MICHAEL C. ORMSBY
United States Attorney
PAMELA J. DeRUSHA
ANDREW S. BIVIANO
Assistant United States Attorney
Post Office Box 1494
Spokane, WA 99210-1494
Telephone: (509) 353-2767

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, Plaintiffs, vs. ERIC H. HOLDER, JR., Attorney General of the United States; et al., Defendants.	NO. CV-11-3028-RMP FEDERAL DEFENDANTS' REPLY RE MOTION FOR RECONSIDERATION OF THE COURT'S ORDER ON MOTION TO STAY DISCOVERY

Pursuant to Fed. R. of Civ. P., Rule 59(e) and Local Rule 7.1, the Federal Defendants have requested that the Court reconsider its September 12, 2011 Order (hereinafter "Discovery Order"), in which the Court allowed Plaintiffs to take discovery before ruling on the pending Motion to Dismiss. Specifically, the Federal Defendants argued no discovery is necessary at this time because resolution of the Motion to Dismiss only depends on legal matters and is in no way dependent on any facts, the discovery order conflicts with Ninth Circuit precedent and the ordered discovery does not consider the discretion held by the United States when conducting a criminal investigation.

In response, Plaintiffs claim: (1) Rule 59(e) does not apply to reconsideration of discovery orders; (2) there is no basis for reconsideration because the arguments could have been raised earlier; (3) the Administrative Procedures Act's ("APA") waiver of sovereign immunity is in no way limited and

applies to all claims arising under federal law; and (4) internal policy statements can legally have the force of law. See generally ECF No. 184.

As discussed below, motions for reconsideration of orders are properly resolved under the Rule 59(e) standard; that standard is met here because (1) the Federal Defendants had no cause to brief cases not presented during the earlier briefing, which Federal Defendants view as not applying, and (2) the decision contains clear error. Plaintiffs incorrectly argue the Ninth Circuit's holding in Veterans for Common Sense v. Shinseki, 644 F.3d 845 (9th Cir. 2011) as broadly allowing for a waiver of sovereign immunity over any challenge to agency action. Regardless, Plaintiffs cannot use the APA's waiver of sovereign immunity for their claimed agency inaction (failure to notify or consult) because there are no mandatory duties to notify and consult prior to carrying out law enforcement actions; the Department of Justice's internal policies, memorandum and the Executive Order on consultation with Indian tribes contain language clearly retaining discretion.

Federal Defendants agree with Plaintiffs that the question of whether a policy has binding effect is a legal determination. In other words, there is no need for a factual inquiry into compliance with any "known" policies and any "unknown" policies, that by their very nature, would not be published and thus, lack the force of law. As such, the Federal Defendants respectfully request the Court vacate the Discovery Order, set a date to complete the Motion to Dismiss briefing and schedule a hearing on that Motion.

I. The Court Has Authority to Reconsider the Discovery Order Pursuant to Local Rule 7.1 and Fed. Rule Civ. P. 59(e).

Plaintiffs argue that Rule 59 does not provide a basis by which the Court can reconsider the Discovery Order. See ECF No. 184 at 2-5. While motions for reconsideration are not explicitly mentioned in the Federal Rules or Civil Procedure, such practice is common and well accepted by the federal courts.

Accord Lindsey v. Life Investors Ins. Co. of Am., 2010 WL 1542568 at *1 (N. D. Okla. Apr. 15 2010)(citing Computerized Thermal Imaging, Inc. v. Bloomberg, L.P., 312 F.3d 1292, n. 3 (10th Cir. 2002)); see also Am. Ironworks & Erectors Inc. v. N. Am. Constr. Corp., 248 F.3d 892, 898-99 (9th Cir. 2001). In the Ninth Circuit, motions to reconsider discovery orders fall within this practice. See Ritchie v. United States, 451 F. 3d. 1019, 1026, n. 12 (9th Cir. 2006)(recognizing reconsideration motion of discovery order); Rivera v. NIBCO, Inc., 364, F. 3d 1057, 1061 (9th Cir. 2004) (considering interlocutory appeal from an order on motion for reconsideration of a protective discovery order).

Likewise, and applicable here, "[a] timely filed motion for reconsideration under a local rule is a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e)." See Bestran Corp. v. Eagle Comtronics, Inc., 720 F.2d 1019 (9th Cir. 1983). In bringing the Motion for Reconsideration of the Discovery Order, the Federal Defendants rely upon both Local Rule 7.1 and Fed. R. Civ. P. Rule 59(e). See ECF No. 177. In other words, contrary to Plaintiffs' argument, motions for reconsideration of a discovery order are properly considered pursuant to Fed. Rule Civ. P. Rule 59(e). As such, there is no question that the Court can reconsider the Discovery Order under the Rule 59(e) standard.[1/]

II. The Rule 59(e) Reconsideration Standard is Met; the Court Should Reconsider the Discovery Order.

A court may reconsider an order which contains clear error or effects a manifest injustice. Plaintiffs argue the standard for reconsideration of the Discovery Order is not met because arguments should not be raised for the first time in a motion for reconsideration. See ECF No. 184 at 3-5. Specifically, Plaintiffs claim the Federal Defendants should have made arguments regarding the

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[1/] As to a different procedural matter, Plaintiffs' memorandum once again fails to comply with Local Rule 10.1 (a)(2) by exceeding the page limitations due to not double spacing their footnotes.

lack of a sovereign immunity waiver and that discretionary policies do have the force of law in earlier briefing. Id. But, Plaintiffs did not brief the case law (upon which the Court seems to have relied in issuing the Discovery Order) until after the protective order briefing was completed. Compare ECF No. 47 at 9 with ECF No. 145 at 12-14 (citing Eighth Circuit precedence regarding the binding nature of internal regulations for the first time); see also ECF No. 145 at 8-9 (citing Veterans for Common Sense v. Shinseki, 644 F.3d 845 (9th Cir. 2011) for the first time). As the Federal Defendants do not believe any of that case law applies here, they had no reason to address these cases in earlier briefing.

As discussed below and in the opening memorandum in support of the motion for reconsideration, the Discovery Order conflicts with Ninth Circuit precedent. See generally ECF No. 178. First, Plaintiffs continue to argue that the APA waiver of sovereign immunity applies because they challenge agency action, which according to them is the only thing they need to plead in order to fall within the waiver of sovereign immunity. See ECF No. 184 at 6, n. 23. Plaintiffs are wrong. Plaintiffs persist in their claim that the Ninth Circuit has determined that the APA's waiver of sovereign immunity applies to any claims arising under federal law. See ECF No. 184 at 6 (citing Shinseki). As stated in our opening brief, the Shinseki panel did not make such a broad holding. See ECF No. 178 at 3-4 (discussing that the Shinseki panel limited its holding to the constitutional claims presented). Again, if the Shinseki panel intended for all claims challenging agency action to fall within the APA's waiver, the panel would not have needed to separately evaluate the non-constitutional claims. See Shinseki, 644 F.3d at 868-870 (holding that the plaintiffs' non-constitutional claims do not fall within the APA's waiver of sovereign immunity); see also Int'l Longshore and Warehouse Union v. Solis, 2011 WL 3667474 at *4, n. 2 (Aug. 22, 2011) (N.D. Cal. 2011) (noting that Shinseki is limited to "whether sovereign immunity barred adjudication of *constitutional* claims") (emphasis added).

Moreover, even though Plaintiffs recognize the federal government's discretion in conducting law enforcement activities on the reservation, see ECF No. 184 at 9, they fail to acknowledge that such discretion precludes their failure to act claim. As discussed in Federal Defendants' opening brief, in "failure to act" cases under the APA, plaintiffs must show that the "failure to act" amounts to withholding an action that is both "discrete" and "legally required." See ECF No. at 6 (citing Shinseki, 644 F.3d at 868 (quoting Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004) ("SUWA")). While Plaintiffs argue that the Department of Justice's internal guidance documents create a procedural duty to notify and consult before carrying out a search warrant in Indian county, they fail to identify any specific, non-discretionary, mandatory duties contained within those policies. As such, there is no waiver of sovereign immunity for the agency's claimed inaction.

Plaintiffs further argue that "the existence of many of the agency guidelines *binding* Federal Defendants is known." See ECF No. 184 at 6-7 (emphasis added). Indeed, rather than stating they needed to conduct discovery in order to find out whether other relevant policies exist, in responding to the Motion to Dismiss, Plaintiffs identify at least four of the "multiple" policies, they believe bind the federal government. See ECF No. 145 at 15. Plaintiffs then cite various case law, which they claim support how the internal guidelines they have already identified create the force of law and bind the federal government. See ECF No. 184 at 7-8. By this argument, Plaintiffs concede that the Motion to Dismiss only raises legal matters. In other words, the Court does not need to make any findings of fact to resolve the Federal Defendants' Motion to Dismiss. Instead, the Court only need decide as a threshold legal matter whether discretionary guidelines disclaiming their use in judicial proceedings can bind the federal government, making

discovery unnecessary.[2/]

Moreover, while the parties disagree about whether the policies identified by Plaintiffs create the force of law and bind the federal defendants, the parties agree that in certain circumstances, internal policies can bind an agency. For an agency pronouncement to have the force and effect of law, it must: "(1) prescribe substantive rules – not interpretive rules, general statements of policy, or rules of agency organization, procedure or practice- and; (2) conform to certain procedural requirements." United States v. Alameda Gateway, Ltd., 213 F.3d 1161, 1168 (9th Cir. 2010) (quoting United States v. Fifty-Three Eclectus Parrots, 685 F.2d 1131, 1136 (9th Cir. 1982)). A rule is substantive if it is "legislative in nature, affecting individual rights and obligations." Alameda Gateway, 213 F.3d at 1168 (quoting James v. United States Parole Comm'n, 159 F.3d 1200, 1206 (9th Cir. 1998)). In contrast, a rule is interpretive if it "clarif[ies] or explain[s an] existing law or regulation[s]". See Mt. Diablo Hosp. Dist. v. Bowen, 860 F.2d 951, 956 (9th Cir. 1988) (quoting Linoz v. Heckler, 800 F.2d 871, 877 (9th Cir. 1986)). In other words, the factors to consider in determining whether a policy binds an agency include: whether the policy is published; whether the policy includes language committing to bind the agency, or likewise, includes language purporting to not

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[2/] Likewise, Plaintiffs still make no argument in their opposition to the Motion for Reconsideration (nor have they argued in their response to Federal Defendants' Motion to Dismiss) that they lack sufficient facts in order to respond to the arguments raised by the Motion to Dismiss. Instead, Plaintiffs argue they do not know "the exact extent to which Federal Defendants failed to comply with those guidelines." Again, whether the Federal Defendants have complied with internal guidelines is not at issue in the pending Motion to Dismiss. The legal questions presented in the Motion to Dismiss are whether the Court lacks jurisdiction and whether the Plaintiffs have failed to state a claim upon which relief can be granted.

bind the agency; and whether the document relates to internal administrative procedure. Shinseki, 644 F.3d at 870.

All of the cases cited by Plaintiffs are consistent with these factors for resolving whether a particular policy has the force of law; the cases address situations in which an agency has formally promulgated regulations, where a policy has been published, or where the language of the policy includes language requiring action. See Clemente v. United States, 766 F.2d 1358, 1365 (9th Cir. 1985) (regulations bind an agency); Alcaraz v. INS, 384 F.3d 1150, 1162 (9th Cir. 2004) (considering the "will" language of the memorandum but remanding to agency to determine "the purely legal question" of whether internal due process guidelines applied); United States v. Heffner, 420 F.2d 809, 812 (4th Cir. 1969) ("The [internal guidance] document purports to establish certain procedures which Special Agents are 'required' to follow."); Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 838 (9th Cir. 2003) (FWS policy published in federal register); Church of Scientology of Cal. v. United States, 920 F.2d 1481, 1487-88 (9th Cir. 1990) (in the context of a preliminary injunction, characterizing whether an IRS policy statement has binding effect as a conflict of law and not resolving the question); Romeiro de Silva v. Smith, 773 F.2d 1021, 1025 (9th Cir. 1985) (IRS operating instructions do not have the force and effect of law because they are "internal directives not having the force and effect of law.") (internal citations omitted).

The factors for resolving whether a particular policy has the force of law impact whether discovery should go forward. As discussed in the opening memorandum, the Ninth Circuit has held that agency policies only "unearthed" through discovery of the agency's inner workings cannot create the force of law and do not bind the agency, as those policies have by definition never been published. See ECF No. 178 at 7 (citing United States v. One 1985 Mercedes, 917 F.2d 415 (9th Cir. 1990)); see also Goetz and Sons Western Meat LLC v. United

States, 2008 WL 449654 at *3 (W.D. Wash.) (holding that discovery to "uncover internal policies governing the protocol for an inspector's actions" is not appropriate because internal policies do not have the effect of law and could not transform plaintiff's claims into claims properly asserting subject matter jurisdiction). Plaintiffs' attempt to limit the Ninth Circuit's holding in One 1985 Mercedes to situations where the proponent of the discovery is seeking "the absence of a policy." See ECF No. 184 at 6. Plaintiffs misread One 1985 Mercedes. In One 1985 Mercedes, the defendant sought discovery for two reasons: first, to determine if existing policies were not followed, i.e., whether federal law enforcement complied with internal guidance, and second, to determine if there were no such policies. One 1985 Mercedes, 917 F.2d at 418. In fact, even though "[i]nformation concerning these policies may reflect upon the appropriateness of government action in [the] case" and that there may have been agency guidelines to assist government law enforcement agents, the Ninth Circuit held that discovery was not appropriate. Id. at 423. Similarly here, the Court should vacate the Discovery Order. [3/]

III. In the Alternative, the Federal Defendants Seek Further Limitations As to the Type and Subject Matter of Discovery Permitted by the Discovery Order.

As part of the Motion for Reconsideration, the Federal Defendants have asked the Court to further limit any discovery because the Discovery Order permits overly broad discovery as to factual matters with no bearing on jurisdiction. See ECF No. 178 at 8-10. Instead of explaining why such further limitations are not needed, Plaintiffs take issue with the manner in which the

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[3/] Of further note, as the Plaintiffs' motivation in bringing this case is to assist the enforcement of federal law on the reservation, see ECF No. 184 at 9-10, it is hard to see how they can be harmed by the exact activity they wish to assist, i.e., by the federal government dutifully carrying out a federal criminal investigation.

Federal Defendants have brought the issues to the Court's attention by claiming such matters are not appropriately resolved on a motion for reconsideration. See ECF No. 184 at 5. While the Federal Defendants attempted to work with Plaintiffs as to the scope of their requests (and will continue to do so again if the Discovery Order is reinstated), the parties have conflicting views regarding the scope of the Discovery Order. In other words, we anticipate that in the absence of clarification, there will be further discovery motions. As such, it is more efficient for the Federal Defendants to seek the Court's clarification as to the scope of the Discovery Order as part of this briefing.

The Court has ordered discovery into three areas. The first category of discovery is for policies "“that relate to *any duty* of the Federal Defendants to notify the Yakama before entering Yakama land and any policies governing the limitation, if any, on Federal Defendants' conduct while on Yakama land." See ECF No. 159 at 10 (emphasis added). Federal Defendants view the use of the phrase "any duty" to mean policies that impose mandatory duties on the Federal Defendants. As argued above, the Federal Defendants' legal view is that discovery will not lead to any enforceable duties, which further supports ruling on the Motion to Dismiss first.

The Court next permitted a second category of discovery into the facts involving the Federal Defendants' entry onto Yakama land on February 16, 2011. Federal Defendants have repeatedly acknowledged that for purposes of the Motion to Dismiss, the Court must accept as true the factual allegations in the Complaint, i.e., that Federal Defendants entered onto the reservation on the morning of February 16, 2011, did not consult with the Yakamas prior to entering onto the reservation, nor notified the Yakamas prior to the entry. In other words, deciding the Motion to Dismiss does not require any additional factual information about what occurred on February 16, 2011.

Likewise, with respect to the Court's third category permitting discovery of

facts concerning any decisions regarding notification of the Yakama of the entry onto the reservation, this area allows discovery of facts that go directly to whether the FBI properly exercised its discretion in carrying out the search warrant. Plaintiffs believe they have a right to inquiry into the exercise of this discretion. See ECF No. 184 at 9-10. Contrary to Plaintiffs' assertion, the Federal Defendants are not required to justify the exercise of their discretion as to how and why decisions are made when carrying out a criminal investigation simply because Plaintiffs would like to know.

Of particular relevance here, a party who seeks to challenge an exercise of prosecutorial discretion on the ground of government misconduct is not entitled to discovery unless he can first make a substantial threshold showing that the claim is meritorious. See Wade v. United States, 504 U.S. 181, 186 (1992); United States v. Armstrong, 517 U.S. 456 (1996) (holding that the lower courts had erred in ordering discovery of the Executive's decision to prosecute a case). "The presumption of regularity supports their prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." Armstrong, 517 U.S. at 456 (internal citations and quotations omitted); accord Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1239 (Fed. Cir. 2002) ("The presumption that government officials act in good faith is nothing new in our jurisprudence."). Facts about why notification occurred in the manner it did are not germane to deciding the issues presented in the Motion to Dismiss – whether Plaintiffs have set forth policies that, if violated, give rise to this Court's jurisdiction. Discovery covering these last two areas is not needed to "establish whether the Court has jurisdiction". See ECF 159 at 8.

DATED this 19th day of October, 2011.

MICHAEL C. ORMSBY
United States Attorney

s/ Pamela J. DeRusha
PAMELA J. DeRUSHA
Assistant U. S. Attorney
Attorney for Federal Defendants
United States Attorney's Office
P.O. Box 1494
Spokane, WA 99210-1494
(509) 353-2767, telephone
(509) 353-2766, fax
USAWAE.PDerushaECF@usdoj.gov

s/ Maureen E. Rudolph
MAUREEN E. RUDOLPH
U.S. Department of Justice
Environment and Natural Resources
Division, Natural Resources Section

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Gabriel S. Galanda:	gabe@galandabroadman.com
Anthony Broadman:	anthony@galandabroadman.com
Julio Carranza:	julio@yakamanation-olc.org
Kenneth W. Harper:	kharper@mjbe.com
Quinn N. Plant:	qplant@mjbe.com
Stephen J. Hallstrom:	stephen.hallstrom@co.benton.wa.us
Mike Williams:	mdw@winstoncashatt.com
Gregory C. Hesler:	greg.hesler@painehamblen.com
Michael Kapaun:	mjk@witherspoonkelley.com
William J. Schroeder:	william.schroeder@painehamblen.com
William M. Symmes:	wms@witherspoonkelley.com

and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: N/A

s/ Maureen E. Rudolph
MAUREEN E. RUDOLPH
U.S. Department of Justice
Environment and Natural Resources Division,
Natural Resources Section
Tel. (202) 305-0479
maureen.rudolph@usdoj.gov

Attorney for Federal Defendants