UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, a federally recognized Indian tribe,

Plaintiffs,

v

RICK SNYDER, Governor of the State of Michigan, et al.

Defendants.

No. 1:15-cv-850

HON. PAUL L. MALONEY

STATE'S BRIEF IN OPPOSITION TO TRIBE'S COMBINED MOTION FOR PARTIAL SUMMARY JUDGMENT AND RULE 12(F) MOTION TO STRIKE DEFENSES OR RULE 26(B) LIMIT DISCOVERY

Bill Schuette
Attorney General

Jaclyn Shoshana Levine (P58938)
Kelly M. Drake (P59071)
Nathan Gambill (P75506)
Assistant Attorneys General
Attorneys for Defendant
Environment, Natural Resources
and Agriculture Division
P.O. Box 30755
Lansing, Michigan 48909
(517) 373-7540
LevineJ2@michigan.gov
DrakeK2@michigan.gov
GambillN@michigan.gov

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Page

Cases

Statutes

Rules

Treaties

CONCISE STATEMENT OF ISSUES PRESENTED

1. Has the Tribe established that the 1855 Treaty created a reservation in support of its theory that there is treaty rights vs. remedy distinction that bars the equitable defenses?

2. If the 1855 Treaty had created a reservation for the Tribe, can the Tribe bar the State from discovering and presenting the wide array of evidence relevant to a diminishment claim and to responding to the complaint?

3. Is the State obligated to wait to raise its equitable defenses in a subsequent case?

4. Is the Tribe entitled to circumvent the land-to-trust process Congress mandated by asking this Court to declare a reservation?

The State answers each of these questions NO.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority: *Solem v. Bartlett*, 465 U.S. 463 (1984); *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005).

INTRODUCTION

The history invoked by this case spans at least three centuries, starting before Michigan became a state and arriving at the present day. The defense experts and witnesses have a tremendous task that is just starting. Governor Snyder's (State) position is sure to evolve as discovery progresses. But even at this early stage, the State cannot agree with the way Plaintiff Little Traverse Bay Bands of Odawa Indians (Tribe) has framed this as a "diminishment" or "reservation boundaries" case because it has yet to establish that the Treaty with the Ottawa and Chippewa, 11 Stat. 621 (July 31, 1855), established a reservation.

Even if the Tribe's starting point that the 1855 Treaty created a reservation were accurate, the Tribe brings this motion based on the incorrect premise that precedent creates a heavy black line separating "treaty rights" cases from "remedy" cases. In the Tribe's view, equitable defenses and supporting evidence cannot be asserted in a case that decides whether Congress created and then diminished an Indian reservation. The Tribe contends that equitable defenses and supporting evidence are only allowed in a later case in which a tribe asks a court to grant it a remedy that threatens to disrupt longstanding expectations concerning state and local jurisdiction in a specific context, like taxes. Effectively, the Tribe is telling this Court to focus on the 1850s, not to consider any present-day evidence or the potential consequences of its decision.

The precedent, however, does not bar the State's equitable defenses and its supporting evidence or require a narrow view of history. *Solem v. Bartlett*, 465 U.S. 463 (1984), created a three-part analytical framework that considers a wide range of events that occurred after a reservation was created and Congress passed surplus acts alleged to have diminished the reservation. *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 214-21 (2005), interpreted the equitable considerations in *Solem* and other reservation diminishment precedent to permit equitable defenses when a tribe is seeking remedies that would "disrupt"

state and local governance in the "present" and "future." *Id*. at 203. *Sherrill* also instructs tribes that seek to "regain sovereign control over territory" that has lost its Indian character to have the land taken into trust. See *id*. at 220-21.

The Tribe has made State and local governance central to its complaint, expressly seeking to disrupt present and future state and local civil, criminal, and family jurisdiction with declaratory and permanent injunctive relief. The Tribe asks this Court to exercise its equitable powers to provide this broad and disruptive relief so that it can avoid complying with the specific land-to-trust process Congress created for it in Charlevoix and Emmet Counties. Thus, this is precisely the type of case in which *Sherrill* allows equitable defenses to be asserted and supported with evidence, including present-day and future-looking evidence.

TREATY BACKGROUND

The key question in this litigation is whether the Treaty with the Ottawa and Chippewa, 11 Stat. 621 (1855), created a permanent reservation for the Tribe's political predecessors (the Bands). Multiple lines of evidence lead the State to believe that the 1855 Treaty did not create a reservation for the Bands out of lands that they had ceded almost twenty years earlier. Rather, the Bands chose to end the persistent threat of removal from Michigan by ceding a temporary reservation created in the Treaty of Washington, 7 Stat. 491 (March 28, 1836), and accepting title to individual land allotments. The Bands strategically chose land title ownership, not a reservation, to make Michigan their permanent homeland.

The townships in Article 1, Paragraphs Third and Fourth, of the 1855 Treaty established the geographic area where the United States temporarily set aside public lands from which the Bands' members could select allotments or purchase lands. The set-aside avoided competing

land claims from settlers and other Indians, including competing claims from members of other bands who were entitled to select their own allotments. See 1855 Treaty, art. 1, ¶¶ 1, 2, 5-8.

The 1855 Treaty never conveyed control or ownership of unallotted or unsold lands to the Bands to be held in common as a reservation or to the Bands' individual members. Lands that were not selected for allotments or purchased by the Bands' members were required to "remain the property of the United States[.]" 1855 Treaty, art. 1. The 1855 Treaty provided that, at the end of the allotment process, "all lands remaining unappropriated by or unsold to the Indians . . . may be sold or disposed of by the United States as in the case of all other public lands." *Id*.

Three acts passed by Congress in the 1870s implemented and extended the time for the allotment process. See An Act for the Restoration to Market of Certain Lands in Michigan, 17 Stat. 381 (1872), as amended in 18 Stat. 516 (1875) and 19 Stat. 55 (1876). These acts ultimately returned the lands the Bands' members did not select or purchase to the public domain, resulting in their sale.

LEGAL TEST

A party seeking partial summary judgment must demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" concerning the claims or defenses challenged. Fed. R. Civ. P. 56(a). A court reviews all the evidence in the record in the light most favorable to the nonmoving party. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A court may only enter summary judgment against the non-movant "after adequate time for discovery" and if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Celotex Corp. v.*

Catrett, 477 U.S. 317, 322 (1986); see also *Plott v. Gen. Motors Corp., Packard Elec. Div.*, 71 F.3d 1190, 1195 (6th Cir. 1995).

A motion to strike an affirmative defense may only be brought within twenty-one days of being served within a pleading.[1] Fed. R. Civ. P. 12(f). "Motions to strike are viewed with disfavor and are not frequently granted." *Operating Engineers Local 324 Health Care Plan v. G & W Const. Co.*, 783 F.3d 1045, 1050 (6th Cir. 2015). "The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy." *Brown & Williamson Tobacco Corp. v United States*, 201 F.2d 819, 822 (6th Cir. 1953).

ARGUMENT

I. The Tribe has not established that the 1855 Treaty created a reservation, making the treaty rights vs. remedy distinction it claims bars the equitable defenses irrelevant.

The Tribe's principal argument is that Defendants may not assert equitable defenses to defeat a tribe's treaty rights. (PageID.694.) However, all the cases the Tribe cites involve a tribe with established treaty rights, such as the right to a reservation or hunting and fishing rights. *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 334 (1998) (reservation); *United States v. Washington*, 157 F.3d 630, 638-39 (9th Cir. 1998) (fishing rights). The Tribe cannot rely on this precedent because it has not established that it has a reservation under the 1855 Treaty, which is why it seeks a declaration that the reservation "exists today[.]" (PageID.17.)

There is a growing body of evidence that the Tribe does not have a reservation. For instance, Congress did not identify an existing reservation when it reaffirmed its relationship

[1] The State served its answer with affirmative defenses on September 15, 2015, making this motion to strike filed on May 20, 2016, far too late. (PageID.24, 680.)

with the Tribe in 1994. See Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act (Reaffirmation Act), Pub. Law 103-324 (Sept. 21, 1994), 108 Stat. 2156, codified at 25 U.S.C. § 1300k. Congress may have reached this conclusion for a variety of reasons, including the fact that the Tribe had "pursued a successful land claim with the Indian Claims Commission" that may have addressed the Tribe's claims.[2] 25 U.S.C. § 1300k(6).

Congress acknowledged only that the 1836 and 1855 Treaties recognized the Tribe's "ancestral homeland." 25 U.S.C. § 1300k(2)(3). Congress also used the lands identified in Article 1, Paragraphs Third and Fourth, of the 1855 Treaty to establish a federal service area for the Tribe's members near that homeland, "notwithstanding the *establishment of a reservation for the tribe* ***after*** *the date of the enactment* of this Act." 25 U.S.C. § 1300k(4)(b)(2)(A) (emphasis added). Congress did not use the geographic area described in Article 1, Paragraphs Third and Fourth to recognize a reservation because it anticipated a reservation being established only *after* the Reaffirmation Act was signed into law.

To create a post-1994 reservation, Congress mandated that the Secretary of the Interior acquire eligible lands to take into trust for the Tribe in Charlevoix and Emmet Counties. 25 U.S.C. § 1300k(6)(a). Congress also allowed the Tribe to request that the Secretary take into trust eligible land it acquired in the larger federal service area under the discretionary process in the Indian Reorganization Act (IRA), 25 U.S.C. § 465. 25 U.S.C. § 1300k(6)(c). Congress deemed only these lands actually taken into trust part of the Tribe's "reservation." 25 U.S.C. § 1300k(6)(d). Neither the mandatory nor discretionary land-to-trust process in the Reaffirmation

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[2] The United States finally paid the judgment for the Tribe's land claims in the Michigan Indian Land Claims Settlement Act (MILCSA), Pub. Law 105-143 (Dec. 15, 1997), the same statute at issue in *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014).

Act followed the boundaries of the townships listed in Article 1, Paragraphs Third and Fourth, of the 1855 Treaty. The right to acquire lands in a reservation through a *statute* enacted in the 1990s is a far cry from establishing that the Tribe has an historic right to a much larger reservation based on any *treaty* rights.

The United States Bureau of Indian Affairs (BIA) also appears to have concluded that the Tribe does not have a reservation under the 1855 Treaty. For example, in 2014, the Michigan Department of Licensing and Regulatory Affairs (DLARA) sought information from the BIA regarding all Indian lands in Michigan and the basis on which any reservations were established as part of a mapping project. (Ex. A.) The BIA responded that only four federally-recognized tribes in Michigan have "designated boundaries based on treaty areas." (Ex. B.) The BIA listed reservations for the Bay Mills Indian Community, the Saginaw Chippewa Indian Tribe, the Hannahville Indian Community, and the Keweenaw Bay Indian Community. The response explained, "***The remaining Tribes* [in Michigan] *do not have a treaty based reservation***. Reservation status is determined either by statute or by requesting a reservation proclamation once the land is in trust." (Emphasis added.) The BIA identified the Tribe's trust lands, but did not identify a reservation for the Tribe. (Ex. C.[3])

The State's equitable defenses and witnesses are appropriate responses to the facts alleged, relief requested, and legal analysis required in this case. But even if there were merit in the Tribe's argument that equitable defenses are never relevant to a "treaty rights" case, there is a genuine issue of material fact concerning whether it has a treaty right to a reservation. The Tribe is not entitled to have its motion granted on the basis of the "treaty rights" cases it cites.

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[3] Cell height increased at the end of the last page of the table to reveal the unaltered text when preparing the exhibit.

II. The State is entitled to discover and present the wide array of evidence relevant to a diminishment claim and to respond to the complaint.

Based on its assumption that the 1855 Treaty created a reservation, the Tribe argues that reservation diminishment focuses solely on Congressional intent, leaving only eight potential witnesses to be shared by all nineteen Defendants. (PageID.691, 696, 712-715.) The Tribe contends that *eighty-one witnesses* should be excluded because the Tribe speculates that they might testify regarding Defendants' "settled expectations" and equitable defenses, or the "continuous jurisdiction" exercised by the State and local units of government in Charlevoix and Emmet Counties. (PageID.701-704.)

A. Present-day evidence is directly relevant to diminishment.

Solem, *supra* at 470, established a three-part framework for determining whether a surplus land act diminished an Indian reservation or simply allowed non-Indians to purchase lands within a reservation. The analysis looks at (1) whether Congress expressed a clear intent to diminish a reservation; (2) the "widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation;" and (3) the "events that occurred after the passage of a surplus land act [that help] to decipher Congress's intentions." *Id*. This analysis is expansive, requiring that a court look at "*all the circumstances* surrounding the opening of a reservation." *Hagen v. Utah*, 510 U.S. 399, 412 (1994) (emphasis added).

The Tribe claims that the third factor in *Solem* only looks at demographic information and how the United States treated the lands. (PageID.698.) But this third factor is actually open to all subsequent events relevant to understanding whether the reservation was diminished. The third factor operates on a "pragmatic level," recognizing that the circumstances surrounding "who actually moved onto opened reservation lands is also relevant to deciding whether a

surplus land act diminished a reservation." *Solem*, *supra* at 470. "Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character," the Supreme Court has "acknowledged that *de facto*, if not *de jure*, diminishment may have occurred." *Id*.

The subsequent events relevant to diminishment are case-specific. Courts have looked at evidence as broad as: the percentage of Indian vs. non-Indian population and land ownership; geographic patterns associated with allotment, settlement, and tribal and non-Indian businesses; tribal social and cultural practices; and when and where state, local, and tribal governments have asserted jurisdiction over particular issues. See *Nebraska v. Parker*, 136 S. Ct. 1072, 1077, 1081 (2016); *Yankton Sioux*, *supra* at 356-357; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-5 (1977). Courts may give evidence of *de facto* diminishment less weight than other evidence, but they do consider it. See *Hagen*, *supra* at 420 (strong contemporaneous evidence of diminishment, but "less illuminating" subsequent history); *Yankton Sioux*, *supra* at 356 (evidence of *de facto* diminishment less compelling than evidence under other *Solem* prongs).

If the Tribe proves there is a reservation, this Court must consider a wide range of evidence from 1855 to the present day pointing to diminishment. For instance, the BIA information indicates that the Tribe has concentrated its core governmental functions (tribal offices, medical center, courts, etc.) on trust lands. (Ex. C.) This suggests that the Tribe itself has not viewed the fee lands within the townships listed in the 1855 Treaty as a reservation.

There is also little question that the State has a longstanding and substantial presence in Emmet and Charlevoix Counties in its sovereign capacity. That is why multiple State executive agencies maintain offices in the area to provide services. (Ex. D.) The State also has vast landholdings in Charlevoix and Emmet Counties, including state parks, wildlife/game areas, and

other lands in the alleged reservation. (Ex. E.) In the early 1990s when the Tribe obtained Congressional reaffirmation, its 1,000 members living "close" to (but not necessarily in) Charlevoix and Emmet Counties constituted roughly 2% of the 46,438 people in the two counties. See 25 U.S.C. § 1300k(2)(3). (Ex. F.) The majority non-Indian population makes the State's jurisdiction in the area logical and consistent with diminishment.

The Tribe's efforts to characterize the State's evidence as "continuous jurisdiction," "present day," "future effects" is irrelevant to deciding whether the State may assert and pursue its equitable defenses. This type of evidence is permissible under *Solem*.

B. Jurisdictional evidence is directly relevant to diminishment.

The Tribe argues that this Court should preclude any evidence or testimony addressing how declaring reservation boundaries would affect "justifiable expectations" or have "future effects" on state and local jurisdiction. (PageID.705-709.) The Tribe's argument improperly attempts to eliminate contemporaneous understanding (second prong) and *de facto* diminishment (third prong) from the *Solem* framework.

Federal courts examine which governments exercise jurisdiction and when they began to exercise that jurisdiction because it is directly relevant to the contemporaneous understanding of whether a surplus land act diminished a reservation. *See, e.g., Hagen, supra* at 421 (state exercised jurisdiction "from the time the reservation was opened"); *Solem, supra* at 479-80 (state/federal criminal jurisdiction, but tribal authorities and BIA took "primary responsibility for policing and supplying social services"). The exercise of state and local jurisdiction is also relevant to determining if the area lost its "Indian character" due to *de facto* diminishment. *See, e.g., Hagen, supra* at 421 (state jurisdiction plus 85% non-Indian population was "practical acknowledgment of" diminishment); *Solem, supra* at 480 (few settlers entered reservation).

Solem explained why it is so important to look at which governmental entities exercise jurisdiction in the diminishment analysis, saying, "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." *Solem, supra* at 471, n 12; see also *Hagen, supra* at 421 (concluding reservation not diminished "would seriously disrupt the justifiable expectations of the people living in the area"). Courts must understand how state and local governments have exercised their jurisdiction, how that jurisdiction will change in the future if the area is declared an undiminished reservation, and the burdens that the jurisdictional change may entail. See also *Rosebud Sioux, supra* at 604-5 (long history of state jurisdiction over area with non-Indian character relevant to diminishment and "has created justifiable expectations which should not be upset"); *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 442-44, 449 (1975) (reviewing eighty years of jurisdictional history in concluding reservation had been diminished).

In some cases, longstanding state and local jurisdiction is simply not enough to overcome clear evidence that Congress did not diminish a reservation. See *Parker, supra* at 1081-82 (evidence that the federal and state governments treated reservation as within state jurisdiction did not outweigh other evidence of Congressional intent). However, it is up to the courts to weigh the evidence, not to exclude it and related defenses from the outset of a case.

C. The Tribe has made jurisdiction the central issue in this case and the State is entitled to present evidence that rebuts the allegations in the complaint.

The very ordinary principle that relevant evidence is generally admissible and subject to discovery also supports the State's right to offer present-day evidence concerning a wide variety of facts and the potential impacts of this case on jurisdiction. See *Daubert v. Merrell Dow*

Pharmaceuticals, Inc., 509 U.S. 579, 587; (all "relevant" evidence admissible under Fed. R. Evid. 402 and Fed. R. Evid. 401 provides a "liberal" definition of what is admissible); Fed. R. Civ. P. 26(b) (defining the scope of discovery based on relevance). The Tribe is the party that has framed this case as a jurisdictional dispute, stating that the case presents "significant present-day jurisdictional and governance ramifications for the Tribe." [4] (PageID.2, ¶ 6.)

The Tribe's complaint alleges the geographic area where it claims to exercise jurisdiction under tribal law. (PageID.11-12, ¶ 49.) The Tribe asserts that the State and local units of government have acknowledged its tribal sovereignty and the existence of a reservation by entering into agreements and respecting some aspects of its jurisdiction. (PageID.12, ¶ 50.) The Tribe claims the State has asserted its own jurisdiction or has not recognized all tribal jurisdiction. (PageID.13-14, 17, ¶¶ 51-52, 58-59.) The Tribe has also sought discovery attempting to establish if or how the State is exercising its jurisdiction at an environmental remediation project in Emmet County. (Ex. G, RFP #3.) The Tribe even seeks relief that would bar the State from asserting jurisdiction. (PageID.18.)

The State has identified witnesses who will rebut the Tribe's factual assertions regarding present-day circumstances and jurisdiction. For instance, the State may call a witness from the Michigan Department of Treasury (Walt Fratzke) to testify concerning the tribal-state tax agreement addressed in paragraphs 50 and 51 of the complaint. (Ex. H.) That agreement expressly provides in Section II.A that

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[4] The Tribe makes broad statements about jurisdiction, in part, because it has not waited for a dispute to arise in a court could decide if it has a reservation. *See, e.g., Parker*, *supra* at 1078 (tax and licensing jurisdiction); *Solem*, *supra* at 465 (criminal jurisdiction); *DeCoteau*, *supra* at 428-430 (jurisdiction to terminate parental rights and criminal jurisdiction). The Tribe's failure to plead a specific jurisdictional dispute on the face of the complaint suggests that it has failed to allege a case and controversy sufficient for Article III jurisdiction.

> neither the State nor the Tribe makes any admissions, representations, or concessions whatsoever regarding the extent of Indian Country and either the State's or Tribe's jurisdiction, and this negotiated [geographic] Agreement Area *can serve absolutely no precedential purpose in any administrative or judicial proceeding not directly related to the administration or enforcement of this Agreement*.

(Ex. I, p 5 (emphasis added).) Consequently, Mr. Fratzke's testimony will support the State's defense that the geographic area underlying the tax agreement alleged in paragraphs 50 and 51 of the complaint has no bearing whatsoever on: whether the Tribe has a reservation; what the reservation boundaries may be; and whether the State has exercised its own sovereignty and jurisdiction in a way that allows the Tribe to bring this suit, among other things.

The State has also named other witnesses who would testify concerning the factual allegations in paragraphs 50 and 51 of the complaint regarding: Indian child and adult welfare (Department of Health and Human Services, Director of Office of Native American Affairs Stacey Tadgerson); artifacts and remains (State Archaeologist Dean Anderson); state taxes (Treasury economist Scott Darragh); and the allegation that the Michigan Department of Natural Resources (DNR) does not object to tribal natural resources jurisdiction (DNR Tribal Coordinator Dennis Knapp). (Exs. H and J.) A community planner (Richard Carlisle) may also provide testimony relevant to the Tribe's contention that the state-local government relationship allows the State to be bound by local actions or local units of government that are not parties to be bound by relief entered against the Michigan Governor. (PageID.13, 18.) (Ex. J.)

As the case develops, the State will name additional witnesses and submit other evidence that would rebut the Tribe's allegations regarding jurisdiction. Even in a diminishment case, these witnesses and other documentary evidence cannot be excluded when they are directly relevant to defending against the allegations in the complaint. If the Tribe is entitled to make allegations regarding present-day jurisdiction and jurisdictional impacts it deems important, then

the State is entitled to present witnesses and evidence on those issues. If this Court were to exclude or limit this evidence or preclude these witnesses from testifying, then the corresponding allegations in the complaint must be stricken.

III. The State is not obligated to wait to raise its equitable defenses in a subsequent case.

The Tribe contends that this is a "treaty rights" case and equitable defenses are relevant only in a later jurisdictional "remedy" case, citing *Sherrill*, *Parker*, and an unpublished opinion concerning the Isabella Indian Reservation in Michigan. (PageID.696-700.) But the case law allows the State to assert its equitable defenses here to raise the pragmatic concerns that would arise if this Court were to declare that a reservation exists.

A. *Sherrill* expressly provides equitable defenses to disruptive claims for sovereignty over lands.

In 1788, the Oneida Indian Nation entered into a treaty with the State of New York that ceded 5 million acres of land and reserved 300,000 acres as a reservation. *Oneida Indian Nation of N. Y. State v. Oneida Cty., New York*, 414 U.S. 661, 664 (1974) (*Oneida I*). The Oneida entered into an additional treaty with New York in 1795, which ceded roughly 100,000 acres of the reserved lands. *Id*. at 664; *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 229 (1985) (*Oneida II*). New York and the Oneida entered into this treaty despite federal nonintercourse laws requiring Indian lands to be conveyed only in federal treaties subject to Congressional approval. See *Oneida II*, 470 U.S. at 229, 231-232. Almost two hundred years later, descendants of the Oneida sued to have the 1795 conveyance declared void and to obtain damages in the amount of the fair market rental value of the lands during a limited period in the 1960s. See *Oneida I*, 414 U.S. at 664-665. The Supreme Court issued two separate decisions to

resolve federal jurisdiction and claims issues. See *Oneida I*, 414 U.S. at 675; *Oneida II*, 470 U.S. at 244-250.

The tribal-state-local dispute continued in *Sherrill* after the Oneida descendants refused to pay local taxes on lands within the historic reservation it had purchased on the open market in 1997 and 1998. See *Sherrill*, *supra* at 211. The tribe sought declaratory and injunctive relief that recognized its sovereign immunity from local taxes within the reservation. See *id*. at 211-212, 214. As part of the proceedings, the lower courts determined that a 1794 treaty created a reservation that had not been diminished by a subsequent treaty. See *id*. at 212.

Though diminishment had been actually litigated in *Sherrill*, the subsequent appeal did not challenge the lower courts' conclusion that the reservation existed and was undiminished. Rather the City of Sherrill focused on the tribe's theory that repurchasing lands in the reservation boundaries automatically made those lands immune from local taxes after so many years. See *Sherrill*, *supra* at 213-214.

The Supreme Court considered the tribe's request for relief "in light of the long history of state sovereign control over the territory." See *Sherrill*, *supra* at 213-214. Borrowing from the "different, but related, context of diminishment," *Sherrill* looked at the majority non-Indian population and their "justifiable expectations" of state jurisdiction to give those factors "heavy weight." *Id*. The Court concluded that the "long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude OIN [the tribe's descendants] from gaining the disruptive remedy it now seeks." *Id*. at 216-217.

The Supreme Court explained that equitable defenses like laches, acquiescence, and impracticability may be asserted to address the wide variety of pragmatic concerns that arise

when a tribe reasserts sovereignty over a reservation that has long been developed by innocent non-Indian purchasers. See *Sherrill*, *supra* at 217-220. To avoid those pragmatic concerns, tribes should follow the process to have the land taken into trust. See *id*. at 220-221. Ultimately, the Supreme Court concluded the equitable defenses applied despite the existence of an undiminished reservation. *Id*. at 221.

The Tribe asserts that even though *Sherrill* allowed equitable defenses, they are only allowed in a "remedy" case deciding jurisdiction in a particular context. The Tribe maintains that it is seeking in this case to establish that it has an undiminished reservation under the 1855 Treaty, not to determine any jurisdictional remedies.

The Tribe's argument is perplexing because diminishment was a distinct part of *Sherrill* in the lower courts. More importantly, the Supreme Court also expressly looked to the equitable considerations in five Indian reservation diminishment cases to find the basis to assert equitable defenses against possessory land claims and claims for money damages.[5] At oral argument in *Parker*, discussed *infra*, *Sherrill's* author (Justice Ginsburg) stated that the holding on equitable defenses in *Sherrill* was "based on what *Solem* said" about *de facto* diminishment. (Ex. K, pp 7-8.) *Sherrill* merely "picked up" the theme "stated in *Solem*." (Ex. K, p 8.)

If there is any type of case where these equitable defenses should apply, it is one in which a tribe argues that diminishment case law applies directly rather than by extension to other types of claims. *Sherrill* has also been interpreted by other courts to allow equitable defenses to tribal

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[5] See *Sherrill*, *supra* at 215 (citing *Rosebud Sioux*, *supra* at 604-605 and *Hagen*, *supra* at 421 in support of respecting contemporary "justifiable expectations"), at 219 (citing *Yankton Sioux*, *supra* at 357 in support of impracticability), at 219-220 (citing *Hagen*, *supra* at 421, in turn quoting *Solem*, *supra* at 471-472, n 12, in support of impossibility), and *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408 (opinion of Stevens, J.) (comparison in support of balance of interest over zoning jurisdiction).

claims for injunctive relief in cases with undiminished reservations. *See, e.g., Stockbridge-Munsee Cmty. v. New York*, 756 F.3d 163, 165 (2d Cir. 2014) (equitable defenses barred claim to lands); *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 268 (2d Cir. 2005) ("Based on *Sherrill*, we conclude that the possessory land claim alleged here is the type of claim to which a laches defense can be applied.").

Moreover, the Tribe has not limited the complaint to a request for a declaration that its reservation exists and is undiminished. The Tribe takes the next, giant step forward into an equitable remedy case by alleging multiple ways in which it would like to exercise civil, family, and criminal law jurisdiction. (PageID.15-16, ¶ 52.) The Tribe also asks this Court to enter a permanent injunction that would prevent the State from: (a) "asserting jurisdiction over the Tribe or Tribal citizens in any way inconsistent with the Reservation's status as Indian country"; and (b) "taking any actions that would interfere with the rights of the Tribe and its citizens under federal law to be otherwise free of state law and regulation within the Little Traverse Reservation." (PageID.18.) If anything, the remedy that the Tribe seeks here is even broader and more disruptive than *Sherrill* because it is not limited to local taxing jurisdiction, making the equitable defenses proper.

B. *Parker* does not prevent the State from asserting equitable defenses.

The Tribe argues that the Supreme Court's recent decision in *Parker*, *supra* at 1082, concluded that the equitable defenses addressed in *Sherrill* cannot be raised in a diminishment case. *Parker* involved the Omaha Reservation in Nebraska, which was opened for settlement in an 1882 act. *Id*. at 1077-1078. A railroad right-of-way demarcated where virtually all Indians selected their allotments (on the east side) versus where virtually all non-Indians settled (on the

west side) after the reservation was opened. *Id*. The Village of Pender is located on the west side of the right-of-way. *Id*. at 1078.

In 2006, the Omaha Tribe sought to regulate non-Indian retailers in Pender under a tribal ordinance that required a tribal license to sell alcoholic beverages and impose a 10% tribal tax. *Parker*, *supra* at 1078. The tribe also demanded that Nebraska share state motor fuel tax revenue from the area west of the right-of-way. *Id*. Nebraska, Pender, and the non-Indian businesses in Pender (collectively Nebraska) sued the tribe to establish that the area west of the right-of-way was not within tribal jurisdiction because it was not within the reservation. *Id*. at 1080.

The lower courts in *Parker* concluded that there was substantial evidence under *Solem*'s first two prongs that the reservation had *not* been diminished despite evidence of *de facto* diminishment under *Solem's* third prong. See *Smith v. Parker*, 996 F. Supp. 2d 815, 836-844 (D. Neb. 2014), aff'd 774 F.3d 1166, 1166-1169 (8th Cir. 2014). Neither of the lower courts cited the *Sherrill* case or addressed any equitable defenses because Nebraska did not raise *Sherrill* until it appealed to the Supreme Court. (Ex. K, pp 7, 20-21.)

The Supreme Court in *Parker* decided that Nebraska could not demonstrate diminishment based solely on evidence under *Solem's* third prong. The Supreme Court chose not to address the equitable doctrines because they had not been previously raised in the case, saying, "[W]e express no view about whether equitable considerations of laches and acquiescence may curtail the Tribe's power to tax the retailers of Pender in light of the Tribe's century-long absence from the disputed lands." *Parker*, *supra* at 1082, citing *Sherrill*, *supra* at 217-21. That sentence was the one and only mention of *Sherrill* in the *Parker* opinion.

Parker did not overrule *Sherrill* or hold that equitable defenses are inapplicable in a diminishment case. Thus, *Parker* does not prevent the State from asserting its equitable defenses

in this case. Indeed, the State took to heart one of *Parker's* most important lessons: plead *Sherrill* defenses early in a case as affirmative defenses.

C. The Isabella Indian Reservation case is not applicable.

The Tribe also argues that an unpublished opinion in the Isabella Indian Reservation case bars the equitable defenses in this case. See *Saginaw Chippewa Indian Tribe of Michigan v. Granholm*, unpublished opinion and order in File No. 05-10296-BC (E.D. Mich. Oct. 22, 2008), available at 2008 WL 4808823. (PageID.766.) In *Granholm*, the State moved to amend its answer to assert the equitable defenses from *Sherrill*. See *id*. at *7. The court granted leave to the State to amend the complaint to assert the equitable defenses. See *id*. at *8. The court also interpreted *Rosebud Sioux* and other diminishment cases to "assure that the justifiable expectations of the affected parties to the treaties, based upon events that have occurred after the treaties themselves have been ratified, should be considered as they may be relevant to Congress's intention." See *id*. at *17.

However, the court in *Granholm* concluded that a variety of factors distinguished the Isabella Indian Reservation case from *Sherrill* and its progeny, including *Cayuga*, *supra*. The State and local defendants in *Granholm* had assumed jurisdiction in a narrow time between treaties executed in 1855 and 1864, rather than at the beginning of the history of the United States. *Id*. at *22. The Isabella Indian Reservation case did not involve the federal nonintercourse laws, possessory land claims, or claims for money damages like in *Sherrill*. *Id.* The plaintiff Saginaw Chippewa Indian Tribe had also "eliminated any request for relief from property taxes and have expressly stipulated that they do not seek to govern persons who are not members of the tribe." *Id*. The court saw that any relief to be granted would flow directly from the treaties, not any remedy it fashions. *Id*. at *23. More importantly, the United States had

intervened in *Granholm* as a sovereign and on behalf of the tribe. The court concluded that the laches could not be asserted against the United States or to prevent the United States from enforcing its sovereign rights to enter into treaties. *Id*.

Granholm held that, "as a matter of law, the time-based equitable defenses Defendants wish to advance are inapplicable to the issues here presented and may not otherwise be advanced against the United States's enforcement of its treaties." *Id*. at *23. As a result, the court barred testimony and proof in support of the equitable defenses, but left open the possibility it would admit "future effects" questions in deciding jurisdictional issues between the state, local, and tribal governments.

The State respectfully contends that *Granholm* gave an unduly narrow reading of *Sherrill*. In particular, *Granholm* failed to recognize that *Sherrill* expanded the equitable considerations in reservation diminishment case law to apply equitable defenses against possessory land claims involving the Nonintercourse Act and money damages; *Sherrill* did not bar those same equitable defenses from being raised in their original reservation diminishment context. Further, while *Granholm* picked up on the discussion of "ancient" claims in *Sherrill*, it misunderstood the State's jurisdiction to have begun in the 1850s rather than at statehood in 1837. To modern eyes, it also seems hardly a distinction that the facts of a case cover approximately 200 years (*Sherrill*) versus 150 years (*Granholm*).

There are substantial differences between *Granholm* and this case. Though both cases involve treaties from 1855, they are different treaties with different parties and terms and very different subsequent histories. See Treaty with the Chippewa, 11 Stat. 633 (1855); Treaty with the Chippewa, 14 Stat. 637 (1864). For example, the Saginaw Chippewa Indian Tribe's 1864 Treaty expressly referred multiple times to the "reservation at Isabella" or the "said reservation."

See 1864 Treaty, arts. 1 and 3. In comparison, the United States did not enter into a treaty with the Bands after 1855, much less a treaty acknowledging a reservation for the Bands. Rather, the United States completed the 1855 Treaty allotment process under the 1870s acts and proceeded to sell the surplus lands. The Tribe's twentieth century Indian Claims Commission proceedings may also be relevant to determining whether the United States and the Tribe have already resolved the Tribe's claim to a reservation, at least as part of the larger story.

In *Granholm*, the parties also had discovery for years, including in a prior tax case, providing them an opportunity to develop the equitable defenses and have their experts provide reports that the court actually considered. The motion in this case comes far too early. The current schedule in this case provides for another year of discovery and is likely to be extended.

The Tribe has not limited this case as the Saginaw Chippewa Indian Tribe limited its own case. The Tribe makes allegations both about state taxation and exercising jurisdiction over non-Indians in the complaint while seeking broad injunctive relief. Relief here would not simply flow from treaties. Most critically, the United States has not intervened here. *Granholm* specifically recognized a general rule that laches cannot be asserted against the United States acting in its capacity as a sovereign. The rule is inapplicable in a case where the United States is not a party in any capacity.

An unpublished opinion is not binding precedent. *United States v. Sanford*, 476 F.3d 391, 396 (6th Cir. 2007). *Granholm* is not persuasive authority because of the significant differences between the cases.

IV. *Sherrill* and the Victories Casino do not allow the Tribe to circumvent the land-to-trust process Congress mandated.

In *Sherrill*, *supra* at 220, the Supreme Court explained that "Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well-being." The land-to-trust process strikes a balance between tribal sovereignty and longstanding, justifiable expectations outside the tribe. The State must be permitted to assert its equitable defenses because the Tribe has brought this suit to avoid the formal land-to-trust process and the balance it strikes, as *Sherrill* instructed.

This lawsuit is not the first time that the Tribe has tried to skip the trust process to assert its sovereignty over lands. In 1999, the Tribe opened the Victories Casino near Petoskey after applying to have the casino land taken into trust, but before it was actually taken into trust. The United States, the Bay Mills Indian Community, and the Sault Ste. Marie Tribe of Chippewa Indians sued in the Western District to enjoin gaming at the casino until the land was taken into trust. *Bay Mills Indian Community v Little Traverse Bay Bands of Odawa Indians*, unpublished opinion in File No. 5:99-CV-88 (W.D. Mich. August 30, 1999), available at 1999 U.S. Dist. LEXIS 20314, at *4. (Ex. L.)

The Tribe "consistently asserted that the Victories Casino land is squarely within the boundaries of the Tribe's reservation under historic treaties." *Bay Mills*, *supra* at *9-10. The Tribe maintained that purchasing the land within the area described in the 1855 Treaty made it eligible for gaming under the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(4). *Id*. This Court rejected the argument, concluding that the land had not been taken into trust as required in the tribal-state gaming compact. *Id*. at *10. The court enjoined gaming at the Victories Casino "until such time as the LTBB has demonstrated to the satisfaction of this Court that LTBB has met the requirement that the Victories Casino land has been taken into trust." *Id*. at *17-18.

The Sault Tribe then sued the United States to challenge its decision to take the Victories Casino property into trust and make it eligible for gaming. See *Sault Ste. Marie Tribe of Lake Superior Chippawa Indians v. United States*, 78 F. Supp.2d 699, 704 (W.D. Mich. 1999). The Sault Tribe argued, among other things, that if the court held that the Reaffirmation Act, 25 U.S.C § 1300k(6)(a), created a mandatory trust process, there would be no limit to the amount of land that the Tribe would have taken into trust in Charlevoix and Emmet Counties. See *id*. at 704. This Court rejected the Sault Tribe's argument, explaining,

> Congress does not appear to be concerned with this possibility, and neither is this Court. Before property can be accepted by the Secretary on behalf of the LTBB, the LTBB must first acquire title to the property. There are practical limits on the LTBB's ability to do this. The LTBB must be able to afford the property and it must be able to find a willing seller. Congress can also amend the statute to eliminate the mandatory provision if a concern arises about the extent of the property being acquired.

(*Id*. at 704-5.) As in *Sherrill*, this Court concluded that the land-to-trust process Congress created for the Tribe took into consideration the practical concerns that arise when a tribe seeks to assert its sovereignty over lands where state and local government have long had jurisdiction.

This case goes well beyond the Sault Tribe's concerns about the Tribe expanding its sovereignty through the mandatory trust process; the Tribe seeks to avoid the trust process altogether. If the Tribe prevails, it does not need a willing seller, the funds to purchase lands, or the time to go through the trust process – there will be none of the checks that this Court has previously insisted apply before the Tribe asserts its sovereignty over land. Nor will the Tribe seek to test its sovereignty and jurisdiction on an incremental basis by acquiring individual parcels of property, as was the concern in *Sherrill*. The Tribe will simply assert that all the lands described in Article 1, Paragraphs Third and Fourth, of the 1855 Treaty are within its reservation to resolve any jurisdictional question, regardless of whether it owns the land or it has been taken into trust. The practical concerns from disruptive remedies identified in *Sherrill* are even more

heightened in this case, which makes this precisely the type of case where *Sherrill* allows the State to raise equitable defenses.

V. There is no basis to limit discovery.

The Tribe contends that, if this Court dismisses or strikes the equitable defenses, it should require Defendants to withdraw their witnesses who support those defenses pursuant to Fed. R. Civ. P 26(b)(2)(C)(iii). The State has already established why its defenses and potential witnesses cannot be barred in this case.

More importantly, the Tribe is not seeking a protective order in response to a defense discovery request. See Fed. R. Civ. P. 26(c). Defendants have not sought discovery of the Tribe yet. They have merely disclosed the identities of people who *may* have discoverable information or *may* testify at trial as required in Rule 26(b). It is "unreasonable" for the Tribe to assume that everyone disclosed will testify. See *El Camino Resources, Ltd. v. Huntington National Bank*, unpublished memorandum opinion in File No. 1:07-cv-598 (W.D. Mich 2009), available at 2009 WL 1228680. (Ex. M.)

The Tribe mentions only numbers, not names, when seeking to exclude large groups of witnesses. The Tribe's suggestion that it can compile a table from the disclosures, categorize (or mischaracterize) [6] the proposed testimony, and then have *eighty-one* witnesses barred from testifying before discovery is conducted is a breathtaking proposition. That is not what happened when a similar motion was granted in *Granholm* and it certainly is not what justice requires here.

[6] The Tribe does not actually identify any "future effects" concepts for four of the State's witnesses it seeks to exclude. (PageID.715-716.)

The Tribe tried to make this a two-party case, suing only Governor Snyder even though it made allegations concerning and sought relief against eighteen local units of government. This motion tries to accomplish that same goal by limiting the Intervening Defendants to just two of the witnesses they have collectively identified, neither of whom is a fact witness. Based on the Tribe's chart, the City of Charlevoix and Charlevoix Township cannot call any of the witnesses it disclosed. The Tribe does not, however, offer to withdraw any of its witnesses, including those who might testify to future effects.

A case with twenty parties is more unwieldy and takes more effort to litigate than a case with two parties. But all the parties share that burden. This case has also always had the potential to involve state and local government witnesses due to the allegations in the complaint concerning jurisdiction. Further, Defendants have identified a total of eighty-nine witnesses so far. That works out to an average of less than five witnesses per defendant. Just based on numbers, the aggregate number of witnesses is not disproportionate to the number of parties in the case, the length of the history at issue, and the complex jurisdictional arrangements in play.

The Tribe has had decades to retain experts, conduct historical research, and prepare its case, an advantage the State and other Defendants have not had. The Tribe is free to be selective about the depositions it takes and the other discovery its conducts. The State is also willing to discuss opportunities to make discovery as efficient as possible. But given the substantial governmental interests at stake in the litigation, the burdens of basic discovery are not so undue and one-sided that this Court should effectively prevent Defendants from preparing and litigating their cases. The motion to limit discovery must be denied because it is inconsistent with allowing Defendants to conduct discovery within the scope identified in Fed. R. Civ. P 26(b)(1).

CONCLUSION AND RELIEF REQUESTED

The State respectfully requests that this Court deny the Tribe's motion in its entirety. The State is substantively entitled to present its equitable defenses and witnesses and has not yet had a fair opportunity to conduct discovery. Should this Court grant any portion of the Tribe's motion, it respectfully requests that this Court strike the Tribe's request for injunctive relief in this case so that it seeks only a declaration that a reservation exists and was not diminished.

Bill Schuette
Attorney General

/s/ Jaclyn Shoshana Levine
Jaclyn Shoshana Levine (P58938)
Kelly M. Drake (P59071)
Nathan Gambill (P75506)
Assistant Attorneys General
Attorneys for Defendant
Environment, Natural Resources
and Agriculture Division
LevineJ2@michigan.gov
DrakeK2@michigan.gov
GambillN@michigan.gov

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