IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF JEMEZ, a federally recognized Indian tribe, Plaintiff, v. **UNITED STATES OF AMERICA**, Defendant, and **NEW MEXICO GAS COMPANY**, Defendant-in Intervention.	Case No. 1:12-cv-800 (JB)(JKR)

UNITED STATES' OPPOSITION TO
PLAINTIFF'S MOTION FOR RECONSIDERATION

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I. INTRODUCTION

Plaintiff's motion for reconsideration recasts its unsuccessful effort to quiet title to the Valles Caldera National Preserve and asks this Court to hold that it has title to four areas within the Preserve. Plaintiff's motion should be rejected for the same reason that this Court held that Plaintiff lacks aboriginal title to the entire Preserve – Plaintiff fails to meet its burden of proving that it is the exclusive aboriginal owner of the Preserve lands because those lands were used by a multitude of often-adverse Pueblos and Tribes.

Plaintiff has not identified any judicial error or misapprehension, much less provided any valid basis for reconsidering the Court's opinion. Instead, Plaintiff's motion for reconsideration rests on the unsupported assertion that other Tribes did not use four areas of the Preserve. Plaintiff is simply wrong. Other Tribes used Banco Bonito, Redondo Meadows, the San Antonio Valley, and Redondo Mountain in a manner that defeats Plaintiff's claim of exclusivity.

Plaintiff's motion is also procedurally deficient. First, Plaintiff attempts to replead its claim as one for separate subdivisions of the Preserve rather than the entire Preserve. Second, Plaintiff does nothing more, nor less, than present the Court with the same evidence the Court already found insufficient and ask the Court to draw a different conclusion. This Court should reject Plaintiff's effort to use a motion for reconsideration to improperly slice and then take a second, third, fourth, and fifth bite from the apple.

II. LEGAL STANDARD

The Federal Rules of Civil Procedure contain no express reference to a "motion to reconsider" or a "motion for reconsideration." *Warren v. Am. Bankers Ins. of Fla.*, 507 F.3d 1239, 1243 (10th Cir. 2007). Instead, such motions typically arise under Federal Rules of Civil Procedure 59(e) or 60. Under Rule 59(e), "a motion to alter or amend a judgment must be filed

no later than twenty-eight days after the entry of the judgment." Fed. R. Civ. P. 59(e). Rule 59(e) motions may be granted when "the court has misapprehended the facts, a party's position, or the controlling law" or "to correct clear error or prevent manifest injustice." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Where a motion to reconsider "seeks to alter the district court's substantive ruling, then it should be considered a [R]ule 59 motion and be subject to [R]ule 59's constraints." *Patterson v. Nine Energy Serv., LLC*, 355 F. Supp. 3d 1065, 1105-06 (D.N.M. 2018)(citations omitted).

A motion filed after the twenty-eight day period is "treated as a motion for relief from judgment under Rule 60(b)." *Anderson Living Tr. v. WPX Energy Prod., LLC*, 308 F.R.D. 410, 427 (D.N.M. 2015) (citation omitted). Rule 60 provides for relief from a judgment or order for a number of reasons, including "mistake," "newly discovered evidence," or "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1)-(6). Rule 60(b)(6)'s "any other reason" justification "should only be applied in extraordinary circumstances," *Anderson Living Tr.*, 308 F.R.D. at 430 (citation omitted), which is the type of legal error where, following the final judgment, "there had been a post-judgment change in the law [in a related case] 'arising out of the same accident as that in which the plaintiffs . . . were injured.'" *Id.* (citation omitted).

Movants for reconsideration carry a burden to "persuade the Court, using only the evidence and argument they put before it, that it should change its prior ruling . . . and they must convincingly refute both the counterarguments and evidence that the opposing party used to win the prior ruling and any new arguments and evidence that the opposing party produces while opposing the motion to reconsider." *Payne v. Tri-State Careflight, LLC*, No. CIV 14-1044, 2019 U.S. Dist. LEXIS 43374, at *69-71 (D.N.M. Mar. 16, 2019). A court should consider several factors in reviewing a motion to reconsider. *Anderson Living Tr.*, 308 F.R.D. at 434-35. First,

the Court should limit its review of a prior ruling "in proportion to how thoroughly the earlier ruling addressed the specific findings or conclusions that the motion to reconsider challenges." *Id.* at 434. Second, a court should consider "the case's overall progress and posture, the motion for reconsideration's timeliness relative to the ruling it challenges, and any direct evidence the parties may produce, and use those factors to assess the degree of reasonable reliance the opposing party has placed in the Court's prior ruling." *Id.* Finally, a court should consider the grounds for granting a motion to reconsider set forth in *Servants of Paraclete*. *Id.*

III. ARGUMENT

A. Plaintiff never possessed aboriginal title to any portion of the Preserve lands and this Court should reject Plaintiff's belated effort to subdivide the lands in a manner that runs contrary to Tribal use.

Plaintiff's belated effort to subdivide the Preserve into 90 polygons, many of which are neither narrow nor discrete, fails as a matter of law and fact. Plaintiff fails to cite any case supporting its assertion, ECF No. 405 at 5-8,[1] that a Tribe can subdivide hunting grounds into small polygons and then claim title to several of those polygons. To the contrary, hunting grounds do not map on to Plaintiff's narrow subdivisions, as animals can move long distances in unpredictable directions. *See* Trial Tr. at 1929:1-6, 5176:10-23; *Wichita Indian Tribe v. United States*, 696 F.2d 1378, 1385 (Fed. Cir. 1983) ("the northern two-thirds of Oklahoma where the Osage also hunted cannot have been used exclusively by the Wichitas. Lands continuously wandered over by adverse tribes cannot be claimed by any one of those tribes."). As this Court

[1] Plaintiff misuses the Tenth Circuit's direction regarding extinguishment of aboriginal title in this case. ECF No. 405 at 7-8. The full citation ties interference by third parties with Plaintiff's uses to the statute of limitations. *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1166 (10th Cir. 2015) ("As the cases make clear, if there was actually substantial interference by others with these traditional uses before 1946, the Jemez Pueblo will not be able to establish aboriginal title. In that circumstance, moreover, the Pueblo would be barred by the ICCA statute of limitations for failing to bring a claim before the ICC.").

found, many Tribes hunt in the Preserve. ECF No. 398 at 27-28, 31-34, 71-72, 118, 123, 163-65, 175, 185, 188, 194; DX-VG (outlining areas where Gov. Chavarria hunted); DX-FC-47 (Redondo Peak is Zia hunting ground). Plant gathering likewise cannot be subdivided as Plaintiff suggests. DX-EZ-83 [redacted]; ECF No. 398 at 170 (osha grows around Caldera's edges).[2]

As this Court found, use by these often-adverse Tribes defeats Plaintiff's claimed exclusivity. ECF No. 398 at 509-28. Other Tribes view the entire Preserve as sacred and have used the entire Preserve lands for their cultural purposes. ECF No. 386 at ¶¶ 313, 456-61; Trial Tr. 4615:9-4616:7 [redacted] ECF No. 398 at 140-41 [redacted] And the [redacted] Apache Nation's use – and conception of itself as the exclusive aboriginal owner – of the lands at issue singlehandedly defeat Plaintiff's claim. ECF No. 398 at 72, 124-28, 152-54, 195, 202 518, 523-24, 527. [redacted] traveled throughout the Preserve lands, including Banco Bonito and Redondo Peak. *Id*. *See also*, ECF No. 386 at ¶¶ 137-39, 301, 549, 570. Plaintiff's belated effort to subdivide the Preserve into many areas does not withstand scrutiny. In addition to being procedurally inappropriate, *see* pages 17-24 below, Plaintiff's motion fails on the facts.

1. Plaintiff never possessed aboriginal title to Banco Bonito.

Plaintiff's motion for reconsideration dramatically overstates the scope of Plaintiff's use and ignores use by other Tribes. Plaintiff remains unable to carry its burden of proving that it established and maintained aboriginal title. Contrary to Jemez's assertions, the Court properly found that other Tribes occupied the Preserve lands and properly addressed evidence of other Tribes' use of Banco Bonito elsewhere in the Opinion. ECF No. 398 at ¶ 86. While the Court

[2] Plaintiff even bases its claim to the San Antonio Valley on its understanding that everything that it sees when conducting religious observance is part of its ceremonies. PX-190-113.

need not expand upon its original findings, the record offers more support for confirming the Court's conclusion that Plaintiff lacks title to any portion of the Preserve lands.[3]

As an initial matter, Plaintiff's suggestion, ECF No. 405 at 14, that it farmed the entire Banco Bonito is incorrect. Fieldhouses are located [redacted] Banco Bonito located in the Preserve's extreme southwest corner. DX-RZ-3-4.[4] Plaintiff's effort to extend its ancient farming of one portion of Banco Bonito to its entire polygon highlights Plaintiff's inconsistent treatment of tribal use. Plaintiff contends that it establishes exclusivity by establishing that its members set foot somewhere within a polygon, but demands that the United States establish that other Tribes set foot on every square inch of ground within the same polygon. Plaintiff cannot have it both ways. *See Wichita Indian Tribe*, 696 F.2d at 1385.

Moreover, Plaintiff mischaracterizes the United States' experts' opinions regarding Banco Bonito. ECF No. 405 at 10. While the United States' experts recognize that farming for a limited, non-continuous period of time led to the deposit of Jemez pottery, they also identified other Tribes' uses. Contrary to Plaintiff's representation, *id*., Dr. Steffen did not refer to Banco Bonito as Plaintiff's. She instead critiqued Plaintiff's focus on fieldhouses as the only evidence of aboriginal occupation. DX-RZ-3, 6. And in her capacity as Cultural Resources Coordinator, Dr. Steffen facilitated [redacted] from Banco Bonito. DX-ND; DX-NP.

Dr. Anschuetz placed Zia in many areas around Banco Bonito and drew the only reasonable conclusion – that Zia traversed Banco Bonito.[5] Plaintiff significantly misstates [redacted]

[3] Jemez misconstruing footnote 34 of the Opinion to focus solely on Banco Bonito, ECF No. 405 at 10-12, does not detract from the evidence that none of the Preserve was exclusively Plaintiff's.
[4] Plaintiff repeatedly blurs the line between the small portion of Banco Bonito that contained field houses hundreds of years ago and the larger portion of Banco Bonito that does not.
[5] While Jemez is correct that Dr. Anschuetz noted Jemez farmed within Banco Bonito, ECF No. 405 at 10, the next sentence of Dr. Anschuetz's report highlights that [redacted]

[redacted] and Dr. Anschuetz's testimony regarding [redacted] including Banco Bonito. ECF No. 405 at 18-20. Contrary to Plaintiff's assertion that no [redacted], *id.* at 20, Dr. Anschuetz established that [redacted] DX-RP-170-72; *see also*, DX-FC-46, 49. Moreover, Dr. Anschuetz made clear that [redacted], but that the springs are used by "all" Zia. Trial Tr. at 4640:19-4643:8; DX-RP-207. [redacted]. ECF No. 386 ¶ 369; Trial Tr. at 4651:1-5. [redacted]. DX-FC-50-52. As illustrated by Dr. Ellis, [redacted] DX-EY; ECF No. 386 ¶ 521. Dr. Anschuetz's conclusion that Zia members traversed Banco Bonito is reinforced by the fact that, as discussed at pages 8-12 below, [redacted]. As Plaintiff recognizes in arguing that its trails are evidence of use, ECF No. 405 at 26-27, [redacted].[6]

Plaintiff rests much of its motion on the unsupported assertion that [redacted]. ECF No.

[redacted]. DX-RP-201; *See also* ECF No. 398 at 22-24 ([redacted]).

[6] The United States also does not dispute Plaintiff's assertion ECF No. 405 at 5, that Plaintiff's modern use may support the inference that Plaintiff's practices began many years earlier. But the same inference applies with equal force to all other Tribes.

405 at 19. The unremarkable proposition that [redacted], rather than diverting many miles around the 11,254-foot Redondo Mountain, is reinforced by the fact that Jemez, Zia, and Santa Ana previously understood that the three Tribes had a "common interest" in an area of land that included Banco Bonito and is bounded on the east by Redondo Peak. ECF No. 386 ¶¶ 465-67.[7]

Plaintiff's argument is not saved by the high incidence of its pottery in Banco Bonito. As Mr. Gauthier established, sherds of non-Jemez pottery were found in six different locations in Banco Bonito and Redondo Meadows.[8] Four sherds from three different Tewa and Keres vessels were found at [redacted] DX-RR-8 (orange dot); DX-RT-2 (pottery at [redacted] dates to 1650, before Pueblo Revolt). And non-Jemez sherds, including pre-1325 Pajarito PIII, were found at [redacted], and at isolate locations [redacted]. DX-RR-8-9, DX-RT-1, 2, 5; PX-105. In contrast, Plaintiff bases its claim to the entire Valle San Antonio on: 1) a single sherd of Jemez pottery; and 2) its unsupported assertion that post-1700 pottery created by a Keres pueblo was deposited in the Valle San Antonio by Jemez. [redacted].[9] In sum, the pottery record, combined

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[7] Two of Plaintiff's witnesses premised their work on the assumption that people generally take the shortest, least energy-intensive route from place to place. Trial Tr. at 55:14-20 (Fogleman); PX-188-12 (Liebmann); ECF No. 386 ¶¶ 564-66 (Liebmann and Roney); PX-187-17 (Fogleman's prediction that Plaintiff, [redacted]

[8] Because of the locations' proximity and the different mapping techniques employed by Dr. Ferguson and Mr. Gauthier, the intersection of sites mapped by Mr. Gauthier and Dr. Ferguson's Banco Bonito polygon is unclear.

[9] While Plaintiff's Valle San Antonio Polygon appears to exclude [redacted], a sherd of Pajarito PIII utility ware was found at this site bordering the Valle San Antonio. DX-RR-8; DX-RT-5. Pajarito PIII Utility was produced by Keres and Tewa from 1150 to 1325, and therefore provides evidence of those Tribes using the Preserve lands. DX-RR-12.

with other knowledge about Keres and Tewa cultural and religious practices, strongly supports the conclusion that Jemez use of Banco Bonito was not exclusive.[10]

Importantly, the evidence indicated that other Tribes made Banco Bonito dangerous for Plaintiff. Plaintiff's own witnesses admitted that [redacted] ECF No. 386 ¶ 570. [redacted] hunted throughout the Caldera, made the Preserve lands dangerous for Plaintiff, and conceived of itself as the exclusive owner of Banco Bonito (including the portion currently in the Preserve lands). ECF No. 398 at 128 n.112, 195-96, 518, 523-24, 527; ECF No. 386 ¶¶ 137-39, 301, 549, 570. And rather than dominating the Preserve's southwest corner, the evidence establishes that Plaintiff "submit[ted] to Santa Clara Pueblo, San Ildefonso Pueblo, and the Ute Tribe's authority" in the area between Valle Grande and Walatowa—in or near Banco Bonito—in 1863. ECF No. 398 at 520, 527; ECF No. 386 ¶ 64.

2. Plaintiff never possessed aboriginal title to Redondo Meadows.

Plaintiff's claim, ECF No. 405 at 20-22, that other Tribes did not use Redondo Meadows is wildly inaccurate. The Baca geothermal project area substantially overlaps with Plaintiff's "Redondo Meadows" polygon. *Compare* DX-EU-47, 60, 66 and DX-FS-12 with ECF No. 405-2. *See also* ECF No. 398 at 129. In other words, eighteen Pueblos filed suit challenging geothermal development because they used the area Plaintiff claims was used solely by Plaintiff.

[10] To the extent that Plaintiff bases its claim to the arable western portion of Banco Bonito on its former fieldhouses indicating to Zia that the land was Plaintiff's, ECF No. 405 at 18 n.10, Plaintiff neither established nor maintained title because it never continuously occupied the fieldhouses. ECF No. 386 ¶ 566-69. Moreover, the United States respectfully submits that this Court should hold that Plaintiff abandoned or Spain extinguished any title that might have been associated with the fieldhouses. *See* ECF No. 398 at 42 n.38, 64, 71-82. Regardless, Spain's decimation of Plaintiff's population and concentration of Plaintiff 20 miles south of the Preserve means that for at least 350 years, Tribes were not deterred by an occupied Jemez fieldhouse.

The Court properly based its findings on Lois Weslowski's description of the "Redondo Creek" area as a joint use area. ECF No. 398 at 60-61. It need not, but can, supplement its original findings with the words of Plaintiff's past and current witnesses further establishing that other Tribes used and use the area Plaintiff now calls "Redondo Meadows."[11] Ms. Weslowski wrote that "Zia and Santa Ana value [the geothermal project area] in much the same way as the Jemez, since the project area is acknowledged as part of the aboriginal homeland of these Tribes. In earlier years, it was cooperatively used by all three Pueblos for similar procurement and ceremonial purposes." PX-28-44. Plaintiff's expert Dr. Ellis noted in describing [redacted] DX-EZ-81-83. In other words, [redacted] DX-VG.[12] [redacted] DX-EU-213 (also noting [redacted] This is not surprising, as [redacted]. ECF No. 386 ¶¶ 391-96, 605; DX-VG (map of Preserve); DX-FC-50-52 [redacted] DX-EZ-58 [redacted] Trial Tr. at 4644:5-4645:8

[11] The Court can also supplement its findings with the record of *eighteen New Mexico pueblos* insisting that they frequented this area since "pre-Columbian" times. ECF No. 386 ¶¶ 145-53.
[12] Regardless of whether "Redondo Meadows" means the small meadow mapped in DX-VG or the polygon in ECF No. 405-2, [redacted] defeats any claimed exclusivity.

(Anschuetz). Plaintiff's suggestion, ECF No. 405 at 22, that [redacted] is simply untrue.

If the Court requires additional evidence, trial established that Zia and Santa Ana hunted in the Valle Seco, ECF No. 398 at 118, which is located directly between Plaintiff's Valle San Antonio and Redondo Meadows polygons. DX-VG. The Court should conclude that Zia and Santa Ana members on hunting trips walked through the areas at issue here.

Plaintiff's own witnesses made clear that the "Redondo Meadows" area was used by a multitude of other Tribes, [redacted]. Ms. Weslowski wrote that "[o]ther tribes were also noted as utilizing the project area for gathering medications and other ceremonial needs. Various consultants consistently named [redacted]." PX-28-44. Jemez's witness before the ICC testified that [redacted] ECF No. 386 ¶128. These admissions were confirmed by [redacted] within the [geothermal] project area." DX-EU-694. Such uses defeat Plaintiff's claim to exclusively use Redondo Meadows. Trial Tr. at 4586:6-18 (Anschuetz).

3. Plaintiff never possessed aboriginal title to Valle San Antonio.

Plaintiff is similarly incorrect that it "is the only tribe that used and occupied the western two-thirds of the Valle San Antonio subarea." ECF No. 405 at 22.[13] [redacted]. Trial Tr. at 5112:24-5114:21 [redacted]; DX-VG (mapping areas

[13] Defendant also notes that Plaintiff's own efforts to map its territory at the time of Spanish arrival excluded the entire Valle San Antonio. ECF No. 386 ¶ 481. And Plaintiff has placed all points north of Redondo Peak outside of its aboriginal territory by referring to Redondo Peak as the boundary of lands it held in common with Zia and Santa Ana. *E.g.* PX-28-38, 44.

[redacted]; Trial Tr. at 4131:10-4132:15 (Kehoe); 5067:1-23 (Anschuetz) (discussing DX-VF). Santa Clara traversed the Valle San Antonio to, among other things, [redacted]. ECF No. 386 ¶ 521 (citing DX-RP-177-79; Trial Tr. at 4600:21-4602:13); DX-SB-16; DX-LL-4-5, 11, 14-15, 17-23, 27 (describing and mapping route [redacted]). Indeed, [redacted] ECF No. 386 ¶ 313.

The Navajo accessed the Preserve lands from the west. ECF No. 386 at ¶¶ 55-56, 64-66, 301, 441, 445-47, 520, 571; PX-28-44 ("The [redacted]"). Plaintiff's own stories place hostile Navajo in the Valle San Antonio. Trial Tr. at 1955:11-1958:10; ECF No. 386 ¶ 51.

Zia's use similarly defeats Plaintiff's claim to exclusivity. Plaintiff's characterization of the "[redacted]" area, ECF No. 405 at 23, is puzzling. The [redacted]. DX-VG. And Dr. Ellis's map of these locations, consistent with the concept that a mountain's sacredness is not confined to its peak, Trial Tr. at 4463:13-4465:1, include portions of the San Antonio valley and the river itself. DX-EY.[14] Moreover, Plaintiff's witness before the Indian Claims Commission testified (immediately after discussing Redondo Peak) [redacted] DX-CK-31, 33; DX-LL-27 ([redacted]).

[14] Indeed, Plaintiff bases its use of San Antonio Creek on plant gathering on San Antonio Mountain. PX-190-107.

Plaintiff's witness similarly identified an area in "the northeastern corner of the green [shaded area on DX-CC], just west of Redondo" as used [redacted] DX-CK-65. Plaintiff's effort to subdivide the Valle San Antonio is unavailing because Plaintiff's use was not exclusive.

4. Plaintiff never possessed aboriginal title to any portion of Redondo Mountain.

Plaintiff continues to fall far short of establishing its exclusivity to Redondo Peak, in particular, because of the overwhelming evidence that all of Redondo Mountain is a commons. As an initial matter, it is unclear whether Plaintiff is reframing its case to seek the entirety of Redondo Peak [redacted] Regardless, Plaintiff fails to meet its burden of establishing title to any part of Redondo Peak, which was used by a multitude of Tribes for centuries. ECF No. 398 at 16-18, 85, 105, 117-19, 129-32, 135, 172-81; ECF No. 386 ¶¶ 158-87, 301-20, 572-82. Redondo Peak was used so heavily, by so many often-adverse Tribes, that Plaintiff cannot sustain its burden. *See* ECF No. 398 at 446-53.[15]

Some Tribes began using the Preserve lands prior to Plaintiff, thus defeating any suggestion that Plaintiff was the first to establish some sort of aboriginal claim to Redondo Peak. *See* pages 14-15, below. And other Tribes made it dangerous for Plaintiff to access the Preserve lands, thus defeating any claim by Plaintiff that it dominated Redondo—or any other portion of the Preserve lands—after the 1600s. *Id*.

To the extent that Plaintiff is asserting that it [redacted], Plaintiff offers no legal support for its assertion that aboriginal title can be sliced so

[15] The United States notes that the Indian Canon of Construction is inapplicable where, as here, "all tribal interests are not aligned." *Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015). *Contra* ECF No. 398 at 453-54.

finely.[16] [redacted] And the many Tribes who traverse [redacted] while making pilgrimages must [redacted], thereby defeating Plaintiff's unsupported assertion that the trails are exclusive to Plaintiff.

Many Tribes view the [redacted] Trial Tr. 4594:8-4595:20 (Anschuetz). Contrary to Plaintiff's representation that "[t]here is no evidence that any other tribe or pueblo used" [redacted] Plaintiff's former expert Dr. Ellis documented [redacted] DX-FC-45-46; *id* at 48-50. [redacted] DX-FC-45-46, 48-50, 58; *see also*, ECF No. 398 at 178; ECF No. 386 ¶¶ 34, 331, 368, 394. Plaintiff has not established title to any spring.

The United States clarifies that, at a minimum, Congress's rejection of Plaintiff's effort to purchase 200 acres on Redondo Peak in 2000 means that Plaintiff lacked title to that land. *See* ECF No. 398 at 143-44, 146. *See also*, *id*. at 150-51. Plaintiff's explicit admission to Congress that it lacked title to Redondo Peak and Congress's rejection of Plaintiff's offer to purchase

[16] Plaintiff offers no support for finding that it holds aboriginal title to either a small rock feature, the land underneath that feature, or both.

Redondo Peak provide independent bases for rejecting Plaintiff's motion for reconsideration. Regardless, it would be difficult to identify a place that has been used by more Tribes, many of them often adverse to Plaintiff, than Redondo Mountain – particularly Redondo Peak. As with the entire Preserve, Plaintiff cannot prove it exclusively used any portion of Redondo Mountain.

B. Plaintiff fails to meet its burden to establish that it was the exclusive aboriginal user of the lands at issue through 2000.

Plaintiff continues to misstate and misapply the law of aboriginal title in an effort to establish and then freeze aboriginal title. ECF No. 405 at 3-9. Plaintiff is incorrect because, as this Court found, use of the entire Preserve lands by adverse Tribes defeats Plaintiff's effort to rely on exceptions to the rule that a Tribe must exclusively possess land for its aboriginal title to be recognized. ECF No. 398 at 509-28. Indeed, Plaintiff's efforts to reframe its claim make clear that, regardless of whether the Preserve is analyzed as a single parcel or as many individual parcels, Plaintiff's claims fail because other tribes used the lands prior to Plaintiff and tribes have continuously used the lands despite being adverse to Plaintiff.

Plaintiff provides no basis for reconsidering this holding by reframing the relevant time period when it allegedly "settled in the Jemez Mountains in the 13th Century" or ending the relevant period "during the Spanish colonial and Mexican periods." *Id*. at 5. Plaintiff's efforts to reframe the relevant time period are legally unsound and Plaintiff's assertions of dominance during these periods is factually unsupported.[17] Plaintiff's poorly-defined "relevant periods" attempts to define away periods prior to its arrival in the area near the Valles Caldera and after other Tribes began dominating Plaintiff's use of the Preserve lands. Plaintiff cites no law supporting its assertion that aboriginal title can be frozen for over 300 years, *id*. at 4, through a

[17] As set forth below, Plaintiff fails to establish its exclusivity even within that window because Zia and Santa Clara, at a minimum, have continuously used the Preserve lands since before 1300.

period when Plaintiff's own expert admits that Plaintiff was unable to prevent adverse Tribes from traversing, gathering resources from, and worshipping on the Preserve lands. ECF No. 398 at 84. Nor does Plaintiff cite any case in which the scope and depth of other Tribal use approaches use by over fifteen Tribes of the Preserve lands here.

If Plaintiff is correct that aboriginal title, once established, cannot be lost except through abandonment, conquest, or Congressional extinguishment, ECF No. 405 at 4, then this provides an independent basis for denying reconsideration.[18] The evidence indicates that Zia began using the Preserve lands prior to Jemez. PX-154 at 8-9 (Jemez contends it arrived around 1300); DX-RI-2; ECF No. 398 at 21-22 n.18, 35-36, 132, 157. As discussed below, [redacted] at issue in this motion. Plaintiff did not establish that it conquered any tribe, including Zia. *See id*. at 21-22. To the contrary, Plaintiff repeatedly admitted prior to filing this lawsuit that the areas Jemez used in the Preserve were used jointly with Zia. *Id*. at 60-61, 113-21. And as the Court found, the Tewa used the Preserve lands "as early as 1200." *Id*. at 49 (Tewa ceramics). Plaintiff asserts that a tribe that first used an area establishes a title to that area that can only be voided by conquest. ECF No. 405 at 4-5. Following Plaintiff's logic, Zia or the Tewa – not Jemez – would have had a stronger claim to aboriginal title to the Preserve prior to expiration of the statute of limitations because they have been using the lands at issue for longer than Plaintiff.

Plaintiff is similarly unable to evade the past several hundred years of history establishing that many often-adverse Tribes used the Preserve lands – including the areas at issue here – without permission from or being dominated by Plaintiff. Plaintiff cites no case establishing that its purported title, if established, would survive through several centuries following Spain's

[18] The United States maintains that both Congressional actions and the actions of the third-party owners of the Preserve lands independently extinguished any aboriginal title well before 2000.

decimation of Plaintiff's population, during which: 1) Plaintiff lacked the ability to dominate the Preserve lands; and 2) other Tribes made it dangerous for Plaintiff to access the lands. As this Court addressed, Plaintiff cannot establish that it was the exclusive aboriginal user where other, often-adverse, Tribes used the same lands. ECF No. 398 at 509-28. Moreover, this Court has already analyzed the very question Plaintiff puts before it, and did not find that Plaintiff proved it held aboriginal title to any portion of the Preserve. Closing Arg. Tr. at 80:18-81:16 (considering whether Court could find that Plaintiff has title to a portion of the Preserve).

The cases Plaintiff cites establish that Plaintiff must maintain its alleged title through the alleged taking of that title in 2000 by Congress. Plaintiff cannot avoid the facts that: 1) other Tribes used the specific areas at issue while occupying the Preserve lands prior to Plaintiff; 2) other Tribes used the specific areas at issue continuously from 1300 to 1700; and 3) other Tribes made the Preserve a dangerous place for Plaintiff's few members after 1700. From the time of the Baca Grant in 1860, the Navajo, Santa Clara, San Ildefonso, Ute, and Jicarilla, at a minimum, used the lands at issue in a manner that defeats Plaintiff's claim to exclusivity because those Tribes: 1) used the lands at issues; and 2) either could have or did dominate Plaintiff within the Preserve lands at that time. ECF No. 398 at 84, 87-91, 123-28; ECF No. 386 ¶¶ 46-69. Indeed, Plaintiff must establish that it maintained any aboriginal title through 2000, the date on which Plaintiff alleges that its title was interfered with. *Sac & Fox Tribe of Indians of Okla. v. United States*, 383 F.2d 991, 998-99 (Ct. Cl. 1967) (title is not "frozen" on date of discovery or the United States' establishment). *See also* ECF No. 398 at 476. Plaintiff did not and cannot do so.

C. Plaintiff's use of a motion for reconsideration to dramatically reframe its case from a case regarding the entire Preserve to a case regarding discrete areas of the Preserve after judgment is inappropriate.

Plaintiff's effort to belatedly subdivide the Preserve fails because other Tribes used and continue to use the entirety of the Preserve's lands in a manner that is incompatible with

Plaintiff's claim to exclusive use. Moreover, Plaintiff asks this Court to use Rule 59(e) for a prohibited purpose. Rule 59(e) "'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" *Nelson v. City of Albuquerque*, 921 F.3d 925, 929 (10th Cir. 2019) (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008)); *see also Dombos v. Janecka*, 2012 WL 1372258, *3 (D.N.M. April 12, 2012) ("A motion for reconsideration is an 'inappropriate vehicle[ ] to reargue an issue previously addressed by the court when the motion merely advances new arguments, or supporting facts which were available at the time of the original motion.'")(citation omitted). Plaintiff's motion seeks to do both. Plaintiff again argues that it used the Preserve to the exclusion of other Tribes. In doing so, it presents no new evidence, but instead performs an about-face from its former position that it had title over the entire Preserve, and instead argues there is insufficient evidence that other Tribes used subareas of the Preserve. ECF No. 405 at 2-3. The evidence proved otherwise and demonstrated that Plaintiff did not exclusively use any portions of the Preserve, including the four subareas. Plaintiff's motion should be denied.

D. Plaintiff's argument fails to carry its burden to prove that this Court misapprehended the facts or that a legal error occurred.

1. This Court's final judgment specifically addressed whether Plaintiff exclusively used Banco Bonito, Redondo Mountain, Redondo Meadows, and the Valle San Antonio.

Plaintiff appears to contend that the Court erred by finding that Plaintiff lacked title to any portion of the Preserve lands and that this Court should reconsider the evidence with respect to Banco Bonito, Redondo Mountain, Redondo Meadows, and portions of Valle San Antonio. ECF No. 405 at 2-3. A court's review of its prior ruling is relatively narrow and focuses on reducing "the depth of the Court's analysis the second time around" and "the time and expense that the party opposing reconsideration spent in winning the earlier ruling, and [a court] should

try to prevent that party from having to bear the same impositions again." *Anderson Living Tr.*, 308 F.R.D. at 435. This Court and the United States expended significant time and resources thoroughly litigating this case. That factor weighs heavily against granting Plaintiff's motion.

"How 'thoroughly' a point was addressed depends both on the amount of time and energy the Court spent on it, and on the amount of time and energy the parties spent on it—in briefing and orally arguing the issue, but especially if they developed evidence on the issue." *Anderson Living Tr.*, 308 F.R.D. at 434. This Court and Parties expended tremendous time and energy litigating Plaintiff's claims. The Parties spent two years conducting discovery, including fifty-seven depositions, and briefing many motions, including summary judgment. Prior to trial, this Court reviewed briefs, heard argument, and issued a ruling on exactly what evidence was relevant to Plaintiff's burden to prove it held aboriginal title to the Valles Caldera. *See Pueblo of Jemez v. United States*, 350 F. Supp. 3d 1052, 1119-20 (D.N.M. 2018). Over a twenty-one day trial, this Court heard testimony from 31 witnesses and admitted over 700 exhibits centered on the question of whether Plaintiff exclusively used the Valles Caldera as a whole. The evidence provided a history of the many Tribes whose ancestors utilized the Valles Caldera for hundreds of years, maintain their connection to and use of the land, and never sought Plaintiff's permission to use the land. The Court reviewed hundreds of pages of post-trial filings and drafted a 530-page opinion thoroughly rejecting Plaintiff's claim that it exclusively used the Valles Caldera.[19]

The Court addressed the arguments Plaintiff makes here regarding its purported exclusivity in determining that Plaintiff lacks title to Banco Bonito by finding that: 1) Zia, at a minimum, used the area; 2) the Spanish concentrated Plaintiff 20 miles away in Walatowa; and

[19] The Court also examined and rejected Plaintiff's claim to exclusively use Banco Bonito. Closing Arg. Tr. at 80:18-88:11.

3) Plaintiff and Zia recognized that Zia used an area encompassing Banco Bonito in common with Plaintiff. ECF No. 398 at 77-82, 113-121, 178-79, 513-514, 521-22. The Court similarly addressed the arguments Plaintiff makes regarding Redondo Mountain by finding, among other things, that Redondo Peak is used by at least fifteen Tribes. *Id*. at 16-18, 85, 105, 117-19, 129-32, 135, 172-81. And the Court addressed the arguments Plaintiff makes in determining that Plaintiff lacks title to Redondo Meadows by finding, among other things, that many Tribes use it based upon their challenge to geothermal development in Redondo Meadows. *Id*. at 128-37, 175. So too with the Valle San Antonio. *Id*. at 50, 61, 64, 184-86, 513.

A motion to reconsider that "rehashes the same arguments . . . and essentially asks the Court to grant the movant a mulligan on its earlier failure to present persuasive argument and evidence" faces a challenging task. *Anderson Living Tr.*, 308 F.R.D. at 434; *see also Dombos*, 2012 WL 1372258, at *7 (denying reconsideration motion because it "relies on evidence that has already been available to [movant] and on which he has relied before in his previous filings with the Court"). Though Plaintiff attempts to characterize its motion as a request for this Court to reconsider a small, discrete portion of its prior ruling, ECF No. 405 at 1, Plaintiff instead asks this Court to reconsider whether Plaintiff proved that it exclusively used and occupied large areas of the Preserve. Plaintiff's motion regurgitates the same arguments it made at trial, presents no new evidence disproving or calling into question this Court's thorough consideration and analysis of the evidence presented throughout trial.

- Compare ECF No. 405 at 10 and ECF 237 at 9 (NPS staff consult with Jemez regarding Banco Bonito archaeological resources)
- Compare ECF No. 405 at 16-17 and ECF 237 at 9 (focusing on predominance of Jemez pottery on Banco Bonito)
- Compare ECF No. 405 at 25-26 and ECF 237 at 15, 29 (asserting uniqueness of Plaintiff's use of Redondo Peak)

Plaintiff's motion should be denied on this basis, standing alone.

2. Plaintiff is bound by its prior case strategy of seeking title to the entire Preserve.

While Plaintiff's motion for summary judgment put this Court and the United States on notice that Plaintiff sought to carve out Banco Bonito and Redondo Mountain as discrete areas within the Preserve, Plaintiff made no similar effort to carve out Redondo Meadows or any portion of the San Antonio Valley. Plaintiff is bound by its formulation of this case as a challenge to title over the entire Preserve and cannot now recast its case as a challenge to dozens of discrete areas. *Rivero v. Bd. of Regents of the Univ. of N.M.*, No. CIV 16-0318 JB\SCY, 2019 U.S. Dist. LEXIS 36803, at *196 (D.N.M. Mar. 7, 2019) ("Courts will not grant relief when the mistake of which the movant complains is the result of an attorney's deliberate litigation tactics."). Plaintiff had ample opportunity to re-plead its case and put on evidence of its use and exclusivity over distinct portions of the Preserve, and did indeed offer such evidence with respect to some areas of the Preserve. Plaintiff similarly had the opportunity to frame its case as a challenge to title to distinct polygons within the Preserve, but instead framed its case as a challenge to title to the entire Preserve. Having thoroughly considered the evidence, this Court found that Plaintiff failed to prove its exclusive and dominant use of the Preserve. "[O]nce a district court enters judgment, the public gains a strong interest in protecting the finality of judgments." *Nelson*, 921 F.3d at 929. Plaintiff's renewed attempt to prove its case using the same evidence presented at trial is inappropriate.

E. Plaintiff's newfound claims to Redondo Meadows and the western two-thirds of Valle San Antonio are precluded by Rule 15(b).

Plaintiff's motion is based on the alleged "lack of geographically specific findings or record evidence showing other tribal uses in . . . four discrete areas." ECF No. 405 at 2-3. As set forth below, there is no such "lack of . . . findings or . . . evidence." But if there were, it is in part

at least the result of the fact that Plaintiff is now seeking judgment on claims that were neither pled nor tried. The Court cannot allow such post-trial maneuvering to undo the results of a full trial (following years of discovery).

The Complaint was premised entirely upon a claim of aboriginal title to the entirety of the Preserve. ECF No. 1 at 3, 14-15. Plaintiff's motion assumes that evidence was compiled on different issues – Plaintiff's use of discrete areas. Where evidence deviates from the pleadings, Rule 15 governs.[20] By the Rule's language, there are two methods for allowing the adjudication of unpled claims: a finding that the unpled issues were in fact tried "by the parties' express or implied consent," or granting a post-trial motion to conform the pleadings to the evidence. *Id.* The latter "mechanism of Rule 15(b) is . . . inapplicable" because "Plaintiff[] filed no such motion," *Green Country Food Mkt., Inc. v. Bottling Grp., LLC*, 371 F.3d 1275, 1281 (10th Cir. 2004), and because a motion to conform cannot be granted where doing so would prejudice the nonmoving party. Prejudice here is undeniable: shifting the basis for a claim after years of litigation, scores of depositions, and a lengthy trial is the epitome of prejudice. *McFarlane v. Millard Cty.*, No. 2:17-CV-00599-DS, 2018 WL 296091, at *1 (D. Utah Jan. 4, 2018) ("[c]ourts will properly deny a motion to amend when it appears that the plaintiff is using Rule 15 to make

[20] Federal Rule of Civil Procedure 15(b)(2) provides:

> When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

Rule 15(b) is "intended to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel." 6A Wright, Miller & Kane, *Federal Practice and Procedure*, § 1491 (3d ed. 2019).

the complaint a moving target, to salvage a lost case by untimely suggestion of new theories of recovery . . .") (citing *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1206 (10th Cir. 2006)).

So the question is whether the claims Plaintiff now presses were "tried by the parties' express or implied consent." Fed.R.Civ.P. 15(b). Because Banco Bonito and Redondo Peak were the subject of Plaintiff's summary judgment motion, Tenth Circuit precedent suggests that these issues satisfy the consent prong of Rule 15(b). *See Reed v. Phillip Roy Fin. Servs., LLC*, 546 F. Supp. 2d 1219, 1230 (D. Kan. 2008), *amended in part by Reed v. Phillip Roy Fin. Servs., LLC*, 2008 WL 2556692 (D. Kan. June 23, 2008) ("plaintiff has argued these issues on summary judgment. In fact, these issues were significantly important in the Court's decision on summary judgment"); *Owner-Operator Indep. Drivers Ass'n, Inc. v. USIS Commercial Servs., Inc.*, 537 F.3d 1184, 1190 (10th Cir. 2008) ("USIS first raised the statutory exclusion in its motion to dismiss. It revived this argument when it moved for judgment as a matter of law. . . . The plaintiffs responded to this argument on the merits in its responses to both motions.").

But the Redondo Meadows and San Antonio Valley claims were the subject of no pretrial motions and are now asserted for the first time as separate claims. Claims to title to these discrete areas were not tried by consent, express or otherwise. Evidence relating to these areas *was* adduced, but *only* because such evidence was relevant to the one issue the Complaint did put in issue – Plaintiff's alleged aboriginal title to the entirety of the Preserve. As to these issues, Rule 15(b) is therefore *not* satisfied. *Smith v. Glob. Staffing*, 621 F. App'x 899, 904 (10th Cir. 2015) ("Implied consent [to try an issue under Rule 15(b)] cannot be based upon the introduction of evidence that is relevant to an issue already in the case when there is no indication that the party presenting the evidence intended to raise a new issue"); *Eller v. Trans Union, LLC*, 739 F.3d 467, 481 (10th Cir. 2013); G*reen Country Food Mkt., Inc.*, 371 F.3d at 1280. Plaintiff

should not be able to recast its argument after trial to attack the individual blades of grass that the United States did not focus on in presenting its defense of the entire Preserve.[21]

F. This Court should strike Plaintiff's "exhibits" because they evade page limits.

This Court limits memoranda in support of motions to 27 double-spaced pages absent leave. D.N.M. LCvR 7.5. Federal courts routinely warn litigants not to use textual footnotes to evade page limits. *See Kano v. Nat'l Consumer Coop. Bank*, 22 F.3d 899 (9th Cir. 1994) (imposing sanctions for improper line spacing and excessive footnotes); *Caldera v. J.M. Smucker Co.*, No. CV 12-4936-GHK, 2013 U.S. Dist. LEXIS 183975 (C.D. Cal. Oct. 4, 2013) (striking brief for "excessive use of footnotes"); *Ibrahim v. Dep't of Homeland Sec.*, No. C 06-00545 WHA, 2014 U.S. Dist. LEXIS 145642, at *8 (N.D. Cal. Oct. 9, 2014) (striking filings that were "not a good faith effort to comply with the page limits"). Plaintiff's exhibits E, F, G, H, and I, ECF Nos. 405-5-9, consist entirely of single-spaced text critiquing several of this Court's findings of fact. These "exhibits" evade Local Rule 7.5 because they: 1) are not exhibits; 2) convert portions of Plaintiff's brief into "exhibits," and 2) reduce the spacing of those "exhibits" so that they do not comply with the Court's spacing requirement. The Court should therefore strike these "exhibits."

To the extent this Court considers Plaintiff's "exhibits," their critiques of this Court's findings are unpersuasive. For example, ECF No. 405-9 contends that there is no evidence on one map that Santa Clara and Navajo members would travel to the western part of the Preserve lands. ECF No. 405-9. But as discussed above, pages 10-11, [redacted] And it cannot reasonably be disputed that

[21] The United States developed evidence regarding Banco Bonito and Redondo Mountain, in particular, at trial. Plaintiff's presentation of its claim as one for the entire Preserve did not provide the United States with reason to similarly focus on Plaintiff's other polygons.

Navajo entering and exiting the Preserve's southeast portion traveled west through Banco Bonito or northwest through Valle San Antonio, or both. *See* page 11, above. Plaintiff is similarly incorrect that it "has always been consistent with its Banco Bonito exclusivity." ECF No. 405-8. To the contrary, Plaintiff repeatedly described its use of a portion of the Preserve lands as a "common interest" with Zia and Santa Ana. ECF No. 386 ¶¶ 119-33, 145-51, 155, 173-74, 465-67; ECF No. 398 at 113-21. And Plaintiff's critique that footnote 34 of the Court's opinion improperly relies upon evidence of Tribes' shrines and Navajo hogans, ECF No. 405-5, is similarly unpersuasive. As Dr. Steffen, among others, noted, aboriginal use can take many forms in addition to architecture. DX-RZ-3, 6. Indeed, Plaintiff's claims to the 99% of the Preserve that lacks fieldhouses are based on similar, non-architectural evidence. Nor can Plaintiff reasonably deny that admissible evidence of Navajo hogans from a longtime ranch manager is valid evidence of Navajo occupation just because Dr. Liebmann was not aware of the evidence until he was cross-examined. ECF No. 398 at 37. Plaintiff's argumentative exhibits not only violate this Court's rules, they are factually incorrect.

IV. CONCLUSION

Plaintiff's motion to reconsider should be denied as procedurally improper, legally unsound, and factually inaccurate. Plaintiff's belated effort to subdivide the Preserve lands cannot alter the Court's well-reasoned conclusion—that Plaintiff never established aboriginal title to any portion of the Preserve lands.

Respectfully submitted this 29th day of October, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2019, 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 ECF registrants in this case.

/s/ *Matthew Marinelli*
Matthew Marinelli