe opposes these motions. However, without waiving objection to the assertion of the defense, the acquiescence defense is discussed below for ease of analysis.
[50] *United States v. Mandycz*, 447 F.3d 951, 965 (6th Cir. 2006) (internal quotation omitted).
[51] *Thomas v. Miller*, 489 F.3d 293, 302 (6th Cir. 2007).
[52] *Bissell v. L. W. Edison Co.*, 156 N.W.2d 623, 626 (Mich. Ct. App. 1968) (quotations omitted).
[53] *Hazard Coal Corp. v. Ky. W. Va. Gas Co., L.L.C.*, 311 F.3d 733, 740 (6th Cir. 2002).

3. The proposed future-effects discovery is irrelevant and should be protected against because the "effects" of a ruling are not relevant.

Defendants set forth 15 witnesses to discuss the future "effects" of a ruling, but *none* of the defenses asserted in the Answers of the City, State, and County look to the future. They rely on proof of facts that are or were—not speculation of what may come. Because discovery regarding the future "effects" of denying these defenses has no tendency to prove or disprove the asserted defenses, the discovery is not relevant to this action, and should be barred.

This declaratory action focuses on the historical establishment of the Isabella Reservation and its present existence. Though Defendants have raised the equitable defenses of laches, estoppel, impossibility, and potentially acquiescence, these defenses all look backward to what has happened, not forward to what may (or may not) happen. This only makes sense. This is a case about whether 19th Century treaties created the Isabella Reservation. The Defendants' proposed parade of witness testimony about the future "effects" of confirming the Isabella Reservation's existence does not address the central issue before the Court—whether the Reservation exists. Instead, it addresses the question Defendants would rather pose—whether the Defendants want the Reservation to exist. But this is not the law. If the Defendants are allowed to maintain their equitable defenses, the eight Future Effects Witnesses should be stricken, and the Court should limit discovery of any Future Effects Testimony of the City's lay witnesses or any testimony of the County and State's Future Effects Witnesses.[54] The Court should also bar reference at trial to the purported future "effects" of recognizing the Isabella Reservation.[55]

[54] *Goodyear Tire*, 332 F.3d at 982.
[55] *Eschenberg*, 142 F.R.D. at 302.

B. In the alternative, the court should issue an order protecting against the proposed future-effects discovery because any minimal relevance is outweighed by the undue burden of the discovery.

Even if the Defendants could demonstrate any minimal relevance of the discovery concerning the *eight* County and State Future Effects Witnesses, and the Future Effects Testimony of *seven more* of the City's lay witnesses, the discovery should be limited under Rule 26(c). The Court of Appeals for the Sixth Circuit has repeated that "[t]he desire to allow broad discovery is not without limits and the trial court is given wide discretion in balancing the needs and rights of both plaintiff and defendant."[56] The frequency, methods, and extent of discovery "shall be limited by the Court if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."[57] The Court may enter a protective order under Rule 26(c) barring unduly burdensome discovery or discovery of irrelevant matters.[58] "It is well established that the scope of discovery is within the sound discretion of the trial court."[59]

The lay witness phase of discovery is quickly spiraling out of hand. For example, in its most recent filing "supplementing" its lay witness list, the State expanded its witness roster to include not one but *three* witness to testify "regarding the effect on law enforcement of declaring

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[56] *Surles*, 474 F.3d at 305 (quoting *Coleman v. Am. Red Cross*, 23 F.3d 1091, 1096 (6th Cir. 1994)).
[57] Fed. R. Civ. P. 26(b)(2)(C)(iii).
[58] Fed. R. Civ. P. 26(c); *Seales v. Macomb County*, 226 F.R.D. 572, 575 (E.D. Mich. 2005) ("Under Rule 26(c), the Court may enter a protective order to limit or preclude discovery, with reference to the Rule 26(b) factors.").
[59] *Seales*, 226 F.R.D. at 575.

six townships of Isabella County 'Indian Country.'"[60] The County and City have followed the State's lead, each calling two witnesses to discuss what they believe will be the future "effects" for law enforcement of confirming that the reservation exists. In total, the Defendants propose to call *six* separate witnesses, and to call First Lieutenant Stolicker *twice* (both for the State and the County), to discuss law-enforcement issues.

The burden and expense of deposing 15 individuals with often duplicative testimony regarding what they speculate may be the future "effects" of a ruling for the Tribe in this case greatly outweighs any potential benefit of such discovery. The cost of such discovery would be extraordinary. Allowing discovery of the testimony of the County and State's Future Effects Witnesses would require the Saginaw Chippewa Tribe and the United States to prepare for and conduct the depositions of eight witnesses *solely* to discover the witness's best guess as to what may happen in the event this Court confirms the existence of the Isabella Reservation boundaries. The Saginaw Chippewa Tribe's cost to take just these depositions reaches at least $38,400.[61]

The Saginaw Chippewa Tribe and the United States would be forced to repeat this unreasonably speculative area of inquiry for seven more of the City's witnesses. Though the depositions of these witnesses would go forward regardless of whether they testify regarding their guesses of the "effects" of the case, allowing the future "effects" testimony would require the Saginaw Chippewa Tribe and the United States to prepare for this line of inquiry as to seven

[60] The State proposes to call First Lieutenant Christopher Stolicker, Major Anthony Gomez, and Lieutenant Gregory Zartoney regarding this topic.
[61] April 3, 2008 Aff. of S. Reed ¶ 5, Exhibit C to Tribe's Response to State's Motion to Amend.

more witnesses, and would extend the deposition time necessary for each of these witnesses, increasing both preparation and deposition costs.

In addition to these 15 witnesses, the Defendants have named nine more witnesses in support of their equitable defenses. In total, it seems Defendants invite the five parties to this litigation to coordinate the depositions of 24 different defense lay witnesses, *eight* of whom will testify only as to their guess about what may happen in the future, and *another seven* of whom will only do so for part of their testimony. Deposing the Defendants' equitable-defense witnesses would take at least a month and a half at a cost to the Saginaw Chippewa Tribe of $115,200.[62] In light of the factors set forth in Rule 26(c), this is simply unwarranted.[63]

CONCLUSION

For the reasons described above, the Saginaw Chippewa Tribe respectfully requests that this Court strike the Defendants' equitable defenses of laches, estoppel, and impossibility. In the alternative, if the Court declines to strike the defenses, the Tribe asks that the Court enter an order limiting discovery by 1) barring discovery regarding the future-effects testimony of the City's lay witnesses and discovery regarding the testimony of the County and State's future-effects witnesses; 2) striking from the State and Counties' witness lists the eight future-effects witnesses; and 3) barring from introduction at trial any testimony or other evidence regarding the future effects of a ruling in this case.

[62] *Id.*
[63] Fed. R. Civ. P. 26(c).

Dated: April 4, 2008

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN

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Certificate of Service

I hereby certify that on April 4, 2008, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

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and I hereby certify that there are no non-ECF participants listed in the case that require service by U.S. mail.

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