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-** **SALLY JEWELL, SECRETARY OF THE INTERIOR, AND THE UNITED STATES DEPARTMENT OF THE INTERIOR,** **Cross-Defendants.**	**Case No. 4:11-CV-648-TCK-TLW**

REPLY 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 Reply in support of their motion seeking reconsideration or, in the alternative, certification, 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").

The Cherokee Nation asserts that this Court may look to the standards set forth in Rules 59(e) and 60(b) for guidance in making its Rule 54(b) determination. Cherokee Opp'n at 4, *citing Brown v. K-MAC Enters.,* No. 12-cv-55-TCK-FHM, 2012 WL 4321711, at *3 (N.D. Okla. Sept. 19, 2012) (Kern, J.). However, reconsideration is equally appropriate under each of these rules. *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (describing one ground warranting reconsideration under Rule 59(e) as "the need to correct clear error or prevent manifest injustice"); *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 576 (10th Cir. 1996) (collecting cases) (relief permissible under Fed. R. Civ. P. 60(b)(1) where "the judge has made a substantive mistake of law or fact in the final judgment or order"); *Stewart Sec. Corp. v. Guar. Trust Co.*, 71 F.R.D. 32, 33-34 (W.D. Okla. 1976) (under Fed. R. Civ. P. 60(b)(6), reconsideration is alternatively available for "any other reason justifying relief," which includes "the interest of justice"). Additionally, as this Court has noted, "a motion to reconsider is appropriate where the court has obviously misapprehended a party's position or the facts or applicable law." *Brown*, 2012 WL 4321711, at *3, *quoting Laney ex rel. Laney v. Schneider Nat'l Carriers, Inc.*, 259 F.R.D. 562, 565 (N.D. Okla. 2009).

The Cherokee Nation argues that transfer is inappropriate under both the first-to-file rule and 28 U.S.C. § 1404(a) because (1) the balance of convenience favors this Action in light of the parties' Oklahoma connections and (2) the Nation will consent to a declaratory judgment action regarding the meaning of the Treaty of 1866 – the central claim in this case – in Oklahoma, but not in the District of Columbia. Cherokee Opp'n at 5-6; *see also* Election Commission Opp'n at

3. This argument ignores the purpose of the Freedmen's Motion to Transfer or Stay and the reality of the Cherokee Nation's immune status.

The Freedmen do not argue that it is inconvenient to litigate in Oklahoma *per se*, but instead seek to avoid the inconvenience to all parties of litigating nearly identical actions in Oklahoma and the District of Columbia simultaneously. As the D.C. Circuit has ruled, "[a]s a practical matter . . . the Cherokee Nation and the Principal Chief in his official capacity are one and the same" for purposes of litigating the Freedmen's *Ex parte Young* claims against Chief Baker. *Vann v. DOI*, 701 F.3d 927, 929 (D.C. Cir. 2012) ("*Vann IV*"). And in any case, as the Federal Defendants point out, the Cherokee Nation has no sovereign immunity as to the declaratory judgment action in the District of Columbia because the federal government itself will bring its claim against the Cherokee Nation. Federal Response at 4-6. Further, the Cherokee Nation's waiver of immunity as to its own claim for declaratory judgment would be unaffected by a transfer – as a plaintiff, it is subject to the same procedural rules as other litigants. *See, e.g., In re Regents of University of California*, 964 F.2d 1128, 1135 (Fed. Cir. 1992) (plaintiff state subject to Multidistrict Panel's order to consolidate cases in another district for pretrial purposes because "[h]aving invoked the jurisdiction of the federal court, the state accepted the authority of the court"); *The Regents of the Univ. of California v. Eli Lilly and Co.*, 119 F.3d 1559, 1564-65 (Fed. Cir. 1997) (affirming § 1404(a) transfer of plaintiff state for trial in same case). Because the Cherokee Nation will be subject to the jurisdiction of the United States District Court for the District of Columbia ("D.C. Court"), the interests of judicial efficiency and economy are best served by transferring this case to the District of Columbia. *See St. Paul Fire & Marine Ins. Co. v. Runyon*, 53 F.3d 1167, 1170 (10th Cir. 1995).

If the Court does not transfer this case, it should certify the transfer issue for interlocutory appeal. While the Cherokee Nation claims that the only way to advance the ultimate termination of this litigation is to hear this action in Oklahoma (Opp'n at 7), the fact remains that hearing this case in two forums at once – when the first-filed forum can hear the core legal issue in this case with all parties present – would only delay the ultimate resolution of the claims between the parties.

CONCLUSION

For the foregoing reasons and as further set forth in the Freedmen's opening brief and the Federal Defendants' Response, this Court should transfer this Action to the D.C. Court. In the alternative, this Court should certify the transfer issue for interlocutory appeal and stay this Action pending the D.C. Court's decision on the merits.

Dated: May 6, 2013

Respectfully submitted,

/s/ Alvin Dunn

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2013, I electronically transmitted this Reply in Support of the 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
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/s/ Alvin Dunn
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