UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, Plaintiff, and THE UNITED STATES, Intervenor Plaintiff, v. JENNIFER GRANHOLM, et al., Defendants, and COUNTY OF ISABELLA and CITY OF MT. PLEASANT, Intervenor Defendants.	Case No. 05-10296-BC Honorable Thomas L. Ludington

UNITED STATES' MOTION IN LIMINE TO STRIKE DEFENDANTS' WITNESSES RELATING TO THEIR EQUITABLE DEFENSES AND MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to the Federal Rules of Evidence 401 and 402, the United States respectfully submits this Motion *in limine* to exclude the testimony of approximately thirty witnesses on the grounds that the anticipated testimony of those witnesses is irrelevant and inadmissible as a matter of law. The anticipated testimony is being offered in support of Defendants' claim that the United States is barred by the doctrines of laches, estoppel, or impossibility from bringing this federal Indian treaty rights case and from confirming its sovereign jurisdiction in Indian

Country under 25 U.S.C. § 1151. However, it is well-settled law that equitable defenses cannot bar the United States, acting in its sovereign capacity, from enforcing the terms of its treaties with Indians in determining the boundaries of a reservation.

Therefore, the testimony of witnesses who are expected to testify to facts or opinions related to Defendants' equitable defenses should be excluded as irrelevant and inadmissible as a matter of law under Federal Rules of Evidence 401 and 402. Similarly, because equitable defenses may not be asserted against the United States in this case as a matter of law, pursuant to Federal Rules of Civil Procedure 56, the United States is entitled to summary judgment dismissal of Defendants' equitable defenses.

Pursuant to Local Rule 7.1(a), the United States could not obtain concurrence to this Motion.

Submitted herewith is the United States' Brief in Support of this Motion *in limine* and Motion for Partial Summary Judgement.

Dated: April 4, 2008

/s/Patricia Miller
PATRICIA MILLER
U.S. Department of Justice
Environment & Natural Resources Division
Indian Resources Section
L'Enfant Plaza Station, P.O. Box 44378
Washington, D.C. 20026-4378
Telephone: (202) 305-1117
Telefax: (202) 305-0271
patti.miller@usdoj.gov
Attorney for the United States

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UNITED STATES' BRIEF IN SUPPORT OF ITS MOTION IN LIMINE TO STRIKE DEFENDANTS' WITNESSES RELATING TO THEIR EQUITABLE DEFENSES AND MOTION FOR PARTIAL SUMMARY JUDGMENT

PATRICIA MILLER
U.S. Department of Justice
Environment & Natural Resources Division
Indian Resources Section
L'Enfant Plaza Station, P.O. Box 44378
Washington, D.C. 20026-4378
Telephone: (202) 305-1117
Telefax: (202) 305-0271
patti.miller@usdoj.gov
Attorney for the United States

CONCISE STATEMENT OF ISSUES PRESENTED

1. Should the testimony of Defendants' witnesses who are to testify in support of Defendants' equitable defenses of laches, estoppel, and impossibility be excluded as a matter of law because the United States cannot be barred by equitable defenses from bringing this federal Indian treaty rights case concerning reservation boundaries and from confirming its sovereign jurisdiction in Indian Country under 25 U.S.C. § 1151?

CONTROLLING AND MOST APPROPRIATE AUTHORITY

Bd. of Comm'rs of Jackson County v. United States, 308 U.S. 343 (1939)

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

Elia v. Gonzales, 431 F.3d 268 (6th Cir. 2005)

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

Hagen v. Utah, 510 U.S. 399 (1994)

Mille Lacs Band of Chippewa Indians v. Minnesota, 853 F. Supp. 1118 (D. Minn. 1994), *aff'd,* 124 F.3d 904 (8th Cir. 1997), *aff'd sub nom,* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999)

New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977)

Office of Pers. Mgmt. v. Richmond, 496 U.S. 414 (1990)

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977)

Solem v. Bartlett, 465 U.S. 463 (1984)

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

United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956), *cert. denied,* 352 U.S. 988 (1957)

United States v. City of Tacoma, 332 F.3d 574 (9th Cir. 2003)

United States v. Florida, 482 F.2d 205 (5th Cir. 1973)

United States v. Mandycz, 447 F.3d 951 (6th Cir. 2006), *cert. denied,* 127 S. Ct. 414

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

United States v. Washington, 157 F.3d 630 (9th Cir. 1998)

Utah Power & Light Co., v. United States, 243 U.S. 389 (1917)

I. INTRODUCTION

Pursuant to Federal Rules of Evidence 401 and 402, the United States respectfully submits this Motion *in limine* to exclude the testimony of approximately thirty witnesses on the grounds that the anticipated testimony of those witnesses is irrelevant and inadmissible as a matter of law.[1/] The anticipated testimony is being offered in support of Defendants' claim that the United States is barred by the doctrines of laches, estoppel, or impossibility from bringing this federal Indian treaty rights case concerning reservation boundaries and from confirming its sovereign jurisdiction in Indian Country under 25 U.S.C. § 1151. *See* State of Mich.'s Answer to U.S.' Compl. in Interv., Affirm. Defenses ¶ 5 (laches and impossibility); City of Mt. Pleasant Answer, Affirm. Defenses ¶ 4 (laches and estoppel); County of Isabella Answer, Affirm. Defenses ¶ 4 (laches).

However, it is well-settled law that equitable defenses cannot bar the United States, acting in its sovereign capacity, from asserting jurisdiction or enforcing the terms of its treaties with Indians in determining the boundaries of a reservation. Consequently, all testimony of witnesses who are expected to testify to facts or opinions related to these equitable defenses should be excluded as irrelevant and inadmissible as a matter of law. Similarly, because

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[1/] The United States requests that at a minimum the following witnesses be excluded under this Motion:
1) All of the witnesses identified in the City of Mt. Pleasant's Witness List and Amended Witness List (Docket Nos. 57, 59);
2) All of the witnesses identified in the County of Isabella's Witness List (Docket No. 55);
3) All of the witnesses identified in the State's Witness List and Supplemental Witness Lists (Docket Nos. 20, 38, 56) except Anthony Gulig, Theodore Karamanski, any other witness or rebuttal witness the State identifies as testifying to the meaning of the 1855 and/or 1864 treaties, or any other witnesses necessary for entry into evidence of historical documents related to the meaning of the treaties. These latter witnesses may, however, be subject to another motion *in limine*.

equitable defenses may not be asserted against the United States in this case as a matter of law, pursuant to Federal Rule of Civil Procedure 56, the United States is entitled to summary judgment dismissal of Defendants' equitable defenses.

II. THE COMPLAINTS AND RELIEF SOUGHT

On November 1, 2008, the United States intervened as Plaintiff on its own behalf and as trustee for the Saginaw Chippewa Indian Tribe ("Tribe"). *See* Compl. in Interv. ¶ 5. The United States seeks a declaratory judgment that all lands within the boundaries of the Isabella Reservation as established by the May 14, 1855 Executive Order, the 1855 Treaty (11 Stat. 633) and the 1864 Treaty (14 Stat. 657) are "Indian Country" under 25 U.S.C. § 1151(a). *See* id. ¶ 21. The United States does not seek monetary damages, compensation for trespass, ejectment, injunctive relief, or any other remedy related to the dispossession of Indian lands.[2/]

The original action filed by the Tribe on November 21, 2005, seeks a declaratory judgment that the Isabella Reservation continues to exist as established by the 1855 Executive Order and the 1855 and 1864 Treaties. *See* Tribe's Am. Compl. ¶ 44. The Tribe also seeks an injunction that prohibits the Defendants taking any action against the "Tribe or Tribal members" within the boundaries of the Reservation in a manner inconsistent with the Reservation's status as Indian Country. Id. ¶ 45. The Tribe does not seek monetary damages, compensation for trespass, ejectment, or any other remedy for the dispossession of Indian lands. The Complaint on its face excludes remedies concerning non-Indian residents of the Isabella Reservation.

Additionally, on March 2, 2006, the parties entered into a stipulation which states:

> The Saginaw Tribe specifically does not seek remedies related to

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[2/] Indeed, the United States does not allege that an unlawful dispossession occurred.

> the Tribe's jurisdiction over non Indians within the alleged historic Isabella reservation as part of this litigation.

Joint Stip. ¶ 4 (Docket No. 15).

III. STANDARD FOR GRANTING MOTIONS IN LIMINE AND FOR SUMMARY JUDGMENT

Although neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure explicitly authorize motions *in limine*, the United States Supreme Court has noted that the practice has developed pursuant to the district court's inherent authority to manage the course of trials. *See* Luce v. United States, 469 U.S. 38, 41 n.4 (1984). The Seventh Circuit has noted that a motion *in limine*:

> is an important tool available to the trial judge to ensure the expeditious and evenhanded management of the trial proceedings. It performs a gatekeeping function and permits the trial judge to eliminate from further consideration evidentiary submissions that clearly ought not be presented to the jury because they clearly would be inadmissable for any purpose. The prudent use of the in limine motion sharpens the focus of later trial proceedings and permits the parties to focus their preparation on those matters that will be considered. . . .

Jonasson v. Lutheran Child and Family Servs., 115 F.3d 436, 440 (7th Cir. 1997). District courts have broad discretion in determinations regarding the admissibility of evidence. *See* United States v. Chambers, 441 F.3d 438, 455 (6th Cir. 2006).[3/]

Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the

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[3/] The Sixth Circuit has cautioned against excluding broad categories of evidence under Federal Rule of Evidence 403 in the context of motions *in limine*. The district court is in a better position during trial to employ the balancing test required under Federal Rule of Evidence 403 to exclude prejudicial, confusing, misleading, or cumulative evidence even if it is relevant. *See* Sperberg v. Goodyear Tire & Rubber Co., 519 F.2d 708, 712 (6th Cir. 1975). This caution is inapplicable here, however, because the expected testimony of Defendants' witnesses is irrelevant and inadmissible as a matter of law under Federal Rule of Evidence 401 and 402.

action more probable or less probable than it would be without the evidence." "Evidence which is not relevant is not admissible." Fed. R. Evid. 402. A district court has broad discretion in deciding what evidence is relevant or irrelevant. *See* United States v. Breitkreutz, 977 F.2d 214, 219 (6th Cir. 1992).

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see* Spotts v. United States, 429 F.3d 248, 250 (6th Cir. 2005). The moving party bears the burden of proving that there are no genuine issues of material fact. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Material facts are only those which are identified by the substantive law as being so. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Midwest Media Prop., L.L.C. v. Symmes Twp., 503 F.3d 456, 469 (6th Cir. 2007) (a fact is material only if it has the effect of establishing or refuting an element of a defense under the appropriate principle of law). Factual disputes that are irrelevant or unnecessary do not preclude summary judgment. *See* Liberty Lobby, 477 U.S. at 248.

IV. ARGUMENT

All witnesses who are expected to testify in support of Defendants' defense that the United States and the Tribe are barred by the doctrines of laches, estoppel, or impossibility should be stricken. The United States is not subject to these equitable defenses as contemplated by City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197, 219-20 (2005), in federal jurisdiction and Indian treaty interpretation cases. Therefore, any related testimony is irrelevant and inadmissible under Federal Rules of Evidence 401 and 402. The United States is also

entitled to summary judgment dismissal of Defendants' equitable defenses under Federal Rule of Civil Procedure 56.

A. Equitable Defenses Cannot Prevent the United States from Enforcing the Terms of its Treaties with Indians and from Confirming its Sovereign Jurisdiction in Indian Country under 25 U.S.C. § 1151.

The United States is not subject to equitable defenses in reservation boundary treaty interpretation cases. In fact, numerous cases specifically have held that in treaty interpretation cases, equitable defenses are not available against the United States. It is similarly well-settled that laches, equitable estoppel and the doctrine of impossibility cannot prevent the United States, when it acts in its sovereign capacity, from enforcing its sovereign rights.

Equitable defenses do not bar an action by the United States to enforce Indian treaty rights and terms or to confirm its jurisdiction in Indian Country. *See* United States v. Summerlin, 310 U.S. 414, 416 (1940); Utah Power & Light Co., v. United States, 243 U.S. 389, 409 (1917). Indeed, the United States Supreme Court has entertained numerous reservation boundary Indian treaty interpretation cases, and not once has it applied laches, estoppel, impossibility, or other equitable defenses against the United States. *See e.g.,* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) (holding 1894 surplus land act diminished reservation created pursuant to 1858 treaty); Hagen v. Utah, 510 U.S. 399 (1994) (holding 1902 Act diminished reservation created by Act of Congress in 1864); Solem v. Bartlett, 465 U.S. 463 (1984) (holding 1908 Cheyenne River Act did not diminish reservation); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) (holding 1904, 1907, and 1910 Acts diminished reservation created by 1889 treaty); DeCoteau v. Dist. County Court for Tenth Judicial Dist., 420 U.S. 425 (1975) (holding 1891 Act terminated reservation created by 1867 treaty); Mattz v. Arnett, 412 U.S. 481 (1973) (holding 1892 Act did

not terminate reservation created by 1855 executive order); Seymour v. Superintendent of Wash. State Penitentiary, 368 U.S. 351 (1962) (holding 1906 Act did not terminate reservation created by 1872 executive order).

Many cases expressly have held that equitable defenses such as laches, estoppel, or impossibility cannot prevent the United States, acting in its sovereign capacity, from enforcing the terms of treaties it makes with Indians. *See* 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 sub nom,* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 334 (9th Cir. 1956), *cert. denied,* 352 U.S. 988 (1957); Swim v. Bergland, 696 F.2d 712, 718 (9th Cir. 1983); United States v. Washington, 157 F.3d 630, 649 (9th Cir. 1998).

In this Circuit, laches is "a negligent and unintentional failure to protect one's rights." Chirco v. Crosswinds Communities, Inc., 474 F.3d 227, 231 (6th Cir. 2007) (citations omitted). "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." Id.

As a general matter, laches cannot bar the United States when it is acting in its sovereign capacity to enforce is sovereign rights. *See* United States v. Thompson, 98 U.S. 486, 488 (1878); United States v. Nashville, Chattanooga & St. Louis Ry. Co., 118 U.S. 120, 125- 26 (1886); Stanley v. Schwalby, 147 U.S. 508, 514-15 (1893); Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938*);* Bd. of Comm'rs of Jackson County v. United States, 308 U.S. 343, 351 (1939); Costello v. United States, 365 U.S. 265, 281 (1961). "The ancient rule *quod nullum tempus occurit regi*- 'that the sovereign is exempt from the consequences of its laches . . .'-has

enjoyed continuing vitality for centuries." United States v. Peoples Household Furnishings, Inc., 75 F.3d 252, 254 (6th Cir. 1996) (quoting Guaranty Trust, 304 U.S. at 132); *see also* Hatchett v. United States, 330 F.3d 875, 887 (6th Cir. 2003) ("It is well established that the Government generally is exempt from the consequences of its laches."); United States v. Weintraub, 613 F.2d 612, 618 (6th Cir. 1979). The Sixth Circuit recognizes that the United States can be subject to the defense of laches, but only if the government is standing in the shoes of a private party. *See* United States v. Mandycz, 447 F.3d 951, 964-65 (6th Cir. 2006), *cert. denied,* 127 S. Ct. 414.

Whatever the contours of the exceptions are when the government stands in the shoes of a private party, *see* Hatchett, 330 F.3d at 887; *cf.* United States v. California, 507 U.S. 746, 757 (1993); Clearfield Trust Co. v. United States, 318 U.S. 363, 369 (1943), they are not implicated here. When the United States seeks to enforce the terms of it treaties, it quintessentially acts in its sovereign capacity to enforce sovereign rights. *See* Grand Traverse Band of Chippewa and Ottawa Indians v. Dir., Mich. Dep't of Natural Res., 971 F. Supp. 282, 288 (W.D. Mich. 1995) ("Treaty-reserved rights . . . are property rights protected by the United States Constitution."); New Mexico v. Aamodt, 537 F.2d 1102, 1110 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977).[4/]

[4/] As explained by the Eleventh Circuit in Federal Deposit Insurance Corp. v. Harrison, 735 F.2d 408, 411 (11th Cir. 1984), other characteristic "sovereign" activities include: the interpretation of tax statutes, *see* Auto. Club of Mich. v. Comm'r of Internal Revenue, 353 U.S. 180 (1957); enforcement of health and safety regulations, *see* Pac. Shrimp Co. v. U.S. Dep't of Transp., 375 F. Supp. 1036, 1042 (W.D. Wash. 1974); actions affecting federal property and Indian lands, *see* United States v. Florida, 482 F.2d 205 (5th Cir. 1973); authorization of funds for public utilities, *see* Somerville Tech. Servs. v. United States, 640 F.2d 1276 (Ct. Cl. 1981); grants of disability benefits, *see* Gressley v. Califano, 609 F.2d 1265 (7th Cir. 1979); awards of student loans, *see* Hicks v. Harris, 606 F.2d 65 (5th Cir. 1979); denials of United States citizenship, *see* INS v. Miranda, 459 U.S. 14 (1982) (per curiam); and the issuance of permits for developers' dredge and fill activities, *see* Deltona Corp. v. Alexander, 682 F.2d 888 (11th Cir. 1982).

Nor does equitable estoppel lie against the United States when it seeks to enforce its sovereign rights under an Indian treaty. For equitable estoppel, the following elements must be proved:

> 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 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.

Thomas v. Miller, 489 F.3d 293, 302 (6th Cir. 2007) (internal quotation omitted). However, the federal government generally is not subject the defense. *See* 14 Charles Wright & Arthur Miller, Federal Practice and Procedure §3652 (3d ed.). There are, however, narrow exceptions that require additional elements of proof. *See* id.

For example, in the immigration context, the Sixth Circuit has recognized that the Supreme Court has "left open the possibility that a claim of equitable estoppel may lie against a federal government agency for misleading statements or actions that a private party relies upon, where the agency commits *'affirmative misconduct'* causing the denial of a benefit." Elia v. Gonzales, 431 F.3d 268, 276 (6th Cir. 2005) (citing Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 421-23 (1990)) (emphasis added); Mich. Express, Inc., v. United States, 374 F.3d 424, 427 (6th Cir. 2004) (party asserting estoppel against the government has a "very heavy burden" and must at a minimum show affirmative misconduct); *accord* Carrillo v. United States, 5 F.3d 1302, 1306 (9th Cir. 1993); Harrod v. Glickman, 206 F.3d 783, 793 (8th Cir. 2000) (same)

(citing Heckler v. Cmty. Health Servs. of Crawford County, Inc., 467 U.S. 51, 59-61 (1984); *see also* Woodstock/Kenosha Health Center v. Schweiker, 713 F.2d 285, 290 (7th Cir. 1983) (estoppel against the government is recognized only in "certain narrow circumstances"); United States v. Gordon, 78 F.3d 781, 786 (2d Cir. 1996) (equitable estoppel only available in most serious of circumstances).

However, the court need not be concerned about whether the narrow circumstances and requisite heightened elements of proof are present in this case. Just as with laches, there is no legal precedent for applying estoppel against the federal government when it seeks to enforce its sovereign rights pursuant to an Indian treaty. *See* United States v. City of Tacoma, 332 F.3d 574, 581-82 (9th Cir. 2003) ("[T]here can be no argument that equitable estoppel bars the United States' action because, when the government acts as trustee for an Indian tribe, it is not at all subject to that defense."); Portmann v. United States, 674 F.2d 1155, 1161 n.15 (7th Cir. 1982) ("government actions with respect to federal property and Indian lands held in trust are normally regarded as 'sovereign' and thus not subject to estoppel.") (citing New Mexico v. Aamodt, 537 F.2d 1102, 1110 (10th Cir. 1976), *cert. denied,* 429 U.S. 1121 (1977)); United States v. Florida, 482 F.2d 205 (5th Cir. 1973)); Cramer v. United States, 261 U.S. 219, 234 (1923) (United States government could not be estopped from bringing suit on behalf of Indians in possession by earlier, unlawful "act[s] or declaration[s] of its officers or agents").

Lastly, the doctrine of impossibility (or impracticability) has no application against the United States in the area of treaty interpretation cases either.[5/] This doctrine, as articulated by

[5/] Typically, the doctrine of impossibility/impracticability is a defense for non-performance of a contract. *See* Restatement (Second) of Contracts § 261; Troutman v. State Farm Fire & Cas. Co., 570 F.2d 658, 658 (6th Cir. 1978). However, it appears some courts have used the term to mean

the Supreme Court in Sherrill, 544 U.S. at 219, stands for the proposition that it may be impossible for a court to fashion a remedy that allows a tribe to unilaterally reestablish sovereign control by unifying aboriginal title (abandoned centuries ago) with fee title because to do so "would have disruptive practical consequences." As explained more fully below, the case at hand is completely different from Sherrill, both legally and factually. To extend the impossibility doctrine as articulated by Sherrill to this case, where the United States seeks a declaration as to the meaning of Indian treaty terms, would be unprecedented and unwarranted. There is no legal basis to do so.

In sum, equitable defenses cannot prohibit the United States from acting in its sovereign capacity to enforce the terms of treaties with Indians or from confirming federal jurisdiction in Indian County pursuant to 25 U.S.C. § 1151. Consequently, there is no legal basis for Defendants' equitable defenses and all testimony in support of these defenses is irrelevant and inadmissible as a matter of law under Federal Rules of Evidence 401 and 402. The United States is entitled further to partial summary judgment dismissing Defendants' equitable defenses.

B. Sherrill Did Not Alter the Legal Landscape in Indian Treaty Interpretation Cases.

The Supreme Court's decision in Sherrill did not reverse the long-standing precedent that the United States cannot be barred by equitable defenses from enforcing Indian treaty rights and

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that the remedies sought by an Indian tribe in a land claim case would be impossible or impracticable to fashion because they would be too disruptive. *See* Sherrill, 544 U.S. at 219-20; Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony v. City of Los Angeles, 2007 WL 521403, at * 10 (E.D. Cal. Feb. 15, 2007) (explaining the Supreme Court's use of the doctrine in Sherrill).

terms.[6] There is still no legal basis to apply these doctrines in this case.

Sherrill involved an action brought by the Oneida Nation ("Nation") concerning whether the local government could impose taxes on land purchased by the Tribe in fee. The action was related to a series of lawsuits by the Nation alleging unlawful possession by non-Indian landowners. *See* Oneida Indian Nation of N.Y. v. New York, 500 F. Supp. 2d 128 (N.D.N.Y. 2007). The United States was not a party. The specific parcels in Sherrill had been sold to New York in 1805 in violation of the Indian Trade and Intercourse Act, 25 U.S.C. § 177, which requires federal approval of Indian land sales. For two centuries, the land indisputably had been under the governance of the State and local governments. In 1997 and 1998, the Nation purchased the land in fee on the open market. The Tribe claimed the land was exempt from local taxes on the theory that the unification of aboriginal title with fee title unilaterally restored tribal sovereignty over the land. The Court rejected the "unification" theory and held that equitable considerations barred the Tribe from unilaterally resurrecting sovereignty. It held that even if the Tribe had a legal right to exert sovereignty over the land, the vindication of that right was too disruptive.

Specifically, the Court was concerned that the unilateral resurrection of sovereignty would significantly upset "justifiable expectations" of the local community and the State and local governments. Sherrill, 544 U.S. at 215. According to Sherrill, the Nation sold and abandoned the area over two centuries ago, and it was not until recently that the Nation sought to

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[6] Sherrill does not apply any of these equitable doctrines *per se.* Rather, the Court held that the circumstances "*evoke[d]* the doctrine of laches, acquiescence and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate." 544 U.S. at 221 (emphasis added).

regain control over its aboriginal land and seek redress for the ancient land loss. During the past two centuries, the State and local governments indisputably exercised governmental jurisdiction over the parcels. Further, the properties in the Nation's aboriginal area had gone through significant changes in value and character. The aboriginal land area was overwhelmingly populated by non-Indians. Development of "every type imaginable" had been going on in the area for over two hundred years. Id. at 219 (citation omitted). There were "longstanding observances" by all parties and "settled expectations" regarding the land. Id. at 218. Even though the cause of action arose in 1805, the Nation sought redress for the ancient wrong centuries after-the-fact. The Court was concerned that the Nation sought to resurrect sovereign control unilaterally in a piece-meal fashion by acquiring parcels in fee. Due to these practical and equitable concerns, the Court held that equitable defenses barred a remedy in the case. The Court did not address reservation boundaries. And, because the United States was not a party, it did not address whether the United States is subject to the same equitable concerns evoked in the case.

Some courts have interpreted Sherrill as holding that equitable defenses can apply to Indian possessory land claims that seek or sound in ejectment of the current owners, which is by its very nature disruptive, or where the tribe seeks to unilaterally resurrect its sovereign authority over the land, which is also disruptive by its nature. *See* Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266 (2d Cir. 2005) (Indian land claim alleging unlawful possession by non-Indians subject to equitable defenses, where claim is disruptive and United States acts as a private party); Oneida, 500 F. Supp. 2d at 137-38 (explaining the parameters of Sherrill and Cayuga); New York v. Shinnecock Indian Tribe, 523 F. Supp. 2d 185, 279-81 (E.D.N.Y. 2008) (even if tribe's

aboriginal title was not extinguished in the 1600's, tribe barred by laches in a disruptive land claim to assert sovereign authority on a parcel sold by the tribe in the 17th century (citing Cayuga as binding precedent)); Paiute-Shoshone, 2007 WL 521403, at *9-11 (equitable defenses may be available against a tribe in a suit for ejectment based upon a claim of legal title or prior possession of Indian tribe); In re Schugg, 2008 WL 401414, *12 (D. Ariz. Feb. 12, 2008) (laches may be a defense against a tribe in a possessory Indian land claim such as a dispute over ownership of an easement (citing Cayuga, 413 F.3d at 273-78)).[7] At the heart of these cases is the concern that "[p]ast injustices suffered by the [Indians] cannot be remedied by creating present and future injustices." Oneida, 500 F. Supp. 2d at 137.[8]

Sherrill and its progeny have no application here. First, this cases does not involve a claim for Indian lands unlawfully dispossessed. Neither the United States nor the Tribe allege that Defendants or any citizens unlawfully possess Indian lands. Instead, the United States and

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[7] In Ottawa Tribe of Oklahoma v. Ohio Dep't of Natural Res., 2008 WL 878824 (N.D. Ohio March 31, 2008), the district court held that laches barred the Tribe from asserting inland commercial hunting and fishing rights in the State of Ohio based upon early 19th century treaties. The court did not rule that equitable defenses are available against the United States. The United States was not a party, and indeed the court indicated that the United States' presence may have led to a different outcome. *See* id., at *5. Importantly, the case did not involve a dispute over a reservation boundary. Rather, the Tribe (now located in Oklahoma) was attempting to establish a commercial fishing company in an area abandoned by the Tribe 150 years ago in the State of Ohio, where the relief sought potentially implicated the use and occupancy of private landowners. Thus, in the Court's view, the factual situation and the theories presented implicated the types of concerns present in disruptive aboriginal possessory land claims.

[8] Although the recent decision in Oneida Tribe of Indians of Wisconsin v. Villiage of Hobart, 2008 WL 821767 (E.D. Wis. March 28, 2008), cites Sherrill, it did not apply equitable defenses against the Tribe. It cited Sherrill to support its conclusion that the Tribe cannot resurrect long-lost sovereignty over aboriginal land by reacquiring it on the open market, but instead, it should have the land taken into trust under the Indian Reorganization Act, 25 U.S.C. § 465. *See* id., at *10-11 (citing Sherrill, 544 U.S. at 220-21).

the Tribe seek a declaration as to the meaning of several treaties.

Second, the parties do not seek a remedy that sounds in ejectment. No citizens will be displaced. The Tribe is not seeking monetary compensation based upon a legal theory of unlawful possession or trespass. Property titles will not be affected. No one will be displaced or forced to pay damages for wrongs committed centuries ago.

Third, this case does not involve the "unification theory" of merging aboriginal title with fee title in order to unilaterally resurrect tribal sovereignty over land sold and abandoned centuries ago. The Saginaw Chippewa Tribe has had a continuous presence in the six-township Reservation since its inception and never abandoned the lands in question. The Tribe is not attempting to unilaterally resurrect long-lost sovereignty over long-lost land. It is not attempting to resurrect or assert governmental control over non-Indians.

Fourth, the remedy sought is not inherently disruptive. It would be a novel proposition indeed to hold that a declaration as to the meaning of treaty terms is disruptive by its very nature. As stated above, non-Indian residents of the Isabella Reservation are expressly excluded from the remedy in the Complaint and the Joint Stipulation. As a practical and legal matter, the declaration sought in this case will amount to very little change in jurisdiction. Non-Indian residents within the six-township area will continue to be under the jurisdiction of the State, County and City. *See* Montana v. United States, 450 U.S. 544, 565 (1981) (with limited exceptions, a tribe's "inherent sovereign powers . . . do not extend to the activities of non-members of the tribe."). This case will not overturn years of settled expectations concerning land ownership or occupancy. Certainly, Defendants have been aware of the treaties since their ratification. The real effect of the declaration will be consistency, predictability and stability for

all governmental entities and their citizens.

Fifth, the cause of action in this case did not arise centuries ago based upon ancient wrongdoing. Rather, this case became ripe when the Defendants started acting in a manner inconsistent with the Isabella Reservation's status as Indian Country. *See* State of Mich.'s Answer, Actions of the Defendants ¶¶ 9-13; State of Mich.'s Answer to Am. Compl., Actions of the Defendants ¶¶ 8-11; Answer to United States' Compl. in Interv., Actions of the Defendants ¶¶ 16, 18-20. Neither the United States nor the Tribe unreasonably delayed bringing this case. Instead, the parties simply could not bring the action until there was a ripe, live case or controversy as required by Article III of the United States Constitution.

Lastly, to the extent that considerations akin to equitable considerations are relevant, they may be considered pursuant to the framework established by the Supreme Court in Rosebud Sioux and its progeny as contemporaneous evidence regarding the parties' intent regarding the reservation boundaries. As the Court in Sherrill pointed out, *see* 544 U.S. at 215, 219-20, any concerns regarding disruption, or justifiable expectations, in reservation boundary treaty interpretation cases should follow the analysis set forth in Rosebud Sioux, 430 U.S. at 604-5, Hagen, 510 U.S. at 421, and Solem, 465 U.S. at 479-80.

Under this line of treaty interpretation cases, the court may look at the immediate subsequent jurisdictional history and subsequent demographics in order to confirm the meaning of the treaty's terms. *See* Solem, 465 U.S. at 479-80. If, for example, the subsequent history shows that the State assumed immediate jurisdiction, and the United States did not seek to do the same, it can confirm the parties' understanding of the meaning of the treaty. Additionally, the court may not "strain[] a reading" of the treaty if to do so would upset "justifiable expectations"

of a large non-Indian population, its land use, and the undisputed jurisdiction of the State and local governments. Rosebud Sioux, 430 U.S. at 605.

The Supreme Court in Sherrill explained that these cases address "the different, but related, context of the diminishment of an Indian reservation," 544 U.S. at 215, and found them a useful guide in determining how it would address the novel problems posed by the Oneida Nation's theory that free market purchases of land parcels also restored ancient Indian sovereignty over those parcels. The diminishment cases provided a useful reference point for the Court in Sherrill, but the Court was not purporting to overrule or alter the settled law that is applied in treaty interpretation cases like the present one.

Defendants' witnesses, however, are not relevant to the inquiry under Rosebud Sioux. The jurisdictional history immediately following the treaties is addressed by historical documents and historians. The parties can stipulate to, or the Court can take judicial notice of, the U.S. Census Bureau data concerning the area's population demographics.

In short, to the extent any potential disruption or justifiable expectations are relevant, they may be dealt with properly pursuant to Rosebud Sioux, Hagen and Solem. The equitable defenses evoked under Sherrill and its progeny are inapplicable to reservation boundary treaty interpretation cases where the United States seeks to enforce its sovereign rights and seeks to confirm its sovereign jurisdiction.

V. CONCLUSION

For the foregoing reasons, equitable defenses cannot bar the United States from seeking to enforce the terms of its treaties with the Saginaw Chippewa Tribe or from seeking to confirm its sovereign jurisdiction in Indian Country under 25 U.S.C. § 1151. Therefore, any testimony in

support of the equitable defenses is irrelevant and inadmissible as a matter of law under Federal Rules of Evidence 401 and 402. The United States respectfully requests that its motion *in limine* be granted and that summary judgment dismissal of the equitable defenses be granted in its favor.

Dated: April 4, 2008

/s/Patricia Miller
PATRICIA MILLER
U.S. Department of Justice
Environment & Natural Resources Division
Indian Resources Section
L'Enfant Plaza Station, P.O. Box 44378
Washington, D.C. 20026-4378
Telephone: (202) 305-1117
Telefax: (202) 305-0271
patti.miller@usdoj.gov
Attorney for the United States

CERTIFICATE OF SERVICE

This is to certify that on April 4, 2008, the United States' Motion in Limine and for Partial Summary Judgment, Brief in Support, and Proposed Order were filed electronically with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

s/ Patricia Miller
PATRICIA MILLER
U.S. Department of Justice
Environment & Natural Resources Division
Indian Resources Section
L'Enfant Plaza Station
P.O. Box 44378
Washington, D.C. 20026-4378
Telephone: (202) 305-1117
Telefax: (202) 305-0271
patti.miller@usdoj.gov