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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, a federally recognized Indian Tribe,

Plaintiff,

vs.

S.M.R. JEWELL, Secretary of the Interior, et al.,

Defendants, and

THE ESTOM YUMEKA MAIDU TRIBE OF THE ENTERPRISE RANCHERIA, CALIFORNIA,

Intervenor Defendant.

CASE NO. 12-CV-03021-TLN-AC

INTERVENOR-DEFENDANT'S OPPOSITION TO PLAINTIFF COLUSA INDIAN COMMUNITY'S MOTION FOR RECONSIDERATION

Plaintiff's Motion for Reconsideration of the Court's September 24 Summary Judgment Order fails to identify any new evidence, change in controlling law, clear error, or extraordinary circumstance that could justify reconsideration under Federal Rules of Civil Procedure 59(e) and 60(b). In fact, the Motion does not even acknowledge those standards and prerequisites.

Instead, the Motion impermissibly re-argues a selection of the National Environmental Policy Act ("NEPA"), Indian Gaming Regulatory Act ("IGRA"), and Indian Reorganization Act ("IRA") claims Plaintiff has already presented to the Court on prior occasions.

There is no factual or legal basis for granting Plaintiff another bite at the apple. The Court's Summary Judgment Order thoroughly addressed and properly rejected Plaintiff's claims.

Accordingly, Intervenor-Defendant the Estom Yumeka Maidu Tribe of the Enterprise Rancheria ("Tribe" or "Enterprise") respectfully requests that the Motion for Reconsideration be denied.

I. COLUSA FAILS TO ADDRESS THE STRICT STANDARDS FOR RECONSIDERATION IMPOSED BY THE FEDERAL RULES OF CIVIL PROCEDURE

Plaintiff Colusa Indian Community's Reconsideration Motion invokes Federal Rules of Civil Procedure 59(e) and 60(b), but fails to address — or even to acknowledge — the requirements of either Rule.

Rule 59(e) permits reconsideration of a prior order, but only if the moving party demonstrates the existence of newly-discovered evidence, clear error or manifest injustice, or an intervening change in controlling law. *See Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). The Ninth Circuit has characterized this as "an extraordinary remedy" that is "to be used sparingly." *Id*. For that reason, a Rule 59(e) motion "is not a vehicle for relitigating old issues, presenting the case under new theories, [or] securing a rehearing on the merits..." *Vaquero Energy v. Herda*, 2015 U.S. Dist. Lexis 118000, *2 (E.D. Cal. Sept. 3, 2015) citing *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998). Rule 59(e) requires "more than a disagreement with the Court's decision, and a recapitulation of arguments and cases considered by the Court before issuing its original decision fails to carry the moving party's burden." *Id.*; *see also Fuller*

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v. M.G. Jewelry, 950 F.2d 1437, 1442 (9th Cir. 1991) (Rule 59(e) motion denied where moving party failed to present new argument); *Backlund v. Barnhart*, 778 F.2d 1386 (9th Cir. 1985) (same).

Rule 60(b) allows a party to seek relief from a final judgment or order "upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) extraordinary circumstances which would justify relief." *School District 1J v. AC and S, Inc*., 5 F.3d 1255,1263 (9th Cir. 1993). The rule is "used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *Fantasyland Video, Inc. v. County of San Diego*, 505 F.3d 996, 1005 (9th Cir. 2007) citing *United States v. Alpine Land & Reservoir Co*., 984 F.2d 1047, 1049 (9th Cir. 1993). Rule 60(b) "is not a vehicle to reargue a motion or present evidence which should have been presented before." *United States v. Westlands Water District*, 134 F. Supp. 2d 1111, 1131 (E.D. Cal. 2001). Likewise, "Rule 60(b) cannot substitute for an appeal" when a party's contention is "nothing more than dissatisfaction with the ruling of the court." *McCarthy v. Mayo*, 827 F.2d 1310, 1318 (9th Cir. 1987).

On its face, Colusa's Reconsideration Motion falls well short of the requirements of Rules 59(e) and 60(b). The Motion does not identify any newly-discovered evidence, intervening change in controlling law, mistake, surprise, excusable neglect, fraud, voided judgment, or discharged judgment that could conceivably justify relief under either Rule (Colusa Motion at 1-6). Nor does it identify any specific errors of law or factual inaccuracies in the Court's Summary Judgment Order (*id*.). Nor, for that matter, does the Motion identify any

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"extraordinary circumstances" within the meaning of Rule 60(b) (*id.*).[1]

Instead, Colusa has simply re-argued a series of claims previously presented in its unsuccessful motion for summary judgment (*compare* ECF 170 (Motion for Reconsideration) *with* ECF 102-1 at 7-10, 13-18 (Motion for Summary Judgment, same claims)).[2] Disagreement with the Court's conclusions is not a valid basis for reconsideration, and re-litigation of previous arguments is not sufficient to satisfy Colusa's burden. *See, e.g., Fuller,* 950 F.2d at 1442; *Backlund*, 778 F.2d at 1387; *Vaquero Energy*, 2015 U.S. Dist. Lexis 118000, *2 (E.D. Cal. Sept. 3, 2015); *Hansen v. Schubert*, 459 F. Supp. 2d 973, 998 (E.D. Cal. 2006).

Colusa has tried to obscure this defect with a conclusory 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" (Motion at 1). The effort is not convincing. Rather than providing a detailed assessment of the (alleged) omissions in ***the Court's*** September 24 Summary Judgment Order, the Motion recapitulates Colusa's opposition to ***the Federal Defendants'*** underlying decision to take land into trust for the Tribe. And rather than addressing the legal standards bearing on reconsideration, the Motion discusses authority purported to be relevant to Colusa's underlying NEPA, IGRA, and IRA claims.[3] Colusa's filing is a "Reconsideration Motion" in title only. As such, it must be denied.

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[1] Indeed, it is doubtful that Colusa could ever make such a showing. The "extraordinary circumstances" provision of Rule 60(b) requires the moving party to demonstrate that it cannot secure relief on appeal "in the ordinary manner." *Twentieth Century-Fox Film Corp. v. Dunahoo*, 637 F.2d 1338, 1341 (9th Cir. 1981) citing *Ackermann v. United States*, 340 U.S. 193 (1950); *see also McCarthy*, 827 F.2d at 1318 (Rule 60(b) does not substitute for an appeal), *Plotkin v. Pacific Telephone & Telegraph Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982) (legal error alone is insufficient to warrant relief under Rule 60(b)). Here, there is no reason to believe Colusa cannot pursue its claims of error in the Court of Appeals.

[2] The same claims were also presented to the Court in the context of Colusa's Motion for Preliminary Injunction (*compare* ECF 170 with ECF 8-1 at 6-11 (Motion for Preliminary Injunction, same claims)).

[3] Indeed, it is worth noting that Colusa's Motion does not cite a single case addressing reconsideration.

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II. THE COURT'S SUMMARY JUDGMENT ORDER PROPERLY ADDRESSED AND REJECTED COLUSA'S CLAIMS

Moreover, Colusa's (re)arguments lack merit. Contrary to Colusa's representation (Motion at 1), the Court's Summary Judgment Order fully addressed each of the NEPA, IGRA, and IRA claims presented in Colusa's Motion for Summary Judgment. The Order is thorough, well-reasoned, and consistent with both the administrative record and controlling case law. For this reason, too, Colusa's reconsideration request must be denied.

A. The Court Properly Rejected Colusa's NEPA Claims

1. Analysis of Alternatives

Colusa's Motion for Summary Judgment argued that the Federal Defendants violated NEPA by failing to address an adequate range of alternatives to the Tribe's casino project (ECF 102-1 at 7-10). In particular, Colusa focused on the possibility of alternative locations for the casino (*see, e.g.,* ECF 102-1 at 9:14-15 ("did not seriously propose any other casino locations"), 10:1 ("the obvious missing alternative is another site")). The Motion for Summary Judgment briefly mentions two such locations: a site on Highway 99 and a site near the City of Oroville (ECF 102-1 at 9:16-20).

In response, the Tribe explained that under controlling case law (i) a deferential "rule of reason" governs both an agency's choice of alternatives and the extent to which each one much be discussed in an Environmental Impact Statement ("EIS"); (ii) an EIS need only consider sufficient alternatives to foster informed decision-making; (iii) an EIS need not evaluate in detail alternatives determined to be infeasible, remote, or speculative; and (iv) the Federal Defendants had complied with NEPA by preparing an EIS that addressed a reasonable range of alternatives including approval of the Tribe's proposed project, modification of the project, modification of the project location, or denial of the project (ECF 119-1 at 14-15 (identifying cases)).

The Tribe also provided detailed citations to portions of the Administrative Record explaining why the two locations mentioned in Colusa's Motion for Summary Judgment — the

Highway 99 site and the Oroville site — were not viable (ECF 119-1 at 15:23 to 16:13, 17:1-5 and n.7). The record showed that the Highway 99 site was infeasible due to the presence of sensitive biological resources, the absence of water and wastewater infrastructure, and the Tribe's inability to secure investment (*see* ECF 119-1 at 16 (citing AR 23391-92)), while the Oroville site could not be used for the Tribe's project because it was dedicated for future use as low- and moderate-income housing and is "landlocked" (*i.e.*, lacks access to the public road system), surrounded by residences, and near a school (*see* ECF 119-1 at 17 n.17 (citing AR 22969, 26484, 28620)).

Finally, the Tribe identified controlling precedent requiring plaintiffs challenging an agency's analysis of alternatives to demonstrate the viability of alternatives that were not considered (ECF 119-1 at 16:18-23; ECF 136 at 5-6).

The Court's Summary Judgment Order fully addressed and resolved each of these issues (ECF 168 at 6-9). The Court explicitly acknowledged and discussed Colusa's contention that the Federal Defendants should have considered a broader range of alternative locations for the Tribe's project (ECF 168 at 7:18 to 8:3). But it properly rejected that contention on the grounds that (i) the Federal Defendants had considered sufficient alternatives to permit a reasoned choice (ECF 168 at 9:10-20) and (ii) Plaintiffs (including Colusa) had failed to establish the viability of additional alternatives (ECF 168 at 8:24 to 9:9).

Colusa nonetheless alleges that its claims regarding the Oroville site were ignored (Motion at 1-2). The allegation is entirely without merit. First, the plain language of the Summary Judgment Order shows that the Court carefully considered the entirety of Colusa's Summary Judgment Motion (*see, e.g.*, ECF 168 at 7:18 to 8:3, 9:18-20). Second, Colusa's NEPA "claim" regarding the Oroville site is fully encompassed within a larger cause of action addressing the scope of the Federal Defendants' analysis of alternatives; the Summary Judgment Order upheld the scope of that analysis, thereby resolving the entire dispute (including any subsidiary "claim" involving the Oroville site) in Defendants' favor (*see* ECF 168 at 9). Third, the Court properly concluded that Plaintiffs (a class that includes Colusa) failed to establish the

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viability of any alternative sites (a class that includes the Oroville site) (*see* ECF 168 at 8:24 to 9:9). Fourth, throughout the parties' summary judgment briefing, Colusa never disputed any of the record evidence showing that the Oroville site was unsuitable for casino development (*compare* ECF 119-1 at 17 n.7 (Tribe's Motion for Summary Judgment, citing evidence) *with* ECF at 8-9 (Colusa Opposition/Reply Brief, mentioning Oroville site but failing to address evidence)). Fifth, Colusa's contentions regarding the Oroville site were not properly before the Court in the first place (*see* ECF 116-1 at 32, ECF 119-1 at 17). Put simply, Colusa's claims were fully addressed and its request for reconsideration should be denied.

2. "Hard Look" at Socioeconomic Consequences

Colusa's Motion for Summary Judgment also alleged that the Federal Defendants violated NEPA by failing to take a "hard look" at the potential socioeconomic consequences of approving the Tribe's casino project (ECF 102-1 at 10-11). The allegation included two distinct claims: first, that the Federal Defendants had relied on economic information and studies that were outdated (ECF 102-1 at 10:10-16); and second, that Colusa's own economic expert had found the Federal Defendants' analysis "so minimal as to be useless" (ECF 102-1 at 10:17-11:9).

The Court fully addressed and resolved both claims. The first claim (outdated information) was explicitly addressed in the Summary Judgment Order (ECF 168 at 13-24). The second (expert review) was resolved by the Court's June 17, 2015 Order striking the extra-record declaration of Colusa's economic expert and the portions of Colusa's Motion for Summary Judgment relying thereon (ECF 158 at 4-7, 12-13).[4] In short, the claim has been fully resolved and no reconsideration is warranted.

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[4] The stricken portions of Colusa's Motion for Summary Judgment include page 10, lines 17-24 and page 11, lines 3-9 (*see* ECF 121-1 at 4 n.1; ECF 158). Together, those two passages constitute the entirety of the second claim (*see* ECF 102-1 at 10-11).

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B. The Court Properly Rejected Colusa's Indian Reorganization Act and Indian Gaming Regulatory Act Claims

1. Consideration of Purpose and Need for Additional Land Under the IRA

Colusa's Motion for Summary Judgment included an imprecise series of arguments generally alleging that the Federal Defendants failed to properly evaluate the Tribe's "need" for additional trust land under the IRA's implementing regulations (ECF 102-1 at 16-19). Among other things, Colusa alleged that various parcels of land in Butte County (including the Oroville site) would be more appropriate for the Tribe's needs than the Tribe's preferred property in Yuba County (ECF 102-1 at 16:23 to 17:21).

The Court squarely addressed the issue in its Summary Judgment Order (ECF 168 at 25:1-27), ultimately concluding that (i) the Federal Defendants properly considered the Tribe's needs and (ii) the IRA did not require the Federal Defendants to justify the Tribe's preference for one parcel over other possibilities. The Court's conclusion is consistent with and supported by the administrative record, applicable regulations, and settled law (*see* ECF 168 at 25:7-18 (citing authority); *see also* ECF 116-1 at 16-17, ECF 119-1 at 24, ECF 139 at 5-6, ECF 136 at 9-10 (additional authority)). Colusa's Reconsideration fails to identify any legal error[5] or factual inaccuracy[6] in the Court's analysis. There is no basis to reconsider the Court's decision.

2. Consultation Under IGRA

Colusa's Motion for Summary Judgment alleged that the Federal Defendants improperly limited their IGRA consultations to "nearby governments" within 25 miles, thereby excluding Colusa (ECF 102-1 at 13-16).

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[5] *Redding Rancheria v. Jewell*, 776 F.3d 706 (9th Cir. 2015), cited on page 5 of Colusa's Motion, addresses various exceptions to section 20 of IGRA. It has nothing whatsoever to do with the IRA, the IRA's implementing regulations, or the facts of the instant case.

[6] Contrary to Colusa's representation, the administrative record confirms that the Federal Defendants were fully aware of — and fully considered — the Oroville site when evaluating the Tribe's need for additional trust land. *See, e.g.*, AR 22969-70 (Oroville site addressed in Tribe's application for fee-to-trust transfer of Yuba County property), AR 30168 (Federal Defendants' decision-making based on consideration of Tribe's application materials).

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The Federal Defendants responded that Colusa was not excluded from the IGRA consultation process; to the contrary, Colusa had refused to participate in the consultation despite a specific invitation from the Federal Defendants (ECF 116-1 at 28-29). The Federal Defendants also noted that the 25-mile radius for identifying "nearby governments" is a regulatory requirement (ECF 116-1 at 29-30).

Colusa's reply brief failed to dispute any of the points raised by the Federal Defendants, thereby conceding the issue(s) (*see* ECF 130). Accordingly, the Court's Summary Judgment Order rejected Colusa's claim (ECF 168 at 17-18).

Perhaps regretting its prior concession, Colusa has belatedly attempted to resurrect its IGRA claim by arguing that certain economic concerns have yet to be addressed (ECF 170 at 5-6). The argument is baseless. The Court thoroughly reviewed and properly rejected every aspect of the IGRA claim raised in Colusa's Motion for Summary Judgment ***despite the fact that Colusa abandoned the issue in its reply brief*** (ECF 168 at 17-18). There is no reason to reconsider that result.[7]

III. CONCLUSION

The Court's September 24 Summary Judgment Order thoroughly addressed and properly rejected Plaintiffs' claims, and Colusa has not made even a basic, *prima facie* showing that reconsideration is warranted.

Colusa has, however, managed to further prolong the Tribe's 14-year effort to re-establish a viable land base and move toward greater self-sufficiency. There is no just cause for further delay. The Tribe respectfully requests that Colusa's Motion for Reconsideration be denied.

[7] The Tribe notes *Citizens for Better Forestry v. U.S. Dep't of Agriculture*, 2007 U.S. Dist. Lexis 51378, *45-46 (E.D. Cal. July 3, 2007), in which reconsideration was denied under analogous circumstances.

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Dated: November 25, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2015, true and correct copies of **INTERVENOR-DEFENDANT'S OPPOSITION TO PLAINTIFF COLSUA INDIAN COMMUNITY'S MOTION FOR RECONSIDERATION** were served electronically on all parties for which attorneys to be noticed have been designated, via the CM/ECF system for the U.S. District Court for the Eastern District of California.

Respectfully submitted,

Dated: November 25, 2015

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