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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PAIUTE-SHOSHONE INDIANS OF THE)
BISHOP COMMUNITY OF THE BISHOP)
COLONY, CALIFORNIA, a federally)
recognized Indian tribe,)
Plaintiff,)
v.)
CITY OF LOS ANGELES, a)
California municipal)
corporation,)
Defendant.)
_____)

1:06-cv-0736 OWW SMS
ORDER GRANTING MOTION FOR
CERTIFICATION OF
INTERLOCUTORY APPEAL UNDER
28 U.S.C. § 1292(b) (DOC.
75)

I. INTRODUCTION

The Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California, a federally recognized Indian tribe ("Plaintiff") filed this ejectment action against the City of Los Angeles ("Defendant" or "the City"), claiming the right to occupy lands previously held in trust for the Tribe by the United States which were transferred to the City in 1941 by agents of the United States government. (Doc. 1, Complaint, filed June 12, 2006.) Among other things, Plaintiffs allege that omissions and other failures by agents of the United States caused the 1941

1 land transfer to fail to satisfy the requirements of a federal
2 statute governing alienation of the land. The complaint names
3 only the City as a Defendant, excluding the United States from
4 the lawsuit.

5 On February 14, 2007, the district court granted the City's
6 motion to dismiss the complaint, concluding that the United
7 States is an indispensable party under Federal Rule of Civil
8 Procedure 19. (Doc. 73.) After carefully analyzing numerous
9 cases, including a somewhat analogous Tenth Circuit decision,
10 *Navajo Tribe v. New Mexico*, 809 F.2d 1455 (10th Cir. 1987), the
11 district court concluded that because the complaint alleges that
12 omissions and wrongdoings by agents of the United States
13 contributed to the unlawfulness of the land transfer, the United
14 States must be deemed an indispensable party to the lawsuit. The
15 district court recognized, however, that "this is an exceedingly
16 close case." (*Id.* at 44.)

17 Plaintiffs move for certification under 28 U.S.C. § 1292(b)
18 of the legal issue of "whether the United States is an
19 indispensable party in an ejectment action by an Indian Tribe
20 brought pursuant to § 1362 to defend its title to land when the
21 complaint alleges omissions and other failure by agents of the
22 United States to satisfy the requirements of a federal statute
23 allowing the alienation of Indian land." (Doc. 75-2, filed March
24 8, 2007.) The City opposes certification. (Doc. 79, filed Apr.
25 9, 2007.) The motion was originally set for hearing, but that
26 hearing was vacated upon stipulated motion requesting that the
27 district court decide the matter on the pleadings. (See Doc. 81,
28 filed April 16, 2007.)

1 II. DISCUSSION

2 A. Legal Standard

3 Certification of an interlocutory appeal may be appropriate
4 if the issue for which certification is sought

5 (1) is a controlling question of law;

6 (2) over which there is substantial grounds for difference
7 of opinion; and

8 (3) an immediate appeal may materially advance the ultimate
9 termination of the litigation.

10 28 U.S.C. § 1292(b). "Section 1292(b) is a departure from the
11 normal rule that only final judgments are appealable and
12 therefore must be construed narrowly." *James v. Price Stern*
13 *Sloan, Inc.*, 283 F.3d 1064, 1068 n.6 (9th Cir. 2002). The
14 interlocutory appeal procedure is only to be used in
15 extraordinary cases where an interlocutory appeal might avoid
16 protracted and expensive litigation. See *In re Cement Antitrust*
17 *Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982).

18
19 B. Controlling Question of Law.

20 A decision involves a controlling question of law for
21 purposes of certification if "resolution of the issue on appeal
22 could materially affect the outcome of litigation in the district
23 court." *Id.* at 1026. In this case, the issue of
24 indispensability is a controlling question of law. As discussed
25 in the February 14, 2007 memorandum decision it is possible that
26 the United States cannot be joined in this action "by reason of
27 the bar of the [Indian Claims Commission Act] and its statute of
28 limitations." (Doc. 73 at 29.) Accordingly, the issue of

1 indispensability is potentially fatal to the Tribes' case. It is
2 therefore appropriate to consider the issue "controlling" for
3 purposes of certifying an interlocutory appeal.

4
5 C. Substantial Grounds for Difference of Opinion.

6 Plaintiffs cited numerous cases in support of their
7 contention that wrongdoing by the United States does not
8 necessitate a finding of indispensability. Although the district
9 court ultimately distinguished all of these cases, recognizing
10 that "[t]his case presents a unique set of circumstances for
11 which there is no exact parallel in any case cited by the
12 parties," the district court noted that its decision on the
13 indispensability issue was an "exceedingly close" call. (Doc. 73
14 at 44.) There is no reason to repeat the reasoning set forth in
15 the February 14, 2007 memorandum decision. It is incorporated
16 here to demonstrate that there are substantial grounds for
17 differences in opinion over the issue of indispensability.

18 The City cites *Mid-Hudson Realty Corp. v. Duke & Benedict,*
19 *Inc.*, 278 B.R. 334, 2002 U.S. Dist. LEXIS 9793 (S.D.N.Y. 2002),
20 for the proposition that to demonstrate a substantial ground for
21 difference of opinion, the party seeking certification "must show
22 that [the] issue is difficult and of first impression and
23 involves more than just a strong disagreement among the parties."
24 The City argues that "[w]hether a party is indispensable under
25 § 1292 is not a difficult question, nor is it one of first
26 impression." (Doc. 79 at 4.) The City defines the inquiry too
27 broadly. The issue is not whether the question of
28 indispensability has ever been dealt with by a court of law

1 before. Rather, the question is whether indispensability has
2 ever been analyzed in the context of facts and circumstances that
3 resemble those of this case. As discussed at length in the
4 February 14, 2007 memorandum decision, although a number of cases
5 have dealt with indispensability in somewhat similar contexts,
6 none concerned factual circumstances similar enough to this case
7 to provide clear guidance. There are substantial grounds for
8 difference of opinion.¹

9 Plaintiffs offer new case citations in support of their
10 position that the United States is not an indispensable party,
11 some of which were not cited in the context of the motion to
12 dismiss. It is not necessary or appropriate to consider these
13 new cases here, as this is not a motion for reconsideration.

14
15 D. Materially Advance the Ultimate Termination of the
16 Litigation.

17 Plaintiffs assert that immediate resolution of the
18 indispensability issue will materially advance the ultimate
19 termination of the litigation. Plaintiffs argue that this case
20 is a "straightforward ejectment action in which plaintiff only
21 seeks possession of land to which it holds superior title."
22 (Doc. 75 at 11.) The Tribe further asserts that "[t]he question
23

24 ¹ The City correctly indicates that section 1292(b) is not
25 meant to be used for the review of factual issues nor is it to be
26 used to "substitute wholesale appellate certainty for trial court
27 uncertainty." *Link v. Mercedes-Benz of North Am.*, 550 F.2d 860,
28 863 (3d Cir. 1977). But, the issue proposed to be certified is a
mixed question of fact and law that is appropriately raised on
interlocutory appeal.

1 of whether plaintiff can be forced to add a party against which
2 it is not seeking relief will materially alter the nature and
3 extent of this litigation. Adding a party with the legal
4 resources available to the United States of America will
5 drastically increase the scope, cost and duration of the
6 litigation, and will require plaintiffs to address two well
7 financed parties, only one of whom can provide the relief
8 plaintiff seeks." Finally, Plaintiffs point out that if the
9 Tribe is required to name the United States, the United States
10 will likely move to dismiss on the ground that they cannot be
11 named as a party. Litigating this issue would be avoided if the
12 Ninth Circuit rules in favor of the Tribe on interlocutory
13 appeal. The City responds that interlocutory appeal will only
14 delay pretrial development of this case and that, even if the
15 issue of indispensability was resolved in the Tribe's favor, no
16 factual issue or element of proof would be removed. (Doc. 79 at
17 9.) But, the City's scenario would only be valid if the United
18 States can be named as a party. The Tribe wishes to avoid
19 involving the United States in the first place. Among other
20 things, if the Tribe is successful on appeal, they will thereby
21 avoid the considerable time and expense of litigating any
22 potentially dispositive motion to dismiss filed by the United
23 States. Given the severely overloaded docket of this particular
24 district court, avoiding an additional round of dispositive
25 motions represents a significant litigation efficiency that would
26 materially advance the termination of this litigation.

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1 III. CONCLUSION

2 For the reasons set forth above Plaintiff's motion for
3 certification of an interlocutory appeal pursuant to 28 U.S.C. §
4 1292(b) is GRANTED. The issue certified for appeal is whether
5 the United States is indispensable under Fed. R. Civ. P. 19(b) in
6 an ejectment action by an Indian tribe brought pursuant to 28
7 U.S.C. § 1362 to defend the Tribe's title to land, when the
8 complaint alleges omissions and other failures by agents of the
9 United States to satisfy the requirements of a federal statute
10 allowing alienation of Indian land. This is a controlling
11 question of law over which there are substantial grounds for
12 difference of opinion and an immediate appeal may materially
13 advance the ultimate termination of this lawsuit.

14 IT IS SO ORDERED.

15 Dated: July 27, 2007

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE