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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA,

Plaintiff

v.

S.M.R. JEWELL, et al.

Defendants

CITIZENS FOR A BETTER WAY, et al.

Plaintiffs

v.

UNITED STATES DEPARTMENT OF INTERIOR, et al.

Defendants

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY,

Plaintiff,

v.

S.M.R. JEWELL, et al.

Civil Action No. 2:12-CV-3021-TLN-AC
(Consolidated)

FEDERAL DEFENDANTS' OPPOSITION TO COLUSA'S MOTION FOR RECONSIDERATION

A. Introduction

Colusa's motion rests on the assertion that "the Court omitted consideration of several claims included in Colusa's Memorandum of Points and Authorities in support of its Motion for Summary Judgment." Pl.'s Mot. for Recons. 1, ECF 170. Because that assertion is unsupported, Colusa's motion does not meet the high standard for reconsideration and must be denied.

B. Legal Standard

Colusa invokes Federal Rules of Civil Procedure 59(e) and 60(b) to support their motion.

Rule 60(b) permits a district court to relieve a party from a final order or judgment on grounds of: "(1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud . . . of an opposing party; . . . or (6) any other reason justifying relief [from the operation of the judgment]." The motion for reconsideration must be made within a reasonable time, in any event "not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(c)(1)

Motions to reconsider under Rule 60(b) are committed to the discretion of the trial court. *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983) (en banc). The standard is strict: to succeed, a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. *See*, e.g., *Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part and rev'd in part on other grounds*, 828 F.2d 514 (9th Cir. 1987). The Supreme Court has held that Rule 60(b)(6) motions should be granted only in "extraordinary circumstances." *Ackermann v. United States*, 340 U.S. 193, 199 (1950).

Rule 59(e) permits a court to "alter or amend a judgment" where there is clear error or the initial decision was manifestly unjust; this too sets a high standard. The Court will find "clear error" in connection with a Rule 59(e) motion only when it has the "definite and firm conviction"

that a mistake has been committed. See *Joe Hand Promotions, Inc. v. Mujadidi*, No. C-11-5570 EMC, 2012 WL 4901429, at *1 (N.D. Cal. Oct. 15, 2012) ("[C]lear error should conform to a very exacting standard" by which "a final judgment must be 'dead wrong' to constitute clear error" (citation omitted)); *J & J Sports Prods., Inc. v. Juanillo*, No. C 10-01801 WHA, 2011 WL 335342, at *1 (N.D. Cal. Feb. 1, 2011) ("If a court 'got the law right' and 'did not clearly err in its factual determinations,' then clear error was not committed—even if another reasonable judicial body 'would have arrived at a different result'" (citation omitted)); *Mitchell v. Asuncion*, No C 12-5935 PJH (PR), 2013 WL 2016136, at *1 (N.D. Cal. May 13, 2013) ("A district court does not commit clear error warranting reconsideration when the question before it is a debatable one." (citation omitted)).

Relevant to both rules is the principle that reconsideration is an "extraordinary remedy" which should be used "sparingly in the interests of finality and the conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (quoting 12 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 59.30[4] (3d ed. 2000)). "A motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law," and it "may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (internal quotations marks, alterations, and citations omitted) (emphasis in original).

C. Colusa's National Environmental Policy Act Arguments are Waived

Colusa argues that the Bureau of Indian Affairs (BIA) should have given greater consideration to Enterprise's 63-acre landholding as an alternative gaming site, and that BIA

neglected to consider the proposed casino's economic impact on Colusa. Both arguments rehash points already made and correctly rejected; both lack meaningful support; and both have been waived.

1. The 63-acre alternative was never presented to BIA

Colusa raised its argument regarding the 63-acre parcel in its initial briefing — albeit in a single sentence. [1] The United States responded: "Colusa ([Pl.'s Mem. of Points & Authorities in Supp. of Mot. for Summ. J. 17,] ECF 102-1[]) mentions a 63-acre parcel acquired by Enterprise in 2006 (see AR NEW 22969) but neither Colusa, nor any of those who actually commented on the DEIS, proposed that this tract be evaluated as an alternative to the Yuba site. The issue has therefore been waived." Defs.' Notice of Mot. & Cross-Mot. for Summ. J. 39, ECF 116-1.[2] A litigant cannot raise issues in court that were not laid before the agency below; as this Court recently explained,

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[1] Colusa's only record cite for this parcel is the following, from Enterprise's fee-into-trust application:

> In 2006, the Tribe became the fee owner of a 63 acre parcel of land in Butte County. The land was purchased with Indian housing funds from the United States Department of Housing and Urban Development. This parcel is dedicated for use as low and moderate-income tribal housing, as the existing Rancheria site is not suited for housing development The Tribe has not submitted a trust application for the site and does not intend to use the parcel for anything except tribal housing and related uses.

AR NEW 22696-97. Colusa does not quote this language; instead, it accuses Enterprise of "giving the impression that it only owned its original pre-IGRA 40-acre reservation …". ECF 170 at 2. The accusation is, obviously, baseless, as demonstrated by the record excerpt that Colusa itself cites.

[2] Colusa's only written input to the agency can be found at AR NEW 26979-81 (and 28185-89) (6/23/09 letter from Colusa opposing the Enterprise casino, with no mention of NEPA). Colusa did not submit any comments on the Draft EIS. See AR NEW 26412-25809 (Appendix T to Final EIS) (list of commenters); AR NEW 26416-26549 (list of comment letters). Similarly, Colusa failed to participate in any of the public hearings conducted by the agency, AR NEW 3052-3111 (scoping meeting transcript), 26551-26651 (hearing on the DEIS).

> [t]he general standard is well established. The APA requires that plaintiffs exhaust administrative remedies before bringing suit in federal court. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006). In the NEPA context, this means that a plaintiff "must structure [its] participation so that it ... alerts the agency [of its] positions and contentions, in order to allow the agency to give the issue[s] meaningful consideration." *Id*. (quoting *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764–65, 124 S. Ct. 2204, 159 L. Ed. 2d 60 (2004)). The purpose of the exhaustion requirement is to avoid premature claims and to ensure the agency is given "a chance to bring its expertise to bear to resolve a claim." Id. "[A] claimant need not raise an issue using precise legal formulations, as long as enough clarity is provided that the decision maker understands the issue raised." *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010) (internal quotation and citation omitted). Accordingly, "alerting the agency in general terms will be enough if the agency has been given a chance to bring its expertise to bear to resolve the claim." *Id*. If a plaintiff fails to meet exhaustion requirements, its claim is waived. See *Pub. Citizen*, 541 U.S. at 764–65, 124 S. Ct. 2204.

Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Dept. of Interior, 996 F. Supp. 2d 887, 901 (E.D. Cal.), *appeal docketed*, No. 14-15514 (9th Cir. Mar. 19, 2014) (alterations in original). Neither in its summary judgment briefing, nor in its motion for reconsideration, does Colusa provide the Court with any basis for holding that the 63-acre parcel argument was *not* waived, which is telling because "[p]laintiffs b[ear] the burden to establish they had presented and exhausted their claims before the [agency]." *Kaiser v. Blue Cross of Cal.*, 275 F. App'x 673, 674 (9th Cir. 2008) (citation omitted); see also *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002) ("As to the habitat conservation plan claim, the [plaintiffs] fail to point out where in the record they raised this issue before the [agency] and we have been unable to locate any reference to this claim in the administrative record."); *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (failure to raise concerns during NEPA comment process barred claim).

We show below that there was no reason for BIA to give special attention to the 63-acre tract. As regards NEPA, the issue is not properly before the Court.

2. Colusa's socioeconomic impact argument was waived

Colusa's argument that BIA underestimated the proposed casino's economic impact on Colusa, and its impact on Colusa's government and community, presents nothing new and nothing that has not been fully refuted already. In our reply brief on the cross-motions for summary judgment (ECF 139 at 11-12), we demonstrated that:

- Colusa waived the argument by failing to participate in the NEPA process or raise the issue before BIA;
- Colusa declined the specific invitation to establish an exception to the 25-mile rule by showing that the tribe's "governmental functions, infrastructure or services will be directly impacted by the proposed gaming establishment." AR NEW 30289 (ECF 113-1); and
- Purely economic injury is not cognizable under NEPA.

We will not repeat those demonstrations here, but incorporate them by reference.

Colusa also rehashes its argument (see ECF 102-1 at 10 through 11) that BIA's estimate of the likely reduction in Colusa's gaming revenues is imprecise. But the gaming market study relied upon by BIA is detailed and thorough and applies well-accepted market modelling methods. See AR NEW 24195-24207. The projected revenue drop for Colusa is 7.5%. AR NEW 24892-93 (slightly greater under the gravity model – see AR NEW 24811). The claim that this will result in "the destruction of the primary source of [Colusa's] governmental revenues" (ECF 170 at 3) is thus grossly overblown and provides no basis for the Court's reconsidering its decisions. And if, in a perfect world, BIA would have given more precise consideration to the economic impacts on Colusa, it was Colusa itself — which uniquely knows the facts, and which declined every opportunity to enlighten BIA — that prevented this from happening. See n. 2, above.

D. Reconsideration of the Court's 25 C.F.R. Part 151 and Part 292 Findings is Unwarranted

Colusa asserts this Court failed to consider its argument that pursuant to 25 C.F.R. § 151.10(b), the Secretary was required to consider the existence of a 63-acre parcel owned in fee by Enterprise. ECF No. 170 at 4-5; Pl.'s Combined Resp. in Supp. of Mot. for Summ. J. & Opp'n to Defs.' Mot. for Summ. J. 2, ECF No. 130 (raising argument in one sentence). The Department considered the Tribe's fee holdings in arriving at its decision to accept land in trust. In the November 2012 ROD, the Department explained that the decision is based upon consideration of, among other things, "the Tribe's fee-to-trust application and materials submitted therewith." AR NEW 30168. That application explains that the sixty-three acre parcel "was purchased with Indian housing funds from the United States" and has been "dedicated for use as low and moderate-income tribal housing, as the existing Rancheria site is not suited for housing development." AR NEW 22969-70.

In addressing Part 151.10(b) and the Tribe's need for additional land, the Department noted that Enterprise's existing forty acre trust parcel was inadequate to meet "tribal housing needs, tribal government or economic development purposes." ARN 30214. The Department further noted that the "Tribe's office is located on non-Indian fee land," further showing awareness of the Tribe's fee holdings even if they were not itemized. Because the sixty-three acre parcel was already dedicated to tribal housing (in accord with the purpose of the federal funds allocated for its purchase), it was unavailable for economic development. The Department was not required to spell out this obvious fact in the ROD, and it certainly was not required to second guess the Tribe's choice of which land it wanted placed in trust in the context of Part 151.[3] As this Court noted, "the

[3] Nor is the Department required to second guess how the Tribe chooses to use its land, as Colusa implicitly suggests in arguing this parcel should be rededicated to gaming. Rededicating the 63

regulation does not require a justification for why a particular parcel was chosen over other possibilities." Sept. 24, 2015 Order 25, ECF No. 168. *See also South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 801 (8th Cir. 2005); *Cty. of Sauk v. Midwest Reg'l Dir.*, 45 IBIA 201, 212 n.13 (2007). Neither was the Court required to spell the obvious out. This Court correctly read the ROD as finding that "the [Tribe's] current land is not big enough to meet all of the tribe's needs, and they need additional land." ECF No. 168 at 25.

In short, the Department reasonably concluded that the "Tribe needs the subject parcel held in trust in order to better exercise its sovereign responsibility to provide economic development to its tribal citizens," ARN 30168, and this Court properly upheld that finding.

Colusa also seeks reconsideration of the Court's conclusion under Part 292 that the Department properly found that gaming by Enterprise would not be detrimental to the surrounding community pursuant to 25 U.S.C. § 2719(b)(1)(A) and 25 C.F.R. § 292. ECF No. 170 at 5. Specifically, Colusa argues that the Court "did not address Colusa's argument that DOI incorrectly ignored the detrimental economic impacts on Colusa." *Id.* However, the Department was not required to consider the detrimental impacts on Colusa because, as a tribe located over twenty-five miles from the trust parcel, Colusa is neither a "nearby Indian tribe" nor part of the "surrounding community" as those terms are defined in the Department's regulations. 25 C.F.R. § 292.2. The Court addressed and rejected Colusa's challenge to the twenty-five mile radius limiting which tribes are subject to the consultation requirement. ECF No. 168 at 18. Colusa offers no arguments why the Court should reconsider that holding, but instead raises arguments about why the

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acre housing parcel to economic development would still leave the Tribe with a need for land, since its housing needs would no longer be met. In any event, the record makes clear that the parcel is unsuitable for economic development. AR NEW 26484-85 (commenter noting that the 63 acre parcel is "adjacent to residential community, a public school," is "'landlocked,'" and is situated within two miles of two casinos).

Department should have considered the adverse effects of competition on its casino. However, absent a showing that the Department was legally obliged to consider impacts on Colusa, such arguments are unavailing, and do not meet the high standards required for reconsideration.

In any event, the Court fully considered the argument that the impact of Enterprise's gaming facility on competing facilities should preclude a "no detriment" finding and rejected it. The Court explained that "competition alone from the proposed gaming facility in an overlapping gaming market is not sufficient to conclude that it would result in a detrimental impact . . . ." ECF No. 168 at 20. Colusa offers no basis for reconsidering that view, stating that it does not seek "to avoid competition," but rather objects to the fact that Enterprise's competing gaming facility can be located on land outside the forty acres historically held in trust for it, characterizing that situation as improper favoritism in violation of 25 U.S.C. § 476(f). ECF No. 170 at 5. However, Colusa failed to raise any claims alleging violation of that statute in their complaint, and it is far too late now. Moreover, it is the Indian Reorganization Act that permits tribes to petition to have new lands placed in trust for their benefit, not the Department; and it is the Indian Gaming Regulatory Act that permits tribes to game on those newly acquired lands if certain conditions are met, not the Department. Colusa has the same rights under these statutes as Enterprise, so Colusa's argument about improper favoritism by the Department is baseless.

Respectfully submitted this 25th day of November, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on November 25th, 2015, I electronically filed the foregoing Federal Defendants' Opposition to Colusa's Motion for Reconsideration with the Clerk of the Court using the CM/ECF system which will send notification of such to counsel of record.

/s/*Peter Kryn Dykema*
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