UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Saginaw Chippewa Indian Tribe of Michigan, et al.,

Plaintiffs,

v.

Case No. 05-10296-BC
Honorable Thomas L. Ludington

Jennifer Granholm, et al.,

Defendants.

Plaintiff Saginaw Chippewa Indian Tribe of Michigan's Response to Isabella County's Motion for Certification and Stay of Proceedings and City's Motion to Amend and Certify the Court's Opinion and Order of October 22, 2008

CONCISE STATEMENT OF ISSUE PRESENTED

1. Under U.S.C. § 1292(b), the Court may certify an interlocutory appeal if it will materially advance the ultimate termination of the litigation. An interlocutory appeal here cannot speed the parties' progress to trial, simplify the issues, or decrease the duration of the trial. Should the order be certified for appeal?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Standard for Certification of an Interlocutory Order for Appeal

28 U.S.C. § 1292(b).

Application of the Certification Standard

In re. City of Memphis, 293 F.3d 345 (6th Cir. 2002).

INTRODUCTION

The City and County seek certification of an interlocutory appeal of two parts of the Court's October 22, 2008 order:[1] the exclusion of time-based defenses and the bifurcation of trial.[2] Neither party has demonstrated that certification is appropriate under U.S.C. § 1292(b). Certification of an interlocutory appeal of the Opinion can only delay the ultimate termination of this litigation, keeping the parties on this Court's docket for many more months than if certification is denied.

LEGAL STANDARD

A district court may, in its discretion, certify for appeal an "order involve[ing] a controlling question of law as to which there is substantial ground for difference of opinion" when "an immediate appeal from the order may materially advance the ultimate termination of the litigation[.]"[3] But as the Seventh Circuit has held, "[u]nless *all* these criteria are satisfied, the district court may not and should not certify its order to us for an immediate appeal under section 1292(b). To do so in such circumstances is merely to waste our time and delay the litigation in the district court[.]"[4] Indeed, interlocutory appeal under 28 U.S.C. § 1292(b) "is granted

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[1] Oct. 22, 2008 Opinion and Order, Doc. 121 ("the Opinion").

[2] Isabella County's Motion for Certification and Stay of Proceedings, Doc. 133 ("County's Motion"); [City of Mt. Pleasant's] Motion to Amend and Certify the Court's Opinion and Order of October 22, 2008, Doc. 134 ("City's Motion"). Because it is inapposite to the certification issue presented by these motions, the Tribe does not address that portion of the City's supporting memorandum that reargues the issues already decided by this Court. City's Mot. 6-10.

[3] 28 U.S.C. § 1292(b).

[4] *Ahrenholz v. Board of Trustees of the Univ. of Ill.*, 219 F.3d 674, 676 (7th Cir. 2000) (cited in City's Mot. at 5).

sparingly and only in *exceptional* circumstances."[5] This restraint fosters the strong judicial policy, articulated by the Supreme Court, against interlocutory appeals:

> This rule, that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits, serves a number of important purposes. It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of the trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoiding the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." The rule also serves the important purpose of promoting efficient judicial administration.[6]

ARGUMENT

The Tribe disputes both that the bifurcation and preclusion of defenses are controlling questions of law, and that there is substantial ground within the circuit for disagreement on these issues. But the requests of the City and County are easily resolved on the third factor of the interlocutory appeal test. Before the Court may certify this appeal, the City and County must

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[5] *In re. City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002) (emphasis added) (cited in County's Mot. at 7, City's Mot. at 3). In fact, of the 12 cases relied on by the City and County, the vast majority did not allow an interlocutory appeal or did not actually address the standard. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 74 (stating that parties need not seek an interlocutory appeal to preserve objections, but not performing a section 1292(b) analysis); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981) (dismissing appeal for lack of jurisdiction because interlocutory appeal was improperly granted); *City of Memphis*, 293 F.3d 345 (denying petition for interlocutory appeal); *Ahrenholz*, 219 F.3d 674 (same); *Vitols v. Citizens Banking Co.*, 984 F.2d 168 (6th Cir. 1993) (same); *Baden-Winterwood v. Life Time Fitness*, No. 2:06-CV-99, 2007 WL 2326877 (S.D. Ohio Aug. 10 2007), attached as Exhibit A (denying motion to certify order for interlocutory appeal); *Walker v. Daimler-Chrysler Corp.*, No. 02-CV-74698, 2006 WL 932313 (E.D. Mich.. April 11, 2006), Doc. 134-3 (same); *Barrett v. Burt*, 250 F. Supp. 904 (S. D. Iowa 1966) (same).

[6] *Firestone Tire & Rubber Co.*, 449 U.S. at 374 (internal alteration and citation omitted) (cited in City's Mot. at 3).

demonstrate that an immediate appeal from the order could "materially advance the ultimate termination of [this] litigation[.]"[7] They cannot do so.

In the Sixth Circuit, "[i]f it appears that an interlocutory appeal will delay a trial, rather than expedite or eliminate it, leave to appeal should be denied."[8] In *City of Memphis*, the plaintiffs challenged a Memphis minority-hiring-preference ordinance.[9] In its defense, Memphis argued that the ordinance served a compelling governmental interest by remedying past discrimination and preventing future discrimination.[10] The district court ruled that Memphis could introduce a *pre*-enactment disparity study as evidence of the compelling governmental interest, but could not rely on a second *post*-enactment disparity study, and barred Memphis from introducing the post-enactment study.[11] The district court certified the order for interlocutory appeal, but the Sixth Circuit refused to grant the section-1292(b) appeal. According to the Sixth Circuit, because part of Memphis's case (the post-enactment evidence), but not all (the pre-enactment evidence) of it, was excluded, interlocutory appeal "may not materially advance the ultimate termination of the litigation."[12] It reasoned:

> Under [controlling case law], [Memphis] must present preenactment evidence to show a compelling state interest. [Memphis] has preenactment evidence. Thus, [Memphis] will pursue its defense in substantially the same manner. If [Memphis] prevails with its preenactment evidence, the exclusion of postenactment evidence will be moot. If it does not prevail, [Memphis] can then appeal on the evidentiary ruling and any other issues that may arise below.[13]

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[7] 28 U.S.C. § 1292(b).
[8] 4 Am. Jur. 2d *Appellate Review* § 124 (2008).
[9] *City of Memphis*, 293 F.3d at 348.
[10] *Id.*
[11] *Id.*
[12] *Id.* at 351.
[13] *Id.*

So it is here. Under *Minnesota v. Mille Lacs Band of Chippewa Indians*,[14] the Defendants must present evidence that the Saginaw Chippewa Indians intended that the Treaties of 1855 and 1864 would not create a permanent reservation.[15] The Defendants believe they have that evidence in the form of expert and historical testimony.[16] Thus, even with evidence of time-based defenses excluded, the Defendants will pursue their case in substantially the same manner. If the Defendants prevail with their treaty-interpretation evidence, the exclusion of time-based defenses will be moot. If they do not prevail, the Defendants can then appeal the ruling excluding time-based defenses and any other issues that may still arise in this action.

And a closer look at what the City and County seek shows that certification *cannot* speed the resolution of this case. If certified, an appeal can *only* delay the time it takes to get to trial, extend the time a trial will take, and prolong the ultimate resolution of this case.

As it stands, the first phase of trial only considers treaty-interpretation issues, and the parties will reach the second phase only if the Plaintiffs prevail in the first:

Scenario	**Trial Issues**
Current Posture	Phase I (treaty-interpretation) and contingent Phase II (remedy)

But if the Opinion is appealed, there are four possible outcomes:

[14] 526 U.S. 172 (1999).
[15] *See* Plaintiff Saginaw Chippewa Indian Tribe of Michigan's Challenges to Defendants' October 2008 Witness Lists, Doc. 142, § I(B), pp. 5-7.
[16] [State] Defendants' Second Supplemental Witness List, Doc. 125 at 2 ¶¶ 5-7 (naming Drs. LeRoy Barnett, Anthony Gulig, and Theodore Karamanski); City of Mt. Pleasant's Second Amended Witness List, Doc. 130 at 4-5, ¶¶ 14-16 (same).

Scenario	**Time to Trial and Trial Issues**
Both Issues Upheld	Phase I (treaty-interpretation) and contingent Phase II (remedy) + *delay for appeal*
Only Bifurcation Reversed	Single-phase trial (treaty-interpretation + remedy) + *delay for appeal*
Only Exclusion Reversed	Phase I (treaty-interpretation + *time-based defenses*) and contingent Phase II (remedy) + *delay for discovery of time-based defenses* + *delay for appeal*
Both Issues Reversed	Single-phase trial (treaty-interpretation + *time-based defenses* + remedy) + *delay for discovery of time-based defenses* + *delay for appeal*

Every one of these potential outcomes either delays the time it will take to get to trial or extends the time a trial will take, or both. *None* materially advance the ultimate termination of this litigation. So this case is fundamentally distinguishable from all four cases the City and County cite granting a motion to certify an order for interlocutory appeal, or granting a petition for interlocutory appeal.[17]

Even if all the issues are upheld, the parties will be in the same position they are in now, but will have been forced to spend time and resources to get back to this square one. If bifurcation is reversed, the parties will incur the delay and expense of an appeal, *and* the time at trial may be increased (because the parties will be required to put on their Phase II cases *whether or not* the Court finds that the Treaties established a reservation). If the exclusion of time-based

[17] *See Consub Delaware LLC v. Schahin Engenharia Limitada*, 476 F. Supp. 2d 305 (S.D.N.Y. 2007) (reversal of order would terminate action) ; *Eagen v, CSX Transportation, Inc.*, 294 F. Supp. 2d 911 (E.D. Mich. 2003) (reversal of mistrial order would avoid complete retrial of all issues); *Cardwell v. Chesapeake & Ohio Railway Co.*, 504 F.2d 444 (6th Cir. 1974) (accepting appeal of denial of motion for judgment notwithstanding the verdict after completion of trial and entry of judgment); *Atlantic City Elec. Co. v. Gen. Elec. Co.*, 207 F. Supp. 613 (S.D.N.Y. 1962) (reversal of denial of motion to strike defenses would eliminate issues from trial).

defenses is reversed, the parties will incur the delay and expense of an appeal, *and* the time to trial will be delayed (because time will be needed for full discovery of these issues), *and* the time at trial will be delayed (because the Phase I trial will require testimony from additional witnesses regarding additional issues). And if both the bifurcation and exclusion of time-based defenses are reversed, the parties will incur the delay and expense of an appeal, *and* the time to trial will be delayed (because time will be needed for full discovery of time-based defenses), *and* the time at trial will be delayed (because trial will require testimony from additional witnesses regarding additional issues *and* the parties will be required to put on their Phase II cases *whether or not* the Court finds that the Treaties established a reservation).

But all of this can be avoided if the appeal is not certified. If the appeal is not certified, Phase I goes on as a treaty-interpretation case. If Defendants prevail, no presentation of Phase II cases or appeal of the Opinion is necessary.[18] If they don't, the parties continue to their Phase II cases.[19] And if at the end of Phase II the City and County still want to appeal the Opinion, they can—along with all the other rulings they may disagree with between now and a final

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[18] In this respect, the County's argument that an appeal could eliminate the need for bifurcation, County's Mot. 6-7, stands the analysis on its head. Bifurcation is a tool to avoid interlocutory appeal, not the other way around. *See Gen. Acquisition, Inc. v. GenCORP, Inc.*, 23 F.3d 1022, 1031-32 (6th Cir. 1994) (denying leave for interlocutory appeal and suggesting bifurcation as appropriate case-management tool).

[19] Though it may "appear" that witnesses may be duplicated in Phase I and II, County's Mot. 6, this has yet to be determined. The City clearly seeks to introduce its Phase II witnesses in Phase I to testify about future effects under the guise of *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), but the United States and Tribe have both challenged these designations. United States' Objections to Defendants' Witness List, Doc. 138 at 3-5; Plaintiff Saginaw Chippewa Indian Tribe of Michigan's Challenges to Defendants' October 2008 Witness Lists, Doc. 142 ("Tribe's Witness Challenge") at 2-15. Similarly, the Tribe's witness list includes a placeholder for "jurisdictional fact" witnesses to address the possibility that this case may be recast as a diminishment case under *Rosebud Sioux Tribe*, but if the case is not recast in this manner, this placeholder is unnecessary. Tribe's Witness Challenge at 12 n. 42.

disposition. If, after that single appeal on the full record, the Sixth Circuit believes that time-based defenses should be explored, then the parties aren't out anything—they will simply come back to this Court on remand and pick up with that discovery and trial.[20] The defenses will have been deferred, but not denied, and each extra expense will be incurred knowing that it was required by the outcome of the previous step. In contrast, in any of the potential outcomes of an interlocutory appeal, the parties will spend *more* time and resources *before* it is clear that the expense is necessary or appropriate. This is not the "exceptional" case that merits interlocutory appeal—it is the cautionary tale *against* one.

CONCLUSION

Section 1292(b) permits interlocutory appeals "only for the purpose of minimizing the total burdens of litigation on parties and the judicial system by accelerating or at least simplifying trial court proceedings."[21] Interlocutory appeal of the Opinion would do neither. The City's and County's motions for certification should be denied so that the parties and Court can most quickly reach the resolution of these proceedings.

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[20] The City expresses a desire to develop a complete "future effects" record regarding the time-based defenses now, City's Mot. 10, but does not say why it could not as easily do so later at the conclusion of a standard appeal, or why doing so now would materially advance the termination of this litigation.

[21] 16 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3930 (2d ed. 2008).

Dated: November 20, 2008

Respectfully submitted,

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN

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Certificate of Service

I hereby certify that on November 20, 2008, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

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and I hereby certify that there are no non-ECF participants listed in the case that require service by U.S. mail.

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