JAMES S. ANGELL, *Pro Hac Vice*
jangell@earthjustice.org
EDWARD B. ZUKOSKI, *Pro Hac Vice*
tzukoski@earthjustice.org
Earthjustice
1400 Glenarm Place, Ste. 300
Denver, CO 80202
Tel: (303) 623-9466
Fax: (303) 623-8083

MICHAEL R. SHERWOOD, CA Bar No. 63702
Earthjustice
426 17th Street, 5th Floor
Oakland, CA 94612
Tel: (510) 550-6725
Fax: (510) 550-6749
msherwood@earthjustice.org

Attorneys for Defendant-Intervenors

LISA T. BELENKY, CA Bar No. 203225
Center for Biological Diversity
351 California St., Suite 600
San Francisco, CA94104
Tel: 415-436-9682 x 307
Fax: 415-436-9683
lbelenky@biologicaldiversity.org

Attorney for Defendant-Intervenor Center for Biological Diversity

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

COUNTY OF INYO, Plaintiff, v. UNITED STATES DEPARTMENT OF INTERIOR, *et al.* Defendants, and SIERRA CLUB, *et al.* Defendant-Intervenors.	Case No: 1:06-cv-1502 AWI-DLB **DEFENDANT-INTERVENOR SIERRA CLUB's AND DEFENDANT UNITED STATES' JOINT OPPOSITION TO PLAINTIFF INYO COUNTY'S MOTION FOR RECONSIDERATION** Date: September 22, 2008 Time: 1:30 p.m. Room: Courtroom 3, 5th Floor Anthony W. Ishii United States District Judge

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

Plaintiff Inyo County has moved this Court to reconsider its recent ruling dismissing nearly all of the County's claims in this case. Because the County's argument largely rehashes issues thoroughly briefed by the parties, or raises legal arguments that the County should have or could have raised earlier, the County's motion must be denied.

BACKGROUND

In this suit, Inyo County seeks to quiet title to rights-of-way along four alleged highways that the County claims were constructed and maintained across designated wilderness in Death Valley National Park. Under the federal Quiet Title Act (QTA), the County was required to file its claim within 12 years of when it knew, or should have known, of an adverse claim by the United States. 28 U.S.C. § 2409a(g). In 1979, the Bureau of Land Management (BLM) completed an inventory of the lands traversed by the routes – an inventory of which the County was well aware – and determined the lands to be "roadless" and free of any constructed, maintained public highways. See Order on Motions by Defendants to Dismiss at 3-6 (Aug, 11, 2008) (Dkt. # 62) ("Order"). BLM thus designated these lands to be "wilderness study areas" (WSAs) which would be managed to protect their roadless nature. Id. at 3-4, 15. Both the Federal Defendants and Defendant-Intervenors Sierra Club et al. moved to dismiss the County's claims on the grounds that BLM's 1979 roadless determination and WSA designation put the County on notice that the United States believed no roads or constructed highways existed in the areas. Id. at 2. Federal Defendants and Sierra Club argued that these actions started the clock on the QTA's 12-year statute of limitations. Because that clock ran out in 1991, 15 years before the County filed this case, Federal Defendants and Sierra Club urged this Court to conclude that it lacked jurisdiction to hear the County's claims. Id. at 12.

On August 11, this Court entered its Order largely dismissing Inyo County's case, agreeing with the movants that BLM's designation of WSAs, by freezing the County's ability to in any way "enhance or upgrade" its claimed rights of way, put the County on notice of an interest adverse to its claims that the lands were crossed by County highway rights-of-way. Id. at 15, 19. The Court held that BLM's duty to manage WSAs "so as not to impair the suitability of such areas for preservation as wilderness" resulted in "an impairment of [the County's] ability to enhance or upgrade" its alleged highway rights-of-way. Id. at 15, 19; 43 U.S.C. § 1782(c).

The County filed the pending motion to reconsider on August 25. The County asks this Court to overturn its dismissal of the County's claims in part because it claims that: (1) impairment of the County's right to improve its claimed rights-of-way under R.S. 2477 was not sufficient to put the County of the United States' adverse interest; and (2) it is not certain the County has the right to improve its claimed rights-of-way. The County further alleges that the Order contained a factual error.

STANDARD OF REVIEW

The County cites no authority for its motion. Courts, however, have the authority to revise "any order or other decision, however designated, that adjudicates fewer than all the claims or the right and liabilities of fewer than all the parties ... before the entry of" a final judgment. Fed. R. Civ. P. 54(b). This Court recently explained the standard for review in such cases such as follows:

> The court has discretion to reconsider and vacate a prior order. Barber v. Hawaii, 42 F.3d 1185, 1198 (9th Cir. 1994); United States v. Nutri-cology, Inc., 982 F.2d 394, 396 (9th Cir. 1992). Motions for reconsideration are disfavored, however, and are not the place for parties to make new arguments not raised in their original briefs. Northwest Acceptance Corp. v. Lynnwood Equip., Inc., 841 F.2d 918, 925-26 (9th Cir. 1988). Reconsideration is not to be used to ask the court to rethink what it has already thought. United States v. Rezzonico, 32 F. Supp. 2d 1112, 1116 (D.Ariz. 1998)."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." U.S. v. Westlands Water Dist., 134 F. Supp. 2d 1111, 1131 (E.D.Cal. 2001). Motions to reconsider are committed to the discretion of the trial court. Combs v. Nick Garin Trucking, 825 F.2d 437, 441 (D.C. Cir. 1987); Rodgers v. Watt, 722 F.2d 456, 460 (9th Cir. 1983) (en banc). 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). When filing a motion for reconsideration, Local Rule 78-230(k) requires a party to show the "new or different facts or circumstances claimed to exist which did not exist or were not shown upon such prior motion, or what other grounds exist for the motion."

Hamilton v. Willms, 2008 WL 436932 at *2 (E.D.Cal. No. 1:02-CV-6583 AWI SMS) (Feb. 14, 2008). See also Costello v. United States, 765 F. Supp. 1003, 1009 (C.D.Cal. 1991) (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."); Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (motion to reconsider "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." (emphasis in original)).

In general, then, "before reconsideration may be granted there must be a change in the controlling law or facts, the need to correct a clear error, or the need to prevent manifest injustice." Central Valley Chrysler-Jeep, Inc. v. Goldstene, 529 F. Supp. 2d 1151, 1162 (E.D.Cal. 2008), citing United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997). The very high bar that movants must overcome to prevail on a motion for reconsideration reflects the courts' "concerns for preserving dwindling resources and promoting judicial efficiency." Costello, 765 F. Supp. at 1009.

ARGUMENT

The County's motion must be denied because it cannot demonstrate the highly unusual circumstances that warrant reconsideration. The County does not argue that "new or different facts" or a change in the controlling law mandates a reversal of this Court's dismissal. Instead, the County quibbles with the outcome by rehashing prior arguments and attempting to raise new arguments on matters that were clearly at issue – and that the County clearly could have addressed – in prior briefing. Thus, the County's arguments for reconsideration are precisely the type that the courts typically reject. Further, the County's legal arguments have no merit.

I. THE COURT DID NOT COMMIT "CLEAR ERROR" IN DISMISSING THE COUNTY' CLAIMS.

The County makes three arguments in support of its reconsideration motion. First, it argues that that the savings provision of the Federal Land Policy and Management Act (FLPMA) preserving valid existing rights somehow barred BLM from making claims against the County's alleged highway rights-of-way. Motion for Reconsideration at 2-3 (Aug. 25, 2008) (Dkt. # 64) ("Inyo Mtn. to Reconsider"). The County argues that no federal agency could contradict Congress and take away the County's rights-of-way. Id.

Here, the County rehashes the identical, failed argument it made in its opposition to the motions to dismiss. See Inyo County's Opp. to Federal Defendant's Motion to Dismiss at 9-10 (May 22, 2008) (Dkt. # 52) ("Inyo Opp.") (citing FLPMA Sec. 701(a)). For this reason alone, the Court should reject the County's second bite at the apple. Further, Sierra Club and Federal Defendants have previously shown that the County's argument contradicts the black-letter law of the Ninth

Circuit that in QTA cases, the merit of the government's claim "is irrelevant to [the] operation of the bar of a statute of limitations." Government of Guam v. United States, 744 F.2d 699, 701 (9th Cir. 1984). See also Sierra Club's Reply Memo. in Support of Their Mtn. to Dismiss at 12-13 (June 13, 2008) (Dkt. # 57) ("Sierra Club Reply"); Federal Defendants' Reply to Inyo County's Opp. at 13 & n.7 (June 13, 2008) (Dkt # 58) ("Federal Defendants Reply"); Spirit Lake Tribe v. North Dakota, 262 F.3d 732, 738 (8th Cir. 2001) ("Even invalid government claims trigger the QTA limitations period."). Moreover, the Court's conclusion that WSA designation put the County on notice of the United States' adverse claim in no way conflicts with FLPMA's savings clause. If valid rights-of-way existed within the WSAs, BLM's WSA designation did not terminate them. The WSA designation did, however, put the County on notice that these areas would be managed so as to preserve their wilderness character and that any improvement of travel routes or "ways" within these areas was prohibited, thereby triggering the QTA's statute of limitations. And by designating WSAs, BLM was following Congress's instructions in FLPMA, namely determining whether BLM lands contained roadless areas suitable for eventual wilderness designation. 43 U.S.C. § 1782(a).

Second, the County argues that FLPMA's prohibition on expansion and improvement of roads in WSAs is not "a claim against the entirety of the Plaintiff's property interest, i.e. the existing roads," and thus could not have put the County on notice of an adverse United States interest. Inyo Mtn. to Reconsider at 3. Here again, the County is attempting to get a second bite at the apple. All parties to this case provided the Court with extensive briefing on the question of whether WSA designation put the County on notice as to an interest adverse to that of the County's claimed highways. Indeed, that was the primary question that consumed the vast majority of the parties' memoranda on the motions to dismiss. The County cannot feign surprise that the Court concluded that FLPMA's ban on roads within WSAs started the QTA's statute of limitations clock running, given that this issue was previously briefed. See Sierra Club's Memo. in Support of Their Mtn. to Dismiss at 8 & n.6 (May 9, 2008) (Dkt. # 44) ("Sierra Club Memo."); Federal Defendants' Memo. in Support of Mtn. to Dismiss at 15 (May 9, 2008) (Dkt. # 46) ("Federal Defendants Memo.") at 15; Inyo Opp. at 5-8; Sierra Club Reply at 4-5; Federal Defendants Reply at 11-12. Inyo County may now wish it had provided more convincing arguments on this question. However, the issue was

clearly presented to the Court. A motion for reconsideration may not be used by a party to attempt to re-brief an issue more convincingly. See White v. Sabatino, 424 F. Supp. 2d 1271, 1276 (D. Haw. 2006) (where losing party "clearly knew" that an interpretation of law was at issue, failure to address legal issue in prior pleadings was sufficient grounds for denial of reconsideration motion).

Even if the Court revisits the issue of the impact of WSA designation on the County's alleged rights-of-way, the County cannot show that the Order involved "clear error." Most importantly, the County misunderstands what kind of notice the QTA requires to start the statute of limitations clock. The United States' claim need not be need not be "clear and unambiguous." State of Cal. ex rel. State Land Comm'n v. Yuba Goldfields, Inc., 752 F.2d 393, 397 (9th Cir 1985), cert. denied sub nom California State Lands Com. v. United States, 474 U.S. 1005 (1985). "Knowledge of the claim's full contours is not required. All that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff's." Knapp v. United States, 636 F.2d 279, 282-83 (10th Cir. 1980) (emphasis added). See also Park County, Montana v. United States, 626 F.2d 718, 721 n.6 (9th Cir. 1980). The Court properly held that WSA designation – which barred maintained roads and road improvements within the WSA – announced some interest adverse to the County's claimed rights-of-way.[1] That is all that was needed to trigger the statute of limitations clock.

Instead of analyzing or distinguishing any of the cases relied upon by the Court to hold that WSA designation put the County on notice of the Unites States' adverse interest, the County relies on a single state court case that is irrelevant to the question of notice under the QTA. The County points to Ng v. Warren, 79 Cal. App. 2d 54, 62, 179 P. 2d 41 (Cal.App.1.Dist. 1947), for the proposition that "the acquiescence to a slight interference with [plaintiff's] right to use the driveway should not bar the lessee from objecting to its complete obstruction by the erection of a building thereon." However, in determining whether this Court has jurisdiction over the County's case, the question at is not whether the United States may or may not obstruct the routes claimed as County

[1] Because, as the Court found, WSA designation was flatly inconsistent with the County's ability to regularly maintain and potentially improve its alleged rights-of-way, BLM's actions effectively denied the rights-of-way's existence, triggering the statute of limitations. See McFarland v. Norton, 425 F.3d 724, 727 (9th Cir. 2005).

highways. Rather, it is whether BLM's determination that areas crossed by the "highways" were roadless and would be managed to retain their roadless nature should have made the County reasonably aware that the United States claimed "some interest adverse to" the County. Knapp, 636 F.2d at 282-83. As this Court properly held, WSA designation constituted such a claim.

Third, the County argues that the Court should permit "further briefing" on the issue of whether the County's claimed rights-of-way "were adversely affected by the creation of the WSAs." Inyo Mtn. to Reconsider at 6. The County seeks to do so because "on more informed examination," it seeks to fundamentally reverse its position on a matter of law. Id. Again, the County seeks more briefing on an issue that was central to the motions to dismiss, that was thoroughly briefed by the parties, and that was properly decided by the Court. The County does not allege the existence of "new facts or circumstances," see L.R. 78-230(k), and is not entitled to further briefing concerning its "disagreement with the Court's decision." Westlands Water Dist., 134 F. Supp. 2d at 1131 (quotations & citation omitted). The County cannot use a motion for reconsideration – or even more briefing – to cure whatever failings it now sees in its prior memorandum, based on a "more informed examination" it only sought fit to undertake after this Court's Order. See Northwest Acceptance Corp., 841 F.2d at 925-26 (motions for reconsideration not the place for parties to make new arguments not raised in their original briefs).

The County seeks new briefing apparently to argue that "it is far from certain" that the County could actually expand or improve its rights-of-way in a manner that might have been limited by WSA designation. Inyo Mtn. to Reconsider at 6. In an apparent effort to salvage its case, the County makes an argument that represents a 180-degree turn from the position the County takes in its complaint, something the County freely admits. Id. at 5-6. In its complaint, the County stated that the "scope of an R.S. 2477 right-of-way is 'not … restricted to the actual beaten path,' but includes the right to widen the road to meet the exigencies of increased travel even after 1976, 'at least to the extant of a two-lane road' to allow travelers to pass each other." Complaint to Quiet Title at ¶ 24 (Oct. 25, 2006) (Dkt. # 1) (quoting Sierra Club v. Hodel, 848 F.2d 1068, 1083 (10th Cir.

1988)). See also id. at ¶ 23 ("The scope of an R.S. 2477 right-of-way includes the right … to make improvements therein without [National Park Service] authorization.").[2]

In attempting to justify its complete turnabout, the County, "on more informed examination," suggests that California state cases may limit its ability to expand the area of the right-of-way in excess of the area "put to actual use" as of 1976. Inyo Mtn. to Reconsider at 6. But, even assuming state law bears on the question, none of the four cases the County cites says anything about whether highways may be expanded or improved beyond their initially-created width. Three of them simply conclude that in setting boundaries for streets, where actual use of the route occurred may help courts identify the route's precise location.[3] The County's final case merely holds that a law requiring highways laid out by local authorities be a specific width did not apply to those roads created by prescriptive use, which could be narrower. Mulch v. Nagle, 51 Cal.App. 559, 568, 197 P. 421 (Cal.App.1.Dist. 1921). In contrast, "[m]any California cases have held that in the grant or dedication of land for highway purposes [c]hanging conditions, in customs, usages and improvements, and changes in the prevailing mode of transportation ... since the original dedication are to be assumed as being contemplated." Norris v. State of California, 261 Cal.App.2d 41, 47, 67 Cal.Rptr. 595 (Cal.App.3.Dist. 1968) (citations & quotations omitted).

Federal land management agencies have the authority regulate and impose reasonable restrictions upon the exercise of even duly adjudicated R.S. 2477 rights-of-way. See, e.g., Clouser v. Espy, 42 F.3d 1522, 1538 (9th Cir. 1994). However, the County's new suggestion that its rights-of-way are absolutely and forever limited to their physical condition as of 1976 – and therefore that WSA designation prohibiting widening and improvement could not have put the County on notice of

[2] While the County argues that its rights to widen or upgrade rights-of-way are "far from certain" under state law, this argument ignores the fact the United States' claim need not be need not be "clear and unambiguous" to trigger the statute of limitations clock. Yuba Goldfields, 752 F.2d at 397.

[3] Oreña v. City of Santa Barbara, 91 Cal. 621, 628, 28 P. 268 (Cal. 1891) ("In determining the line of the street, measurements on that street would naturally be of more value than elsewhere, and if they, or the places where they were, cannot be located, it would be important to ascertain the boundaries of the street as actually opened and used."); Payne v. English, 101 Cal. 10, 14, 35 P. 348 (Cal. 1894) (same, quoting Oreña); Youngstown Steel Products Co. v. City of Los Angeles, 38 Cal.2d 407, 410-11, 240 P.2d 977 (Cal. 1952) ("Once the location of an easement has been finally established, whether by express terms … or by use … it cannot be substantially changed without the consent of both parties.")

an adverse United States interest to such rights-of-way – is undermined not only by Norris but by the very cases the County relies upon. For example, Inyo County relies on Tenth Circuit cases that have concluded that R.S. 2477 rights-of-way holders may "improve" such highways (i.e., widen or modify the surface of a route) "as necessary to meet the exigencies of increased travel, so long as this [is] done in the light of traditional uses to which the right-of-way was put as of repeal of the statute in 1976." S. Utah Wilderness Alliance v. Bureau of Land Management, 425 F.3d 735, 746 (10th Cir. 2005) ("SUWA v. BLM") (citation and quotations omitted) (interpreting Utah law). See also Sierra Club v. Hodel, 848 F.2d 1068, 1083 (10th Cir. 1988) (interpreting Utah law and holding that a county had the right under R.S. 2477 to upgrade a one-lane dirt right-of-way into a two-lane road covered with asphalt, subject to oversight by the federal land manager); Inyo Mtn. to Reconsider at 6 (citing SUWA v. BLM and Hodel). These cases hold that right-of-way holders must first consult with the federal land manager before undertaking such improvements, given that "the easement holder must exercise its rights so as not to interfere unreasonably with the rights of the owner of the servient estate." SUWA v. BLM, 425 F.3d at 747. However, these cases conclude that Federal land managers may not "delay" or "unreasonably disapprov[e]" proposals for improvement that are within the scope of the right-of-way.[4] Here, the WSA designation completely eliminated any ability of the County to undertake any improvements. Order at 15, 19.

---

[4] The Tenth Circuit has summarized the relative rights of easement owners and land owners as follows:

> when the holder of an R.S. 2477 right of way across federal land proposes to undertake any improvements in the road along its right of way, beyond mere maintenance, it must advise the federal land management agency of that work in advance, affording the agency a fair opportunity to carry out its own duties to determine whether the proposed improvement is reasonable and necessary in light of the traditional uses of the rights of way as of October 21, 1976, to study potential effects, and if appropriate, to formulate alternatives that serve to protect the lands. The initial determination of whether the construction work falls within the scope of an established right of way is to be made by the federal land management agency, which has an obligation to render its decision in a timely and expeditious manner. The agency may not use its authority, either by delay or by unreasonable disapproval, to impair the rights of the holder of the R.S. 2477 right of way. In the event of disagreement, the parties may resort to the courts.

SUWA v. BLM, 425 F.3d at 748 (footnotes omitted).

In sum, Inyo County's motion provides no "new or different facts or circumstances," nor alleges any change in the controlling law. It simply rehashes already-rejected arguments, or attempts to argue matters that were at the center of the motions to dismiss, namely, whether WSA designation should have put the County on notice of some United States interest adverse to the County's alleged rights-of-way. The County thus provides no valid basis for reconsideration, and its motion on these grounds must be denied.[5]

II. INYO COUNTY'S ARGUMENT CONCERNING PADRE POINT ROAD.

The County requests that the Court "amend its factual finding on page 6 to reflect that Padre Point Road has not been closed to vehicular traffic." Inyo Mtn. to Reconsider at 2. The Order states that all four roads at issue in the case "have been closed to vehicular travel since 1994, either by the posting of signs or by the erection of barriers." Order at 6-7. Sierra Club and Federal Defendants do not object to a modification of the Court's order that omits Padre Point in the list of routes that "have been closed to vehicular travel since 1994, either by the posting of signs or by the erection of barriers." This minor modification, however, in no way changes the fact that the Padre Point route was included within a WSA in 1979 and was included within the Death Valley Wilderness Area in 1994. Therefore, the fact that Federal Defendants have not blocked the route by barrier or signed it as closed in no way undermines the legal rationale for the Court's decision dismissing the County's Padre Point claim.

[5] In addition, even if the Court finds some merit in the County's position, the Court should dismiss the County's case. As argued in the motions to dismiss, BLM's determination, announced to the public, that each area had wilderness character, that each area was, by definition, "roadless," and that roads and rights-of-way were found only on the outside of each area, directly conflicted with (and thus put a "cloud" on) the County's claim that it possesses rights-of-way for County highways within each area. See Sierra Club Memo. at 8-12; Federal Defendants Memo. at 15-16.

DATED: August 20, 2008

Respectfully submitted,

s/ Edward B. Zukoski
EDWARD B. ZUKOSKI
JAMES S. ANGELL
Earthjustice
1400 Glenarm Place, Suite 300
Denver, CO 80202
Telephone: (303) 623-9466
Fax: (303) 623-8083

MICHAEL R. SHERWOOD
Earthjustice
426 17th Street, 5th Floor
Oakland, CA 94612
Tel: (510) 550-6725
Fax: (510) 550-6749

Attorneys for Defendant-Intervenors

s/ Lisa T. Belenky (authorized 9/05/08)
LISA T. BELENKY
Center for Biological Diversity
351 California St., Suite 600
San Francisco, CA94104
Tel: 415-436-9682 x 307
Fax: 415-436-9683
lbelenky@biologicaldiversity.org

Attorney for Defendant-Intervenor Center for Biological Diversity

MATTHEW J. MCKEOWN
Acting Assistant Attorney General
Environment and Natural Resources Division

s/ Bruce D. Bernard (authorized 9/05/08)
BRUCE D. BERNARD
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
1961 Stout Street, 8th Floor
Denver, CO 80294
Tel: (303) 844-1361
Fax: (303) 844-1350

Attorneys for Federal Defendants