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

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| THE CHEROKEE NATION,<br><br>Plaintiff,<br><br>v.<br><br>RAYMOND NASH, LARRY WASSON, ROBERT ALLEN, KATHY WASHINGTON, LISA DUKE, SALLY JEWELL[1], SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR<br><br>Defendants. | ) | Case No. 11-CV-648-TCK-TLW |

**FEDERAL DEFENDANTS' RESPONSE TO THE FREEDMEN'S MOTION FOR RECONSIDERATION OR CERTIFICATION**

[1] Sally Jewell was sworn in as Secretary of the Interior on April 12, 2013 and is substituted for Ken Salazar pursuant to Federal Rule of Civil Procedure 25(d).

## INTRODUCTION

In its March 15, 2013 Order, this Court denied transfer of this action based on a determination that, if the case were transferred, "[t]here would ultimately be no judgment for or against the Cherokee Nation itself" because the Cherokee Nation will assert sovereign immunity in the D.C. Court. Order at 7. The Court determined that "immunity in the transferee forum is a special circumstance that overrides the general first to file rule." Order at 8. The Court's Order is based on the erroneous conclusion that the Cherokee Nation could assert sovereign immunity as to all claims against it if the case were transferred to D.C. In fact, the Cherokee Nation has ***no sovereign immunity in any forum*** with respect to the central claim in this case – the United States' declaratory judgment claim regarding the meaning of the Treaty of 1866. The Cherokee Nation has no sovereign immunity in suits brought by the United States. The Cherokee Nation will remain a party to the judgment on this claim and be fully bound by it. Further, the Cherokee Nation's sovereign immunity in this action as to any other claims will not be affected by transfer of the action to a different federal court. Thus, the Federal Defendants support the Freedmen's motion to reconsider, and respectfully request that this Court reevaluate the factual and legal bases for its March 15, 2013 Order.

Although the Federal Defendants support the motion to reconsider, the Federal Defendants do not support a lengthy stay of this action pending adjudication of the full merits of *Vann v. Salazar* or certification for interlocutory appeal because both would unnecessarily delay the resolution of the central question in this case about the meaning of the Treaty of 1866.

## BACKGROUND

On July 2, 2010, the Court granted the Federal Defendants' and the Freedmen's original motions to transfer because the *Vann* action was filed first (in D.C.) and there was substantial

overlap between the parties and the issues. *Cherokee Nation v. Nash*, 724 F. Supp. 2d 1159 (N.D. Okla. 2010) (Docket No. 48) (hereinafter "Original Transfer Order"). After dismissing the *Vann* action on September 30, 2011, the D.C. District Court transferred *Nash* back to this Court because "in the absence of the first-filed case . . . the first to file rule and its underlying rationale no longer apply." (Docket No. 83, at 3). The Freedmen appealed the D.C. District Court's decision to the D.C. Circuit.

On December 14, 2012, the D.C. Circuit unanimously reversed and remanded *Vann* to the D.C. District Court, holding that "the Cherokee Nation and the Principal Chief in his official capacity are one and the same in an *Ex parte Young* suit for declaratory and injunctive relief."[2] *Vann v. United States Dep't of Interior*, 701 F.3d 927, 929 (D.C. Cir. 2012). The Freedmen moved to transfer *Nash* back to the D.C. District Court on January 11, 2013. (Docket No. 178). The Federal Defendants supported transfer and the Cherokee Nation opposed it (Docket Nos. 184, 185), and on March 15, 2013 this Court issued its Order denying transfer.

## ARGUMENT

### I. Because Transfer is Appropriate Under the First-to-File Rule and 28 U.S.C. § 1404(a), the Motion to Reconsider Should Be Granted

#### A. Legal Standard for Motions to Reconsider

Although the "Federal Rules of Civil Procedure do not recognize a 'motion to reconsider,'" *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991), courts in the Tenth Circuit treat motions for reconsideration of interlocutory orders as arising under Federal Rule of Civil Procedure 54(b). *Raytheon Constructors Inc. v. Asarco Inc.*, 368 F.3d 1214, 1217 (10th Cir. 2003) *Tomlinson v. Combined Underwriters Life Ins. Co.*, 684 F. Supp. 2d 1296, 1299

[2] On March 12, 2013, the D.C. Circuit denied the Cherokee Nation's petitions for panel rehearing and rehearing en banc. *Vann v. United States Dep't of Interior*, Case No. 11-5322, Document Nos. 142489, 1424807.

(N.D. Okla. 2010). When examining motions to reconsider under Rule 54(b), courts in the Tenth Circuit have looked to the standards established under Rule 59(e) for guidance. *Tomlinson*, 684 F. Supp. 2d at 1299.

Under Rule 59(e), courts consider the following grounds for reconsideration: "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Id.* (quoting *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)). "Additionally, a motion to reconsider is appropriate where the court has obviously misapprehended a party's position or the facts or applicable law." *Brown v. K-MAC Enters.*, No. 12-CV-55, 2012 WL 4321711, at *3 (N.D. Okla. Sept. 19, 2012) (quoting *Laney ex rel. Laney v. Schneider Nat'l Carriers, Inc.*, 259 F.R.D. 562, 565 (N.D. Okla. 2009)). Courts are not bound by these standards and have the inherent authority to alter interlocutory orders "even where the more stringent requirements" of Rule 59(e) are not satisfied. *Nat'l Bus. Brokers, Ltd. v. Jim Williamson Prods., Inc.*, 115 F. Supp. 2d 1250, 1256 (D. Colo. 2000).

In this case, the Court erred in its legal conclusion that immunity warranted an exception to the first-to-file rule and weighed against transfer under Section 1404(a). Moreover, even if the Court finds that it does not need to correct clear error, it should exercise its broad discretion to reconsider.

### B. The Cherokee Nation's Sovereign Immunity Does Not Present a Special Circumstance that Trumps the First-to-File Rule

As this Court noted in its Original Transfer Order, the first-to-file rule is a presumption that can be rebutted only if an opposing party establishes that a recognized exception is met. Those exceptions include: "(1) where the balance of convenience favors the second-filed action, and (2) where *special circumstances* warrant giving priority to the second suit." *Nash*, 724 F.

Supp. 2d at 1166. In its March 2013 Order, the Court concluded that the first-to-file rule generally applies here, but determined that the Cherokee Nation's waiver of immunity in the second-filed lawsuit – "whether viewed as a 'special circumstances' exception to the first to file rule or a lack of sufficient similarity between the parties" – makes transfer inappropriate. Order at 7-8. There are several reasons why the Court should reconsider its Order, and find that the Cherokee Nation's sovereign immunity neither presents a "special circumstance" that merits an exception to the first-to-file rule nor results in a lack of sufficient similarity between the parties.

***First***, the Court did not address the fact that the principal issue in this case – the request for a declaratory judgment resolving the dispute between the signatories to the Treaty of 1866 about the Treaty's meaning – is presented by the ***United States'*** declaratory judgment claim against the Cherokee Nation. (Docket No. 118). The Cherokee Nation cannot assert immunity to this claim in any forum because tribal sovereign immunity cannot bar a suit by the United States.[3] *See, e.g., Miccosukee Tribe of Indians of Florida v. United States*, 698 F.3d 1326, 1331 (11th Cir. 2012); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459-60 (9th Cir. 1994); *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382-83 (8th Cir. 1987); *United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986). Thus, the United States' counterclaim against the Cherokee Nation, which forms the heart of this lawsuit, will unquestionably survive even if the case is transferred.[4]

[3] The issue of sovereign immunity as to the United States' claims was not fully briefed before this Court because of the posture of this motion. The Federal Defendants and the Cherokee Nation filed briefs in response to the Freedmen's transfer motion on the same day, February 1, 2013, and it was in that brief that the Cherokee Nation first alluded to this immunity argument.

[4] Because the Cherokee Nation would still be a party to the case upon transfer, the March 2013 Order's citation to *Sotheby's, Inc. v. Garcia*, 802 F. Supp. 1058, 1065-66 (S.D.N.Y. 1992), is inapposite. Order at 8-9.

As a result, the Court's statements that "upon transfer, [the Cherokee Nation] would presumably cease to seek declaratory relief and would re-assert immunity for any pending counterclaims," and that "[t]here would ultimately be no judgment for or against the Cherokee Nation itself" are incorrect. Order at 7. If this action is transferred to the D.C. Court, the United States' declaratory judgment claim will proceed against the Cherokee Nation and would result in a judgment for or against the Cherokee Nation itself.

***Second***, to the extent that the Court's reasoning is based on its conclusion that the Cherokee Nation's waiver of sovereign immunity is affected by a transfer of this case between federal district courts, this is incorrect. *See* Order at 7 (suggesting that upon transfer the Cherokee Nation "would presumably cease to seek declaratory relief and would re-assert immunity for any pending counterclaims"). The Court's Order adopts the reasoning of Judge Kennedy's *Vann III* opinion, which held that the Freedmen could not add the Cherokee Nation as a defendant in the *Vann* action based simply on the fact that the Cherokee Nation had filed the *Nash* action. *Vann v. Salazar*, 883 F. Supp. 2d 44 (D.D.C. 2011). The *Vann III* Court rejected the Freedmen's proposition that by filing the *Nash* action, the Cherokee Nation had waived its sovereign immunity and consented to federal jurisdiction "with regard to the subject matter of this case." *Id.* at 54. Thus, the *Vann III* Court held that the Cherokee Nation's filing of *Nash* did not waive its immunity as to claims in a separate suit, even where those claims concerned the same subject matter.

But the immunity issue addressed by the *Vann III* Court is different from the question raised here of whether the Cherokee Nation may waive its immunity in one federal district court but then re-assert the immunity when that same action is transferred, under normal venue rules, to a different federal district court. This question has previously been presented in this case, but

was not decided. In a motion to dismiss or transfer the *Nash* case while it was pending in the D.C. Court, the Cherokee Nation argued that its waiver of immunity in *Nash* was limited to the Northern District of Oklahoma. (Docket No. 51.) The Federal Defendants opposed this motion, arguing that by filing suit in federal court, the Cherokee Nation subjected itself to the same procedural rules as other litigants. (Docket No. 55.) *See, e.g., In re Regents of University of California*, 964 F.2d 1128, 1135 (Fed. Cir. 1992) (rejecting argument that waiver of sovereign immunity was limited to a particular federal district court, and finding that case was subject to Multidistrict Panel's order to consolidate cases in a different district court). Thus, in the Federal Defendants' view, the transfer of the *Nash* case to the D.C. Court will not have an effect on the Cherokee Nation's assertion or waiver of sovereign immunities in this case. For this reason, the Cherokee Nation's sovereign immunity does not warrant an exception to the first-to-file rule here.

***Third***, as a practical matter, given the closely related and overlapping issues in both cases, it is critical that the two cases be considered in tandem, even if the cases may not be appropriate for consolidation. While it is true that the identities of the parties in the two suits are not identical – the *Vann* case includes the Cherokee Nation Principal Chief as a defendant, whereas the Cherokee Nation itself is a party to the *Nash* action – the parties are sufficiently similar to warrant transfer under the first-to-file rule. Indeed, as the Court noted in its July 2010 Transfer Order, "the Cherokee Nation's immunity is not particularly relevant in analyzing the *similarity of parties* between the two actions for the purposes of the first to file rule." *Nash*, 724 F. Supp. 2d at 1170. Further, as the Freedmen point out, under *Ex parte Young*, "a judgment against a sovereign's official has the practical effect of a judgment against the sovereign itself." (Docket No. 190-1, at 3).

The application of the first-to-file rule here warrants transfer of this case to D.C., and the Federal Defendants respectfully suggest that this Court reevaluate its conclusions regarding the applicability of the exception to that rule. *See Brown*, 2012 WL 4321711, at *3 (reconsideration appropriate where conclusion is based on a "misappreh[sion of] a party's position or the facts or applicable law").

### C. The Interest of Justice Will Be Served by Transferring this Action to D.C. Under 28 U.S.C. § 1404(a)

The Court also erred when it denied transfer under 28 U.S.C. § 1404(a). After acknowledging that the interest of justice is usually served by transferring a case to the first-filed forum, the Court referenced its analysis under the first-to-file rule and found that "this is a unique case in which the plaintiff seeking declaratory relief in the second-filed forum is immune from suit in the first-filed forum." Order at 11. As noted above, immunity is not an obstacle to transferring *Nash* to D.C. because the United States' counterclaim is the heart of this case and the Cherokee Nation is not immune from suit by the United States. Moreover, "[t]he 'interest of justice' is a separate element of the transfer analysis that relates to the efficient administration of the court system." *Research Automation Inc. v. Schrader-Bridgeport Intern., Inc.*, 626 F.3d 973, 978 (7th Cir. 2010). The efficient administration of the court system will be best served by transfer because it will avoid two separate courts using judicial resources to consider the same issues of law and also avoid the risk of inconsistent decisions.

## II. Because Interlocutory Appeal Will Unnecessarily Delay the Adjudication of this Action, the Motion for Certification Should be Denied

Under 28 U.S.C. § 1292(b), courts may certify appeal of an interlocutory order 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." 28 U.S.C. § 1292(b). Interlocutory review under Section 1292(b) was designed to avoid undue delay in litigation and intended to be available only in exceptional circumstances. *See Utah v. Kennecott Corp.*, 14 F.3d 1489, 1495 (10th Cir. 1994) (a Tenth Circuit committee addressing interlocutory appeals during the debate on Section 1292(b) based its "recommendation upon the premise that the enlargement of the right to appeal should be limited to extraordinary cases in which extended and expensive proceedings probably can be avoided by immediate final decision of controlling questions encountered early in the action"). Several courts have found interlocutory appeal under Section 1292(b) unavailable for the review of the grant or denial of a 28 U.S.C. § 1404(a) transfer motion for "incorrect evaluation of proper factors." *E.g., A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 443 (2d Cir. 1966).

Although the Court's Order was erroneous and requires reconsideration for the reasons described above, if the Court declines to reconsider its views, the Federal Defendants do not support certification.[5] The Court's Order does not unequivocally satisfy the factors in Section 1292(b). And here, the Federal Defendants believe that the potential for extensive further delays in this case outweigh any benefits of interlocutory review. While the Federal Defendants strongly believe that the *Vann* and *Nash* cases are so similar as to require coordinated handling and that this could be best achieved by having both the cases in the same court, this goal could still be accomplished by the respective district courts without interlocutory appeal.

The Court's legal error goes to a matter of venue that does not necessarily affect the ultimate outcome of the case. Disputes as to venue are rarely ones that materially affect the

[5] The Federal Defendants also oppose reconsideration of the Court's denial of a stay pending the resolution of the *Vann* action because of the unnecessary delay that would result. It would be most efficient for a single court to consider both *Vann* and *Nash*. If this does not occur, however, it would not be efficient to entirely defer the Treaty claims in *Nash* until the *Vann* case is fully resolved.

outcome of a case. *See Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974) ("If there are two districts, either of which would have jurisdiction, but one of which is in the opinion of the district court superior, it is extremely unlikely that a change of venue would result in a reversal after final judgment."). Moreover, an appeal at this juncture would result in more delay as it will be difficult for the litigants to move forward in either case until the problem of potentially inconsistent judgments is addressed.

Second, although it is the Federal Defendants' position that the Court's Order should be reconsidered, this issue does not rise to the level of a substantial difference of opinion justifying further delay through certification. The fact that "settled law might be applied differently does not establish a substantial ground for difference of opinion." *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010).

Third, the *Vann* case has been pending for over ten years, and the *Nash* case for over three years. Certification will not advance resolution; it will only inject more delay. Pending certification and resolution in the Tenth Circuit, it will be difficult to advance *Nash* and *Vann* because the parties will lack the certainty needed to know how to resolve these cases in a manner that is efficient and that avoids inconsistent judgments. *See Olinick*, 365 F.2d at 443 ("[R]eview of the disposition of the transfer motion may delay a decision on the merits and so defeat the manifest statutory objective of making litigation quicker and less expensive.").

In these circumstances, certification of the Court's Order under Section 1292(b) is inappropriate because an appeal would unnecessarily delay the resolution of this case.

## CONCLUSION

For the reasons stated herein, this Court should grant the Freedmen's motion for reconsideration of this Court's Order denying transfer. This Court should deny the Freedmen's motion for reconsideration of the denial of a stay pending resolution of *Vann* and the Freedmen's motion for certification.

Dated: April 22, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2013, I electronically transmitted the attached document to the Court using the ECF system, which indicates that Notice of Electronic Filing will be sent to the following counsel:

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