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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

THE UNITED STATES OF AMERICA Plaintiffs, v. H.C. ANGLE, *et al.,* Defendants.	CIV. NO. S-80-583-LKK [In Equity No. 30] PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO RECONSIDER Date: April 20, 2009 Time: 10:00 am Court: Courtroom 4 Judge: Hon. Lawrence K. Karlton

I. INTRODUCTION

The plaintiff, United States of America, files this response opposing the "Defendant's Application/Motion to Reconsider Order" filed on February 17, 2009. Doc. 297. The motion to reconsider concerns the court's February 11, 2009, Order (Doc. 295) pertaining to the Angle Decree. The Angle Decree, initially issued in 1930, adjudicated the surface water rights to Stony Creek and its tributaries and included provisions awarding certain water rights to the United States Bureau of Reclamation (Reclamation) to operate the federal Orland Project. The project

water was used to irrigate agricultural lands in the vicinity of Orland, California.

As the United States explained in its motion to amend the decree (Doc. 277), over the course of more than 78 years, the "place of use" of water rights on certain lands covered by the Decree changed due to changes in cropping patterns and land use. The United States asked the court to amend the Decree to conform the recognized place of use to current irrigation practices. Reclamation sought to modify the designated place of use as expressly authorized by the Decree. The court granted the government's motion in the February 11 Order. Doc. 295. The court also denied Mr. Barkley's counter-motion (Doc. 284), which sought to set aside the 1930 Decree in its entirety or, alternatively, to require various forms of extraordinary relief.

On February 17, 2009, the defendant moved to reconsider the February 11 Order. Doc. 297. The United States opposes the motion to reconsider for two principal reasons. First, the defendant has not satisfied any of the criteria under the Federal Rules of Civil Procedure, the Local Rules of this court, and established case law governing reconsideration. Second, even if the defendant had provided a colorable basis for asking the court to reexamine the findings and conclusions in the February 11 Order, Mr. Barkley failed to demonstrate any erroneous legal ruling or abuse of discretion in that Order that warrants a different result. Accordingly, the United States requests that the court deny the motion to reconsider. [1]/

II. ARGUMENT

A. Standard of Judicial Review on Motion for Reconsideration

1. Federal Rule of Civil Procedure 59(e)

To the extent that the court's February 17 Order constitutes a "judgment" that modifies an existing court decree, a motion to reconsider filed within ten days after entry of that judgment is considered under Federal Rule of Civil Procedure Rule 59(e). Relief under Rule 59(e) is extraordinary and used sparingly in the interests of finality and conservation of judicial resources. 12 James Wm. Moore et al., Moore's Federal Practice § 59.30[4] (3d ed. 2000);

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[1]/ The defendant noted the motion to reconsider for hearing on April 20, 2009. The United States does not believe that a further hearing is warranted and requests that the court decide the motion to reconsider on the basis of the written submissions.

Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir. 2003); *Kona Enters., Inc. v. Estate of Bishop*, 220 F.3d 877, 890 (9th Cir. 2000). Rule 59(e) motions are considered only under three circumstances: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. *Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981); *Carroll v. Nakatani*, 342 F.3d at 945; *Enghelhard Indus., Inc. v. Research Instrumental Corp.*, 324 F.2d 347, 352 (9th Cir. 1963); *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.,* 90 F.3d 1264, 1269-70 (7th Cir. 1996).

A motion to reconsider is not a vehicle permitting the unsuccessful party to "rehash" arguments previously presented, nor to present "contentions which might have been raised prior to the challenged judgment." *Costello v. United States*, 765 F.Supp. 1003, 1009 (C.D. Cal. 1998); *Hill v. San Francisco Bay Area Rapid Transit Dist*., 2006 WL 335411 at *2 (N.D. Cal., Feb. 13, 2006) (quoting *Caroll v. Nakatani*, 342 F.3d at 945. The defendant in this case, however, simply recasts his opposition to the United States' motion to amend the Decree based on rejected arguments and makes no effort to explain why these claims constitute a change in controlling law or new evidence that was not previously available to him, nor has he identified any "manifest injustice" resulting from the Decree which has governed water rights and use in the Stony Creek watershed since 1930. The defendant has failed to meet the applicable standards for reconsideration under Rule 59(e).

2. Federal Rule of Civil Procedure 60(b)

As an alternative basis for seeking reconsideration, the defendant conceivably could rely on Fed. R. Civ. P. 60(b), which sets forth six criteria for reconsideration of a final judgment, order, or proceeding: mistake, newly discovered evidence, fraud, a void judgment, a satisfied or released judgment, and "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1)-(6). Relief under Rule 60(b), however, also is "extraordinary and may only be granted in exceptional circumstances." *Cashner v. Freedom Stores, Inc.*, 98 F.3d at 576 (internal quotation marks omitted). This court consistently requires parties seeking reconsideration to satisfy the standards set forth in Rule 60(b). For example, the court ruled that:

> In the absence of an allegation of a change in the law or the existence of new evidence, reconsideration is proper only "to correct a clear error or prevent manifest injustice." *Kern-Tulare Water District 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 415 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015, 108 S.Ct. 1752, 100 L.Ed.2d 214 (1988). A finding of "extraordinary circumstances" is required to grant relief under Rule 60(b)(6). *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985). Thus while the Court has jurisdiction to hear the motion, relief may be granted to Movants only upon a showing of extraordinary circumstances, a clear error of law, or manifest injustice.

Barcellos and Wolfsen v. Westlands Water Dist., 849 F.Supp. 717, 728 (E.D. Cal. 1993). Judge Wanger elaborated on that standard in subsequent litigation. *United States v. Westlands Water Dist.*, 134 F.Supp.2d 1111, 1129-30 (E.D. Cal. 2001) (*citing cases*). Motions to reconsider "are not vehicles permitting the unsuccessful party to 'rehash' arguments previously presented. . . . Nor is a motion to reconsider justified on the basis of new evidence which could have been discovered prior to the court's ruling. . . . Finally, 'after thoughts' or 'shifting or ground' do not constitute an appropriate basis for reconsideration." *Id*. (*citing United States v. Navarro*, 972 F.Supp. 1296, 1299 (E.D. Cal. 1997); *accord*, *Freeman v. City of Fresno*, No. 1:05-cv-0328 OWW SMS, 2007 WL 1345440, *1 (E.D.Cal. May 8, 2007).

As with relief under Rule 59(e), "Rule 60 reconsideration is generally appropriate in three instances: 1) where there has been an intervening change of controlling law, 2) new evidence has come to light, or 3) when necessary to correct a clear error or prevent manifest injustice." *Westlands Water Dist*., 134 F.Supp.2d at 1131 (citation omitted). A motion for reconsideration "is not a vehicle to reargue the motion or to present evidence which should have been raised before," a party seeking reconsideration "must show more than a disagreement with the Court's decision, and "recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden," and, finally, to succeed, "a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Id*., *citing Kern-Tulare Water Dist., supra,* 634 F.Supp. at 665.[2]/

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[2]/ "A motion for reconsideration 'is not another opportunity for the losing party to make its strongest case, reassert arguments, or revamp previously unmeritorious arguments." *Jackson v. Woodford*, No 05cv0513-L(NLS), 2008 WL 2115121, at *1 (S.D. Cal. May 19, 2008), *cited in Sanders v. Ruiz*, 2009 WL 256456 (E.D.Cal. Feb. 3, 2009). The court's "opinions are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Quaker Alloy*

Weighed against these standards and the governing case law, the defendant's motion fails entirely to present any plausible grounds for reconsideration. His claims consist of nothing more than rehashed versions of claims that the court has found are not cognizable in law, and his effort to recast those arguments in the guise of new legal theories likewise cannot provide a basis for reaching a different result. The indisputable fact is that all "facts" and cases that he cites have been available for many years, often decades, and there remains no valid justification for waiting for 78 years before attempting to set aside or fundamentally alter a Decree that the court validly entered in 1930 and has properly implemented and overseen ever since.

3. Local Rule 78-230(k)

Local Rule 78-230(k) also prescribes specific criteria to file a motion for reconsideration, as frequently noted by this court. *Clinton v. Dept. of Corrections*, 2008 WL 4821744 at *1 (E.D. Cal., Nov. 4, 2008); *Woods v. Carey*, 2008 WL 78366 at *1 (E.D. Cal., Jan. 13, 2009); *White v. California*, 2008 WL 4601063 at *1 (E.D. Cal., Oct. 15, 2008). Under Local Rule 78-230(k), the party seeking reconsideration must set forth the material facts and circumstances surrounding each motion for which reconsideration is sought, including:

> (1) when and to what Judge or Magistrate Judge the prior motion was made,
> (2) what ruling, decision or order was made thereon,
> (3) what new or different facts or circumstances are claimed to exist which did not exist or were not shown upon such prior motion, or what other grounds exist for the motion, and
> (4) why the facts or circumstances were not shown at the time of the prior motion.

L.R. 78-230(k); *see Orff v. United States*, No. CV-F-93-5327 OWW SMS, 2000 WL 34510767, at *1 (E.D. Cal. Aug. 10, 2000) (denying motion to reconsider); *United States v. Little*, No. CV-F-02-5141 REC DLB, 2006 WL 2432270, at *2 (E.D.Cal. Aug. 21, 2006). While the defendant refers to L.R. 78-230(k), his motion and supporting declaration present no new or different facts or circumstances that did not exist prior to the February 9 hearing. Mr. Barkley was able to, and did, present all of these allegations in his prior counter-motion, memorandum, and reply brief.

Casting Co. v. Gulfco. Indus., Inc., 123 F.R.D. 282, 288 (N.D. Ill. 1988), *cited in Jimena v. UBS AG Bank, Inc.*, No. CV-F-07-367 OWW GSA, *3, 2008 WL 2774676 (E.D. Cal. Jul. 15, 2008).

B. Reconsideration is not warranted where a party seeks to introduce facts that previously were available and discoverable.

Under Rule 59(e), any new facts alleged are only considered if "(1) the evidence was discovered after [the judgment] (2) the exercise of due diligence would not have resulted in the evidence being discovered at an earlier stage and (3) the newly discovered evidence is of such magnitude that production of it earlier would likely have changed the outcome of the case." *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 928-29 (9th Cir. 2000); *see also Engelhard Industries, Inc. v. Research Instrumental Corp.*, 324 F.2d at 352.

The defendant has attempted to argue precisely the same issues alleged in his prior opposition and countermotion (Doc. 284) and reply memorandum (Doc. 293) by asserting facts that were available prior to the February 11, 2009, hearing and the court's February 11, 2009 Order. As explained below, none of these facts warrants a different outcome.

1. Defendant cannot reargue "fraud" by improperly asserting new facts.

The defendant asserts that he was not "allowed to speak" at the hearing on February 9 on three issues and that he "did not get his point across" in his cross motion on one issue. Def. Motion at 2. The defendant had a full opportunity to present his arguments in his written opposition and cross-motion, and there is no "right" to present oral argument in a civil case.

The alleged evidence of "fraud" that the defendant contends infected the Angle Decree cannot be sustained for two reasons. First, the motion to reconsider, like the earlier filings, simply provide no "evidence" of fraud or improper conduct by Judge Kerrigan, the United States Attorney, or anyone else.[3]/ Mr. Barkley's contentions illustrate, at best, specious and speculative conspiracy-type theories. Allegations of fraud, especially the type that Mr. Barkley suggests

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[3]/ Mr. Barkley notes that he filed a sworn and verified Declaration (Doc. 297), but a careful review of that Declaration reveals nothing more than his confusion and dissatisfaction with the manner in which varies parties, including Judge Kerrigan, the State of California, and the United States, among others, interpreted water law statutes and cases during the 1920s. His disagreement with legal positions of the court or other parties cannot remotely constitute "fraud." While Mr. Barkley attests that he has "come to believe plaintiff's attorneys suckered Judge Kerrigan, or rather more specifically, committed a fraud on the court," he provides not a single scintilla of evidence to support that belief. The defendants' undersigned litigation counsel referred the Barkley Declaration to the Department of Justice litigation division's ethics officers and was informed that no further inquiry of investigation of Mr. Barkley's unsupported allegations was warranted or appropriate.

have corrupted a federal judicial proceeding, are very serious charges that cannot be proffered lightly without credible and probative evidence supported by documents or sworn testimony. The defendant offers no such evidence, and the United States is not aware of any. These alleged facts would have existed for nearly 80 years and, if they do in fact exist, would have been readily available to the defendant throughout the duration of this litigation. However, even if all of these facts were adequately alleged prior to the date of the judgment, they would not have changed the outcome of the case.[4]/ As the court convincingly stated, "the reasonable time for [these] challenges has passed" and therefore the court "lacks the power to address the merits of defendant's challenge to the original decree." February 11 Order at 13. Challenges to the original Decree must have been brought a year after the entry of the 1930 Decree or within a reasonable time. The court did not find the defendant's argument of changed circumstances adequate to set aside the Decree, and the defendant cannot use this motion to reconsider as a means of restating his arguments by asserting new facts after 78 years. *Id.* at 9.

2. The defendant's "new" facts are reiterations of old legal arguments

The defendant argues that the court misunderstood applicable law and that the Supreme Court's ruling in *Nevada v. United States* regarding ownership of water rights prohibits the United States' ability to use the amendment procedure provided by the Decree itself. Doc. 297, Def. Motion to Reconsider at 2-3. This court ruled that the defendant did not provide arguments or evidence that "would support the astounding conclusion that a delay of seventy-eight years was reasonable." Doc. 295, Order at 8-9. As the court stated at the February 9 hearing, the defendant "failed to make a showing sufficient to justify reopening the petition." Doc. 296,

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[4]/ Mr. Barkley's efforts to call into question Judge Kerrigan's competence cannot be sustained. The Ninth Circuit rejected an attempt to overturn a judicial decree in a major fishing rights case based on *post hoc* claims that the federal judge who issued the decree may have been mentally impaired as a result of suffering from Alzheimer's disease while presiding over the litigation. *United States v. Washington*, 98 F.3d 1159 (9th Cir. 1996). The court of appeals squarely denied that collateral attack on the district court's decree and concluded that Rule 60(b)(6) should be used sparingly as an equitable remedy to prevent manifest injustice, *citing United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). In a concurring opinion, Judge Kozinski stated that no relief would be available even if the parties *had* shown conclusively that the judge was mentally impaired when he rendered judgment against them. 98 F.3d at 1164.

Transcript of Proceedings at 1:16-17. Moreover, the court found that the issues raised by the defendant "are not cognizable" as a matter of law. *Id*. at 3:18-19. Further, in granting the United States' motion, the court found that "[r]es judicata in no way limits plaintiff's ability to use the amendment procedure provided by the decree itself." Doc. 295, Order at 9 n.5.

At bottom, the defendant simply disagrees with the court's ruling regarding the manner in which Mr. Barkley believes that *Nevada v. United States* should apply to the Angle Decree. The appropriate recourse would be for the defendant to appeal. A motion to reconsider is not a vehicle permitting the unsuccessful party to "rehash" arguments previously presented or to present "contentions which might have been raised prior to the challenged judgment." *Costello v. United States*, 765 F.Supp. at 1009. The court specifically stated that, regardless of whether res judicata were to apply under *Nevada v. United States*, Fed. R. Civ. P. 60 encompasses similar principles. Order at 9. The defendant's motion to reconsider attempts to reargue the validity of *Nevada v. United States,* but fails to provide any valid arguments or evidence to overturn the court's conclusion, namely, that the 78-year period of time that elapsed before he sought to reopen or reconsider the 1930 Decree constituted unreasonable delay.

The defendant's request to amend the Decree to recognize his asserted claims of riparian water rights also must fail because Article XVII of the Decree "forever enjoin[s] and restrain[s] parties to the decree, their successors and assigns from asserting or claiming...any right, title, or interest in or to the waters of Stonycreek or its tributaries..." Decree at 177-78. The defendant complains that the United States inappropriately pursued a legislative amendment. Def. Motion at 3:11-13. Even assuming that statement to be correct, there is absolutely nothing improper about any party seeking to amend the law through new legislation. Absent the presentation of any change in governing law or the discovery of any truly new facts, the defendant remains precluded from reasserting that the Decree should be vacated with respect to *Nevada v. United States.*

C. Reconsideration is not warranted where a party seeks to reassert an argument that was previously made prior to the judgment or order

The defendant's motion to reconsider asserts that the current usage of water by the United States violated the water limit allowed under the decree. Def. Motion at 6. That charge is incredible, unsupported, and unconvincing. To the contrary, the United States affirmed its intent to adhere strictly to the total water volume water awarded. The amended place of use will have no effect on the overall acreage or the water applied to beneficial use, as the court found. In the Opposition and Counter-Motion previously filed by the defendant, Mr. Barkley raised an issue that enforcement of the decree had been selective. The United States refuted that charge, and the court found no basis for the defendant's position. In the subsequent motion to reconsider, the defendant again raised the issue, asserting that if the decree were enforced "against plaintiff the way it has been against various of the defendants...plaintiffs would be in irons for these violations and ordered to relinquish them." Def. Motion at 8. This statement exhibits hyperbolic rhetoric, devoid of any factual support, and ignores the United States' explanation of why earlier enforcement actions under the Decree were necessary and proper steps to implement the judicial determination and adjudication of water rights.

Finally, the defendant renews his effort to raise issues of groundwater use that, as the United States has explained, lie outside the scope of the Angle Decree, the surface water rights adjudication, and this court's jurisdiction. Rather than attempting once more to refute each and every confusing and unsupported allegation in the motion to reconsider, the United States requests that the court find that the defendant has failed to present any basis under Rule 59(e) or 60(b) or Local Rule 78-230(k) to warrant reconsideration of new facts or law. There is no valid basis to upset the long-settled judicial decree that has governed Stony Creek water rights and the Orland Project for the past 78 years. The United States requests that the court deny the motion.

Apart from the motion to reconsider, as one minor point of clarification, the United States' noted in its reply brief that one landowner, Mr. George Kokkinakis, had inquired whether the same procedure proposed by Reclamation (and now approved by the court) for future changes in the place of use also would apply to a similar request to change the point of diversion,

provided of course that the change would not adversely affect any other party's water rights. Doc. 290 at 6 n.1. The United States believes that the same approach is warranted for a change in the point of diversion and reiterates that point for the benefit of the court and Mr. Kokkinakis.

III. CONCLUSION

A motion to reconsider under Rule 59(e) or Rule 60(b) is an extraordinary remedy that is only warranted in truly exceptional circumstances, but is not available to a party who merely wishes to use facts that were available during original briefing and argument to reargue issues that the court has addressed and resolved. The defendant here has failed to make the required showing to justify relief under either Rule 59(e) or Rule 60(b). Instead, he merely advanced facts and claims that were available to him prior to the court's February 9 hearing and February 11 Order and attempts to reargue issues that were already addressed in that Order.

The court correctly concluded that the defendant did not assert his challenge to the original Decree in a timely manner. The defendant has provided no basis for a different result now. Finally, the court correctly ruled that the defendant lacked support to allege that the Decree has been selectively enforced, and the court should deny the motion for reconsideration on that ground, as well. The defendants submit a proposed order for the court's consideration.

Respectfully submitted,

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