IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, and THE OSAGE MINERALS COUNCIL, Plaintiffs, vs. OSAGE WIND, LLC; ENEL KANSAS, LLC; and ENEL GREEN POWER NORTH AMERICA, INC., Defendants.	)	Case No. 14-CV-704-GKF-JFJ

DEFENDANTS' MOTION TO RECONSIDER OPINION AND ORDER GRANTING OSAGE MINERALS COUNCIL'S MOTION FOR JUDGMENT ON THE PLEADINGS [DKT. # 207, AMENDED BY DKT. # 219] AND OPINION AND ORDER DENYING DEFENDANTS' OBJECTIONS TO MAGISTRATE JUDGE'S OPINIONS AND ORDERS [DKT. # 210 AND # 214]

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The combined effects of this Court's Order and Opinion granting the Osage Minerals Council's Motion for Judgment on the Pleadings ("Affirmative Defense Order") [Dkt. # 207, amended by Dkt. # 219],[1] and this Court's May 21, 2021 Opinion and Order [Dkt. # 226] ("Objections Order") denying Defendants' Partial Objections to the Magistrate Judge's Opinions and Orders denying Defendants Motions for Protective Order, are to foreclose the Court from considering evidence of Plaintiffs' pre-suit conduct which federal law makes material to whether it should order the extreme remedy of project ejectment. Since this conclusion was based upon the demonstrably incorrect conclusion that a *different* standard for evaluating the propriety of injunctive relief applies in cases involving Indian Trust property, the Court should reconsider its Affirmative Defense Order and Objections Order (both of which are indisputably not final judgments). Reconsideration is necessary to enable the Court to consider, with respect to the Plaintiffs' claims for both equitable relief and damages, the *retrospective*, pre-suit (*and* pre-construction) failure of the United States and the Osage Minerals Council ("OMC") to clearly advise Defendants a mineral lease (or permit)[2] was required until after Osage Wind had made irreversible commitments to the Osage Wind wind energy project ("Project") construction, as

[1] The Defendants did not earlier seek reconsideration of the Affirmative Defense Order, because the breadth ascribed to it by this Court was not clear until the entry of the Objections Order.

[2] The distinction is an important one and it underscores the necessity of considering such evidence here. The applicable regulations do not use the phrase "Sandy Soil Permit," and there is no objective source of law from which the Defendants could have concluded that such a "Permit" was required. Yet, it is only such a "Permit" that the Plaintiffs asserted was required pre-suit. *See* Dkt. # 4-3. If the Plaintiffs did not believe that a lease was required prior to commencing suit—or even if they were uncertain on that score—the Defendants cannot be faulted for believing that no lease was required (and it, at a minimum, demonstrates that their belief in that regard was not willful bad faith). Such evidence would also weigh heavily on the equitable considerations as between the parties, especially as to the removal of the Project entirely. Yet, the Affirmative Defense Order and the Objections Order prevent even the consideration of that issue in any manner.

Plaintiffs were well aware Defendants would. Plaintiffs had detailed knowledge of Project plans, including for the number and dimensions of subsurface tower foundations, since no later than 2011, and were advised repeatedly since October 2013.[3] Defendants understood no mining lease (or other authorization, including, but not limited to, a permit) was required because Osage Wind would not sell or remove minerals excavated from the Project site. Yet neither Plaintiff controverted Defendants' communications setting out this understanding for over a year after Project construction began, *see, e.g.,* Dkt. # 17-2, at 42, and, even when the United States objected to excavation in October 2014, it never specifically controverted Defendants' expressed understanding, much less set forth the legal theories the Tenth Circuit ultimately relied upon, despite Defendants' repeated requests, *see, e.g.,* Dkt. # 17-2, at 42. These are crucial facts that respectfully must be considered in determining the propriety of injunctive relief, whether as affirmative defenses to remedy alone or as factors in the injunctive relief analysis.

I. INTRODUCTION

This Court should reconsider its Affirmative Defense Order, dismissing Defendants' affirmative defenses of estoppel, laches, waiver, unclean hands, and *in pari delicto* [Dkt. # 207, at 11][4], and as barring claims either for equitable remedies or damages. [Dkt. 8-9]. The Court should also reconsider its Objections Order denying Defendants' Partial Objections to Magistrate Judge's Opinions and Orders [Doc. 218] ("Discovery Order"), which relies upon the Court's dismissal of the five mentioned affirmative defenses and extends the Affirmative Defense Order to foreclose

[3] This knowledge is demonstrated by, among other things, this Court's findings of fact and conclusions of law in case No. 11-cv-643-GKF-PJC (Dkt. # 36, at ¶¶ 5-9 and ¶ 8, in particular, which describes the Project's subsurface presence in detail); *see also* Dkt. # 204, Ex. A.

[4] Recognizing the Court amended its January 11, 2021 Order and Opinion [Dkt. # 207] on March 3, 2021 [Dkt. # 219], this Motion conforms to the Docket reference the Court applied in its Objections Order, referencing the Amended Affirmative Defense Order as Docket # 207.

consideration of any and all "backward looking" inequitable conduct of Plaintiffs, even to determine the appropriate remedy when the affirmative defense is not a complete bar to the claim [Dkt. # 218, at 10-11] ("collectively, "the Affirmative Defense/Objections Orders").

First, this Court's Affirmative Defense Order summarily dismisses Defendants' affirmative defenses (without consideration of any factual record or resolution of the many factual disputes underlying those defenses) based on the conclusions 1) the Tenth Circuit's decision barred assertion of laches or delay-based defenses, and 2) Indian land claims are not "subject to state-law affirmative defenses based on the tribe's own conduct, including waiver, unclean hands, or in pari delicto." Dkt. # 207, at 6. But this Court's law of the case conclusion extends that doctrine far beyond the merits issues before the appellate court and to foreclose equitable remedies *and* consideration of delay in time frames far earlier than the three-month period the Court of Appeals referenced. The Affirmative Defense Order, declining to adopt "state law affirmative defenses," overlooks that Defendants asserted the affirmative defenses are appropriate to inform decisions as to remedy *either* by incorporation of state law *or* independently under the federal courts' traditional equity jurisprudence. Dkt. # 207, at 6, 9, 15-21). The Court should reconsider its Affirmative Defense Order and rule the affirmative defenses of estoppel, laches, waiver, unclean hands, and *in pari delicto* remain viable in this case as defenses to equitable relief.

Second, the Objections Order misapprehends the law applicable to whether, in an action affecting tribal interests in tribal property, only *prospective* conduct of tribal, or federal trustee, plaintiffs, and no pre-suit conduct of plaintiffs, can be material either to defenses to merits claims or to assessing appropriate remedies. The Court should reconsider its Objections Order [Dkt. # 226, at 8] affirming the Magistrate Judge's Discovery Order, which foreclosed all Defendants' discovery into "any backward-looking considerations of past conduct or knowledge" of the

Plaintiffs. Dkt. # 210, p. 23]. The Court's Objection Order, like the Magistrate Judge's ruling, misread *Davilla v. Enable Midstream Partners, L.P.*, 913 F.3d 959 (10th Cir. 2019), as foreclosing consideration of "backward looking evidence" in any case affecting Indian lands. Rather, *Davilla* prescribed standards guiding whether federal courts may borrow state law that may apply here. And, as to remedies, required consideration of federal equitable standards, but in no way excluded consideration of recognized federal law governing remedies, generally, and in cases affecting Indian lands, specifically, which countenance consideration of all relevant evidence, including a plaintiff's pre-suit action and inaction adversely affecting defendants. Further, the Objection Order failed to recognize that, even if the Tenth Circuit's opinion properly can be applied to foreclose "delay-based" affirmative defenses, such as laches, inequitable conduct of plaintiffs remains relevant and admissible (and thus, by definition, discoverable), to inform the Court's application of the three- (or four-) factor federal common law test for issuance of a permanent injunction. Finally, the Objection Order erred because, in cases pertaining to tribal trust or restricted lands, federal courts applying federal equitable principles consider pre-litigation conduct of federal or tribal plaintiffs to fashion equitable relief.

II. STANDARD OF REVIEW

This Court has inherent power to reopen any interlocutory matter in its discretion.[5] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12 (1983) ("[E]very order short of a final decree is subject to reopening at the discretion of the district judge."); *see also* FED. R. CIV. P. 54(b). This Court has applied that standard—under Rule 54(b)—to decide a motion to

[5] This Motion is filed timely after the Court's issuance of its May 21, 2021 Objections Order [Dkt. # 226], which affirmed the Magistrate Judge's refusal to allow discovery into "backward looking" evidence based on interpretation of the Court's Affirmative Defense Order. Defendants note, in the event the Court grants this Motion in whole or in part, Defendants will request supplementation of Plaintiffs responses to written discovery in accordance with the Court's order.

reconsider. *Pikas v. Williams Cos.*, 822 F. Supp. 2d 1163, 1165 (N.D. Okla. 2011). Indeed, the Tenth Circuit has recognized that a Rule 54(b) motion is *different* from a post-judgment motion to reconsider. *Price v. Philpot*, 420 F.3d 1158, 1167 n.9 (10th Cir. 2005); *Sanders v. Sw. Bell Tel., L.P.*, No. 03-CV-0452-CVE-FHM, 2009 U.S. Dist. LEXIS 34069, at *7 (N.D. Okla. Apr. 17, 2009) ("Although plaintiff does not have a viable motion under Rule 59(e) or Rule 60(b), the Court will consider whether to exercise its discretion to reinstate her *Burk* tort claim.").[6] The Supreme Court has noted "the wisdom of giving district courts the opportunity promptly to correct their own alleged errors." *U.S. v. Dieter*, 429 U.S. 6, 8 (1976). And in all events, a motion to reconsider is proper "where the court has misapprehended . . . a party's position, or the controlling law." *SFF-TIR, LLC v. Stephenson*, 264 F. Supp. 3d 1148, 1215 (N.D. Okla. 2017)(quoting *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)). This Motion should be granted under these standards.

ARGUMENT

A. The Court's Affirmative Defense Order Misapplies the Law of the Case Doctrine in Dismissing Defendants' Affirmative Defenses of Estoppel, Laches, Unclean Hands, Waiver, Laches, and *In Pari Delicto.*

The entire appellate record underlying this Court's extending the law of the case to bar affirmative defense of laches, and any related "delay based" defense, consists of a footnote suggestion in Appellees' Brief, Tenth Cir. Doc. # 01019639458, n.11,[7] to which the Court of

[6] The Court in *Sanders* granted the motion to reconsider.

[7] Delay-based" defenses had not been briefed in the district court, or considered by Judge Payne in any manner. Indeed, the parties had agreed that "the central legal issue"—which was the applicability of the regulations at issue in the declaratory judgment claims—should be decided before anything else occurred in the case. (Dkt. # 34, at 3). Although acknowledging the District Court did not address the defense, In the Brief of Appellees, Defendants suggested, via footnote, "[t]he record would permit this Court to affirm on the [alternative] basis of laches, as the OMC delayed . . . *for years after it had knowledge it needed to file suit* . . .". Brief of Appellees at 26-27, n.11. (emphasis added).

Appeals responded only via a footnote. *U.S. v. Osage Wind, LLC*, 871 F.3d 1078, 1087, n.6, Dkt. # 80, at 26, n.6 ("[T]he United States commenced this action within three months after turbine excavation began, which is not an unreasonable amount of time to wait before filing suit."). This Court significantly extended the reach of the Tenth Circuit's footnote: "to the extent premised on unreasonable delay in bringing litigation, the four affirmative defenses other than laches are also precluded based on the law of the case doctrine." Dkt. # 207, at 8, n.5 The Court then further extended the doctrine to exclude, not just *defenses* to the *merits* of the declaratory judgment claims before the Tenth Circuit as to application of the federal leasing regulations, but also to application of the affirmative defenses as to *remedy*, foreclosing any conduct pertaining to delay from consideration with respect to any affirmative defense. This is so even though the Tenth Circuit was not considering remedies, as evidenced by the need for remand to consider remedies. *See also supra* n.5.

At the very least, the Court has ample discretion to rule otherwise. *See McIlravy v. Kerr-McGee Coal Corp*., 204 F.3d 1031, 1035 (10th Cir. 2000) ("The doctrine [of law of the case] is, however, 'only a rule of practice in the courts and not a limit on their power." *Id.* (*citing Messinger v. Anderson*, 225 U.S. 436, 444 (1912)). The Tenth Circuit has recognized three "exceptionally narrow" grounds for departure from that rule of practice: "(1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice." *U.S. v. Alvarez*, 142 F.3d 1243, 1247 (10th Cir. 1998). Here, the issues and evidence are "substantially different" from those before the Tenth Circuit: the issue is not whether delay barred the United States and/or the OMC from securing interpretation of applicable regulations, but what remedies flow from the violation found. And, the delay pertinent

here is not limited to the filing of suit after start of excavation, but Plaintiffs' wholly failing to advise Defendants before filing suit in clear terms the basis for claiming a need for a lease in response to Defendants' explaining why they understood no lease was required, despite Plaintiffs' years-long knowledge of the extent of excavations and the very substantial investments Defendants had committed to without knowledge of the basis for the claim—and despite Defendants' repeated requests for such an explanation.[8] Equity demands consideration of such delay to inform decisions whether to require removal of towers constructed without such notice or knowledge.

Respectfully, Defendants assert application of law of the case to foreclose consideration of any and all Plaintiffs' conduct grounded in delay is clearly erroneous and would work a manifest injustice. *See* Dkt. # 205, at 15-22; Dkt. # 225, at 2-5; *citing Cayuga Indian Nation of N.Y. v. Cuomo,* Nos. 80-CV-930, 80-CV-960, 1999 WL 509442 (N.D.N.Y. July 1, 1999) ("*Cayuga X*"); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982); *U.S. v. Imperial Irr. Dist.*, 799 F. Supp. 1052, 1068 (S. D. Cal. 1992); *Davilla*, 913 F.3d at 972 ("[O]ur jurisprudence distinguishes between matters of right and matters of remedy."); *see also Navajo Tribe of Indians v. N.M.*, 809 F.2d 1455, 1467 (10th Cir. 1987) ("The distinction between a claim or substantive right and a remedy is fundamental."). To allow the United States and the OMC to prosecute extravagant damage claims, and seek equitable remedies, to require tearing down and removing facilities installed after years of planning and very substantial investment without considering the unfairness

[8] Neither the United States nor the Defendants had sought summary judgment on any remedy at the time of Judge Payne's decision that the OMC, not the United States, appealed, and there was no indication that remedies (or defenses to remedies) were at issue. Indeed, the United States had recognized that "the central legal issue"—which was the applicability of the regulations at issue in its declaratory judgment claims—should be decided before anything else occurred in the case. (Dkt. # 34, at 3). Thus, the Tenth Circuit cannot be properly said to have been foreclosing the issue of delay, as to remedy, because that issue was not before it in the procedural posture of the case, and the Defendants had no notice that such a sweeping determination of remedial relief was possible.

of Plaintiffs' conduct in failing to clearly advise why a lease is required, particularly given the uncertainty as to such need reflected in the United States' declining to appeal a decision no such lease was required, is manifestly unfair to a company seeking to advance renewable energy objectives and supporting Osage County public services. The Court should reconsider its application of law of the case to the remedial issues at issue here.

B. **The Court's Affirmative Defense/Objections Orders Misread *Davilla.***

The Opinions err in concluding *Davilla*'s prescribing its three-factor test, *Davilla*, 913 F.3d at 971-974, categorically foreclosed discovery into, and consideration of, pre-suit evidence pertinent under federal law to federal courts' consideration of equitable relief*, id.* at 971 (emphasis added), and application of the three-factor test upon which this Court, and the Magistrate Judge, have focused.[9] But *Davilla* did not in any way indicate it foreclosed consideration of inequitable pre-litigation conduct of plaintiffs, including "backward looking evidence," affecting whether issuance of injunctive relief is, indeed, equitable. In fact, *Davilla* expressly observed no such evidence was before it, quoting and referencing the district court below: "Though it observed 'some courts have declined to enter an injunction when the trespass was unintentional and when the landowner' delays objection, it did not think such issues at play in this case." *Id.* Nor did the Tenth Circuit's opinion in *Davilla*, or any of those it cited, provide any indication its recitation of a test for issuance of injunctive relief would foreclose consideration of conduct generally relevant under federal equitable doctrines. *See, e.g.*, *Amoco Prod. Co. v. Vill. of Gambell, AK,* 480 U.S. 531, 541-42, 107 (1987); *Weinberger v. Romero-Barcelo,* 456 U.S. 305 (1982); *Sw. Stainless, LP*

[9] The Tenth Circuit recognized the three-factor test it applied "differs slightly from that of the Supreme Court in *eBay*," referencing "the usual four-factor test guiding federal courts' grant of permanent injunctive relief." *See, e.g.*, *eBay Inc. v. MercExchange, L. L. C.*, 547 U.S. 388, 391 (2006). 913 F.3d at 971. But, the Court of Appeals observed, "the subtle differences are not at issue, and we think the two articulations capture the same considerations in any event." *Id.* n.9.

v. Sappington, 582 F.3d 1176, 1191 (10th Cir. 2009); *Kitchen v. Herbert,* 755 F.3d 1193, 1208 (10th Cir. 2014).[10]

Any suggestion patent precedent is unpersuasive here is discounted by *Davilla*'s citation with approval of the decision in *eBayInc,* 547 U.S. at 391, in which the Supreme Court, far from decreeing some unique patent-derived rule, brought the "patent injunction" test in line with the injunction test used elsewhere in federal jurisprudence. *Id.* at 391-92 ("These familiar [equitable] principles apply with equal force to disputes arising under the Patent Act. As this Court has long recognized, "a major departure from the long tradition of equity practice should not be lightly implied."). *Id.* The United States' and the OMC's contentions the federal statutory protections of Tribal trust lands unqualifiedly immunize their claims from federal equitable doctrines stand on no firmer footing than those of the inequitable patentees in *eBay* and the other cases discussed.

To the contrary, on remand from the Supreme Court's controlling decision in *eBay*, the district court decision in *MercExchange, L.L.C. v. eBay, Inc*., 500 F. Supp. 2d 556, 561 (E.D. Va. 2007), demonstrates the unquestioned relevance of pre-litigation conduct under generally applicable federal equitable doctrines, including under the "public interest" element in the four (or three) factor federal injunction test. The Supreme Court in *eBay* had left application of the four factor injunction standard to the district court, which engaged in an extensive analysis of the conduct of both parties. Although, concluding defendant eBay's conduct made it a "willful infringer," *id.* at 590, ordinarily requiring an injunction against its use of a patent, it held the conduct of plaintiff MercExchange barred injunctive relief: though "forced royalties are an

[10] *Kitchen,* 755 F.3d at 1208, was the Tenth Circuit case the Affirmative Defense Order principally relied upon with respect to the three-factor test; however, it did not address at all the second and third injunction standards, instead addressing only success on the merits: "Because appellants have challenged only the merits aspect of the district court's decision, we do not consider the remaining factors." *Id.*

imperfect solution" it was "the most equitable," *id.* at 585. Significantly, the court found the inequitable conduct of the plaintiff material, not just under equitable concerns, but, "considering . . . *the position of the litigants and their prior actions*, the court finds that although the public health and welfare is plainly not at issue, the public interest nevertheless favors damages at law rather than an injunction." *Id.* at 586 (emphasis added).

The Objections Order conclusion discounting the applicability of authority from patent cases applying the three (or four) factor federal court injunction standard overlooks statutory and federal policy parallels between federal patent and Indian law statutes and policies. *See* Dkt. 226, at 10 n. 9. In addressing Defendants' citation of *Keystone Driller Co. v. General Excavator Co*., 290 U.S. 240 (1933), and *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co*., 324 U.S. 806 (1945), and the Objections Order suggests that *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 176 (1965), undermines their applicability. But all three cases reflect that, notwithstanding a patentee's statutory protection provided by a government-issued patent, its statutory benefits may be divested by inequitable conduct of the patentee, either in defense of a patent infringement action, *see Keystone* and *Precision*, *supra*, or to strip the inequitable patentee of protection from monopolization claims under the Clayton Antitrust Act, *see Walker*, 382 U.S. at 178. Federal statutes and policies protect asserted rights of patentees of federal patents, just as they protect certain rights of the Osage Nation; but their federally granted rights do not immunize them from the equitable discretion from a federal court sitting in equity. Of particular pertinence here, *Walker* concluded, "even though the per se [antitrust] claim fails at this stage of litigation, we believe that the case should be remanded for Walker to clarify the asserted violations of [Clayton § 2] and to offer proof thereon." *Id.* The

Objections Order deprived Defendants of precisely the opportunity the Supreme Court recognized was required in *Walker*.

Similarly, here, the Court should allow discovery concerning, and hear in this case, evidence regarding, the reasons the United States and the OMC failed to clearly articulate any belief—much less a well-defined, legally supported position—that a mining lease was required until years after the Project was proposed, after the numbers and dimensions of tower foundations were known publicly and specifically to the OMC, a year after construction had begun, and after Defendants' had made irreversible commitments to the Project, which provides important environmental benefits and supports important public services and education in Osage County. Even if the three-factor injunction test somehow deprives the Court of independent authority to consider inequitable conduct as affecting its issuance of the extraordinary remedy of Project ejectment, the Court has unquestioned authority to consider whether the public interest requires more prompt, forthright, and clear, articulation of the basis for a claim, especially where the plaintiff is aware of very substantial reliance by a part, the applicable regulations are ambiguous, had never before been applied in the manner asserted by the Plaintiffs in this case, and were sufficiently uncertain that Judge Payne entered summary judgment rejecting their application and the United States declined to appeal. The public interest does not countenance the United States and the OMC simply waiting until filing of suit to spring their theories, in "gotcha" fashion, then to contend federal law does not allow consideration of the inequity of their delay. *Davilla* simply does not support that federal law forecloses consideration of Plaintiffs' inequitable pre-litigation conduct.

C. **Pre-litigation Conduct of Federal or Tribal Plaintiffs Remains Relevant, and Discoverable, to Determine Remedies for Tribal Land Claims.**

i. The Affirmative Defense Order Errs in Striking Defendants' Five Affirmative Defenses.

The Affirmative Defense Order extended beyond its rejection of all delay based defenses based on law of the case: it rejected entirely the five equitable affirmative defenses on grounds "state law affirmative defenses" are inapplicable to defense of tribal land claims because it found them in conflict with federal law supporting tribal property rights. Dkt. # 207, at 5-8. The Court's conclusion in that regard, however, overlooks that Defendants asserted the affirmative defenses are appropriate to inform decisions as to remedy *either* by incorporation of state law *or* independently under the federal courts' traditional equity jurisprudence. *See* Dkt. # 205, at 6, 9, 15-21, *citing Cayuga X.*, 1999 WL 509442; *Andrus*, 687 F.2d 1324; *Imperial Irr. Dist.*, 799 F. Supp. at 1068.

The Tenth Circuit has affirmed the materiality of equitable considerations and federal affirmative defenses in tribal land claim litigation upon a showing of inequitable tribal landowner or federal trustee conduct. In *Andrus*, 687 F.2d 1342, the Tribe sued to cancel numerous oil and gas leases, and the district court held the Bureau of Indian Affairs ("BIA") had violated leasing regulations requiring advance publication of oil and gas lease sales and, separately, the National Environmental Policy Act in failing to prepare adequate studies required to inform whether the sales were in the Tribe's best interest. Of particular pertinence here, although the Tenth Circuit affirmed the ruling the BIA had leased the Tribe's oil and gas rights without required compliance with BIA regulations, it affirmed the district court's decision on equitable grounds not to cancel the leases, but instead to award money damages in the form of ordered adjusted bonus payments,

as established by evidence at trial.[11] *See id.* at 1333-1334. As the Court has recognized, the Tenth Circuit also affirmed the district court's acceptance of the companies' laches defense to NEPA claims.[12]

The Court has rejected *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), as supporting application of equitable defenses in this case on grounds the case is limited to the unique factual setting in that case. *See* Dkt. # 207, at 10 ("OMC does not seek to vindicate 'land claims of historic vintage. Rather, OMC has consistently exercised its sovereignty over the Mineral Estate. Nor are the claims "disruptive" as contemplated by *City of Sherrill*.") (citations omitted). But, *City of Sherrill* is founded upon principles of federal equity jurisprudence, and the question the Objections Order presents is not whether the claim is meritorious, but whether discovery can unearth facts supporting a potentially meritorious claim or defense. The question here is not whether thousands of property owners may be divested of their homes and lands because a Tribe delayed asserting its rights, but fair, just, and equitable remedies as between Defendants and the OMC; accordingly, different magnitudes of inequity may appropriately affect remedies here under flexible and discretionary standards governing this Court's decisions in equity. As to principles of federal equity jurisprudence, *City of Sherill* concluded "[we] now . . . hold that '*standards of federal Indian law and federal equity practice*' preclude the Tribe from rekindling embers of

[11] The Tenth Circuit's decision here did not discount applicability of *Andrus* to remedial issues, and it recognized, rather than undermined, it as Circuit precedent regarding applying laches to Tribes: ". . . we decline to *dispose of the case* on the equitable doctrine of laches." *Id.* at 14-15, n. 6 (emphasis added). Respectfully, the Affirmative Defense Order misreads *Andrus* and misapplies law of the case in extending the decision to foreclose delay-related conduct as to any defense.

[12] *See Park Cty. Res. Council, Inc. v. U.S. Dep't of Agric.*, 817 F.2d 609, 617 (10th Cir. 1987), *rev'd on other grounds*, *Vill. of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992) ("An environmental action may be barred by the equitable defense of laches if (1) there has been unreasonable delay in bringing suit, and (2) the party asserting the defense has been prejudiced by the delay.") (citing *Andrus*, 687 F.2d 1324, 1338).

sovereignty that long ago grew cold." *Id.* at 214. The Court noted, "the properties here involved *have greatly increased in value . . .*," *id.* at 215, and noted "[t]he principle that the passage of time can preclude relief has deep roots in our law, and this Court has recognized this prescription in various guises. It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief." *Id.* at 217, *citing, Galliher v. Cadwell*, 145 U.S. 368, 373 (1892) ("[L]aches is not . . . a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."). The principles, not the facts, of *City of Sherrill* apply here, and they dictate that the OMC and the United States are not categorically exempt from traditional equity jurisprudence (including consideration of any and all inequitable conduct) merely because Tribal lands are at issue.

Cases following *City of Sherrill* reflect the flexibility inherent in its principles. In *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 274 (2nd Cir. 2005), the Second Circuit Court of Appeals extended *Sherrill* to claims in law, for declaratory judgment and damages, and equity, for ejectment, whether or not the claims sought reassertion of sovereignty, with respect to a relatively small geographic area. *Sherrill* and *Pataki*, were followed by *Shinnecock Indian Nation v. N.Y.*, 2006 WL 3501099, * 4 (E.D. N.Y 2006), which deduced from *Sherrill* and *Pataki*, three principles:

> (i) equitable defenses apply to disruptive Indian land claims, such as possessory land claims, and are not limited to claims seeking a revival of sovereignty, (ii) equitable defenses apply to both actions at law and in equity, because the focus is on the potentially disruptive nature of the claim, and (iii) equitable defenses can be applied at the pleadings stage to dismiss disruptive possessory land claims.

Here, the Plaintiffs' claims for damages and ejectment both are subject to equitable defenses based on the passage of time, not between the initiation of excavation and the filing of suit, but given the years long failure of the United States and the OMC to advise clearly a mining lease was required

notwithstanding Defendants' advising them they would not sell minerals or remove them from the Project site.

ii. The Objections Order Errs in Extending the Affirmative Defense Order to Preclude Consideration of Equitable Factors Pertinent to Affirmative Defenses in Determining Remedies.

Even if the Court determines equitable affirmative defenses are not available as to the merits of the claims here, several federal courts have recognized related conduct or the defense itself remains applicable to remedies. In *Jicarilla Apache Tribe v. Andrus* the Tenth Circuit affirmed the district court's ruling the BIA had leased the Tribe's oil and gas rights covering hundreds of thousands of acres without required compliance with BIA regulations, therefore, in violation of federal law, yet it affirmed the district court's decision on equitable grounds not to cancel the leases, but instead to award money damages in the form of ordered adjusted bonus payments, as established by evidence at trial. 687 F.2d at 1333-1334. In addition, *Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. N.Y.*, 278 F. Supp. 2d 313, 342 (N.D.N.Y. 2003), decided prior to *City of Sherrill*, relied upon the liability versus remedy distinction, granting the Band's motion to strike the laches defense as to liability, but denied it "to the extent that defense can be read as pertaining to remedies," *id*. at 333, 363, and drew the same distinction as to estoppel, *id*. at 340, 363. Similarly, although in *Cayuga Indian Nation of N.Y. v. Cuomo*, 771 F. Supp. 19 (N.D.N.Y. 1991), the district court had dismissed the State's laches and other affirmative defenses, the court subsequently recognized such conduct remained pertinent to the State's defense to the Band's ejectment claim. *See Cayuga X,* 1999 WL 509442, at *3. *See* Dkt. # 205, at 16; *see also Pataki,* 413 F.3d at 273.

Cayuga X, 1999 WL 509442 at *25 is particularly pertinent to the period of inequitable delay under the circumstances, and the need for discovery as to communications here:

> "The reasonableness of the delay is tested by asking *what should have been expected of one in the plaintiff's position as the menace to his interests from the defendant's conduct developed*.". . . [and, although] "prompt action following reasonably explained delay may be especially necessary[,] . . . *protests, complaints and negotiations looking toward a settlement of the controversy, go far to explain the reasonableness of the delay*."

Id. (*quoting* RESTATEMENT § 936, cmt. b; emphasis and alterations added). Similarly, *Brooks v. Nez Perce Cty*,. drew the distinction drawn by *Cayuga X*, rejecting laches to bar completely a claim pertaining to Indian lands, but delay remained pertinent to determine remedy for trespass—*including as to monetary damages*. 670 F.2d 835, 837 (9th Cir. 1982) ("We conclude that laches *does not bar* the government's claim for damages. . . . [But,] Lack of diligence by the government in exercising its role as trustee may be weighed by the district court *in calculating damages*.") (emphasis added). *Cayuga X*'s questions, "*what should have been expected of one in the plaintiff's position as the menace to his interests from the defendant's conduct developed*" and why they declined to pursue "*protests, complaints and negotiations*," are central to the Defendants' need for discovery into pre-suit communications between and among Plaintiffs.

Those communications are confirmed to be relevant here by the United States' and OMC's seeking deposition testimony about pre-suit communications authored by representatives of the United States, the OMC, and the Osage Nation. In the deposition of Kimberlee Centera, an expert witness identified by Defendants, counsel for the OMC questioned Ms. Centera about an October 9, 2014 letter from BIA Superintendent to Robin Phillips and an October 2013 letter to the prior Project owners, Wind Capital Group and TradeWind Energy, Inc., from then-OMC Chairman Andrew Yates. Ms. Centera was asked to opine on whether the referenced communications gave notice that Defendants were engaging in mining. *See* Deposition of Kimberlee Centera, May 14, 2021, pp. 85, 183-184, attached to this Motion as **Exhibit A**. While Defendants have been barred from obtaining discovery relevant to the 2013 and 2014 assertions the United States and OMC

were making, the Plaintiffs are free to discover Defendants' actions (and indeed, legal analyses) at that same time. This grossly imbalanced consequence of the Affirmative Defense Order and Objection Order is inequitable, contrary to law, and must be corrected.[13]

The Affirmative Defense Order indicates reconsideration is appropriate because the Court may have misperceived Defendants' arguments with respect to consideration of equitable factors on remedy *even if an affirmative defense has been rejected on the merits*. In rejecting Defendants' reliance on *Cayuga X* for the proposition just stated above, the Court stated:

> However, in *Cayuga X*, the court was not considering affirmative defenses. Instead, the court was considering the equitable factors articulated in the Restatement (Second) of Torts *to determine the appropriateness of an injunction against trespass*. *Id.* at 19. The court acknowledges the similarity of those factors to some of the affirmative defenses at issue, but places greater significance on the Northern District of New York's prior *grant of judgment as a matter of law as to the affirmative defense of laches*.[5] *See Cayuga Indian Nation of New York v. Cuomo*, 771 F. Supp. 19, 24 (N.D.N.Y. 1991) (emphasis added).

Dkt. # 207, at 9. Then, in footnote 5 of its Opinion, this Court stated: "The court further notes that it is not clear *at this stage of the litigation* that it would be obligated to apply the Restatement (Second) of Torts factors to determine the propriety of injunctive relief. *See Davilla*, 913 F.3d at 969 (emphasis in original) (assuming that Oklahoma follows the Restatement (Second) of Torts but noting that the Oklahoma Supreme Court has only "'quoted [the Second Restatement] with approval,' rather than adopting it)." Dkt. 207, at 9, n.5.

These statements, reflect the Court may not have recognized Defendants contend that, even if the Court may properly strike their five equitable defenses, which Defendants dispute, the Court may still consider conduct pertinent to the equitable defenses in determining the appropriate

[13] The Court denied Defendants' Partial Objections to the Magistrate Judge's Discovery Order to the degree the Discovery Order denied Defendants' pre-suit discovery, but allowed it for Plaintiffs. *See* Dkt. # 218, at 18.

remedy—damages or injunction, including ejectment—in this case. Further, the Court's statement "it is not clear *at this stage of the litigation* that it would be obligated to apply the Restatement (Second) of Torts factors to determine the propriety of injunctive relief," indicates the Court has yet to make that determination. Accordingly, if *Cayuga X*, *Andrus*, and similar "right vs. remedy" cases are pertinent to the remedial determinations in this case, or if the Restatement factors should be (or even might be) considered, the Court may then consider such evidence, and, accordingly, Defendants should be entitled to discover facts now pertaining to that evidence, and Defendants submit the Discovery Order, and this Court's Objections Order, are in error.

CONCLUSION

The Court should reconsider its Affirmative Defense Order, and its Objections Order, and rule that: 1) Defendants' affirmative defenses of estoppel, laches, waiver, unclean hands, and *in pari delicto* are not subject to dismissal at the pleadings stage either based on the law of the case doctrine or based on federal common law applicable to equitable defenses to claims pertaining to tribal lands; 2) even if such defenses may properly dismissed, the equitable considerations reflected in such defenses may be considered in determining appropriate remedies in this remedial stage of the case, in addition to the prospective balance of harms the Court's Orders recognize are appropriate, and 3) accordingly, the Magistrate Judge erred in ruling all "backward looking," apparently meaning pre-litigation filing evidence of conduct of Plaintiffs United States and OMC is not material, and thus, no discovery regarding any such conduct is appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2021, I electronically transmitted the attached Document to the Clerk of the Court using the ECF System for filing. Based on the electronic records currently on file, the Clerk of the Court will transmit a notice of Electronic Filing to the following ECF registrants:

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