UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, Plaintiff, and THE UNITED STATES Intervenor Plaintiff, v. JENNIFER GRANHOLM, et al., Defendants, and COUNTY OF ISABELLA and CITY OF MT. PLEASANT, Intervenor Defendants.	Case No. 05-10296-BC Honorable Thomas L. Ludington

UNITED STATES' RESPONSE TO INTERVENOR-DEFENDANTS' MOTIONS TO CERTIFY THE COURT'S OPINION OF OCTOBER 22, 2008, FOR INTERLOCUTORY APPEAL

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Should the Court certify its Order of October 22, 2008, for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) when the question of whether equitable defenses are available does not materially affect the outcome of the case, there is no substantial ground for difference of opinion, and would not materially advance the ultimate termination of the litigation?

CONTROLLING AND MOST APPROPRIATE AUTHORITIES

28 U.S.C. § 1292(b)

First Am. Corp. v. Al-Nahyan, 948 F. Supp 1107 (D.D.C. 1996)

Haworth, Inc. v. Herman Miller, Inc., 895 F. Supp. 185 (W.D. Mich. 1994)

In re Baker & Getty Fin. Servs., Inc., 954 F.2d 1169 (6th Cir. 1992)

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

Kraus v. Bd. of County Road Comm'rs, 364 F.2d 919 (6th Cir. 1966)

Vitols v. Citizens Banking Co., 984 F.2d 168 (6th Cir. 1993)

White v. Nix, 43 F.3d 374 (8th Cir. 1994)

The United States respectfully submits this response in opposition to the City of Mt. Pleasant's and the County of Isabella's Motions to Certify the Court's Order of October 22, 2008, Dkt. No. 121 ("Order"), for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and to stay the proceedings in this Court until the matters are resolved by the Court of Appeals for the Sixth Circuit.[1/] The United States respectfully requests that the Intervenor-Defendants' Motions be denied. The Court's Order does not meet the standards set forth in 28 U.S.C. § 1292(b).

I. INTRODUCTION

On October 22, 2008, the Court issued an Opinion and Order granting the United States' Motion in *Limine* and for Partial Summary Judgment and granting the Saginaw Chippewa Tribe's Motion to Strike. Dkt. No. 121. The Court ruled that:

> [A]s a matter of law, the time-based equitable defenses Defendants wish to advance are inapplicable to the issues here presented and may not otherwise be advanced against the United States's enforcement of its treaties. Consequently, Defendants may not rely on the time-based equitable defenses of laches, estoppel, acquiescence, or impossibility.

Id. at 40. The Court then bifurcated the case into two phases: one phase to adjudicate the substantive issues and another for a remedial phase, if necessary. Id. at 40-41. The Court stated that while the effect of its decision will be to exclude the testimony supporting the equitable defenses, "the testimony may become relevant if the Saginaw Chippewa and the United States prevail on the merits" because the "issues attendant to implementing a remedy" may implicate the similar testimony regarding relief that may be disruptive, impossible and impracticable. Id. at 40.

[1/]Hereinafter, the City and County shall be referred to as "Intervenor-Defendants."

On November 3, 2008, the City of Mt. Pleasant submitted a Motion to Amend and Certify the Court's Opinion and Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Dkt. No. 134. On November 3, 2008, the County of Isabella submitted a motion requesting the same. Dkt. No. 133. On November 13, 2008, the State of Michigan submitted its Opposition to the Intervenor-Defendants' Motions stating that an immediate appeal would not materially advance the ultimate termination of litigation because an appeal would the delay the case's progress towards trial. Dkt. No. 139.

II. ARGUMENT

In the Sixth Circuit, "[t]o obtain permission to appeal pursuant to § 1292(b), the petitioner must show that: (1) the question involved is one of law; (2) the question is controlling; (3) there is substantial ground for difference of opinion respecting the correctness of the district court's decision; and (4) an immediate appeal would materially advance the ultimate termination of the litigation." Vitols v. Citizens Banking Co., 984 F.2d 168, 170 (6th Cir. 1993) (citing Cardwell v. Chesapeake & Ohio Ry. Co., 504 F.2d 444, 446 (6th Cir. 1974)). All four prongs of the test must be met for the district court to certify an order for interlocutory appeal.

In addition, "[r]eview under § 1292(b) should be sparingly granted and then only in exceptional cases." Vitols, 984 F.2d at 170 (citing Kraus v. Bd. of County Road Comm'rs, 364 F.2d 919, 922 (6th Cir. 1966)). "A question as to the correctness of a ruling alone is not sufficient grounds for certification, and granting certification is within the sound discretion of the district court judge." Cronovich v. Dunn, 573 F. Supp. 1340, 1342 (E.D. Mich. 1983) (citing United States v. Grand Trunk W. R.R. Co., 95 F.R.D. 463, 471 (W.D. Mich.1981)).

The United States agrees that the question regarding the availability of equitable defenses

in the Court's Order is purely one of law. However, the remaining criteria for granting an interlocutory appeal under 28 U.S.C. § 1292(b) are not met.

A. The Question of Whether Equitable Defenses are Available as a Matter of Law is not Controlling in this Case.

What must be shown "in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." In re Baker & Getty Fin. Servs., Inc., 954 F.2d 1169, 1172 n.8 (6th Cir. 1992) (quoting In re Cement Antitrust Litig., 673 F.2d 1020, 1026 (9th Cir.1982) (holding claims that are collateral to the basic issues of the case are not controlling)).[2/] In this case, the question of whether Defendants can assert equitable defenses is not a controlling question of law that materially affects the outcome because the defenses relate to the remedy, and only come into play if the United States and the Tribe are successful on the merits. See Haworth, Inc. v. Herman Miller, Inc., 895 F. Supp. 185, 189 (W.D. Mich. 1994) (question of laches is not a controlling question of law because it only relates to the remedy); see also Price, Heneveld, Cooper, DeWitt & Litton v. Annuity Investors Life Ins. Co., 2005 WL 1923586, at *1 (W.D. Mich. Aug. 11, 2005) (question of estoppel not a controlling question of law because it only relates to the remedy).

If Plaintiffs are not successful, the question regarding the availability of equitable defenses is irrelevant and moot. Similarly, any ruling by the Court of Appeals would be hypothetical because there has not been a ruling on the merits which would dictate whether

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[2/]Although it is not necessary that the resolution of the question have precedential value in order for it to be controlling, In re Baker & Getty Fin. Servs., Inc., 954 F.2d at 1172 n.8(citing Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21, 24 (2d Cir.1990), vacated on other grounds, 937 F.2d 44 (2d Cir. 1991)), it may weigh in favor of certification, Symbol Tech., Inc. v. Lemelson Med., Educ., & Research Found., Ltd. P'ship, 243 F.3d 558 (Fed. Cir. 2000).

equitable defenses could be raised at all. Therefore, it is clear that the availability of equitable defenses does not control the outcome of the case. The parties should proceed with litigating the substantive issues regarding the meaning of the 1855 and 1864 treaties.

B. There is Not a Substantial Ground for Difference of Opinion Concerning the Availability of Equitable Defenses in Treaty Interpretation Cases.

The fact that the appeal would present a question of first impression does not by itself constitute substantial grounds for difference of opinion. See Max Daetwyler Corp. v. Meyer, 575 F. Supp. 280, 283 (E.D. Pa. 1983). Although a "court is not bound to find reasonable cause for disagreement whenever authorities lack unanimity," Allied Princess Bay Co. #2 v. Atochem N. Am., Inc., 1992 WL 135235, at *3 (E.D.N.Y. May 29, 1992), a circuit split provides substantial grounds for a difference of opinion. See In re Baker, 954 F.2d at 1172.

Here, there is no substantial basis for disagreement. There are no conflicting or contradictory decisions. In fact, there is no legal authority that supports the extension of City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197 (2005), to reservation boundary treaty interpretation cases. Substantial grounds for difference do not exist merely because there is a lack of authority or a dearth of cases. See White v. Nix, 43 F.3d 374, 378 (8th Cir. 1994); FDIC v. First Nat'l Bank of Waukesha, 604 F. Supp. 616, 620 (E.D. Wis. 1985). This Court should look to the strength of the parties' positions. Id. In this case, Plaintiffs cited numerous cases in support of their legal arguments whereas Defendants simply argued for extending City of Sherrill. Ultimately, the Intervenor-Defendants' disagreement with the Court's Order does not create a substantial ground for disagreement of opinion. See First Am. Corp. v. Al-Nahyan, 948 F. Supp 1107, 1117 (D.D.C. 1996); Grand Trunk W. R.R. Co., 95 F.R.D at 471 (W.D. Mich. 1981).

C. An Appeal Would not Materially Advance the Ultimate Termination of the Litigation.

An appeal pursuant to 28 U.S.C. § 1292(b) should be used "only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation . . . ." Kraus, 364 F.2d at 922 (quoting Milbert v. Bison Labs., Inc., 260 F.2d 431, 433 (3d Cir. 1958)) (denying application for interlocutory appeal when trial of case in district court would require "only a few days" whereas the appeal would take months); see also Gross v. McDonald, 354 F. Supp. 378, 383 (E.D. Pa. 1973) (denying certification for interlocutory appeal of order striking statute of limitations defense because, "[a]lthough a controlling issue of law is indeed involved," case is not "protracted, complicated, or time-consuming"). "When litigation will be conducted in substantially the same manner regardless of [the court's] decision, the appeal cannot be said to materially advance the ultimate termination of the litigation." In re City of Memphis, 293 F.3d 345, 351 (6th Cir. 2002) (quoting White, 43 F.3d at 378-79).

An appeal at this juncture would prolong the adjudication of the substantive issues in this case and would increase the parties' expenses. An appeal would also sidetrack this case by at least one to two years. Moreover, as explained above, there must be a ruling on the merits before it can be ascertained whether equitable defenses would come into play. In other words, the case would have to proceed to the merits first regardless of the Court's Order because equitable defenses relate only to the remedy. See Price, Heneveld, Cooper, DeWitt & Litton, 2005 WL 1923586, at *3 (litigation would proceed in substantially the same manner because the question of estoppel only goes to the remedy). Indeed, the Court's Order states that testimony concerning the "disruptive" nature of a remedy may become relevant if a remedial phase occurs. Dkt. No. 121 at 40.

In sum, final resolution of this case is best served by proceeding to the substantive phase, and then if necessary, a remedial phase. A party may appeal the case in its entirety after final entry of judgment.

III. CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Court deny Intervenor-Defendants' Motions to Certify the Court's Order of October 22, 2008, for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and deny staying the proceedings in this case.

Dated: November 20, 2008

Respectfully submitted,

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CERTIFICATION OF SERVICE

This is to certify that on November 20, 2008, the United States' Response to Intervenor-Defendants' Motions to Certify for Appeal was filed electronically with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

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