

1 Defendants argue in their certification motion that
2 "federal court subject matter jurisdiction does not extend to
3 cases in which the court must resolve contested issues of tribal
4 law." (Def.'s Req. for Cert. of Order for Inter. App. ("Req.") 1:
5 16-17, ECF 109-1.) Specifically, Defendants contend: "It is only
6 after this Court determines that [D]efendants contravened tribal
7 law that it could reach the broader question of whether in so
8 doing [D]efendants also violated federal and state law." (Req.
9 8:4-6.) However, Defendants fail to state what "tribal law" has
10 to be determined in this action; nor why whatever "tribal law" is
11 referenced has to be decided in connection with Plaintiffs'
12 claims.

13 LEGAL STANDARD

14 "Section 1292(b) provides a mechanism by which litigants can
15 bring an immediate appeal of a non-final order upon the consent
16 of both the district court and the court of appeals." In re
17 Cement Antitrust Litig., 673 F.2d 1020, 1025-26 (9th Cir. 1982).
18 The district court may certify a ruling for interlocutory appeal
19 only if three requirements are met: (1) "the order involves a
20 controlling question of law," (2) there is "substantial ground
21 for difference of opinion" on that controlling question of law,
22 and (3) "immediate appeal of the order may materially advance the
23 ultimate termination of the litigation." 28 U.S.C. §1292(b). "As
24 Section 1292(b) is a departure from the general rule that only
25 final judgments are appealable, it 'therefore must be construed
26 narrowly.'" Zone Sports Ctr., LLC v. Rodriguez, No. 1:11-cv-
27 00622-SKO, 2013 WL 3766749, at *4 (E.D. Cal July 16, 2013)
28 (quoting James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1068

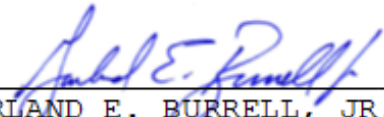
1 n.6 (9th Cir. 2002)). The Ninth Circuit states that the provision
2 in Section 1292(b) is "to be used only in exceptional situations
3 in which allowing an interlocutory appeal would avoid protracted
4 and expensive litigation." In re Cement Antitrust Litig., 673
5 F.2d at 1026. Further, the Supreme Court states "the appellant
6 still 'has the burden of persuading the court of appeals that
7 exceptional circumstances justify a departure from the basic
8 policy of postponing appellate review until after the entry of a
9 final judgment.'" Coopers & Lybrand v. Livesay, 437 U.S. 463, 475
10 (1978) (quoting Fisons, Ltd. V. United States, 458 F.2d 1241, 1248
11 (7th Cir. 1972), rev'd on other grounds, Tidewater Oil Co. v.
12 United States, 409 U.S. 151 (1972)).

13 **DISCUSSION**

14 Defendants have not shown that what they reference as
15 "tribal law" in their motion for certification raises an actual
16 issue of tribal governance necessary to adjudicate Plaintiffs'
17 claims nor that any alleged involvement generates "a controlling
18 question of law" as required by Section 1292(b). 28 U.S.C. §
19 1292(b). See Couch v. Telescope, Inc., 611 F.3d 629, 633 (9th
20 Cir. 2011) (requiring that all of the requirements stated in
21 §1292(b) be met in order to grant certification). However,
22 Defendants make the following argument in their Reply Brief, "the
23 controlling issue in this case is... whether a federal court has
24 subject matter jurisdiction over federal claims that are premised
25 on intra-tribal disputes." (Pls'. Reply 2:5-7, ECF 125.)
26 Plaintiffs move to strike this stated basis for the motion,
27 arguing it is raised for the first time in Defendants' Reply
28 Brief, and if it is not stricken, they seek leave to file another

1 responsive brief. (ECF 126.) The Court need not consider an issue
2 raised for the first time in a reply brief. Int'l Union of
3 Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401, 1404 (9th Cir.
4 1985). Further, it is unclear to what Plaintiffs' refer as
5 "intra-tribal disputes" and Plaintiffs have not shown that the
6 referenced disputes involve a "controlling question of law"
7 concerning subject matter jurisdiction. Therefore, Defendants'
8 request to certify for interlocutory appeal the August 14, 2015
9 ruling, denying Defendants' motion to dismiss for lack of subject
10 matter jurisdiction, is DENIED.

11 Dated: October 13, 2015

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15 GARIAND E. BURRELL, JR.
16 Senior United States District Judge
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