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**

PLAINTIFF, CHEROKEE NATION'S RESPONSE TO THE MOTION OF THE CHEROKEE FREEDMEN FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION

Freedmen Defendants ask this Court for reconsideration of its denial of their fourth[1] application for stay or transfer of this action to the Federal District Court in the District of Columbia (Opinion and Order - Doc 189). In the alternative, they ask this Court to certify the matter for immediate interlocutory appeal on the denial of the stay/transfer so that they can immediately approach the Tenth Circuit with that issue.

[1] Freedmen Defendants have filed a number of requests for stay &/or transfer of this matter (Docs 20, 96, 159, & 178).

The Court's Rulings

This Honorable Court denied the Freedmen Defendants' January 2013 application for stay/transfer under the "first to file" doctrine, stating:

> . . the Court will no longer defer to the first-filed court for deciding whether the "special circumstances" exception applies or for deciding the proper venue for the Oklahoma action. Based on the D.C. Circuit's ruling and denial of rehearing, it is now settled that the D.C. action will proceed without the Cherokee Nation.
> . . .
> . . . the Court now exercises its discretion to reach the "special circumstances" exception and indeed finds that special circumstances trump the first to file rule in this case. The special circumstances are the Cherokee Nation's waiver of immunity in the second-filed lawsuit and successful assertion of immunity in the first-filed lawsuit. The Cherokee Nation has made clear that it intends to waive immunity and seek declaratory relief exclusively in this venue. Thus, upon transfer, it would presumable cease to seek declaratory relief and would re-assert immunity for any pending counterclaims. There would ultimately be no judgment for or against the Cherokee Nation itself, despite the Cherokee Nation's consent to suit in this venue. Under these unique circumstances, the Court finds that immunity in the transferee forum is a special circumstance that overrides the general first to file rule.

(Doc. 189, pp. 6 – 8). The Cherokee Nation maintained, and still asserts, however, that the "first to file" rule is not squarely applicable here, because the Nation is a party in this Court, and not in the District of Columbia. The Nation maintains that this Court is the first Court to acquire complete jurisdiction of all the necessary parties for an ultimate decision on the interpretation of Article IX of the Treaty of 1866. The Court did not solely rely on an "exception" to the first-to-file rule in making its determination, stating:

> Whether viewed as a "special circumstances" exception to the first to file rule or a lack of sufficient similarity between the parties, the Cherokee Nation's immunity in the first-filed case renders transfer imprudent.

(Doc. 189, p. 8).

The Court also denied the transfer under 28 U.S.C. §1404(a). That subsection provides:

> (a.) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

In disposing of this matter the Court found:

> The Court finds that this forum is not inconvenient for any party. The Freedmen Defendants argue that the Cherokee Nation's selected forum should not be entitled to any deference because the Cherokee Nation's headquarters are located in the Eastern District of Oklahoma. This argument is dubious, given that much of the Cherokee Nation's land and citizens are located in this district. This district qualifies as a "home forum" for the Cherokee Nation, and it is certainly more of a home forum than the District of Columbia. More importantly, this case will likely be decided on the briefs and exhibits, rather than on the basis of a trial. Thus the convenience of witnesses is not an important factor.

(Doc 189, p. 11).

The Court therefore found that, because it could not in good conscience stay or transfer the action, that the latest in the series of the Freedmen Defendants' attempts to stay or transfer the Northern District action should be denied (Doc. 189, p. 13).

Argument and Authority

I. The Court Should Deny the Motion to Reconsider.

A. The Legal Standard

"The Federal Rules of Civil Procedure do not recognize a 'motion to reconsider.'" *Van Skiver v. U.S.* 952 F.2d 1241, 1243 (10th Cir. 1991). Instead, the Federal Rules permit a party to move to: (1) alter or amend a judgment within 28 days pursuant to Rule 59(e), (2) vacate a final order pursuant to Rule 60(b), or (3) revise a partial judgment or interlocutory order pursuant Rule

54(b). Here, the Freedmen Defendants' "motion for reconsideration" relates to an order that "adjudicates fewer than all the claims," and they thus request relief under Rule 54(b). *Raytheon Constructors, Inc. v. Asarco, Inc.*, 368 F.3d 1214, 1217 (10th Cir. 2003).

"Although not bound by the standards set forth in Federal Rule of Civil Procedure 59(e) or 60(b) when considering Rule 54(b) motions, courts within the Tenth Circuit generally look to these standards for guidance." *Brown v. K-MAC Enterprises*, No. 12-cv-55, 2012 WL 4321711,*3 (N.D. Okla. Sept. 19, 2012) (Kern, J). A motion to reconsider, like a motion to alter or amend judgment, should be granted only upon the following grounds: "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, [or] (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012, 2009 U.S. Dist. LEXIS 60752, at *5-*7 (10th Cir. 2000). "Such a motion is not appropriate, however, 'to revisit issues already addressed or advance arguments that could have been raised in prior briefing.'" *U.S. v. $343,069 in U.S.Currency*, No. 8-cv-683, 2012 WL 215193, *2 (N.D. Okla. Jan. 24, 2012) (Kern, J.) (*quoting Servants of the Paraclete, ibid*). "Stated another way, a motion for reconsideration is not properly grounded in a request for a district court to rethink a decision it has already made, rightly or wrongly." *Lindley v. Life Investors Ins. Co. of Am.*, 2010 U.S. Dist. LEXIS 37484, 2010 WL 1542568 (N.D. Okla. 2010). The decision of whether to grant or deny a motion for reconsideration is committed to the court's discretion. *See Hancock v. City of Okla. City*, 857 F.2d 1394, 1395 (lOth Cir. 1988).

B. The Court Should not Revisit Arguments that were Raised or Should Have Raised in the Application to Stay/Transfer.

This Honorable Court issued a thirteen page, legally detailed and thorough opinion, denying the January 2013 request for transfer/stay, comprehensively addressing the issues and explaining the reasoning behind the denial. Freedmen defendants point to no new argument that they did not make, or could not have made, as a basis for reconsideration. Whether or not this Court was right or wrong, the criteria for reconsideration has not been met. It was certainly not "clear error" or "manifest injustice" for the Court to deny the fourth application to stay/transfer.

The Northern District of Oklahoma is the home of the original Freedmen Defendants the Cherokee Nation named in its Complaint. The Nation has its business headquarters in the Northern District, and as the Court found, a large portion of its population and property. Mr. Velie, one of the primary attorneys for the Freedmen Defendants, resides in Oklahoma. Undoubtedly a large number of the Freedmen Intervenors reside in Oklahoma. It cannot seriously be argued that the District of Columbia is a more convenient forum for anyone, other than perhaps the United States of America, who is a proper defendant in any federal court in the land.

The Freedmen Defendants reiterate their arguments that they made in the motion to stay or transfer – there is no new law, or change in the evidence, and this Court's ruling was certainly not clear error or manifest injustice. The Freedmen Defendants' brief seeking reconsideration or certification for interlocutory appeal simply reiterates and amplifies the same arguments made (and rejected) on in the latest motion to stay/transfer. This is exactly the type of practice this Court forbids. *See e.g. $343,069 in U.S. Currency*, 2012 WL 215193 at 2 (Kern, J.)(denying motion to reconsider, in part, because "a motion to reconsider is not the place to 'advance arguments that could have been raised in prior briefing.'"); *See also Edwards v. SouthCrest, L.L.C.*, 2012 WL 1752998, *2 (N.D.Okla. 2012) ("A district court does not abuse its discretion if

it refuses to reconsider arguments that have already been considered and rejected.")[2]

Further, the underlying concern this Court expressed in making its determination remains the same. The only recent progress made in the decade old District of Columbia case is the naming of a new Judge to replace now-retired Judge Kennedy. No briefing schedule or deadlines have been entered. The overwhelming public interest in obtaining a federal court determination as to the interpretation of Article IX of the Treaty of 1866 is paramount, and that determination is far more likely to occur in the immediate future in the Northern District of Oklahoma than in the District of Columbia. As this Court found:

> . . . the public interest at stake in this case is a resolution between the Cherokee Nation, the Federal Defendants, and the Freedmen Defendants regarding Freedmens' citizenship rights within the Cherokee Nation. The Cherokee Nation is willing to submit to this Court's jurisdiction to answer this important question, while it will continue to resist enforcement of any judgment rendered in the first-filed forum. Under these circumstances, the Court finds that the public interest is best served by proceeding in this venue.
>
> … This Court cannot in good conscience transfer or stay the only action in which the Cherokee Nation has consented to resolution of these important issues.

(Doc 189, pp. 12, 13).

II. The Court Should Not Certify the Denial of the Motion for Stay or Transfer for Interlocutory Appeal

A. The Legal Standard

"Only exceptional circumstances will justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Federal Trade Com'n v. Skybiz.com, Inc.* 2001 WL 1673630, 1 (N.D. Okla. 2001) (Kern, J.) (citing *In re Flor*, 79 F.3d

[2] Unpublished decisions are not precedential but may be cited for their persuasive value. *See* Fed. R.App. P. 32.1; 10th Cir. R. 32.1

281, 284 (2d Cir.1996)). By statute, a district judge may certify an interlocutory order for appeal if he is of the "opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The present circumstances do not justify this exceptional action.

In fact, the exact converse more accurately meets the standards recited, above. The only real way to "advance the ultimate termination of the litigation" is to proceed through determination in the Northern District of Oklahoma, the only court in which all three interested groups have subjected themselves to jurisdiction (the Cherokee Nation, the United States, and the Freedmen) and are seeking interpretation of Article IX. In the District of Columbia, remand to the District Court has just occurred and a new judge appointed. There will undoubtedly be a series of motions, amendments, and perhaps even more interlocutory appeals before the substance of the Treaty provision is ever addressed. Even then, both co-signors to the Treaty – the Cherokee Nation and the United States of America – are not parties to that litigation.

The terms of 28 U.S.C. §1292(b) admit four criteria that must be satisfied before an issue may be certified for pretrial appeal: (1) the action must be a civil action; (2) the court must conclude that the order involves a controlling question of law; (3) there must be substantial ground for difference of opinion as to the resolution of that question; *and* (4) it must appear that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *In re Spectranetics Corp.*, 2009 U.S. Dist. LEXIS 108542, at *11-*14 (D. Colo. 2009) (denying motion for reconsideration and §1292(b) appeal in PSLRA case). This case is a civil action, but that is the only one of the four criteria which are truly met. The issue here is so fact specific and tied to the highly individualized nature of this case that it is

arguable that the second and third criteria are applicable. And, the fourth criteria demands that an interlocutory appeal and/or reconsideration be denied.

"Even if these three requirements are satisfied, a district court still has the discretion in deciding whether or not to grant a party's motion for certification." *In re LDK Solar Sec. Litig*., 584 F. Supp. 2d 1230, 1258 (N.D. Cal. 2008) (denying motion for reconsideration and §1292(b) appeal in PSLRA case). "Only exceptional circumstances justify departure from the basic policy of postponing appellate review until after the entry of final judgment." *Hightower v. Schwarzenegger*, 2009 U.S. Dist. LEXIS 109603, at *6 (E.D. Cal. 2009); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (1996). *State of Utah v. Kennecott Corp.*, 14 F.3d 1489, 1495 (lOth Cir. 1994) ("A report by a Tenth Circuit committee addressing [§1292(b) appeals] found that the right to appeal should be limited to extraordinary cases."). Hence, "[a] motion for certification must be granted sparingly, and the movant bears the heavy burden of demonstrating that the case is an exceptional one in which immediate appeal is warranted." *Moody*, 2007 U.S. Dist. LEXIS 78534, at *2.

Furthermore, it is highly questionable whether interlocutory appeal should ever be granted on a denial of a motion to transfer. In fact the Fifth Circuit has conclusively held that §1292(b) is not available to challenge a district court's ruling on a §1404(a) motion to transfer.

> We are of the view that§1292(b) review is inappropriate for challenges to a judge's discretion in granting or denying transfers under §1404(a). The Congressional policy against piecemeal appeals, as expressed in the final judgment rule, 28 U.S.C. § 1291, to which § **1292**(**b**) is a narrow exception, is eroded by permitting review of exercise of the judge's discretion under § 1404(a) as a "controlling question of law." Our conclusion is the same as that already reached by the Second, Third, and Sixth Circuits, and by the text writers.

Garner v. Wolfinbarger, 433 F.2d 117, 120 (5th Cir.1970) (citing *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 443 (2d Cir.1966); *Standard v. Stoll Packing Corp.*, 315 F.2d 626 (3d

Cir.1963); *Bufalino v. Kennedy*, 273 F.2d 71 (6th Cir.1959) and 1 BARRON & HOLZOFF, FEDERAL PRACTICE & PROCEDURE, § 86.7 at 434 (Wright ed.1960); *see also* MOORE, FEDERAL PRACTICE, P0.147 at 1973-74 (1964)). See also *In re Matter of Macon Uplands Venture*, 624 F.2d 26 (1980) ("Orders of transfer and consolidation are **interlocutory** and not appealable."); *Louisiana Ice Cream Distributors, Inc. v. Carvel Corporation*, 821 F.2d 1031, 1033 (5th Cir.1987) ("[W]e have disclaimed immediate appellate jurisdiction over the grant or denial of a motion to transfer under 28 U.S.C. § 1404(a).").

B. Freedmen Defendants Vehement Desire to Litigate Outside the Northern District does not Justify an Interlocutory Appeal.

"Mere disagreement, even if vehement, with a court's ruling on a motion to dismiss does not establish a 'substantial ground for difference of opinion' sufficient to satisfy the statutory requirements for an interlocutory appeal." *Taylor*, 2010 U.S. Dist. LEXIS 2675, at *2-*4. Moreover, a controlling question of law, as used in §1292(b), means a pure question of law, requiring the resolution of "abstract" legal issues; it is not the application of a legal question to the particular facts of a case. *See Ahrenholz v. Bd. of Trustees*, 219 F.3d 674, 677 (7th Cir. *Co.*, 2007 U.S. Dist. LEXIS 78534 (N.D. Okla. 2007) (Frizzell, J.).

In their argument for an interlocutory appeal, the Freedmen Defendants choose to argue the alleged novelty of the Court's finding of "special circumstances" supporting the refusal to defer to the "first filed" Court. They then piggy back that argument with the revival of their arguments regarding the adequacy of the D.C. proceedings against the Principal Chief in the absence of the Nation itself. They do not point to any "difference of opinion" regarding application of the "special circumstances" criteria in a similar case. One assumes that they do

not do so, because there is no "similar case." This is a unique situation, involving an important and unique issue, which all parties should want resolved as quickly and effectively as possible. There is no split in the Circuits regarding this matter – it is a highly particularized issue, specific to the facts of this case.

Here, the Court went through a lengthy analysis of the "first-to-file" rule, why the Court believed that special circumstances dictate away from application of that rule to these facts, and why the ends of justice are better served allowing the case to proceed in the Northern District. The facts of this particular case, the Court believed, required the Court to keep the matter rather than transferring it to the District of Columbia, or staying it while the District of Columbia sorts through the jurisdictional morass created by the D.C. Circuit's handling and extension of the *Ex parte Young* issue. This is not a pure question of law, it is the application of legal standards to a very particularized case.

Certifying the Freedmen Defendants' request for stay/transfer for appeal would only protract things further. *See Hansen v. Schubert* 459 F.Supp.2d 973, 1000 (E.D. Cal. 2006) ("This litigation has been protracted for over four years. Now, after dispositive motions have been filed and ruled upon by the court and the issues are ready for trial .. . defendants seek certification for interlocutory appeal. This is not the exception case which Congress contemplated in enacting § 1292(b)"). After this Court determines which, if any, of the Freedmen Defendants' additional claims against the Nation and the United States should proceed (in ruling on the two governments' motions to dismiss), then the matter will be ripe for motions for summary judgment regarding the correct legal interpretation of the current effect of Article IX of the Treaty of 1866. Certifying the matter for interlocutory appeal would only further delay a matter that is of high public importance, has cost the parties millions of dollars, and keeps in

limbo a number of individuals whose citizenship within the Nation remains in question.

CONCLUSION

For the foregoing reasons, the Court should deny the Cherokee Freedmen's Motion for Reconsideration or, in the Alternative, for Certification for Appeal.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2013, I electronically transmitted the Plaintiff, Cherokee Nation's, Response to the Motion of the Cherokee Freedmen for Reconsideration or, in the alternative, for Certification, to the Court via ECF for filing and also electronically transmitted a copy of the same via email to the following:

Amber Beth Blaha
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Respectfully submitted,

s/ A. Diane Hammons

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