

LEXSEE 1993 US DIST LEXIS 8148

**THE KICKAPOO TRIBE OF INDIANS, of the Kickapoo Reservation in Kansas, a/k/a Kickapoo Nation in Kansas, et al., Plaintiffs v. STATE OF KANSAS, Defendant; PRAIRIE BAND OF POTAWATOMI INDIANS, a federally recognized tribe, Plaintiff v. STATE OF KANSAS, Defendant**

No. 92-4233-SAC, No. 92-4234-SAC

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

1993 U.S. Dist. LEXIS 8148

May 19, 1993, Decided

May 19, 1993, Filed

**DISPOSITION:** [\*1] IT IS THEREFORE ORDERED that the plaintiff Tribes' motion for certification of continuing jurisdiction (Dk. 35) is denied.

**COUNSEL:** For THE KICKAPOO TRIBE OF INDIANS, of the Kickapoo Reservation in Kansas aka Kickapoo Nation in Kansas, STEVE CADUE, Tribal Chairman of the Kickapoo Nation in Kansas, plaintiffs: Lance W. Burr, 913-842-1133, 16 East 13th Street, Lawrence, KS 66044. Glenn M. Feldman, O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears, P.A., One East Camelback Road - Ste. 1100, Phoenix, AZ 85012-1656. For POTAWATOMI INDIANS, PRAIRIE BAND OF, a federally recognized tribe, plaintiff: C. Bruce Works, Works, Works & Works, P.A., 118 S.E. 7th - Ste. 100, Topeka, KS 66603, 913-235-2378. Robert L. Pirtle, Pirtle, Morisset, Schlosser & Ayer, 1115 Norton Building, 801 Second Avenue, Seattle, WA 98104-1509.

For KS, STATE OF, defendant: Julene L. Miller, John W. Campbell, Office of the Attorney General, Kansas Judicial Center, 310 West Tenth Street, Topeka KS 66612, 913-296-2215. For STATE OF KANSAS, defendant: John W. Campbell, Office of the Attorney General, Kansas Judicial Center, 310 West Tenth Street, Topeka KS 66612, 913-296-2215.

**JUDGES:** Crow

**OPINIONBY:** SAM A. CROW

**OPINION:**

MEMORANDUM AND ORDER

These [\*2] consolidated cases come before the

court on a joint motion brought by the plaintiff Tribes, the Kickapoo Tribe of Indians and the Prairie Band of Potawatomi Indians. They request the court to continue its jurisdiction over the case upon entering an order that certifies the defendant's appeal is frivolous and a dilatory tactic. The State of Kansas opposes the motion. After hearing oral argument on April 15, 1993, and further researching the issues, the court is prepared to rule.

In October of 1992, the plaintiff Tribes brought suits pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.* alleging the State had failed to negotiate in good faith a tribal-state compact for class III gaming. The magistrate judge entered a scheduling order on November 23, 1992. (Dk. 8). By the agreement of the parties and the court, discovery was stayed until February 12, 1993. Any motions to dismiss for jurisdictional reasons were due March 1, 1993, and the parties' briefs on the merits were due March 15, 1993. The magistrate judge entered another scheduling order on February 16, 1993, that, *inter alia*, consolidated the cases [\*3] for all further proceedings, established discovery deadlines, moved back the time for filing briefs on the merits to March 23, 1993, and set a trial date of May 11, 1993. (Dk. 9).

On February 22, 1993, the State filed its motion to dismiss for lack of jurisdiction arguing the Eleventh Amendment barred this suit. (Dk. 14). On the parties' request, the magistrate judge changed some of the scheduling dates including delaying the date for responsive briefs on jurisdictional issues to March 12, 1993, and for briefs on the merits to March 30, 1993. (Dk. 21). The State timely filed its reply brief to its motion to dismiss, and the district court denied the State's motion in an order filed at noon on March 29, 1993. (Dk. 27). Four hours later, the State filed its notice of appeal (Dk. 28) and thereby avoided filing its brief on the merits that was due the next day.

The general rule is that the filing of a notice of appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Marrese v. American Academy Orthopaedic Surgeons*, 470 U.S. 373, 379, 84 L. Ed. 2d 274, 105 S. Ct. 1327 (1985) (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 74 L. Ed. 2d 225, 103 S. Ct. 400 [\*4] (1982) (per curiam)). This judge-made rule "is founded on prudential considerations" and is "designed to prevent the confusion and inefficiency resulting" when a district court and a court of appeals decide the same issues at the same time. *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3rd Cir. 1988); *United States v. Claiborne*, 727 F.2d 842, 850 (9th Cir.), cert. denied, 469 U.S. 829, 83 L. Ed. 2d 56, 105 S. Ct. 113 (1984); see *Grand Jury Proceedings Under Seal v. U.S.*, 947 F.2d 1188, 1190 (4th Cir. 1991). Without such a rule, an adjudication in one court would moot or make irrelevant in most instances the other judicial proceeding thereby wasting the efforts and time expended in the latter court. Consequently, "a federal district court and a court of appeals should not attempt to assert jurisdiction over a case simultaneously." *Griggs*, 459 U.S. at 58.

The same prudential concerns are also behind a related limitation on appellate jurisdiction. See *Stewart v. Donges*, 915 F.2d 572, 574 (10th Cir. 1990). A court of appeals [\*5] may not review a district court's decision until it is final. 28 U.S.C. § 1291. An appealable final decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521-22, 100 L. Ed. 2d 517, 108 S. Ct. 1945 (1988) (quoting *Catlin v. United States*, 324 U.S. 229, 233, 89 L. Ed. 911, 65 S. Ct. 631 (1945)). "The finality rule of § 1291 protects a variety of interests that contribute to the efficiency of the legal system." *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 380, 94 L. Ed. 2d 389, 107 S. Ct. 1177 (1987). The rule furthers "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.'" *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374, 66 L. Ed. 2d 571, 101 S. Ct. 669 (1981) (quoting *Cobbledick v. United States*, 309 U.S. 323, 325, 84 L. Ed. 783, 60 S. Ct. 540 (1940)).

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949), [\*6] the Supreme Court carved out a "small class" of decisions which are final and appealable under § 1291 even though the decisions do not end the litigation in the district court. *Van Cauwenberghe*, 486 U.S. at 522. Giving § 1291 a "practical rather than a technical construction," the

Supreme Court in *Cohen* held that decisions are appealable if they "determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546. In a later opinion, the Court separated out the elements to this collateral order doctrine and decided that for an order to fall within this exception it must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978).

Generally, the denial of a motion to dismiss is not a final [\*7] order for it continues rather than ends the litigation in the district court. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275, 99 L. Ed. 2d 296, 108 S. Ct. 1133 (1988); *Decker v. IHC Hospitals, Inc.*, 982 F.2d 433, 435 (10th Cir. 1992). However, when the ground asserted for dismissal offers immunity from suit, the Supreme Court has held that the denial of this defense is appealable under the collateral order doctrine. See, e.g., *Mitchell v. Forsyth*, 472 U.S. 511, 526, 530, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985) (holding that qualified immunity defense is an immunity from suit and that an order denying this defense is immediately appealable); *Helstoski v. Meanor*, 442 U.S. 500, 508, 61 L. Ed. 2d 30, 99 S. Ct. 2445 (1979) (holding that Speech and Debate Clause protects a Congressman from the burden of defending himself and that an order denying this defense is immediately appealable); *Abney v. United States*, 431 U.S. 651, 659-662, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977) (holding that the Double Jeopardy Clause "is a guarantee against being twice put to trial for the same offense" and that an order denying this defense is immediately appealable). [\*8] Using the same rationale of immunity from suit, the Supreme Court recently added orders denying claims of Eleventh Amendment immunity to the "small class" of *Cohen* orders. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy*, 113 S. Ct. 684, 121 L. Ed. 2d 605, 612-15 (1993).

In its notice of appeal, the State cited both *Cohen* and *Puerto Rico Aqueduct* as authority for its immediate appeal of the order denying its motion to dismiss. (Dk. 28). The plaintiffs' efforts to distinguish *Puerto Rico Aqueduct* are not persuasive, and their arguments in favor of a narrow reading do not square with the Supreme Court's straightforward and broad reasons for permitting an interlocutory appeal from the denial of Eleventh Amendment immunity.

"The critical question, following *Mitchell*, is whether

'the essence' of the claimed right is a right not to stand trial." *Van Cauwenberghe*, 486 U.S. at 524; see also *Decker*, 982 F.2d at 436. The Supreme Court in *Puerto Rico Aqueduct* put the same emphasis on this inquiry, for its analysis began with whether the Eleventh Amendment [\*9] operated as an immunity from suit or as a mere defense to liability. 121 L. Ed. 2d at 612. The Court concluded that the Eleventh Amendment bar to federal court jurisdiction effectively conferred the States with immunity from suit. *Id.* It necessarily follows then that an order denying a claim for immunity from suit meets the elements of the collateral order doctrine. *Puerto Rico Aqueduct*, 121 L. Ed. 2d at 613 ("Once it is established that a State and its 'arms' are, in effect, immune from suit in federal court, it follows that the elements of the *Cohen* collateral order doctrine are satisfied"); see *Griesel v. Hamlin*, 963 F.2d 338, 340 n. 3 (11th Cir. 1992) (If the asserted immunity functions the same as the qualified immunity addressed in *Mitchell*, then the court may dispense with considering each of the *Cohen* elements). Indeed, the Supreme Court made short work of applying these elements:

Denials of States' and state entities' claims to Eleventh Amendment immunity purport to be conclusive determinations that they have no right not to be sued in [\*10] federal court. Moreover, a motion by a State or its agents to dismiss on Eleventh Amendment grounds involves a claim to a fundamental constitutional protection, cf. *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 502-03, 104 L. Ed. 2d 548, 109 S. Ct. 1976 (1989) (Scalia, J., concurring), whose resolution generally will have no bearing on the merits of the underlying action. Finally, the value to the States of their Eleventh Amendment immunity, like the benefit conferred by qualified immunity to individual officials, is for the most part lost as litigation proceeds past motion practice.

*Puerto Rico Aqueduct*, 121 L. Ed. 2d at 613 (footnote omitted). In sum, the Supreme Court concluded that for purposes of the collateral order doctrine the denial of Eleventh Amendment immunity to a State is indistinguishable from the denial of absolute or qualified immunity to an individual official.

Because the rule in *Puerto Rico Aqueduct* is stated plainly in terms broad enough to cover most, if not all, denials of Eleventh Amendment immunity, the court will give cursory treatment to the plaintiffs' efforts at distinguishing the case and its rule. The [\*11] Tribes contend

the second element of the collateral order doctrine is not met because the State's assertion of Eleventh Amendment immunity is "inextricably intertwined with the merits" of the Tribes' claim that the State has not negotiated in good faith. This argument fails for several reasons. The Tribes do not allege the State's Eleventh Amendment defense as part of their claims. It seems contrived to equate the State's arguments during litigation with the State's position during compact negotiations. The issue on appeal is the legal merits of the defense and not the reasons behind the State's assertion of it. In fact, a decision on the merits of the State's Eleventh Amendment defense will have no bearing on whether the State negotiated with the Tribes in good faith. Most important, the Supreme Court in *Puerto Rico Aqueduct* saw "little basis" for disallowing an immediate appeal because the Eleventh Amendment ruling is "bound up with factual complexities whose resolution requires trial." 121 L. Ed. 2d at 614 (citing *Mitchell v. Forsyth*, 472 U.S. at 528-29 ("The Court has recognized that a question of [\*12] immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff's factual allegation in resolving the immunity issue")).

The Tribes next contend that *Puerto Rico Aqueduct* is distinguishable in two respects. It did not involve a federal statute that clearly abrogates a State's immunity as does IGRA. Rather than mere "private parties" attempting to subject the State to coercive process, the plaintiff Tribes are equal sovereigns asserting narrow rights guaranteed under IGRA. These arguments assume that the Supreme Court's holding applies only to those cases where the policy reasons for Eleventh Amendment immunity are served to the same extent as in *Puerto Rico Aqueduct*. In this court's judgment, the Supreme Court's opinion does not submit to such a narrow reading. There is nothing in *Puerto Rico Aqueduct* nor in the other Supreme Court decisions concerning the collateral order doctrine that suggests the rule is to be applied on a case-by-case basis as opposed to common defenses or claims. These same decisions do not indicate that the lower courts should reconsider in each case [\*13] whether the policy reasons for an immediate appeal would be served. The plaintiff Tribes cite no decision where a court excepted an order otherwise covered by the collateral order doctrine because of facts or circumstances unique to the case. The clarity with which IGRA abrogates the States' immunity obviously is relevant to the merits of the Eleventh Amendment defense, but this does not affect the applicability of the collateral order doctrine. An order denying an immunity from suit defense is immediately appealable whether or not Congress has attempted to abrogate the States' immunity. The plaintiff Tribes essentially advocate adding

elements to the *Cohn* doctrine when there is no authority or precedent cited for doing this. The court chooses to apply the law as written instead of as argued by the plaintiffs. Moreover, the Eleventh Amendment protects the State from the indignity, burden, and expense of a federal lawsuit even when the plaintiff is a sovereign Indian tribe. See, e.g., *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991). The order denying the defendant's motion to dismiss on Eleventh [\*14] Amendment grounds is an order immediately appealable under the collateral order doctrine.

The filing of a notice of appeal from an order denying an immunity from suit defense "divests the district court of jurisdiction to proceed with any part of the action against an appealing defendant." *Stewart v. Donges*, 915 F.2d at 575; see *Johnson v. Hay*, 931 F.2d 456, 459 n. 2 (8th Cir. 1991). The rule of divestiture is not absolute. *Grand Jury Proceedings*, 947 F.2d at 1190; *Sycuan Band of Mission Indians v. Roache*, 788 F. Supp. 1498, 1511 (S.D. Cal. 1992). "A baseless notice of appeal does not divest the district court of its jurisdiction." *McMath v. City of Gary, Ind.*, 976 F.2d 1026, 1031 (7th Cir. 1992) (citation omitted).

"All interlocutory appeals, . . . , are of course subject to abuse." *Kennedy v. City of Cleveland*, 797 F.2d 297, 300 (6th Cir. 1986), cert. denied, 479 U.S. 1103, 94 L. Ed. 2d 185, 107 S. Ct. 1334 (1987). The Seventh Circuit explained the risk of abuse in these terms:

Although this approach [\*15] protects the interests of the defendants claiming qualified immunity, it may injure the legitimate interests of other litigants and the judicial system. During the appeal memories fade, attorney's meters tick, judges' schedules become chaotic (to the detriment of litigants in other cases). Plaintiffs' entitlement may be lost or undermined. Most deferments will be unnecessary. The majority of *Forsyth* appeals—like the bulk of all appeals—end in affirmance. Defendants may seek to stall because they gain from delay at plaintiffs' expense, an incentive yielding unjustified appeals. Defendants may take *Forsyth* appeals for tactical as well as strategic reasons: disappointed by the denial of a continuance, they may help themselves to a postponement by lodging a notice of appeal. Proceedings masquerading as *Forsyth* appeals but in fact not presenting genuine claims of immunity create still further problems.

*Apostol v. Gallion*, 870 F.2d 1335, 1338-39 (7th Cir.

1989). A procedure exists for addressing such possible abuses.

A district court may regain jurisdiction following a notice of appeal if after a hearing and for clear and reasoned findings [\*16] given it certifies that the appeal is frivolous or forfeited. *Stewart*, 915 F.2d at 577. The plaintiff has the burden "to obtain a determination that the defendant's appeal is frivolous or dilatory." *Stewart*, 915 F.2d at 577. Upon certification, the district court regains jurisdiction while the court of appeals continues its jurisdiction. *Langley v. Adams County, Colo.*, 987 F.2d 1473, 1477 (10th Cir. 1993).

An appeal is frivolous if baseless, unfounded or a sham. *Apostol*, 870 F.2d at 1339. On the alternative ground of forfeiture or waiver, the issue is one concerning delay:

Frivolousness is not the only reason a notice of appeal may be ineffectual. Defendants may waive or forfeit their right not to be tried. If they wait too long after the denial of summary judgment, or if they use claims of immunity in a manipulative fashion, they surrender any entitlement to obtain an appellate decision before trial. *Kennedy*, 797 F.2d at 300-01. This is not to say that they lose the right to contend on appeal from the final judgment [\*17] that they enjoy immunity from damages; the right not to pay damages and the right to avoid trial are distinct aspects of immunity, and the former may be raised on appeal at the end of the case even if defendants bypass their right to appeal under *Forsyth* before trial. See *Kurowski v. Krajewski*, 848 F.2d 767, 772-73 (7th Cir. 1988). We have no doubt, however, that defendants who play games with the district court's schedule forfeit their entitlement to a pretrial appeal. A district court may certify that a defendant has surrendered the entitlement to a pretrial appeal and proceed with trial.

*Apostol*, 870 F.2d at 1339 (underlining added). n1 Such an approach to forfeiture is based on the notion that immunity defenses protect different interests implicated at different stages of the litigation. The Sixth Circuit explains it in the following fashion:

Since immunity must be affirmatively pleaded, it follows that failure to do so can work a waiver of the defense. And since certain of the interests protected by the doctrines

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of immunity are conceptually distinct, and all of them are procedurally distinct, the failure [\*18] to plead immunity may, at different stages of litigation, work either a partial or complete waiver. Hence, we conceive it possible that one might assert immunity as an affirmative defense to the complaint and thus as an affirmative defense to ultimate liability without putting in issue his or her right to be free of subjection to trial or, before that, to the burdens of discovery.

*Kennedy*, 797 F.2d at 300. In other words, the district court may certify that the defendant waived certain interests protected by the asserted immunity.

n1 The Seventh Circuit did not develop what was meant by to "use claims of immunity in a manipulative fashion." After carefully reading *Apostol*, *Kennedy* and *Stewart*, the court does not believe these cases actually contemplated a separate exception for dilatory tactics or manipulation of the court's schedule. The courts focused on whether the appeals were frivolous or waived. The dilatory tactics and manipulation were discussed as the dangers for which the exceptions were created. The taking of a frivolous appeal or waiting to raise the immunity defense or to appeal the ruling on it until the delay and inconvenience most harms the plaintiff or most benefits the defendant evidences a dilatory tactic which the district court should guard against. But, what if the appeal is not frivolous and if the immunity defense is raised in a timely fashion and the ruling promptly appealed, can the appeal still be a dilatory tactic justifying certification? The short answer is probably not. It should not be improper for a party to appeal a ruling when it believes in good faith that its arguments on appeal are meritorious and its litigation strategy contemplates the delay caused by the appeal. Appeals under the collateral order doctrine "are bound to create delay" even when brought in good faith. *Kennedy*, 797 F.2d at 300. If it were enough that the defendant only benefits from or acts in a way that suggests it wants the benefit of the delay, then certification would become the rule rather than the exception. This result would be contrary to the Seventh Circuit's admonition that the district courts "act with restraint in using their power to certify." *McMath v. City of Gary, Ind.*, 976 F.2d 1026, 1030 (7th Cir. 1992). Of course, the court does not rule out the possibility of there being instances when certification for dilatory tactics

would be appropriate even though the appeal possessed merit and was timely in all relevant respects. An example may be where a party expressly waives the right to an interlocutory appeal and then later appeals for obvious dilatory reasons.

[\*19]

The plaintiff Tribes' arguments for certification are misdirected. They focus on the extensive efforts by all towards settlement, the Tribes' compromises during compact negotiations, and the Kansas Legislature's obstructive conduct. They allege the Legislature insisted that the Attorney General appeal immediately the district court's Eleventh Amendment ruling. They accuse the Senate leadership of then acting on the delay due to this appeal by forcing the Attorney General to file an original action in the Kansas Supreme Court, by referring the compacts to the Legislature without the Joint Committee's recommendation of approval, and by ultimately rejecting the compacts on the Senate floor.

The court does not appreciate how these alleged circumstances show the State's appeal to be frivolous or a sham. In its prior order, the court fully discussed the division between the district courts over whether Congress may abrogate the States' immunity in the exercise of its power under the Indian Commerce Clause. That this division exists, that this court sided with the minority camp and that the issue is one of first impression for the Tenth Circuit are facts against a finding of frivolousness. [\*20] Add to them, the vulnerable position of the plurality opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989), and the murky law on the interaction between the Eleventh Amendment and the Commerce Clause, and any possibility of a frivolous appeal disappears.

The Tribes' allegations against the Kansas Legislature do not evidence the State's forfeiture or waiver of the rights or interests protected by the Eleventh Amendment's immunity from suit. Forfeiture or waiver results from conduct taken in conjunction with those rights and interests. n2 See, e.g., *Yes v. Cit of Cleveland*, 941 F.2d 444, 450 (6th Cir. 1991) (Joiner, J., concurring); *Heller v. Woodward*, 735 F. Supp. 996, 999 (D.N.M. 1990). Accusations of the Legislature's obstructive conduct or bad faith in the compact process are not a reasonable basis to infer that the State waived or forfeited its right to an immediate appeal of the district court's ruling.

n2 The plaintiff Tribes do not argue any partial waiver of interests or rights as a result of the State's delayed presentation of the Eleventh Amendment issue. If the Eleventh Amendment protects concep-

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tually and procedurally distinct interests, including an interest against joint summary judgment motions submitted on stipulated facts, then that aspect of the Eleventh Amendment immunity arguably could be waived by delaying the presentation of the immunity defense or by agreeing to have the immunity defense decided simultaneously with the dispositive motions. The court does not address this argument for it has not been made and the facts to support it have not been presented.

[\*21]

Certifying an appeal as frivolous or forfeited minimizes the risk that an interlocutory appeal will be abused as a dilatory tactic for obtaining a continuance. *Stewart*, 915 F.2d at 576. Though "valuable in cutting short the deleterious effects of unfounded appeals," the power to certify "must be used with restraint." *Apostol*, 870 F.2d at 1339. Identifying delay as one of the defendant's litigation strategies is not enough for certification. None of the cases on this issue hold that a district court may certify a case when the defendant appeals in a timely

fashion a genuine argument knowing and intending that the delay will benefit it. The certification exception is to prevent abusive interlocutory appeals and unnecessary delay caused by them. It is not intended to end all delay inherent in these appeals. Consequently, there must be a sufficient basis for the court to infer that the principal reason for the defendant's appeal is to manipulate the court's schedule. This can come from the fact that the appeal is frivolous or because the defendant waited to raise the defense or to appeal the unfavorable ruling until [\*22] it was most advantageous to the defendant or most disadvantageous to the plaintiff. The plaintiff Tribes' general accusations of bad faith and a dilatory motive on the part of Legislature are not sufficient for this court to issue a certificate on a reasoned finding that the State's appeal is frivolous, forfeited, or a dilatory tactic.

IT IS THEREFORE ORDERED that the plaintiff Tribes' motion for certification of continuing jurisdiction (Dk. 35) is denied.

Dated this 19th day of May, 1993, Topeka, Kansas.

Sam A. Crow, U.S. District Judge