

1 IN THE TRIBAL COURT OF THE CONFEDERATED TRIBES OF THE
2 GRAND RONDE COMMUNITY OF OREGON
3 COURT OF APPEALS

FILED
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TRIBAL COURT OF APPEALS

4 In the Matter of:) Appellate Case No.: A-15-008
5 ALEXANDER, Val, et al.,) Tribal Court Cases No.: C-14-022 -
6) C-14-088
7 Petitioner/Appellant,) OPINION
8 vs.)
9 THE CONFEDERATED TRIBES OF GRAND)
10 RONDE and the GRAND RONDE ENROLLMENT)
11 COMMITTEE,)
12 Respondent/Appellee.)

11 Appeal from the Trial Court of the Confederated Tribes of the Grand Ronde
12 Community of Oregon

13 David D. Shaw, Tribal Court Judge

14 Argued and Submitted June 14, 2016, Confederated Tribes of the Grand Ronde
15 Community of Oregon Reservation.

16 Decided on August 5, 2016

17 Joseph Sexton and Gabriel Galanda, Seattle, Washington, for
18 Petitioner/Appellant

19 Deneen Aubertin Keller and Kimberly D'Aquila, Grand Ronde, Oregon, for
20 Respondent-Appellee

21 Before: Robert Miller, Douglas Nash, and Patricia Paul, Court of Appeals
22 Judges

23 MILLER, Court of Appeals Judge

24 In this consolidated appeal, the named Petitioner/Appellant, Val
25 Alexander, appeals the September 1, 2015 Trial Court order which affirmed the
26 Grand Ronde Enrollment Committee decision to disenroll all Petitioners in
Tribal Court Cases C-14-022 to C-14-088 from citizenship/membership in the

1 Tribe.¹ We exercise jurisdiction pursuant to the Grand Ronde Tribe Enrollment
2 Ordinance § (i)(6) and we REVERSE.

3 We do not address questions regarding the limits or boundaries of the
4 sovereignty of the Grand Ronde Tribe and Grand Ronde people or of their
5 exclusive authority to decide the requirements for citizenship in the Tribe.
6 See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). Instead, we
7 address two questions of first impression for this Court:

8 1. Is the Grand Ronde Tribe court system a court of equity?

9 2. Can this court system utilize equitable defenses, such as laches and
10 estoppel, and apply them against the tribal government?

11 We answer yes to both questions. Under the unique facts of this case,
12 we hold that the Tribe is prevented by the equitable principles of laches and
13 estoppel from reopening, after 27 years, the issue of the enrollment status
14 of the lineal (and lateral) ancestors from which the Petitioners/Appellants
15 trace their Grand Ronde citizenship.

16 I. FACTS & PROCEDURAL POSTURE

17 In 1986, the lineal ancestors (and apparently for some Petitioners the
18 lateral ancestors, Appellee's Brief, at 5) through which all the Petitioners
19 claim tribal citizenship, were enrolled in the Grand Ronde Tribe upon the
20 recommendation of the Enrollment Committee and by vote of the Tribal Council.
21 In 2013, the Tribal Council authorized an audit of the tribal roll of
22 citizens/members and Petitioners were recommended for an Enrollment Committee
23 investigation due to a potential error in the relevant 1986 enrollment
24 decisions. After prolonged procedures and hearings, including discussions at
25 two Tribal Council meetings or more, the Enrollment Committee was granted
26 authority to make the final decision on disenrolling Petitioners. The

1 The agency is now called the Enrollment Board. Appellee's Brief, at 1 n.2.

1 Committee decided on July 22, 2014 to disenroll the Petitioners/Appellants.
2 Appellee's Brief, at 3-5, 10-14.

3 Petitioner Alexander filed this lawsuit on August 20, 2014 to, in
4 essence, enjoin the Tribe and the Enrollment Committee from disenrolling her.
5 She raised estoppel and laches arguments to the Enrollment Committee, Hearing
6 Brief, Tribe's Supplemental Excerpts of Record, Exh. 5, at 20-22; Exh. 6, at
7 20-22, and to the Trial Court. Petition, Vol. 1 Petitioners Excerpt of
8 Record, 247, 259-61. She requested the Trial Court "[i]ssue an order
9 reversing the Enrollment Committee's decision to disenroll
10 Petitioner/Appellant", and requested that court to "order
11 Petitioner/Appellant's reinstatement as a rightful member of the" Tribe. *Id.*
12 at 264. The Trial Court denied the Petition on September 1, 2015. Vol. 2
13 Petitioners Excerpt of Record, 351 & 368. This appeal followed.

14 II. JURISDICTION & STANDARD OF REVIEW

15 We exercise jurisdiction pursuant to the Grand Ronde Enrollment
16 Ordinance § (i)(6). The ordinance states that when Grand Ronde courts review
17 Enrollment Committee loss-of-membership decisions that "[q]uestions of law or
18 mixed questions of law and fact shall be reviewed de novo." *Id.* at
19 (i)(5)(F)(ii). When reviewing questions of law or mixed questions of law and
20 fact de novo, we review the Trial Court decision "from the same position as
21 the trial court, considering the matter anew as if no decision previously has
22 been rendered." *The Confederated Tribes of Grand Ronde v. M.Q.*, Case No.
23 Confidential (Grand Ronde Ct. App. 2013), at 4; see also *Synowski v. Conf'd*
24 *Tribes of Grand Ronde*, No. A-01-10-001, at 3 (Grand Ronde Ct. App. 2003).

25 The application of laches or estoppel constitute mixed questions of law
26 and fact, especially when the facts are undisputed, because the court has to
apply these legal doctrines to the established facts in a particular case.
See Platt Pacific, Inc. v. Andelson (1993) 6 Cal.4th 307, 319, 24 Cal.Rptr.2d

1 597, 862 P.2d 158 ("When, however, the facts are undisputed and only one
2 inference may reasonably be drawn, the issue is one of law and the reviewing
3 court is not bound by the trial court's ruling."); *Lentz v. McMahon* (1989) 49
4 Cal.3d 393, 403, 261 Cal.Rptr. 310, 777 P.2d 83 ("the weighing of policy
5 concerns that must be conducted in a case of estoppel against the government
6 is in part a question of law."); accord *Feduniak v. California Coastal*
7 *Commission* (2007) 148 Cal.App.4th 1346, 1360.

8 We are also "empowered to exercise all judicial authority of the Tribe
9 . . . [which] shall include . . . the power to review and overturn tribal
10 legislative and executive actions for violation of this Constitution or the
11 Indian Civil Rights Act of 1968." Grand Ronde Const., art. IV, § 3. Moreover,
12 the Grand Ronde Tribal Court Ordinance, § (d)(1) (2013) grants us the
13 "broadest exercise of jurisdiction."

14 III. DISCUSSION

15 The decisive issue in this case is whether equitable principles of law
16 prevent the Tribe from revisiting the question, in 2013, of whether the
17 Petitioners/Appellants' lateral and lineal ancestors were enrolled in error
18 in 1986. To answer this question, we must decide first whether the Grand
19 Ronde court system is a court of equity and can consider equitable issues;
20 and second, whether this court system can use equitable claims and defenses,
21 such as laches and estoppel, against the tribal government. We ultimately
22 decide that the Grand Ronde court system is a court of equity and that both
23 laches and estoppel prevent the Tribe from even raising the issue of the
24 enrollment status of Petitioners/Appellants based on an alleged error in
25 enrolling their lineal and lateral ancestors in 1986.

26 A. Courts of equity

The words "equitable" and "equity" mean, respectively, "Just;
consistent with principles of justice and right;" and "fairness." *Black's Law*

1 Dictionary 654, 656 (10th ed. 2014). A "court of equity" is one that follows
2 the rules and principles of equity and fairness. See *id.* at 431.

3 The English and United States court systems have for centuries
4 recognized equity jurisdiction, various equitable principles, and operated as
5 both courts of law and of equity. 1 Dan B. Dobbs, *Law of Remedies: Damages-*
6 *Equity-Restitution* 89 (2d ed. 1993); James M. Fischer, *Understanding Remedies*
7 190 (2d ed. 2006). In the early 1300s, the English courts of law, also known
8 as the legal courts and the common law courts, were hyper-technical and only
9 allowed lawsuits to be brought under a limited and strictly defined set of
10 claims. The failure of the courts of law to even consider other possible
11 claims led to the development of an alternative form of jurisdiction and
12 court known as equity. 1 Dobbs, *supra*, at 68. This court developed principles
13 of fairness, morality, and equity, and eventually required the king's
14 chancellor, a royal minister, to also become a judge. By the 15th century, the
15 chancellors had developed a court system that recognized claims and
16 litigation procedures that the strict English courts of law did not. This
17 process literally led to the operation of two separate court systems. *Id.* at
72; Fischer, *supra*, at 190.

18 The American colonies, the state courts, and the United States adopted
19 these English principles of law and equity, and of separate legal and equity
20 courts. In modern times, almost all 50 states and the United States have
21 merged their equity and law courts into unified court systems where one judge
22 can hear both legal/at law claims and defenses, and equitable claims and
23 defenses in the same lawsuit. 1 Dobbs, *supra*, at 65-66, 148-49; Fischer,
supra, at 189-92.

24 These developments lead us to the question of whether the Grand Ronde
25 court system is a legal/at law court and also a court of equity and fairness?
26

1 The vast majority of American Indian nations have patterned their
2 modern-day court systems somewhat on the federal and state systems. For
3 example, the Grand Ronde Tribe has adopted the Federal Rules of Civil
4 Procedure to be used in its Trial Court and the Federal Rules of Appellate
5 Procedure for its Court of Appeals. Promulgation of Tribal Court Rules and
6 Tribal Court Rules of Appellate Procedure, Dec. 21, 1998 & Aug. 3, 2001,
7 Petitioners' Excerpt of Record, 129-30. Thus, we look to the federal and
8 state courts for some guidance in deciding whether or not to apply equity and
equitable principles in our courts and in this appeal.

9 We are also well aware that almost all tribal courts apply their own
10 principles of tribal common law, customary law, traditions, and well-known
11 native beliefs of fairness and equity. In fact, the Grand Ronde Tribal Court
12 Ordinance, § (g)(1), directs us to use Grand Ronde common law. See also
13 *Pearsall v. Tribal Council for The Conf'd Tribes of the Grand Ronde*
14 *Community*, Case No. A-03-02-002, at 7 n.2 (Grand Ronde Ct. App. 2004) ("Some
15 tribal courts have held that due process can have a different meaning in a
16 tribal court than in a federal or state court." (citing *Hopi Tribe v.*
17 *Mahkewa*, No. AP-003-93, ¶ 36 (Hopi 1995) and *Alonzo v. Martine*, 18 Indian L.
18 Rep. 6129 (Navajo 1991))); *Synowski v. Conf'd Tribes of Grand Ronde*, at 4 n.4
19 ("While the meaning of due process under the Indian Civil Rights Act is
20 similar to due process as defined under the United States Constitution, it is
21 different. An Indian Tribal Court's interpretation and application of due
22 process represents the unique tribal sovereign, its distinctive tradition,
culture and mores.").

23 Clearly, Indian nations did not learn "due process" and "fairness" from
24 Anglo-American cultures. See, e.g., *Begay v. Navajo Nation*, 6 Nav. Rptr. 20,
25 24-25 (Navajo S. Ct. 1988) ("The concept of due process was not brought to
26 the Navajo Nation by the Indian Civil Rights Act The Navajo people

1 have an established custom"); Raymond D. Austin, *Navajo Courts and Navajo*
2 *Common Law: A Tradition of Tribal Self-Governance* 112 (2009) ("As the Court
3 states, Navajo notions of due process are embedded in long-established
4 customary practices and law ways. The Navajo Nation Supreme Court
5 consistently declares that the foundation for Navajo due process lies in
6 traditional Navajo principles, practices, and values that define fairness,
7 and not in Anglo-American concepts of fairness and fundamental rights").

8 We find persuasive the analysis of Raymond Austin, a Navajo Supreme
9 Court justice from 1985-2001. He states that his Nation's court system
10 supports and preserves its ancient traditions and fundamental values. *Id.* at
11 xvii-xxiv, 18, 199-200. Significantly, he notes the Navajo legal principle of
12 *ch'ihonit'i* (which literally means the "way out") to be an equitable legal
13 principle. *Id.* at 131-34. "In the legal context, the 'way out' custom would
14 allow for application of the law tempered by considerations of fairness and
15 justice that come from traditional Navajo ways of doing things." *Id.* at 132.
16 He also notes that Navajo "doctrine can produce equitable decisions that
17 conform to Navajo concepts of fairness and justice in modern litigation." *Id.*
18 at 134.² See also Vine Deloria, Jr. & Clifford M. Lytle, *American Indians,*
19 *American Justice* 148-51, 229-30 (1983) ("tribal law demands a special
20 blending of traditional customs, which have evolved over centuries and are
21 tenaciously held by reservation people as the proper way to resolve certain
22 kinds of disputes, with modern notions of jurisprudence"; "All of this is a

23 ² In discussing *Atcitty v. District Court for the Judicial District of Window*
24 *Rock*, 7 Nav. Rptr. 227 (Nav. Sup. Ct. 1996), Austin states that "Navajo due
25 process defined within the context of community allowed the applicants for
26 government benefits *more rights than they would have received under federal*
court interpretations and applications of due process." Austin, *supra*, at 113
(emphasis added). See also *Atcitty*, at 231 ("Traditional Navajo due process
encompasses a wider zone of interest than general American due process. In
cases concerning entitlement to governmental benefits, Navajo due process
protections would extend to outcome, making it very relevant.").

1 reflection of the Indians' attempt to preserve a fund of their legal
2 heritage."); Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan*
3 *to Court* 10-72, 96-102 (1975) (tribal goals and values are reflected in
4 Cherokee laws).

5 The history of the Grand Ronde people, and American Indian and Anglo-
6 American principles of equity discussed above, convince us to hold that the
7 Grand Ronde court system is a court of law, and of equity, and that it has
8 the authority and jurisdiction to consider equitable claims and defenses.³ For
9 example, our courts are law courts, legal courts, and we hear cases based on
10 the Tribe's Constitution and laws and common law; but we also have
11 jurisdiction to address any equitable and "fair" claims and defenses a party
12 properly presents. American Indian cultures, traditions, and laws clearly
13 support the idea that modern-day tribal governments and their court systems
14 protect both the legal rights and the equitable/fairness rights of litigants.

14 B. Laches

15 The doctrine of laches stems from the principle that "equity aids the
16 vigilant, not those who sleep on their rights." 1 Dobbs, *supra*, at 104;
17 accord Doug Rendleman, *Complex Litigation: Injunctions, Structural Remedies,*
18 *and Contempt* 251 (2010); Fischer, *supra*, at 441 ("Delay becomes unreasonable
19 when there is no good explanation for delay."). Laches advances numerous
20 public policies such as promoting repose (the assumption that because so much
21 time has passed a claim will not be made against you), discouraging the
22 filing of stale claims, and creating certainty about a plaintiff's
23 opportunity for recovery and a defendant's potential liability. A time
24 restriction on bringing claims also fosters just and fair results by ensuring

25 ³ The Grand Ronde court ordinance expressly mentions our authority over
26 injunctions. Tribal Court Ordinance, § (h)(7). Injunctions are equitable
remedies. *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 893 (7th Cir. 1990)
("an injunction is the exercise of an equitable power").

1 that evidence remains reliable and that all litigants are aware of their
2 rights. See 1 Dobbs, *supra*, at 89, 103-07; Fischer, *supra*, at 440.

3 Various courts have also described the reasons behind the development
4 of laches. "[E]quity . . . has provided its own rule of limitations through
5 the doctrine of laches, the principle that equity will not aid a plaintiff
6 whose unexcused delay, if the suit were allowed, would be prejudicial to the
7 defendant." *Russell v. Todd*, 309 U.S. 280, 287 (1940); see also *A.C. Aukerman*
8 *Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1028-29 (Fed. Cir. 1992)
9 ("laches may be defined as the neglect or delay in bringing suit to remedy an
10 alleged wrong, which taken together with lapse of time and other
11 circumstances, causes prejudice to the adverse party and operates as an
12 equitable bar."); *Powell v. Zuckert*, 366 F.2d 634, 636 (D.C. Cir. 1966) ("The
13 defense of laches stems from the principle that 'equity aids the vigilant,
14 not those who slumber on their rights,' and is designed to promote diligence
15 and prevent enforcement of stale claims."); *Lake Dev. Enters., Inc. v.*
16 *Kojetinsky*, 410 S.W.2d 361, 367 (Mo. Ct. App. 1966) ("'Laches' is the neglect
17 for an unreasonable and unexplained length of time under circumstances
18 permitting diligence, to do what in law, should have been done.").

19 The parties disagree whether this Court can apply laches to the Grand
20 Ronde Tribe. The Tribe correctly cites federal cases that state that laches
21 cannot be used against the federal government, or at least cannot be used
22 against it when it is exercising sovereign rights. See, e.g., *United States*
23 *v. Summerlin*, 310 U.S. 414, 416 (1940). Yet the Petitioners also correctly
24 cite federal cases where laches was applied to the federal government. We
25 consider but we are not bound by this federal case law. As we stated in 2003:

26 Although the Court may look to precedent from the Ninth Circuit, other
federal circuits, and the United States Supreme Court to support the

1 legal analysis in our opinions, we do not consider ourselves bound by
2 that precedent, unless federal law requires otherwise. The same is true
3 for precedent from state courts and other tribal courts. Accordingly,
4 with respect to issues on which there is not general consensus in the
courts, we encourage the parties to inform us of the rationale and
policy considerations that underpin the holdings of cases cited as
support for an argument advanced in this Court.
Synowski, No. A-01-10-001, at 2 n.3.

5 After conducting extensive research, we find that the federal case law
6 on the application of laches to the federal government is unsettled and does
7 not mandate a particular outcome in the appeal before us.

8 In fact, the U.S. Supreme Court has expressly left open the possibility
9 of applying laches against the United States.⁴ And in *Occidental Life Ins. Co.*
10 *v. EEOC*, 432 U.S. 355, 373 (1977), that Court stated that if "an inordinate
11 EEOC [Equal Employment Opportunity Commission] delay" might cause a party to
12 "be significantly handicapped in making" their case, then "the federal courts
13 do not lack the power to provide relief." *Id.* In such a case, "[t]he same
14 discretionary power 'to locate 'a just result' in light of the circumstances
15

16
17 ⁴ *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51,
60 (1984) ("it is well settled that the Government may not be estopped on the
18 same terms as any other litigant. Petitioner urges us to expand this
principle into a flat rule that estoppel may not in any circumstances run
against the Government. We have left the issue open in the past, and do so
again today." (footnotes omitted)); *I.N.S. v. Miranda*, 459 U.S. 14, 19
19 (1982) (*per curiam*) (same); *I.N.S. v. Hibi*, 414 U.S. 5, 8 (1973) (*per curiam*)
20 ("the issue of whether 'affirmative misconduct' on the part of the Government
might estop it from denying citizenship was left open in *Montana v.*
Kennedy, 366 U.S. 308, 314, 315"); *United States v. Dang*, 488 F.3d 1135,
21 1143-44 (9th Cir. 2007) ("It remains an open question in this circuit as to
whether laches is a permissible defense to a denaturalization proceeding.");
22 *United States v. Administrative Enterprises, Inc.*, 46 F.3d 670, 672-73 (7th
Cir. 1995) ("federal common law, relies upon the doctrine of laches A
23 threshold question concerning the application of the doctrines of laches in
this case is whether it can ever be invoked against the federal government.
24 Some courts regard the question as completely unsettled. There is no dearth
of statements that laches cannot be used against the government, yet
25 both *P*I*E* and *Vucitech* involved suits by the government, and the
availability of laches in at least some government suits is supported by
26 Supreme Court decisions, that refuse to shut the door completely to the
invocation of laches or estoppel" (citations omitted)).

1 peculiar to the case,' *ibid.*, can also be exercised when the EEOC is the
2 plaintiff." *Id.*

3 And significantly, federal courts have explicitly applied laches
4 against the United States and Indian nations in cases where the U.S.
5 intervened as a co-plaintiff to join the tribal plaintiff. *Oneida Indian*
6 *Nation, et al, United States of America, Intervenor-Plaintiff v. County of*
7 *Oneida*, 617 F.3d 114, 126-29 (2d Cir. 2010), *cert. den.*, 132 S.Ct. 452 (2011)
8 (laches barred claim of Indian Nation and United States); *Cayuga Indian*
9 *Nation et al, United States, Plaintiff-Intervenor v. Pataki*, 413 F.3d 266,
10 274-79 (2d Cir. 2005), *cert. den.*, 547 U.S. 1128 (2006) (land claim of tribe
11 and U.S. barred by laches; "We recognize that the United States has
12 traditionally not been subject to the defense of laches. However, this does
13 not seem to be a *per se* rule. Judge Posner has aptly noted that 'the
14 availability of laches in at least some government suits is supported by
15 Supreme Court decisions'" (citations omitted)).⁵

16 In addition, the U.S. Supreme Court and other federal courts have
17 expressly applied laches to tribal governments. *City of Sherrill v. Oneida*
18 *Indian Nation*, 544 U.S. 197, 214, 217-19, 221 (2005) (applying the equitable
19 defenses of laches, acquiescence, and impossibility against Oneida Nation);
20 *Ottawa Tribe v. Ohio Dep't of Natural Resources*, 541 F.Supp.2d 971 (N.D. Ohio
21 2008) (laches used to dismiss Tribe's suit due to long delay in filing).

22 Furthermore, there are numerous cases in which federal courts have
23 applied laches against the United States, or in which they considered doing

24 ⁵ *Contra Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water*
25 *Dist. et al.*, 2016 WL 2621301, at *3 (C.D. Cal. 2/23/2016) (laches could not
26 be applied to the co-plaintiff/intervenor United States in a suit involving
land owned by the U.S. in trust for a tribe); *United States v. Wang*, 404
F.Supp.2d 1155, 1157-59 (N.D. Cal. 2005) (equitable defenses of waiver and
laches not allowed against U.S. in a denaturalization case in which defendant
had fraudulently acquired citizenship).

1 so but ultimately rejected the claim. Federal courts have often applied
2 laches against the U.S. in Equal Employment Opportunity Commission cases⁶ and
3 have applied laches and estoppel against other federal entities.⁷

4 In actuality then, notwithstanding the adage that laches cannot be used
5 against the United States, there are numerous cases and situations in which
6 federal courts have used laches and estoppel against the U.S. Moreover,
7 tribal and state courts have also applied these defenses against tribal and
8 state governments and their agencies.⁸

9
10 ⁶ See, e.g., *Equal Employment Opportunity Comm'n v. Dresser Industries, Inc.*,
11 668 F.2d 1199, 1201-02 (11th Cir. 1982) (dismissing EEOC suit as barred by
12 laches after 68 month delay); *EEOC v. Alioto Fish Co.*, 623 F.2d 86 (9th Cir.
13 1980) (dismissing EEOC suit as barred by laches after 62 month delay); *EEOC*
14 *v. Westinghouse Elec. Corp.*, 592 F.2d 484 (8th Cir. 1979) (laches applied to
EEOC); *EEOC v. Liberty Loan Corp.*, 584 F.2d 853, 857-58 (8th Cir. 1978) (EEOC
barred by laches after 52 month delay); *Equal Employment Opportunity Comm'n*
v. Jetstream Ground Services, Inc., 134 F.Supp.3d 1298, 1331 (D. Colo. 2015)
("laches may constitute an equitable defense to a Title VII action when the
EEOC's 'unexcused or unreasonable delay has prejudiced [its] adversary.'").

15 ⁷ See, e.g., *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 894 (7th Cir. 1990)
16 ("government suits in equity are subject to the principles of equity, laches
17 is generally and we think correctly assumed to be applicable to suits by
18 government agencies as well as by private parties."); *United States v.*
19 *Lindberg Corp.*, 882 F.2d 1158, 1163 (7th Cir. 1989); *United States v. Ruby*
20 *Co.*, 588 F.2d 697, 701-03 (9th Cir. 1978) (estoppel is applicable against
21 U.S.; here, there was no showing of sufficient affirmative misconduct by the
22 government to estop it); *United States v. Lazy FC Ranch*, 481 F.2d 985, 987-88
23 (9th Cir. 1973) (U.S. estopped from recovering money paid under soil bank
program; estoppel is applicable to the United States where justice and fair
play require); *United States v. Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir.
1970) (U.S. seeking declaratory relief and specific performance; held that
under the circumstances government was not entitled to immunity from
estoppel); *Spears v. Federal Crop Ins. Corp.*, 579 F.Supp. 1022 (E.D. Tenn.
1984) (Federal Crop Insurance Corp. estopped), vacated, 614 F.Supp. 540
(1985). See also Mary V. Laitos et al., "Equitable Defenses Against the
Government in the Natural Resources and Environmental Law Context", 17 *Pace*
Env'tl L. Rev. 273, 296-300 (2000); David K. Thompson, Note, "Equitable
Estoppel of the Government", 79 *Colum. L. Rev.* 551 (1979).

24 ⁸ See, e.g., *Hoopa Valley Tribal Council v. Sherman*, 7 N.I.C.S. 9, 12, 14-16
25 (Hoopa Valley Tribal Ct. App. 2005) (defendant proved estoppel, acquiescence,
and laches against tribal government), <http://www.codepublishing.com/WA/NICS/>;
26 *Membership of Julie Bill Meza*, 7 N.I.C.S. 111, 117-18 (Sauk-Suiattle Ct. App.
2006) (denying estoppel defense), <http://www.codepublishing.com/WA/NICS/>;
Kalk v. Mille Lacs Band of Ojibwe Corporate Comm'n, 2004 WL 5746060 (Mille
Lacs Ct. App. 9/16/2004) (same); *Shopbell v. Tulalip Gaming Commission*, 3

1 In light of all this precedent, and the fact that Grand Ronde courts
2 are courts of equity, we have no hesitation in holding that laches and
3 estoppel can be applied against the Tribe in the appropriate circumstances.⁹

4 We now proceed to apply laches to the facts of this case.

5 There are two elements to establish a laches claim: "Laches requires
6 proof of (1) lack of diligence by the party against whom the defense is
7 asserted, and (2) prejudice to the party asserting the defense." *Costello v.*
8 *United States*, 365 U.S. 265, 282 (1961). Whether the doctrine bars an action
9 in a particular situation "depends upon the circumstances of that case."
10 *Burnett v. New York Central Railroad*, 380 U.S. 424, 435 (1965).

11 Under the first element, there is no question that the Tribe,
12 Enrollment Committee, and staff were not diligent and unjustifiably delayed
13 instituting this enrollment investigation and the subsequent action to

14
15 N.I.C.S. 363, 368 (Tulalip Tribe Ct. App. 1994) (applied estoppel to the
16 tribe but elements were not proven), <http://www.codepublishing.com/WA/NICS/>;
17 *Brown v. City of New York*, 264 A.D.2d 493, 694 N.Y.S.2d 461 (1999) (estoppel
18 enforced against City Health and Hospitals Corp.); *Harbor Air Serv., Inc. v.*
19 *State Dept. of Revenue*, 88 Wash.2d 359, 367, 560 P.2d 1145 (1977) (supreme
20 court estopped state from collecting taxes); *Shafer v. State*, 83 Wash.2d 618,
21 622, 521 P.2d 736 (1974) (estoppel can be applied to the state if necessary
22 to prevent manifest injustice and governmental functions are not impaired);
23 *Pioneer Nat'l Title Ins. Co. v. State*, 39 Wash.App. 758, 760-61, 695 P.2d 996
(1985) (estoppel can be asserted against the state); *City of Long Beach v.*
24 *Mansell* (1970) 3 Cal.3d 462, 493, 496-97, 476 P.2d 423); *Feduniak v.*
25 *California Coastal Comm'n*, 56 Cal.Rptr.3d 591, 600-01, 617-18 (Ct. App. 6th
26 Dist.), rev. den., (2007) (applying estoppel and laches to state); *J.H.*
McKnight Ranch, Inc. v. Franchise Tax Bd. (2003) 110 Cal.App.4th 978, 991;
Kimberly-Clark Corp. v. Dubno, Comm. Of Revenue, 527 A.2d 679, 684 (Conn.
1987); *North Carolina v. Alcoa Power Generating, Inc.*, 2014 WL 6609763, at *7
(E.D. N.C. 11/20/2014) ("North Carolina courts have applied laches against
state actors." (citing *Town of Cameron v. Woodell*, 563 S.E.2d 198 (N.C. Ct.
App. 2002); *Abernethy v. Town of Boone*, 427 S.E.2d 875 (N.C. Ct. App. 1993)).

⁹ It is irrelevant that Petitioners were in essence the plaintiffs in the case
below. See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214 n.7
(2005) ("The equitable cast of the relief sought remains the same whether
asserted affirmatively or defensively."). In addition, as we state in section
D., we consider the Tribe, Enrollment Committee, and Enrollment Staff to have
been the "plaintiffs" in this administrative disenrollment action.

1 disenroll Petitioners. For up to 27 years, from 1986 to 2013, the Tribe was
2 on actual notice of the facts and circumstances under which Petitioners and
3 their ancestors were enrolled. The Tribe allowed 27 years to pass before
4 taking any action on this alleged enrollment error.¹⁰

5 The second element requires the proponent of laches to present evidence
6 that they were "harmed, either by being hampered in his ability to defend or
7 by incurring some other detriment." *United States v. Administrative*
8 *Enterprises, Inc.*, 46 F.3d 670, 672 (7th Cir. 1995). "Prejudice is never
9 presumed; rather it must be affirmatively demonstrated by the defendant in
10 order to sustain his burdens of proof and the production of evidence on the
11 issue." *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624.

12 Petitioners raised their laches defense before the Enrollment Committee
13 and in their appeal to the Trial Court. However, it does not appear that they
14 presented any evidence at either stage of this process on the harm or
15 prejudice they have already incurred, or might incur, if the Tribe is allowed
16 to proceed with this disenrollment procedure after 27 years of delay. We
17 considered remanding this case to the Enrollment Committee/Board to hold an
18 evidentiary hearing so Petitioners could present evidence of prejudice, but
19 as one court has stated: "Although [laches and] estoppel is generally a
20 question of fact, where the facts are undisputed and only one reasonable
21 conclusion can be drawn from them, whether [laches and] estoppel applies is a
22 question of law." *Feduniak*, 148 Cal.App.4th at 1360. Consequently, we analyze
23 as a question of undisputed fact and law whether Petitioners would suffer the
24 kind of prejudice courts have identified as important if this disenrollment
25 process is allowed to proceed after this long delay.

26 ¹⁰ Until 2011, a federal regulation only allowed the U.S. Immigration and
Naturalization Service two years to bring an administrative action to
denaturalize a newly-naturalized citizen. 8 C.F.R. § 340.1(b) (2010).

1 Courts have noted that the requisite prejudice needed for laches to
2 apply can be shown by loss of evidence, the faded memories and deaths of
3 witnesses, passage of such a length of time that makes gathering and
4 discovering evidence difficult or impossible, and reasonable reliance on the
5 delay such as changes in position or condition that would be nearly
6 impossible or very injurious to undo. *Danjaq LLC v. Sony Corp.*, 263 F.3d 942,
7 955 (9th Cir. 2001); *Saul Zaentz Co. v. Wozniak Travel, Inc.*, 627 F.Supp.2d
8 1096, 1117 (N.D. Cal. 2008) (evidentiary prejudice arises from lost, stale,
9 or degraded evidence; faded memories and witnesses who have died; expectation
10 based prejudice derives from a party "taking actions or suffering
11 consequences that it would not have, had the plaintiff brought the suit
12 promptly."); *Marriage of Plescia* (1997) 59 Cal.App.4th 252, 256-57 (same).

13 The only reasonable conclusion that can be drawn from the facts in this
14 case is that Petitioners have been prejudiced by the 27 year delay, including
15 the faded memories and deaths of relevant witnesses, and a passage of such an
16 amount of time that makes discovering evidence difficult or impossible.
17 Moreover, Petitioners reasonably relied on the Tribe's 27 year lack of action
18 and did change their positions and conditions such that it would be nearly
19 impossible and very injurious to undo, including the impact on such crucial
20 issues as cultural and personal identity. Petitioners would also suffer the
21 loss of some well-known benefits of tribal citizenship such as tribal and
22 Indian Health Service medical and dental care, tribal housing, tribal
23 employment opportunities, and per capita distributions of revenues and more.

24 In light of the undisputed facts regarding the 27 year unreasonable
25 delay in the Tribe bringing this action and the reasonably anticipated
26 prejudice and harm that Petitioners would suffer if the Tribe were allowed to

1 proceed with this disenrollment action, we hold that laches prevents the
2 Tribe and Enrollment Committee/Board from so proceeding.¹¹

3 C. Equitable estoppel

4 "Estoppel is closely related to and sometimes identical with laches." 1
5 Dobbs, *supra*, at 89. Estoppel means in essence "that someone is 'stopped'
6 from claiming or saying something; usually he is stopped from saying the
7 truth or claiming a lawful claim, and usually this is because of some prior
8 inconsistent statement or activity." *Id.* at 84. "Equitable estoppel 'operates
9 to place the person entitled to its benefit in the same position he would
10 have been in had the representations been true.'" *CIGNA Corp. v. Amara*, 563
11 U.S. 421, 441 (2011) (citation omitted).¹²

12
13 ¹¹ The Trial Court held that laches could not be applied to the Tribe. Vol. 2
14 Petitioners Excerpts of Record, at 360. Since we are reviewing that decision
15 de novo, we "consider[] the matter anew as if no decision previously has been
16 rendered." *The Confederated Tribes of Grand Ronde v. M.Q.*, at 4. However, we
17 will briefly address the three reasons the Trial Court relied on. We
18 respectfully disagree with all three.

19 First, the Trial Court stated that the Tribe made only a "narrow waiver
20 of sovereign immunity" for judicial review of enrollment appeals and did "not
21 include explicit language permitting a defense of laches." But the
22 Constitution and Tribal Council expressly granted our courts that authority.
23 As already noted, the Enrollment Ordinance grants us the authority to review
24 questions of law and mixed questions of law and fact "de novo." Laches is a
25 question of law, and of fact, and thus Petitioners can plead that issue and
26 we can review it. Second, the Trial Court relied on federal case law that the
United States cannot be prevented by laches from enforcing its rights. We
have already held the opposite in regards the Grand Ronde Tribe based on the
cases and analysis discussed above. Finally, the Trial Court stated that "the
CTGR action to remove Petitioners from membership is not an equitable claim."
That is an incorrect statement of law. The U.S. Supreme Court says "that a
denaturalization action is a suit in equity." *Fedorenko v. United States*, 449
U.S. 490, 516 (1981) (citing two other Supreme Court cases).

23 ¹² There is another type of estoppel that might apply and prevent the Tribe
24 from arguing now that Petitioners are not Grand Ronde citizens: the Tribe has
25 long argued in other venues that Chief Tumulth, the Walala and Cascade
26 Tribes, and Tumulth's relatives, who were enrolled in the Tribe, all lived in
the Columbia River Gorge and Cascade Locks areas. The Tribe used these
arguments to claim rights in those areas. The Tribe might be estopped from
now making the opposite argument regarding the Petitioners. See Vol 1
Petitioner Excerpt of Record, Exh. H, at 92-99 (Grand Ronde Public Affairs
document); Exh. I, at 103 (Grand Ronde attorney paraphrased in *Indian Country*

1 We already cited several federal, state, and tribal court cases that
2 applied, or considered applying, equitable estoppel to governments. Many
3 other courts have done the same. See, e.g., *Office of Personnel Management v.*
4 *Richmond*, 496 U.S. 414, 421 (1990) ("our more recent cases have suggested the
5 possibility that there might be some situation in which estoppel against the
6 Government could be appropriate."); *Burnside-Ott Aviation v. United States*,
7 985 F.2d 1574 (Fed. Cir. 1993) (issue of fact had to be determined before the
8 court would apply estoppel to the U.S.); *Hollenbeck v. U.S. Internal Revenue*
9 *Serv.*, 166 B.R. 291 (Bankruptcy Court, S.D. Tex. 1993) (IRS was equitably
10 estopped from collecting taxes); *Howard Bank v. United States*, 759 F.Supp.
11 1073 (D. Vermont 1991) (IRS was estopped from raising a legal argument).

12 The Tribe correctly states that, at least in federal court, the United
13 States must have engaged in some kind of affirmative misconduct before it can
14 be estopped; merely negligent conduct or accidentally providing false
15 information will not estop the U.S. See, e.g., *Schweiker v. Hansen*, 450 U.S.
16 785 (1981) (federal representative's errors fell short of conduct which might
17 estop Social Security Administration); *Sanz v. U.S. Sec. Ins. Co.*, 328 F.3d
18 1314, 1320 (11th Cir. 2003) (such claims require "some 'affirmative misconduct
19 on the part of the government officials'").

20 We do not decide today whether the Tribe has to engage in affirmative
21 misconduct before equitable estoppel can be applied against it. But it seems

22 Today, Nov. 17, 2009 that Grand Ronde "possesses ancestral ties to Cascade
23 Locks and that Chief Tumulth and his Walala people fished and lived in the
24 area. The Walala were forced off their lands and onto the Grand Ronde
25 reservation, he added."); accord *id.* at 104 & 105-06, *News From Indian*
26 *Country*, Apr. 27, 2007; Gail Oberst, "Grand Ronde seeking say in Gorge,"
News-Register, Apr. 26, 2007 ("Grand Ronde officials have countered by saying
descendants of Chief Tumulth and Chief Obanaha, both of whom signed treaties
establishing off-reservation fishing and hunting rights in the Columbia River
Gorge, are now members of Grand Ronde tribe. They say the tribal homelands of
these members lie in the Gorge.").

1 clear that enrolling Petitioners' lateral and lineal ancestors, allegedly in
2 error, and then repeatedly enrolling Petitioners, allegedly in error, and
3 then repeatedly telling them, allegedly in error, for 27 years that they were
4 properly enrolled in the Tribe could be affirmative misconduct.¹³

5 Notwithstanding that point, we hold that equitable estoppel applies to the
6 Grand Ronde Tribe under the facts of this appeal.

7 The core elements of estoppel are: "First, the actor, who usually must
8 have knowledge, notice or suspicion of the true facts, communicates something
9 to another in a misleading way, either by words, conduct or silence. Second,
10 the other in fact relies, and relies reasonably or justifiably, upon that
11 communication. And third, the other would be harmed materially if the actor
12 is later permitted to assert any claim inconsistent with his earlier
13 conduct." 1 Dobbs, *supra*, 85 (footnotes and citations omitted); accord
Fischer, *supra*, 480-81.

14 Applying these elements: first, it is undisputed that the Tribe had
15 knowledge and notice of the facts regarding the enrollment of Petitioners'
16 ancestors and Petitioners' claims to enrollment, and yet communicated to them
17 for up to 27 years the allegedly misleading statements that they were
18 enrolled citizens of the Grand Ronde Tribe. Second, there is no dispute that
19 Petitioners did in fact reasonably and justifiably rely upon these
20 communications and conduct by the Enrollment Committee and Tribe. And third,
21 it is incontestable that Petitioners would be materially harmed if the Tribe
22 and Enrollment Committee/Board are now permitted to assert a claim

23 ¹³ Such a long chain of alleged misconduct and misstatements is far more than
24 a one-time negligent act or the mere "negligent provision of misinformation."
25 *Sulit v. Schiltgen*, 213 F.3d 449, 454 (9th Cir. 2000). Furthermore, the Ninth
26 Circuit has explained that "the 'affirmative misconduct' limitation . . .
must be read as requiring an affirmative misrepresentation or affirmative
concealment of a material fact by the government." *United States v. Ruby Co.*,
588 F.2d 697, 703-04 (9th Cir. 1978). The allegedly erroneous actions of the
Tribe and Enrollment Committee over 27 years seem to meet that definition.

1 inconsistent with their 27 years of conduct and statements. There is no
2 question that tribal citizenship is an important and undeniably valuable
3 status for personal, family, cultural, and even financial reasons. To lose
4 that status would materially harm the Petitioners.

5 We hold that the Tribe and Enrollment Committee/Board are estopped from
6 attempting to disenroll the Petitioners based on the alleged 1986 error in
7 enrolling their lineal and lateral ancestors. The Tribe is estopped after
8 making the initial enrollment decisions 27 years ago, continually enrolling
9 the Petitioners/Appellants ever since, and after 27 years of consistently
10 recognizing and stating that all these people are Grand Ronde citizens.¹⁴

11 D. Future issues

12 Our decisions on laches and estoppel terminate this appeal. But we
13 proceed to address other matters that will likely arise in current or future
14 cases so as to give guidance to the Tribe and tribal agencies that might
15 prevent unnecessary proceedings and litigation. We recognize, however, that
16 specific factual situations might arise that could compel us to apply the
17 following dicta in different ways.

18 In our opinion, when a tribe alleges that it has committed a past error
19 in enrollment, or on any other issue, and it seeks to correct that error, the
20 tribal government and/or administrative agency is in essence the plaintiff in
21 the proceeding. By comparison, in federal administrative agency actions the
22 agency bears the burden of persuasion. William Funk, et al., *Administrative*

23 ¹⁴ The Trial Court said Petitioners' equitable estoppel claim failed because
24 when the government is the party to be estopped it must have been more than
25 merely negligent, its action must constitute "affirmative misconduct." We
26 have not decided today when, or if, we will require affirmative misconduct
before applying estoppel to the Tribe. But as stated in footnote 13, we
consider the Tribe's actions in this case to have been far more than just a
negligent misstatement. See *Socop Gonzalez v. INS*, 208 F.3d 838, 843 (9th Cir.
2000) ("a pattern of false promises" could be affirmative misconduct).

1 *Procedure and Practice* 202 (5th ed. 2014). Thus, in our opinion, the Tribe or
2 agency voluntarily takes on the burden to produce evidence that tends to
3 prove that it committed an error, for example, and to meet whatever standard
4 of proof is required to establish that an error was actually committed.

5 In decisions as serious as disenrollments, we believe that the
6 government has the burden of producing evidence on whatever issue is raised,
7 and then has the burden to prove to the fact finder that any claimed error is
8 established by clear and convincing evidence. Tribal citizenship is as
9 important as is U.S. citizenship, and the Supreme Court has stated in that
10 regard: "the right to acquire American citizenship is a precious one and that
11 once citizenship has been acquired, its loss can have severe and unsettling
12 consequences." *Fedorenko v. United States*, 449 U.S. 490, 505 (1981).

13 Consequently, federal courts have established a high standard of proof before
14 an American citizen can lose citizenship: "The Government carries a heavy
15 burden of proof in a proceeding to divest a naturalized citizen of his
16 citizenship. The evidence justifying revocation of citizenship must be
17 'clear, unequivocal, and convincing' and not leave the issue in doubt." *Id.*
18 (citations and quotation marks omitted); see also *United States v. Jean-*
19 *Baptiste*, 395 F.3d 1190, 1192 (11th Cir.), *cert. den.*, 546 U.S. 852 (2005)
20 ("in denaturalization proceedings . . . a court should only revoke
21 citizenship if the government presents 'clear, unequivocal, and convincing'
22 evidence establishing that citizenship was illegally procured.").

23 We see no difference in the tribal setting. A disenrollment or
24 denaturalization case is so important to the Tribe and the individuals
25 involved that proof of disenrollment must be proffered by the Tribe and/or
26 the Enrollment Committee/Board and staff and must be proven to the fact-
finder by a clear and convincing evidentiary standard.

1 If we had been required to analyze the record, the facts, and the
2 proceedings in this appeal, we would have remanded these cases for the
3 Enrollment Committee/Board to reconsider. And we would have placed the burden
4 of producing evidence on the Enrollment staff that it made an error in 1986
5 in enrolling Petitioners' ancestors and in enrolling Petitioners thereafter.
6 We would also require the Enrollment staff to convince the Enrollment
7 Committee/Board, the fact finder and decision maker, and subsequently our
8 courts, by clear and convincing evidence that an error had been made and that
9 disenrollment was the correct remedy.

10 Enrollment cases are so important to crucial tribal interests, and to
11 the individual and familial interests of family, culture, and personal
12 identity, that this heightened standard of proof, and placing the burden on
13 the Tribe, is well justified. Disenrollment is such an extreme sanction for
14 tribal citizens that it justifies using the heightened civil standard of
15 proof of clear and convincing evidence.

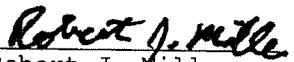
16 IV. CONCLUSION

17 We have decided this appeal based only on the exceptional fact pattern
18 in which it was presented: an attempt to correct an alleged error committed
19 27 years ago in enrolling Petitioners' lateral and lineal ancestors into the
20 Tribe, and the continuation of that alleged error in enrolling Petitioners in
21 the intervening decades. We have applied laches and estoppel to the Grand
22 Ronde Tribe and rejected that attempt. We recognize, as did the Second
23 Circuit in 2005, that it is rare to apply laches and estoppel to governments
24 and we do so only in "the most egregious instances". *Cayuga*, 413 F.3d at 279.
25 We also conclude, as did the Second Circuit, "that whatever the precise
26 contours of the exception to the rule against subjecting the United States

1 [or the Grand Ronde Tribe] to a laches defense, this case falls within the
2 heartland of the exception." *Id.*

3 The September 1, 2015 Order Denying Appeal issued by the Trial Court is
4 REVERSED. This consolidated appeal is REMANDED to the Trial Court to grant
5 the administrative appeals in Trial Court cases C-14-022 to C-14-088 and is
6 then REMANDED to the Enrollment Committee/Board for its decisions
7 disenrolling these persons to be dismissed with prejudice in favor of the
8 Petitioners/Appellants.

9 REVERSED.

10 
11 Robert J. Miller
Court of Appeals Judge

12 WE CONCUR:

13 Patricia C. Paul
14 Court of Appeals Judge

15 Douglas Nash
Court of Appeals Judge

26
22 OPINION

THE CONFEDERATED TRIBES OF GRAND RONDE
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1 IN THE TRIBAL COURT OF THE CONFEDERATED TRIBES OF THE
2 GRAND RONDE COMMUNITY OF OREGON

3 In the Matter of:) Appellate Case No.: A-15-008
4 ALEXANDER, Val, et al) CERTIFICATE OF SERVICE
5 Petitioner/Appellants,)
6 vs.)
7 THE CONFEDERATED TRIBES OF GRAND)
8 RONDE and the GRAND RONDE ENROLLMENT)
9 COMMITTEE)
Respondent/Appellees.)

10 I, Julie Boekhoff, do hereby certify that I served true copies of the
11 attached Opinion, dated August 5, 2016, upon the parties listed below, by
12 placing the same in the United States Mail at Grand Ronde, Oregon, postage
13 prepaid, certified mail, return receipt requested, (except that service was
14 by hand delivery as to the Tribal Attorney's Office,) this 5th day of August,
15 2016.

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