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

THE CHEROKEE NATION, **Plaintiff,** **v.** **RAYMOND NASH, *et al.*,** **Defendants /Cross-Claimants/ Counter-Claimants** **-and-** **MARILYN VANN, *et al.*** **Intervenors/Defendants/Cross-Claimants/Counter-Claimants** **v.** **THE CHEROKEE NATION, *et al.*,** **Counter-Defendants,** **-and-** **KEN SALAZAR, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR,** **Cross-Defendants.**	**Case No. 4:11-CV-648-TCK-TLW**

MOTION OF THE CHEROKEE FREEDMEN FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION

Defendants/Cross-Claimants/Counter-Claimants Raymond Nash, *et al.* and Intervenors/Defendants/Cross-Claimants/Counterclaimants Marilyn Vann, *et al.* (the "Freedmen") respectfully submit this motion seeking reconsideration pursuant to Federal Rule of Civil Procedure 54(b) of this Court's Opinion and Order dated March 15, 2013 ("Order"),

denying the Freedmen's Motion to Transfer or, in the Alternative, to Stay ("Motion to Transfer or Stay"). In the alternative, the Freedmen move for entry of an order, pursuant to 28 U.S.C. § 1292(b), certifying this Court's Order for interlocutory appeal. The Freedmen further request a stay of this Action pending resolution of this Motion and any related appeal. In support of this Motion, the Freedmen respectfully refer the Court to the accompanying Memorandum of Points and Authorities.

Dated: April 1, 2013

Respectfully submitted,

/s/ Alvin Dunn

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2013, I electronically transmitted this Motion of the Cherokee Freedmen for Reconsideration or, in the Alternative, for Certification, to the Court via ECF for filing and for service of Notice of Transmittal upon the following:

A. Diane Hammons
Chrissi R. Nimmo
Michael Todd Hembree
Amber Beth Blaha
Frederick Harter Turner
Harvey Lee Chaffin

/s/ Alvin Dunn
Alvin Dunn

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MEMORANDUM IN SUPPORT OF MOTION OF THE CHEROKEE FREEDMEN FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION

Defendants/Cross-Claimants/Counter-Claimants Raymond Nash, *et al.* and Intervenors/Defendants/Cross-Claimants/Counterclaimants Marilyn Vann, *et al.* (the "Freedmen") respectfully submit this Memorandum in support of their motion seeking reconsideration pursuant to Federal Rule of Civil Procedure 54(b) of this Court's Opinion and Order dated March 15, 2013

("Order"), denying the Freedmen's Motion to Transfer or, in the Alternative, to Stay ("Motion to Transfer or Stay"). In the alternative, the Freedmen move for entry of an order, pursuant to 28 U.S.C. § 1292(b), certifying this Court's Order for interlocutory appeal. The Freedmen further request a stay of this Action pending resolution of this Motion and any related appeal.

This Court declined to transfer this action back to the District of Columbia because the Cherokee Nation waived its sovereign immunity in Oklahoma, while it continues to assert its immunity in the District of Columbia. Reconsideration of this Court's decision is appropriate because the United States Court of Appeals for the District of Columbia Circuit has squarely held that the D.C. Court can adjudicate fully the Freedmen's claims and accord complete relief among the parties without the Nation present. *See Vann v. U.S. Dept. of Interior,* 701 F.3d 927 (D.C. Cir. 2012) ("*Vann IV*"). Absent reconsideration, certification is appropriate under 28 U.S.C. § 1292(b). The first-to-file rule and 28 U.S.C. § 1404(a) invoke controlling questions of law as to which there are substantial grounds for difference of opinion. Resolving these questions will materially advance the termination of this litigation.

ARGUMENT

I. The Court Should Reconsider its Order and Grant the Motion to Transfer or Stay.

A. Legal Standard

Under Federal Rule of Civil Procedure 54(b), "the court retains the power to alter rulings until final judgment is entered on a cause." *Paramount Pictures Corp. v. Thompson Theatres, Inc.*, 621 F.2d 1088, 1090 (10th Cir. 1980); *see also Raytheon Contructors, Inc. v. Asarco, lnc.*, 368 F.3d 1214, 1217 (10th Cir. 2003); *Callaway v. Wiltel Commc'n., LLC*, 2007 WL 2902878, *4 (N.D. Okla. Oct. 2, 2007); *Fye v. Okla. Corp. Com'n*, 516 F.3d 1217, 1223 n.2 (10th Cir. 2008) (in reconsidering a non-final order, "the district court is not bound by the strict standards. . . encompassed in [Rules] 59(e) and 60(b)"). The Court should exercise that power here.

B. The Case Should be Transferred Under the First-to-File Rule.

1. The Cherokee Nation's Assertion of Immunity Creates Neither a Special Circumstance Nor a Significant Difference in the Parties.

Although this Court found that the Cherokee Nation's possible sovereign immunity in the District of Columbia weighs against deference to the first-filed court because it could be viewed as creating either a "special circumstance" or a "lack of sufficient similarity between the parties," (Order at 8), the ability of the Freedmen to proceed against the Principal Chief in the D.C. Action – without the need to join the Cherokee Nation to that lawsuit – overcomes this obstacle.

Both this Court and the D.C. Circuit have already held that "[a]s a practical matter . . . the Cherokee Nation and the Principal Chief in his official capacity are one and the same." *Vann IV*, 701 F.3d at 930; *see also Nash*, 724 F.Supp.2d at 1169 (holding that "Chief Smith is 'substantially similar' to the Cherokee Nation for purposes of the first to file rule."). In fact, even in the recent Order, this Court acknowledged that "the first to file rule generally applies because," among other things, "there is a similarity of parties and issues." Order at 7. Accordingly, there is sufficient similarity between the parties to invoke the first-to-file rule.

For the same reason, the possibility that the Cherokee Nation might re-assert its immunity following a transfer, and that this assertion of immunity could result in a situation where there "would ultimately be no judgment for or against the Cherokee Nation itself," (*id.*), is not a special circumstance. The fact that there will not be a judgment for or against the sovereign is a quintessential feature of any *Ex Parte Young* action. Such actions are now routine, and a judgment against a sovereign's official has the practical effect of a judgment against the sovereign itself. *Vann IV*, 701 F.3d at 930.

Accordingly, regardless of whether the Cherokee Nation can invoke sovereign immunity in the D.C. Action,[1] the Freedmen can proceed in the first-filed court against a substantially similar party.

2. Potential Additional Appeals in the D.C. Action do not Indicate that the Cherokee Nation's Purported Sovereign Immunity is a Special Circumstance

The possibility that the Cherokee Nation may "seek further appellate review of any declaratory relief entered solely against the Principal Chief" and initiate "additional litigation regarding enforcement of any judgment, resulting in further delay of final resolution of the issues," (Order at 9-10), do not indicate that the Nation's selective waiver of its sovereign immunity is a special circumstance. As an initial matter, appeals on any number of procedural and substantive issues are nearly certain in either forum. Moreover, it would be a manifest injustice to let the possibility of additional immunity-related appeals affect the first-to-file analysis where, as here, the D.C. Circuit has already ruled that the Action can proceed without the Cherokee Nation. Such an outcome would reward forum shopping and dilatory litigation tactics, while ignoring the principles of judicial comity that underlie the first-to-file rule. Moreover, because Judge Kennedy erroneously dismissed the D.C. Action in *Vann III*, the D.C. Court has never decided the first-to-file question. Now that the Court of Appeals has issued its mandate reversing the dismissal of the D.C. Action and the case has been assigned to U.S. District Judge Thomas F. Hogan, the procedural posture of the two cases is roughly the same as

[1] The D.C. Court has not conclusively resolved whether the Cherokee Nation has waived its sovereign immunity in the D.C. Court by filing the Oklahoma Action. Although the D.C. Court in *Vann III* found no such waiver, that opinion was reversed by the D.C. Circuit's ruling in *Vann IV*. The D.C. Circuit did not reach the issue of the Cherokee Nation's immunity because it found that the action could proceed in the Cherokee Nation's absence, reasoning that the Principal Chief, joined under the doctrine of *Ex parte Young*, represented the Nation's interests.

it was when this Court first placed the forum issue before the D.C. Court. Accordingly, under the first-to-file rule, Judge Hogan should now determine in which forum these two essentially identical cases should proceed.

C. A Transfer is Appropriate Under 28 U.S.C. § 1404(a).

Although the Court declined to transfer this Action under 28 U.S.C. § 1404(a) because it found that (1) this forum is not inconvenient for any party, and (2) the Cherokee Nation is immune in the first-filed forum, (Order at 11), the convenience of the parties and the interests of justice are indeed furthered by a transfer.

It is true, as the Court noted, "that much of the Cherokee Nation's land and citizens are located in this district" and that "this case will likely be decided on the briefs and exhibits, rather than on the basis of a trial." Order at 11. But this is only part of the convenience analysis. The convenience of the parties is also greatly increased when a transfer has the effect of consolidating multiple actions in one district. *See Recovery Processes Int'l, Inc. v. Hoechst Celanese Corp*., 857 F. Supp. 863, 866 (D. Utah 1994) (finding the presence of a similar, first-filed case to be the "most compelling" factor in a 28 U.S.C. 1404(a) analysis and ordering transfer despite the fact that the plaintiff and witnesses resided in the second-filed forum); *see also Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F. 2d 1509, 1516 (10th Cir. 1991). Likewise, a transfer furthers the "interests of justice" because it guards against inconsistent results and avoids a duplication of resources. *See* Order at 11 ("Ordinarily, the interest of justice is served by transferring a similar case to a first-filed venue in order to avoid duplication, preserve resources, and prevent inconsistent judgments."). While there are unresolved questions surrounding the Cherokee Nation's immunity in the District of Columbia that are not present in the Oklahoma Action, the presence of the Principal Chief negates the practical import of those questions.

D. Absent a Transfer, This Action Should Be Stayed.

Even if the Court declines to transfer this Action, a stay pending the outcome of the D.C. Action remains appropriate. As an initial matter, although the Order relied on the *United Steelworkers* factors, it did not need to do so, because, regardless of the outcome of an analysis of these factors, a stay remains appropriate when it is issued in deference to a first-filed action. *See, e.g., Debt Exch., LLC v. Fluid Trade, Inc.*, No. 10-CV-0464-CVE-TLW, 2010 WL 3790605 (N.D. Okla. Sept. 24, 2010) (staying the case in light of the first-filed action in another federal court). Even applying the *United Steelworkers* factors, however, they weigh in favor of reconsideration.

First, although, as the Court notes, it is not certain that the Freedmen will prevail in the D.C. Action, (Order at 12), the clear language of the Treaty of 1866 supports the Freedmen's core claims. *See* 14 Stat. 799 (July 19, 1866) ("all freedmen . . . shall have all the rights of native Cherokees"). The United States agrees. Letter from Larry Echo Hawk, Assistant Secretary of Indian Affairs of the United States Department of the Interior, to S. Joe Crittenden, Acting Principal Chief of the Cherokee Nation (Sept. 9, 2011), attached as Exhibit A. Next, although the Court found no irreparable harm to the Freedmen from simultaneously litigating identical claims in multiple forums, (Order at 12), requiring the Freedmen to litigate in two forums will not only put a strain on the resources expended in litigating the two actions, but also could delay much-needed relief for the Freedmen if the parties are required to reconcile inconsistent judgments.

Finally, the public interest in resolving the Freedmen's citizenship rights is best served by adhering to the principles of judicial comity and efficiency. Furthermore, the public interest in those principles is harmed by rewarding the litigation tactics used by the Cherokee Nation in this case. If the Principal Chief were not present in the D.C. Action, it would be true that the public

interest in favor of resolution on the merits would be supported by the Cherokee Nation's willingness to submit to this Court's jurisdiction. (*See* Order at 12). The Principal Chief's presence in the D.C. Action, however, allows for a resolution on the merits in that forum, regardless of the Cherokee Nation's presence in the suit. Moreover, the Cherokee Nation has continued to assert sovereign immunity with respect to some of the claims that are currently before this Court, (*id.* at 10, n.7), which further negates any public interest rationale for proceeding in this Court.

Accordingly, absent a transfer, the Court should stay this Action pending resolution of the D.C. Action. *See Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952) (holding that "conservation of judicial resources and comprehensive disposition of litigation" support granting a stay); *O'Hare Int'l Bank v. Lambert*, 459 F.2d 328, 332 (10th Cir. 1972) (the "simultaneous prosecution in two different courts of cases relating to the same parties and issues leads to wastefulness of time, energy and money") (citations and quotations omitted).

II. If the Court Denies Reconsideration, Certification of the Order for Immediate Appeal under Section 1292(b) is Proper

Under Section 1292(b), a district court may certify an interlocutory order for appeal if the order involves (1) a controlling question of law (2) as to which there is substantial ground for difference of opinion; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. *See* 28 U.S.C. § 1292(b); *Homeland Stores, Inc. v. Resolution Trust Corp.*, 17 F.3d 1269, 1271 (10th Cir. 1994). Certification is appropriate because this case satisfies each of these elements. *See, e.g. Houston Fearless Corp. v. Teter*, 318 F.2d 822, 827 (10th Cir. 1963) (considering a court's refusal to transfer a case under 28 U.S.C. § 1404(a), certified for appeal under 28 U.S.C. § 1292(b)).

A. There are Controlling Questions of Law at Issue

A controlling question of law exists where its "resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *McMurtry v. Aetna Life Ins. Co.*, No. CIV-05-84-C, 2006 WL 3228018 at *2 (W.D. Okla. Nov. 3, 2006) (internal citations and quotations omitted). It materially affects the outcome of the litigation, such that certifying the question for appeal saves the court and litigants time and expense. *See Resolution Trust Corp. v. Frates*, 1994 WL 559323, *1 (N.D. Okla. Apr. 12, 1994). The court may consider factual questions that are intertwined with the question of law, where the dispute hinges on what weight to give each fact. *McMurtry*, 2006 WL 3228018 at *2.

The Order involves multiple controlling issues of law: (1) whether it is a "special circumstance" overriding the first-to-file rule when a sovereign claims immunity in a first-filed forum and waives it in the second-filed forum, where the first-filed court has ruled that the action can proceed in the sovereign's absence; (2) whether courts should consider the benefits of consolidating cases under the 28 U.S.C. § 1404(a) "convenience" analysis; (3) whether a party's claimed sovereign immunity in a first-filed court, and waiver of that immunity in a second-filed court, can affect the "interests of justice" analysis under 28 U.S.C. § 1404(a), when the first-filed court has ruled that the action can proceed in the sovereign's absence; and (4) whether litigating in two forums simultaneously justifies a stay of an action.

Here, each of these issues will control the disposition of the case. If sovereign immunity cannot be a special circumstance in this scenario, then the case should be transferred to the District of Columbia. If the benefits of consolidation should be considered under the 28 U.S.C. § 1404(a) "convenience" analysis and if a party's claimed, but legally insignificant, immunity in the first-filed forum should not be considered under the "interests of justice" analysis, then transfer is also appropriate. Finally, if litigating in two forums simultaneously justifies staying

an action, then this Action should be stayed pending resolution of the D.C. Action, saving substantial judicial resources. Because resolution of each issue will affect the further course of this litigation, each is a controlling question of law.

B. There is a Substantial Ground for Difference of Opinion

A "substantial ground for difference of opinion" exists where "a trial court rules in a manner which appears contrary to the rulings of all courts of appeals which have reached the issue, if the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." 2 Fed. Proc. L. Ed. § 3:212 (2013). *See also State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1224 (10th Cir. 2008) (circuit split regarding the issue); *Resolution Trust Corp.*, 1994 WL 559323 (court's ruling conflicted with that of other circuits). "The extent to which the question must be in dispute is lessened in direct correlation to the importance of the issue in the case." *McMurtry*, 2006 WL 3228018 at *2. Here, there are substantial grounds for supporting conclusions contrary to those in the Order.

First, a party's waiver of its immunity in a second-filed forum and assertion of immunity in a first-filed forum cannot constitute a "special circumstance" trumping the first-to-file rule when the first-filed court has ruled that the action can proceed without the sovereign. Whether sovereign immunity constitutes a "special circumstance" at all is an issue of first impression within the Tenth Circuit, which weighs in favor of finding that a substantial question exists. *McMurtry*, 2006 WL 3228018 at *2. As this Court has acknowledged, the courts are "substantially in accord as to the relevant exceptions" to the first-to-file rule, which typically include "bad faith, anticipatory suit, and forum shopping." *Cherokee Nation*, 724 F. Supp. 2d at 1159. *See also Employers Ins. of Wausau v. Fox Entm't Group, Inc.*, 522 F.3d 271, 275 (2d Cir. 2008) ("Given the centrality of the balance of convenience, the "special circumstances" in which

a district court may dismiss the first-filed case without this analysis are quite rare. In fact, we have identified only a limited number of such circumstances"). The Order conflicts with the Second Circuit's narrow interpretation of the "special circumstances" exception, creating a substantial ground for difference of opinion.

However, even if there were no conflict, and if sovereign immunity were generally a "special circumstance" under the first-to-file rule, there would still be a substantial ground for difference of opinion as to whether this exception would apply where the immune sovereign is represented by its official. As described above, *Vann IV* held that the Freedmen's claims against the Principal Chief can proceed in the Cherokee Nation's absence, which strongly supports the transfer of this Action to the D.C. Court. While this Court cites *Sotheby's Inc. v. Garcia*, 802 F. Supp. 1058 (S.D.N.Y.1992), in support of its Order, the immune party in *Sotheby's* was not represented by its official. By allowing the Cherokee Nation's implicit threat to file meritless objections based on its absence to excuse it from normal application of the first-to-file rule, this Court contradicts both the case law governing the "special circumstance" exception generally and the D.C. Court's holding in *Vann IV*.

Second, there is a substantial ground for difference of opinion as to whether courts must consider the benefits of consolidating cases under the 28 U.S.C. § 1404(a) "convenience" analysis. While this Court ignored the benefits of consolidation in considering the relative convenience of the parties, other courts have held that it is among the most important factors to consider. *See Recovery Processes Int'l, Inc.*, 857 F. Supp. at 863 (finding this to be the "most compelling" factor and ordering transfer despite the fact that the plaintiff and witnesses resided in the second-filed forum); *see also Chrysler Credit Corp.*, 928 F. 2d at 1516.

Third, there is a substantial ground for difference of opinion as to whether a party's claimed sovereign immunity in the first-filed court, and waiver of that immunity in the second-filed court, can affect the "interests of justice" analysis under 28 U.S.C. § 1404(a), when it has been adjudicated that the first-filed action can proceed in the sovereign's absence. As described above, this Court's Order holding that it can do so conflicts with the bulk of authority, which holds, as the Court noted, that the "interest of justice is served by transferring a similar case to a first-filed venue in order to avoid duplication, preserve resources, and prevent inconsistent judgments." Order at 11. The Freedmen are not aware of authority in these circumstances that justifies departing from this established precedent.

Fourth, there is authority that conflicts with this Court's ruling as to whether a stay is appropriate where litigation is proceeding in two forums simultaneously. *See Kerotest Mfg. Co.*, 342 U.S. at 183 ("conservation of judicial resources and comprehensive disposition of litigation" supported granting a stay). Given the conflicting authority and issues of first impression, substantial grounds for difference of opinion exist that justify certifying this Order for interlocutory appeal.

C. Certification Would Materially Advance the Termination of Litigation

Certifying this case for interlocutory appeal would materially advance the termination of litigation. If the appeal succeeds and the Tenth Circuit transfers this Action to the D.C. Court, there will be no risk of inconsistent judgments, and the parties will save time they otherwise might have spent attempting to reconcile the two. Furthermore, the D.C. Court will be able to handle this Action efficiently, as it has already ruled on immunity issues that could arise in this Action.

CONCLUSION

For the foregoing reasons, the Freedmen respectfully request that this Court reconsider its Order denying the Freedmen's Motion to Transfer or, in the Alternative, to Stay. In the alternative, the Freedmen request that the Court enter an order, pursuant to 28 U.S.C. § 1292(b), certifying this Court's Order for interlocutory appeal. The Freedmen request a stay of this Action pending resolution of their Motion and any related appeal.

Dated: April 1, 2013

Respectfully submitted,

/s/ Alvin Dunn
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/s/ Alvin Dunn
Alvin Dunn

EXHIBIT A

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

SEP 0 9 2011

The Honorable S. Joe Crittenden
Acting Principal Chief, The Cherokee Nation
P.O. Box 948
Tahlequah, Oklahoma 74465-0948

Dear Chief Crittenden:

We have followed the news of the upcoming election for Principal Chief with interest and growing concern. I write to advise you that the Department of the Interior (Department) has serious concerns about the legality of the Cherokee Nation's actions with respect to the Cherokee Freedmen, as well as the planned September 24, 2011, election.

On August 22, 2011, the Supreme Court of the Cherokee Nation issued its decision in the matter of the *Cherokee Nation Registrar v. Nash*, Case No. SC-2011-02. In this decision, the Court vacated and reversed the earlier decision of the Cherokee District Court, as well as the temporary injunction that maintained the citizenship of the Freedmen. We have carefully reviewed this most recent decision. I am compelled to advise you that the Department respectfully disagrees with the Court's observations regarding the meaning of the Treaty of 1866, between the United States of America and the Cherokee Nation (Nation), 14 Stat. 799, as well as the status of the March 3, 2007, amendment to the Cherokee Constitution.

The Cherokee Constitution ratified by the voters in June 1976 expressly provides that "[n]o amendment or new Constitution shall become effective without the approval of the President of the United States or his authorized representative," which is the Secretary of the Interior. The Department declined to approve the 2003 amendments of the 1976 Constitution, as evidenced by the August 30, 2006, letter from Associate Deputy Secretary James Cason to Principal Chief Chad Smith and the March 28, 2007, letter from Assistant Secretary – Indian Affairs (AS-IA) Carl Artman to Principal Chief Smith, copies of which are enclosed. Although on August 8, 2007, AS-IA Artman approved a June 23, 2007, amendment to the 1976 Constitution that removes the requirement for Secretarial approval of amendments, that decision is not retroactive. Thus, the decision of the Cherokee Nation Supreme Court appears to be premised on the misunderstanding that both the unapproved Constitution adopted in 2003, and the March 3, 2007, amendment that would make Freedmen ineligible for citizenship, are valid. The Department has never approved these amendments to the Cherokee Constitution as required by the Cherokee Constitution itself.

Furthermore, we understand that in 2010 the Nation adopted new election procedures which will govern the upcoming election for Principal Chief. Those procedures were never submitted to, nor approved by, the Secretary of the Interior or any designated Department of the Interior official as required by the Principal Chiefs Act, (Pub. L. 91-495, 84 Stat. 1091). Pursuant to the Principal

Chiefs Act, enacted by Congress in 1970, the Secretary is required to approve procedures for the selection of the Principal Chief of the Cherokee Nation.

We are concerned that the recent decision from the Cherokee Nation Supreme Court, together with 2010 election procedures that have not been approved by the Secretary of the Interior as required by the Principal Chiefs Act, will be the basis for denying Cherokee Freedmen citizenship and the right to vote in the upcoming election. The Department's position is, and has been, that the 1866 Treaty between the United States and the Cherokee Nation vested Cherokee Freedmen with rights of citizenship in the Nation, including the right of suffrage.

I urge you to consider carefully the Nation's next steps in proceeding with an election that does not comply with Federal law. The Department will not recognize any action taken by the Nation that is inconsistent with these principles and does not accord its Freedmen members full rights of citizenship. We stand ready to work with you to explore ways to honor and implement the Treaty.

Sincerely,

Larry Echo Hawk
Assistant Secretary – Indian Affairs

Enclosures