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Honorable Rosanna Malouf Peterson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,

Plaintiffs;

v.

ERIC H. HOLDER, JR.; *et al.*,

Defendants.

NO. CV-11-3028-RMP

MEMORANDUM IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR RECONSIDERATION

INTRODUCTION

Federal Defendants filed a Rule 59(e) Motion for Reconsideration. Because Rule 59(e) does not apply absent a final judgment or appealable order, this Court should deny Federal Defendants' motion. Even if Rule 59(e) applied, or if this Court overlooked Defendants' failure to properly petition for reconsideration of its order, Federal Defendants are not entitled to the relief sought.

STANDARD OF REVIEW

A Rule 59(e) motion may be granted only where the movant makes a showing of "1) a manifest error of law or fact upon which the judgment is based; 2) newly discovered or previously unavailable evidence; 3) manifest injustice; [or] 4) an intervening change in controlling law."[1] "Motions for reconsideration are disfavored"[2] and "should not be granted absent highly unusual circumstances."[3] Because "[a] motion for reconsideration is not an avenue to re-litigate the same issues and arguments upon which the court already has ruled,"[4] District Courts should "decline to address an issue raised for the first time in a motion for reconsideration."[5]

Federal Defendants cannot make their required showing under any

[1] *Levy v. Wells Fargo Bank*, No. 11-0159, 2011 WL 4104155, at *2 (D. Hawai'i Sept. 14, 2011) (citing *McDowell v. Calderon*, 197 F.3d 1253, 1255 n. 1 (9th Cir. 1999)).
[2] *City of Buckley v. Toman*, No. 10-5209, 2011 WL 4344587, at *2 (W.D. Wash. Sept. 15, 2011).
[3] *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999).
[4] *Brown v. Kinross Gold, U.S.A.*, 378 F.Supp.2d 1280, 1288 (D. Nev. 2005).
[5] *Baker v. Walker*, No. 08-1370, 2011 WL 4345870, at *1 (E.D. Cal. Sept. 14, 2011) (citing *389 Orange Street Partners*, 178 F.3d at 665).

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component of Rule 59(e). There are no highly unusual circumstances that compel reconsideration. The issues and arguments first raised by Federal Defendants on reconsideration of the Court's September 12, 2011 Order are inappropriately before the Court. For all of these reasons, Federal Defendants' motion should be denied.

ARGUMENT

I. Rule 59(e) Does Not Provide the Relief Requested.

As a threshold matter, "[a] Rule 59(e) motion may only be brought to amend or alter a final judgment or appealable interlocutory order."[6] Because this Court's September 12, 2011 discovery order was neither a "final judgment" nor an "appealable interlocutory order," Rule 59(e) cannot provide the relief that Federal Defendants request.

For the purpose of Rule 59(e), "[a] 'judgment' is defined [as] a *final* order" as expressed in Rule 54(a).[7] Under that Rule, a District Court's judgment is only final where "it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[8] Here, the Court has yet to decide a dispositive issue. The litigation is far from final. Accordingly, the Court's September 12, 2011, discovery order is not a "final judgment" by any stretch of the term.

Nor was the Court's discovery order an "appealable interlocutory order." Ninth Circuit courts at both the trial and appellate level have held explicitly that

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[6] *Barnard v. Las Vegas Metropolitan Police Dept.*, No. 03-1524, 2010 WL 1815410, at *1 n.1 (D. Nev. Apr. 30, 2010) (citing *United States v. Martin*, 226 F.3d 1042, 1048 (9th Cir. 2000); *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 466-67 (9th Cir. 1989)).

[7] *Martin*, 226 F.3d at 1048 (emphasis in original).

[8] *Catlin v. United States*, 324 U.S. 229, 233 (1945).

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"discovery orders are interlocutory in nature and nonappealable."[9]

District Courts should deny a Rule 59(e) Motion for Reconsideration when put forth improperly, instead of going to the merits of the motion.[10] Federal Defendants' Motion for Reconsideration should be denied accordingly.

II. Federal Defendants Have Not Presented Arguments Reviewable Under Rule 59(e).

Because Federal Defendants have not produced any newly discovered evidence or alleged an intervening change in controlling law, it is assumed they argue that the Court has committed a "manifest error of law or fact." "In order for a party to demonstrate clear error, the moving party's arguments cannot be the same as those made earlier. If a party simply inadvertently failed to raise the arguments earlier, the arguments are deemed waived."[11] It is not an abuse of discretion for a District Court to decline to address an issue raised for the first time in a motion for reconsideration.[12]

In their original motion on the issue of discovery Federal Defendants argued only that: (1) A Rule 26(f) conference had not yet occurred; and (2) Because the

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[9] *Truckstop.net, LLC v. Sprint Corp.*, 547 F.3d 1065, 1067 (9th Cir. 2008); *see also e.g. U.S. v. Fei Ye*, 436 F.3d 1117, 1122 (9th Cir. 2006); *KL Group v. Case, Kay & Lynch*, 829 F.2d 909, 918 n. 5 (9th Cir. 1987); *Thompson v. Morales*, No. 04-6554, 2008 WL 590853, at *1 (E.D. Cal. Feb. 29, 2008).

[10] *See e.g. Balla*, 869 F.2d at 466; *Arenberg v. Ryan*, No. 10-2228, 2010 WL 4920918 (D. Ariz. Nov. 29, 2010); *Weinstein v. Arpaio*, No. 10-0697, 2010 WL 3800893 (D. Ariz. Sept. 22, 2010); *Taverniti v. Astrue*, No. 04-4932, 2008 WL 4167511, at *3 (N.D. Cal. Sept. 8, 2008).

[11] *Baker*, 2011 WL 4345870, at *1 (citing *Glavor v. Shearson Lehman Hutton, Inc.*, 879 F.Supp. 1028, 1033 (N.D. Cal. 1994)).

[12] *Id.*, at *3 (citing *Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999).

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purpose of a Rule 12(b) motion is to "challenge the legal sufficiency of complaints without [being subjected] to discovery," limited jurisdictional discovery at this stage would "be a waste of both parties' time and resources."[13]

In the motion now before the Court, however, Federal Defendants argue that: (1) The Nation has "failed to set forth a waiver of the United States' sovereign immunity"; (2) Because only *legal* questions are at issue in this jurisdictional posture "there is no need to determine whether Federal Defendants complied with internal policies" and therefore no need for limited discovery; and (3) "[T]he Discovery Order is overly broad and should be narrowly tailored as to both the type and subject matter . . . ."[14]

As to (1), this issue has been fully briefed by Federal Defendants in their Motion to Dismiss.[15] Because the Rules do not allow a "second chance when a party has failed to present its strongest case in the first instance,"[16] a motion to reconsider an interlocutory discovery order is clearly an improper manner in which to raise objections to a matter already fully briefed (and yet to be ruled on).

As to (2), Federal Defendants knew as early as April 8, that the Nation would be seeking the exact jurisdictional discovery granted by this Court.[17] Federal Defendants thus had every opportunity to make the arguments now made

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[13] ECF No. 44 at 3-4 (internal quotations omitted).
[14] ECF No. 178 at 1-2.
[15] ECF No. 50.
[16] *Sonnino v. Univ. of Kansas Hosp. Auth.*, 221 F.R.D. 661, 664 (D. Kan. 2004).
[17] *See* ECF No. 15 at 5 ("Discovery is necessary regarding Defendants' agency activity regarding their February 16, 2011 intrusion onto Plaintiffs' Reservation tribal trust lands and Defendants policies, procedures, and other conduct related to the same.").

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in the motion improperly before the Court; they chose not to. The law requires this Court to "deem[] those arguments waived and . . . not address issues raised for the first time in the motion for reconsideration."[18]

As to (3), again, a motion to reconsider is improper for this type of objection. Before seeking this "extraordinary remedy," Federal Defendants should have availed themselves of the numerous discovery-limiting remedies available.[19]

Because their original Motion for a Protective Order was denied, Federal Defendants now seek a chance to relitigate their original motion by supplementing it with new arguments. This is not allowed.[20] Like the movant in *Baker*, Federal Defendants herein have made only "arguments that [they] raised in the underlying briefing . . . or arguments that [they] could have raised but chose not to."[21] Federal Defendants' motion should therefore be denied.

III. Federal Defendants Have Not Met Their Burden Under Any Rule.

Although the Court should not go to the merits of Federal Defendants' improper motion, were it to address the arguments therein it will find the motion fatally flawed on several grounds. In short, the Court has committed no manifest

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[18] *Baker*, 2011 WL 4345870, at *1.

[19] *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). Unfortunately, Federal Defendants' approach is apparently not unique to this litigation. *See U.S. v. Cadet*, 727 F.2d 1453, 1470 (9th Cir. 1984) ("While the discovery order was overbroad in some respects, it appears to us that the United States Attorney was more concerned with forcing . . . confrontation in this matter than attempting to effect a reasonable accommodation with the district court's earnest efforts to [manage] discoverable materials.").

[20] *Wyndham Vacation Resorts, Inc. v. Architects Hawaii Ltd.*, No. 08-0236, 2010 WL 1949357 (D. Hawai'i May 12, 2010).

[21] 2011 WL 4345870, at *2.

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error of law or fact.

First, Federal Defendants misread *Veterans for Common Sense v. Shinseki*[22] as merely finding a waiver of federal sovereign immunity for non-APA *Constitutional* claims. The clear language of *Shinseki* and its discussion of the APA made no such restriction, and Federal Defendants' representation otherwise should not merit the labor of this Court.[23]

Second, Federal Defendants incorrectly argue that "discovery to 'unearth' an agency's internal policies is not warranted because, as a matter of law, such policies do not bind the agency."[24] Federal Defendants' proffered authority for this position stands for just the opposite – the plaintiff in *One 1985 Mercedes* was seeking "discovery proving *the absence* of a policy," not the presence of one.[25] Although the case noted, in *dicta*, that "[a]n agency policy that can only be unearthed by discovery of the agency's internal workings cannot . . . have the force and effect of law," other cases in this Circuit (noted below) dictate otherwise. At any rate, the *existence* of many of the agency guidelines binding Federal

[22] 644 F.3d 845 (9th Cir. 2011).

[23] *See Michigan v. U.S. Army Corps of Engineers*, No. 10-3891, 2011 WL 3836457, at *8 (7th Cir. Aug. 24, 2011) (interpreting *Shinseki* as holding that the APA's waiver applies "in cases involving constitutional challenges *and other claims arising under federal law*") (emphasis added); *see also Clark v. Library of Congress*, 750 F.2d 89, 102 (D.C. Cir. 1984) ("[T]he 1976 amendments to § 702 of the Administrative Procedure Act eliminated the sovereign immunity defense in virtually all actions for non-monetary relief against a U.S. agency or officer acting in an official capacity."); *cf.* ECF No. 178 at 3 ("[T]he reach of Section 702's waiver for non-APA claims is limited to claims under the Constitution or claims meeting the very restrictive criteria for remedying *ultra vires* actions.").

[24] ECF No. 178 at 2 (citing *U.S. v. One 1985 Mercedes*, 917 F.2d 415 (9th Cir. 1990)).

[25] 917 F.2d at 424 (emphasis added).

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Defendants is known – what remains unknown are the particular terms of those guidelines, and the exact extent to which Federal Defendants failed to comply with those guidelines.

Although the most pertinent cases expressly supporting the Nation's argument were decided in the Eighth Circuit,[26] the relevant holdings of those cases have been adopted in the Ninth Circuit. In *Preston v. Heckler*,[27] for instance, the Ninth Circuit explicitly adopted the Eighth Circuit's holding in *Oglala Sioux Tribe v. Andrus*.[28] Likewise, in *Clemente v. U.S.*[29] the Ninth Circuit acknowledged that

> regulations validly prescribed by an agency are binding upon it. . . . "[[A]]n executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if [agency action] is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established . . . . He that takes the procedural sword shall perish by that sword."[30]

Other cases in this Circuit have held similarly.[31]

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[26] ECF No. 178 at 5 (citing *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 784 (D.S.D. 2006) ("An agency must comply with its own internal policies even if those are more rigorous than procedures required by the APA.")).

[27] 734 F.2d 1359 (9th Cir. 1984).

[28] 603 F.2d 707, 716 (8th Cir. 1979).

[29] 766 F.2d 1358 (9th Cir. 1985).

[30] *Id.* at 1365, 1365 n.10 (quoting *Vitarelli v. Seaton*, 359 U.S. 535, 546-47 (1959)). The *Clemente* Court went on to note that "[t]o 'perish' by the procedural sword, however, is not to pay *Bivens* damages. The appropriate remedy for the refusal of an agency to follow its own regulations may be injunctive relief . . . ." *Id.* at 1365 n.10. This is the exact remedy sought by the Nation.

[31] *See e.g. Alcaraz v. I.N.S.*, 384 F.3d 1150, 1162 (9th Cir. 2004) ("The legal proposition that agencies may be required to abide by certain internal policies . . . extends beyond formal regulations.") (citing *United States v. Heffner*, 420 F.2d 809, 812 (4th Cir. 1969) (collecting cases and noting that the doctrine has been

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Finally, the Nation categorically rejects Federal Defendants' inappropriate stance that because the Nation "ha[s] never provided any justification for why they require information about the facts of the entry" it is "us[ing] civil discovery to circumvent the criminal law enforcement process."[32] Indeed, it is that attitude that seems to underlie Federal Defendants' illegal, arbitrary, and capricious decision-making culminating in the unlawful February 16, 2011 entry. The Nation has made absolutely clear its justification for discovery, as noted by this Court:

> Federal Defendants [have] argue[d] that the various federal officers and agencies at issue in this litigation had complied with the internal rules of their respective agencies. Yakama contend[s] that such an argument would require discovery about the events of February 16, 2011, from which this action springs.[33]

Had Federal Defendants complied with applicable federal law, procedures, and policies on February 16, they would not be so reluctant to share those materials.

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applied to a Department of Interior "Order," the Army's "Weekly Bulletin 42," an FCC "rule" which had not been formally promulgated but which the court found had been the FCC's "usual practice," FCC "Standards," and a Department of Defense "Directive")); *National Ass'n of Home Builders v. Norton*, 340 F.3d 835, 852 (9th Cir. 2003) (finding arbitrary and capricious an act that did not comport with the Fish and Wildlife Service's "DPS Policy"); *Church of Scientology of Cal. v. United States*, 920 F.2d 1481, 1487 (9th Cir. 1990) (noting that "an administrative agency is required to adhere to its own internal operating procedures" and analyzing, in this framework, an IRS policy statement in the Policies of the "IRS Handbook"); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) (noting that the INS is bound by its "Operations Instructions"); *see also Brookhaven Housing Coalition v. Kunzig*, 341 F.Supp. 1026, 1029-30 (E.D.N.Y. 1972) (holding that an "Executive Order, having been issued and published by the President pursuant to statutory authority, is not a mere internal housekeeping arrangement . . . . Private citizens have a right to review compliance with both statutes and regulations . . . . This is a specific application of the general principle that government agencies may be required to live up to their own rules.").

[32] ECF No. 178 at 10.

[33] ECF No. 159 at 5 (internal citations omitted).

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Far from trying to "circumvent the law enforcement process," the Nation is trying to bring law and order to its lands by compelling Federal Defendants' assistance in a manner that comports with federal law. The Nation seeks to remedy the law enforcement vacuity that exists on its lands[34] by fulfilling Federal Defendant Attorney General Eric Holder's promise to "work[] closely with tribal governments," "take[] meaningful steps to improve how the federal government addresses tribal justice issues," to "make good on President Obama's call to consult with tribes on issues that affect them, and to coordinate our activities with our tribal partners."[35] Federal Defendants' baseless allegation is as worn as it is reckless; as noted by the Ninth Circuit,

> The Yakama Nation is a sovereign nation, with its own government, laws and courts, not a rogue organization or menace to civil order. The Yakama Nation does not and never has asserted that its members have a right under its treaty to traffic in narcotics. For the government of the United States to be suggesting otherwise is irresponsible.[36]

Federal Defendants demand respect for the United States' discretion, but have

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[34] *See* Matthew Handler, Note, *Tribal Law and Disorder: A Look at a System of Broken Justice in Indian Country and the Steps Needed to Fix It*, 75 BROOK. L. REV. 261, 264 (2009) ("[S]everal changes need to be made to federal law in order to allow tribal governments to take charge of the crime-related problems in Indian country. These changes would empower tribes by . . . unifying the tribal and federal law enforcement agencies to provide more efficient policing on Indian reservations.")

[35] *Attorney General Eric Holder Speaks at the Pine Ridge Indian Reservation*, JUST. DEP'T DOCUMENTS, July 28, 2011, *available at* 2011 WLNR 14948620.

[36] *U.S. v. Smiskin*, 487 F.3d 1260, 1271 (9th Cir. 2007).

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never explained why they are entitled to that deference.[37] Plaintiffs lack information and meaningful law enforcement coordination as a result.[38]

CONCLUSION

Plaintiffs Yakama Nation respectfully request that Federal Defendants' Motion for Reconsideration be **DENIED**. A proposed Order is filed herewith.[39]

DATED this 12th day of October, 2011.

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[37] *See Canterbury Riding Condominium v. Chesapeake Investors, Inc.*, 505 A.2d 858, 866 (Md. Ct. Spec. App. 1986) (finding it "difficult to affirm the exercise of discretion where no reasons for that exercise are given.").

[38] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-751, DEPARTMENTS OF THE INTERIOR AND JUSTICE SHOULD STRENGTHEN COORDINATION TO SUPPORT TRIBAL COURTS (2011), *available at* 2011 WLNR 4888311 (finding that one of the "challenges that have made it difficult for [tribes] to adjudicate crime in Indian country" is "delays in receiving timely notification about the status of investigations and prosecutions from federal entities" and noting that the purpose of the Tribal Law and Order Act, Pub. L. No. 111-211 §201(a), 124 Stat. 2261, 2261 (2010), was to "increase coordination and communication" between tribal and federal agencies and to "empower tribes with the authorities necessary to reduce the prevalence of crime in Indian country.").

[39] Because Plaintiffs anticipate further discovery motions from Federal Defendants regarding the scope of discovery, the attached proposed order contains proposed potential deadlines and clarifying language for discovery and motions regarding the same.

CERTIFICATE OF SERVICE

I, Gabriel S. Galanda, declare as follows:

1. I am now and at all times herein mentioned a legal and permanent resident of the United States and the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to testify as a witness.

2. I am employed with the law firm of Galanda Broadman PLLC, 11320 Roosevelt Way NE, Seattle, WA 98125.

3. On October 12th, 2011, I filed the foregoing document, which will provide service to the following via ECF:

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The foregoing statement is made under penalty of perjury and under the laws of the State of Washington and is true and correct.

Signed at Seattle, Washington, this 12th day of October, 2011.

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