UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

EL DORADO COUNTY, a Political Subdivision of the State of California,

Plaintiff,

v.

GALE A. NORTON, in her Capacity as Secretary of the Interior, PHILIP N. HOGEN, in his Capacity as Chairman of the National Indian Gaming Commission, NATIONAL INDIAN GAMING COMMISSION, AURENE MARTIN, in her Capacity as Assistant Secretary of the Interior for Indian Affairs, and BUREAU OF INDIAN AFFAIRS,

Defendants.

SHINGLE SPRINGS BAND OF MIWOK INDIANS,

Intervenor.

CIV. S-02-1818 GEB DAD

ORDER*

Plaintiff County of El Dorado ("the County") moves for reconsideration of the Order filed May 13, 2004, dismissing Counts 13 and 14 of the Second Amended Complaint ("SAC"). The County also moves to certify the May 13 Order for interlocutory appeal under 28 U.S.C.

* This matter was determined to be suitable for decision without oral argument. L.R. 78-230(h).

§ 1292(b). Intervenor Defendant Shingle Springs Band of Miwok Indians ("the Band") and the Federal Defendants (collectively referenced as "Defendants") oppose the County's motions.

RECONSIDERATION

The County moves for reconsideration of the May 13 Order, proffering evidence that it "utilized every conceivable legal avenue to challenge the construction of the casino." (County's Reconsid. Mot. at 4.) It contends this evidence, when considered under the analysis employed in the May 13 Order, will demonstrate that the statute of limitations governing Counts 13 and 14 had not expired when those claims were asserted in 2003.

The County's argument reflects it does not understand the analysis in the May 13 Order. The Order held the claims in Counts 13 and 14 expired prior to 2003 because they accrued in November 1996 when the County "'discover[ed], or in the exercise of reasonable diligence should have discovered, the factual basis for [Counts 13 and 14].'" (May 13 Order at 14, quoting Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002).) The Order cited to allegations in the SAC which demonstrated the County was aware in November 1996 that the United States Attorney publicly announced "its intention to exert federal authority over the Band" and that the National Indian Gaming Commission ("NIGC") exercised its "federal regulatory jurisdiction over the Band . . ."; it therefore held the allegations of the SAC indicated the County was aware "that the federal Executive Branch was at that time recognizing the Band as an Indian Tribe and the Rancheria land as Indian Land." (Id. at 16.) Since the evidence now proffered

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by the County does not disturb the allegations on which the May 13 Order's findings were based, reconsideration is not justified.[2]

CERTIFICATION FOR INTERLOCUTORY APPEAL

The County also seeks certification of the May 13 Order for interlocutory appeal under § 1292(b). Defendants oppose, arguing the statutory elements for certification have not been met.

Certification under § 1292(b) should be granted "only in exceptional situations [where] allowing an interlocutory appeal would avoid protracted and expensive litigation." In re Cement Antitrust Litigation, 673 F.2d 1020, 1026 (9th Cir. 1982). Certification may not be granted unless it is found: "(1) that there [is] a controlling question of law, (2) that there [are] substantial grounds for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate termination of the litigation." Id. Regardless of whether the May 13 Order presents a "controlling question of law," the Order would not properly be certified for interlocutory appeal if the second or third elements were not met.

The County argues a "substantial ground[] for difference of opinion" is evinced by comparison of the May 13 Order and the October 29, 2003, Order which ruled on Defendants' challenge to Count 13 of the First Amended Complaint ("FAC"). While the October 29 Order found Count 13 to be time-barred under Wind River Mining Corp. v. United States, 946 F.2d 710 (9th Cir. 1991), the County notes the May 13 Order found Wind River inapplicable. (County's Appeal Mot. at 5.) But the Band correctly responds that the treatment of Wind River

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[2] The other evidence proffered in support of this motion, which relates to the 1979 Tribal Status List, does not justify reconsideration since the Order did not state the List was a basis for finding the claims were time-barred.

in the May 13 Order "represent[s] a refinement of opinion upon further briefing, argument and research" rather than a "difference of opinion" as contemplated in § 1292(b). (Band's Opp'n to Appeal Mot. at 5.)

The legal standard relied upon in the May 13 Order's statute of limitations finding was largely the same as that relied upon in the October 29 Order. While the October 29 Order found Count 13 to be time-barred pursuant to both Wind River and the "accrual" doctrine governing application of § 2401(a), the May 13 Order narrowed the standard to the "accrual" doctrine alone. The outcome and the rationale underlying both Orders are the same: the County's challenge to the Band's tribal status was found time-barred because that claim accrued in 1996 when the County objected to the Band's operation of a casino on the Shingle Springs Rancheria property.[3] Contrary to the County's conclusory assertions, the modifications in the May 13 Order do not demonstrate a disagreement which is "tantamount to a disagreement among the courts" since that Order is not substantively different "in logic or effect" from the October 29 Order. Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., 2004 WL 838160, at *4 (N.D. Cal. Apr. 19, 2004) ("EPIC II").

The County argues further, in its reply brief, that a difference of opinion is demonstrated by the conflict between the May 13 Order and the holding in Artichoke Joe's v. Norton, 278 F.

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[3] While the October 29 Order found Count 13 accrued when the County was added as a party to litigation which related to operation of the casino, (see October 29 Order at 10-11), the May 13 Order found the claim accrued when the County discovered, or in the exercise of reasonable diligence should have discovered, that the federal Executive Branch had recognized the Band as an Indian Tribe occupying Indian Lands "in the heart of residential El Dorado County." (SAC ¶ 1; see May 13 Order at 16.) The May 13 finding was based on factual allegations which were not asserted in the FAC, and were first alleged in the SAC.

Supp. 2d 1174 (E.D. Cal. 2003) ("Artichoke Joe's II").[4] (County's Appeal Reply at 4.) As stated in the May 13 Order, Artichoke Joe's II only found the "rationale" of Wind River applicable to its determination of when a tribal status recognition claim accrued. See Artichoke Joe's II, 278 F. Supp. 2d at 1183. Further, the precedent discussed in Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., 266 F. Supp. 2d 1101, 1120 (N.D. Cal. 2003) ("EPIC I"), clearly demonstrates Wind River is not applicable when an agency has not initiated enforcement proceedings or denied a petition to amend or rescind a regulation. The County has thus failed to show "substantial grounds for difference of opinion" supporting certification of an interlocutory appeal.[5]

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[4] Although the County cites the decision in Artichoke Joe's v. Norton, 216 F. Supp. 2d 1084 (E.D. Cal. 2002) ("Artichoke Joe's I"), it is apparent that Artichoke Joe's II is the actual decision referenced by the County. The County also argues two additional cases demonstrate a conflict with the May 13 Order. (See County's Appeal Reply at 4, citing In re Indian Gaming Related Cases Chemehuevi Indian Tribe, 331 F.3d 1094 (9th Cir. 2003); Mechoopda Indian Tribe of Chico Rancheria, Cal. v. Schwarzenegger, 2004 WL 1103021 (E.D. Cal. Mar. 12, 2004).) But these cases neither discuss the issues involved in the May 13 Order nor support an assertion that they conflict with the Order.

[5] Moreover, the County's focus on whether Wind River governed the accrual of Counts 13 and 14 is of questionable value to its motion, since the May 13 Order explicitly stated:

> even under the Wind River doctrine, the County's claims would have accrued when it first should have been apparent to the County that the federal Executive Branch had recognized the Band as an Indian Tribe and the Rancheria as Indian lands - i.e., when the United States Attorney and the NIGC responded to the Band's construction and attempted operation of the 1996 Casino - not every subsequent time the Executive Branch applied its recognition decision.

(May 13 Order at 17 n.14.)

The County also argues certification of an immediate appeal may "materially advance the ultimate termination of the litigation" because "[i]f the appellate court affirms [the May 13 Order], the entire matter would otherwise be submitted at the conclusion of the hearing for cross-motions for summary judgment, presently set for August 23, 2004." (County's Appeal Mot. at 6-7.) This argument is unpersuasive, since the remaining claims will presumably be submitted for resolution following the August 23 motion hearing *regardless* of whether the County is permitted to immediately appeal the dismissal of Counts 13 and 14. See Advanced Micro Devices, Inc. v. Intel Corp., 1992 U.S. Dist. LEXIS 21529, at *10 (N.D. Cal. July 24, 1992) ("Here the Court has ruled that the statute of limitations has run, thus barring AMD's claims. A different answer on appeal would not expedite the termination of the litigation."). The proximity of the scheduled hearing on the remaining claims indicates that this case does not present an "extraordinary" situation where "allowing an interlocutory appeal would avoid protracted and expensive litigation." In re Cement Antitrust Litigation, 673 F.2d at 1026. The County's motion for certification of the May 13 Order for interlocutory appeal is therefore denied.

IT IS SO ORDERED.

DATED: June 16, 2004

GARLAND E. BURRELL, JR.
United States District Judge

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United States District Court
for the
Eastern District of California
June 17, 2004

* * CERTIFICATE OF SERVICE * *

2:02-cv-01818

El Dorado County

v.

Secretary of Int

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on June 17, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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