

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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SHELDON PETER WOLFCHILD, et. al.,	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 03-2684L
	)	
THE UNITED STATES,	)	Judge Charles Lettow
	)	
	)	
Defendant.	)	
	)	
	)	
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**PLAINTIFF-INTERVENORS' RESPONSE IN OPPOSITION TO THE  
UNITED STATES' MOTION FOR RECONSIDERATION OF THE  
COURT'S AUGUST 5, 2011 OPINION AND ORDER, AS CORRECTED**

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**TABLE OF CONTENTS**

STATEMENT OF THE CASE .....2

STANDARD OF REVIEW .....3

ARGUMENT .....7

I. THE UNITED STATES’ MOTION TO RECONSIDER DOES NOT RAISE AN ISSUE JUSTIFYING DEPARTURE FROM THE LAW OF THE CASE .....7

    A. The Government’s Motion Does Not Claim The Discovery Of “New And Different Material Evidence” That Was Not Presented In The Prior Action Nor Any “Intervening Change Of Controlling Legal Authority” .....9

    B. The United States’ Arguments Concerning The Federal Reports Elimination Act, Final Judgment And The Alleged Inconsistency Of The Court’s Order With The Distribution Act Fail To Prove The Court’s August 5, 2011 Opinion And Order Was Clearly Incorrect .....9

    C. The Motion Fails To Establish That The August 5 Order Would Work A Concrete Manifest Injustice Against The United States .....11

CONCLUSION .....13

CERTIFICATE OF SERVICE .....17

**TABLE OF AUTHORITIES**

**COURT OF FEDERAL CLAIMS RULES (RCFC):**

RCFC 54(b) .....3, 4, 5  
RCFC 59 .....1, 3, 4, 5  
RCFC 60 .....3

**FEDERAL STATUTES:**

Federal Reports Elimination and Sunset Act of 1995,  
25 U.S.C. § 1402(a) .....8, 13

**FEDERAL CASES:**

*Alpha I, L.P. v. United States*, 86 Fed. Cl. 126, 129 (2009) .....3, 6  
*Bannum, Inc. v. United States*, 59 Fed. Cl. 241, 243 (2003) .....6  
*Childers v. Slater*, 197 F.R.D. 185, 190 (D.D.C. 2000) .....5  
*Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004) .....5, 6  
*Farmers Coop. v. United States*, 2011 U.S. Claims LEXIS 1898  
(September 20, 2011), Slip. Op. at 5-7 .....5  
*Florida Power & Light Co., v. United States*, 66 Fed. Cl. 93,  
95-97 (2005) .....4  
*Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 300  
(1999) .....6  
*Henderson County Drainage Dist. No. 3 v. United States*, 55 Fed.  
Cl. 334, 337 (2003) .....6  
*Intergraph Corp. v. Intel Corp.*, 253 F.3d 695, 698  
(Fed. Cir. 2001) .....3, 5, 7

*Klamath Irrigation Dist. v. United States*, 68 Fed. Cl. 119, 120  
(2005) .....4

*L-3 Communs. Integrated Sys., L.P. v. United States*, 98 Fed.  
Cl. 45, 48-49 (2011) .....3, 5, 6

*Matthews v. United States*, 73 Fed. Cl. 524, 525 (2006) .....6

*Northern Helex Co., v. United States*, 225 Ct. Cl. 194, 201 (1980),  
634 F.2d 557, 561 (1980) .....11, 12

*Potts v. Howard University Hospital*, 623 F. Supp. 2d 68, 71  
(D.D.C. 2009) .....5, 6

*Short v. United States*, 228 Ct. Cl. 535 (1981), 661 F.2d 150, 154  
(1981) .....11

*Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101  
(D.D.C. 2005) .....6

*United States v. Turtle Mountain Band of Chippewa Indians*, 222  
Ct. Cl. 1, 8 (1979) .....11

*Wolfchild v. United States*, 68 Fed. Cl. 779, 785 (2005)  
(*Wolfchild II*) .....2, 4, 5, 7, 9, 10, 11

*Yuba Natural Resources., Inc. v. United States*, 904 F.2d 1577,  
1583 (Fed. Cir. 1990) .....3

**IN THE UNITED STATES COURT OF CLAIMS**

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SHELDON PETERS WOLFCHILD, et al.,	)	)	
	)	)	
vs.	)	)	Case No.: 03 – 2684L
	)	)	
UNITED STATES,	)	)	Hon. Charles F. Lettow
	)	)	
Defendant.	)	)	
<hr/>		)	

**PLAINTIFFS-INTERVENORS’ RESPONSE IN OPPOSITION TO THE UNITED STATES’ MOTION FOR RECONSIDERATION**

Come Now, the Plaintiff-Intervenors, by and through their undersigned counsel of record, and, pursuant to RCFC 59, herewith collectively submit Intervening-Plaintiffs’ Response in Opposition to the United States’ September 2, 2011 Motion for Reconsideration (Doc. # 1100) of this Court’s August 5, 2011 Opinion and Order (Doc. # 1093) and Judgment (Doc. # 1094), as corrected by this Court’s August 18, 2011 Order (Doc. # 1097) and August 22, 2011 Corrected Judgment (Doc. # 1098) in the captioned matter. The Plaintiffs submit the following in support of their response in opposition to the Government’s Motion for Reconsideration:

## STATEMENT OF THE CASE

The Plaintiff-Intervenors submit that the United States' motion for reconsideration fails for several reasons. As a preliminary matter, the Plaintiff-Intervenors join with the Plaintiffs in their arguments against the Government's motion.<sup>1</sup> However, there are additional reasons why this Court should overrule the motion.

In *Wolfchild II*,<sup>2</sup> this Court detailed the criteria it would utilize in reviewing a motion to reconsider interlocutory rulings. Among those criteria was a requirement that the Government show that this Court's prior rulings were "clearly incorrect" and their preservation would work a "manifest injustice."<sup>3</sup>

The United States' motion is fatally defective for its inability to make a "strong showing of clear error" – on any of the three grounds stated in the motion. Additionally, even if it could show clear error, the Government has not made any showing, much less a prima facie showing, of manifest injustice operable against the Defendant. The United States has not proven any "exceptional circumstances" justifying the relief sought.

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<sup>1</sup> See Docket No. 1104, October 4, 2011.

<sup>2</sup> *Wolfchild v. United States*, 68 Fed. Cl. 779, 785 (2005) (*Wolfchild II*).

<sup>3</sup> *Id.*, citing *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695, 698 (Fed. Cir. 2001).

## STANDARD OF REVIEW

The applicable standard of review depends on the interlocutory character of this Court's August 5, 2011 Opinion and Order, as corrected. Regardless of the finality of the judgment, the decision whether to grant reconsideration lies largely within the discretion of the trial court.<sup>4</sup>

Reconsideration of final judgments is generally governed by RCFC 59(e) and RCFC 60.<sup>5</sup> However, where a party seeks reconsideration and/or clarification of an interlocutory decision, as in the case sub judice, different RCFC provisions come into play.

The standards applicable to reconsideration of non-final decisions are set forth in RCFC 54(b) and RCFC 59(a).<sup>6</sup> RCFC 54(b) provides that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."<sup>7</sup> RCFC 59(a)(1) provides that rehearing or reconsideration may be granted as follows: "(A) for any reason for which a

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<sup>4</sup> *Alpha I, L.P. v. United States*, 86 Fed. Cl. 126, 129 (2009) (citing *Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990)).

<sup>5</sup> *L-3 Communs. Integrated Sys., L.P. v. United States*, 98 Fed. Cl. 45, 48-49 (2011).

<sup>6</sup> *Alpha I, Id.*, 86 Fed. Cl. at 129.

<sup>7</sup> RCFC 54(b).

new trial has heretofore been granted in an action at law in federal court; (B) for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court; or (C) upon the showing of satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States.”<sup>8</sup>

These two Court of Claims rules have been described as reflecting the “precept that ‘courts possess inherent power to modify their interlocutory orders before entering a final judgment.’”<sup>9</sup> RCFC 54(b) expressly recognizes that “any order or other form of decision is subject to revision *at any time before the entry of judgment.*”<sup>10</sup> RCFC 59(a)(1) permits reconsideration “on all or some of the issues.” Among the basis for reconsideration by the court is “for any reason for which a new trial has heretofore been granted in an action at law in federal court.”<sup>11</sup>

Under federal common law principles, this court has power to reconsider its prior decision on any ground consistent with application of the

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<sup>8</sup> RCFC 59(a)(1); see also *Klamath Irrigation Dist. v. United States*, 68 Fed. Cl. 119, 120 (2005) (“a motion for reconsideration of the court's ruling on a partial summary judgment motion may be filed under RCFC 59(a)(1)”).

<sup>9</sup> *Wolfchild II*, 68 Fed. Cl. at 784 (citing *Florida Power and Light Co. v. United States*, 66 Fed. Cl. 93, 95-97 (2005)).

<sup>10</sup> RCFC 54(b).

<sup>11</sup> RCFC 59(a)(1)(A).

law of the case doctrine.<sup>12</sup> This Court previously identified three reasons warranting departure from the law of the case: (1) the discovery of new and different material evidence that was not presented in the prior action, (2) an intervening change of controlling legal authority, and (3) when the prior decision is clearly incorrect and its preservation would work a manifest injustice.<sup>13</sup>

As the present case remains in an “interlocutory posture”, the Plaintiffs’ motion for reconsideration is reviewed under RCFC 54(b) and RCFC 59(a), rather than the “more rigorous standards” of RCFC 59(e).<sup>14</sup> Reconsideration under Rule 54(b) of the Federal Rules of Civil Procedure differs from reconsideration under Rules 59 and 60, and “is available ‘as justice requires.’”<sup>15</sup> The *Potts* court defined the phrase “as justice requires” as the following:

“as justice requires” indicates concrete considerations of whether the court “has patently misunderstood a party, has made a decision outside the adversarial issues presented to the [c]ourt by the parties, has made an error not of reasoning, but of apprehension, or where a

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<sup>12</sup> *Wolfchild II*, 68 Fed. Cl. at 785 (2005)

<sup>13</sup> *Id.*, citing *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695, 698 (Fed. Cir. 2001); see also *Farmers Coop. v. United States*, 2011 U.S. Claims LEXIS 1898 (September 20, 2011), Slip. Op. at 5-7.

<sup>14</sup> *Wolfchild II*, at 784.

<sup>15</sup> *L-3 Communs. Integrated Sys., Id.*, 98 Fed. Cl. at 48, citing *Potts v. Howard University Hospital*, 623 F. Supp. 2d 68, 71 (D.D.C. 2009) (quoting *Childers v. Slater*, 197 F.R.D. 185, 190 (D.D.C. 2000)); see also *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004)).

controlling or significant change in the law or facts [has occurred] since the submission of the issue to the court.”<sup>16</sup>

“[T]he ‘as justice requires’ standard amounts to determining ‘whether reconsideration is necessary under the relevant circumstances.’”<sup>17</sup>

There are inherent restrictions on motions to reconsider. “The court must consider such a motion with ‘exceptional care.’”<sup>18</sup> Accordingly, the movants “must do more than ‘merely reassert arguments which were previously made and carefully considered by the court.’”<sup>19</sup> A motion for reconsideration is not intended, however, to give an ‘unhappy litigant an additional chance to sway’ the court.<sup>20</sup> “[W]here litigants have once battled for the court’s decision, they should neither be required, nor without good reason permitted, to battle for it again.”<sup>21</sup>

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<sup>16</sup> *L-3 Communs. Integrated Sys., Id.*, 98 Fed. Cl. at 49, (*Potts, Id.*, 623 F.Supp.2d at 71; quoting *Cobell*, 224 F.R.D. at 272).

<sup>17</sup> *Potts, Id.*, (quoting *Cobell*, 224 F.R.D. at 272).

<sup>18</sup> *Henderson County Drainage Dist. No. 3 v. United States (Henderson County)*, 55 Fed. Cl. 334, 337 (2003) (quoting *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 300 (1999)).

<sup>19</sup> *Bannum, Inc. v. United States*, 59 Fed. Cl. 241, 243 (2003) (quoting *Henderson County*, 55 Fed. Cl. at 337).

<sup>20</sup> *Alpha I*, 86 Fed. Cl. at 129 (quoting *Matthews v. United States*, 73 Fed. Cl. 524, 525 (2006)).

<sup>21</sup> *Potts*, 623 F. Supp. 2d at 71 (quoting *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005)).

## ARGUMENT

### I. THE UNITED STATES' MOTION TO RECONSIDER DOES NOT RAISE AN ISSUE JUSTIFYING DEPARTURE FROM THE LAW OF THE CASE

In *Wolfchild II*, this Court articulated a review standard for reconsideration of interlocutory orders such as this Court's August 5, 2011 Opinion and Order, as corrected.<sup>22</sup> Applying federal common law principles, this court recognized its power to reconsider a prior decision on any ground consistent with application of the law of the case doctrine.<sup>23</sup> This Court identified three reasons which warranted departure from the law of the case: (1) the discovery of new and different material evidence that was not presented in the prior action, (2) an intervening change of controlling legal authority, (3) when the prior decision is clearly incorrect and its preservation would work a manifest injustice.<sup>24</sup>

The Plaintiff-Intervenors assert that the Government has failed to identify any "exceptional circumstances" such as new material evidence, an intervening change of controlling legal authority, or any grounds upon which to conclude that this Court's summary judgment rulings were manifestly

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<sup>22</sup> *Wolfchild II*, 68 Fed. Cl. 779, 784-785 (2005), citing *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695, 698 (Fed. Cir. 2001).

<sup>23</sup> *WolfchildII, Id.*; see also *Intergraph Corp., Id.*, ("The doctrine of law of the case generally bars retrial of issues that were previously resolved.")

<sup>24</sup> *Id.*

erroneous. Thus, this Court's August 5, 2011 rulings, as corrected, should remain undisturbed.

The Government first argues "the Court has erred in finding that the termination by the Federal Reports Elimination and Sunset Act of 1995 of the requirement in 25 U.S.C. § 1402(a) to submit distribution plans to Congress leaves substantial gaps in the Distribution Act."<sup>25</sup> The United States next requests the Court to reconsider its August 5 Order, thereby making it "a final judgment on all claims."<sup>26</sup> Finally, the Defendant complains that the Court's requirement that completion of a distribution plan within one year of the Order and Judgment "would require Interior to begin its efforts pending any appeal and prior to a final, non-appealable, judgment, and *may result* in unnecessary expenditure of resources in the event this Court's judgment is reversed or modified."<sup>27</sup>

As argued below, the United States' Motion for Reconsideration does not establish any of these three standards meriting reconsideration as a matter of federal law.

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<sup>25</sup> United States' Br. at 2.

<sup>26</sup> U.S. Br., at 3.

<sup>27</sup> *Id.*, (emphasis added).

**A. THE GOVERNMENT’S MOTION DOES NOT CLAIM THE DISCOVERY OF “NEW AND DIFFERENT MATERIAL EVIDENCE” THAT WAS NOT PRESENTED IN THE PRIOR ACTION NOR ANY “INTERVENING CHANGE OF CONTROLLING LEGAL AUTHORITY”**

The Government’s motion for reconsideration does not address the first two of the *Wolfchild II* standards. The Defendant does not cite to any new, material evidence that was not presented in the most recent summary judgment briefing. The United States likewise failed to cite any legislative, administrative or judicial change in controlling legal authority otherwise meriting reconsideration under the *Wolfchild II* standards. Consequently, the motion for reconsideration must be reviewed on the sole basis that this Court’s “prior decision is clearly incorrect and its preservation would work a manifest injustice.”

**B. THE UNITED STATES’ ARGUMENTS CONCERNING THE FEDERAL REPORTS ELIMINATION ACT, FINAL JUDGMENT AND THE ALLEGED INCONSISTENCY OF THE COURT’S ORDER WITH THE DISTRIBUTION ACT FAIL TO PROVE THE COURT’S AUGUST 5, 2011 OPINION AND ORDER WAS CLEARLY INCORRECT**

The Government’s motion fails to establish any “concrete considerations” justifying reconsideration of this Court’s August 5 Opinion and Order.

As a preliminary matter, the Plaintiff-Intervenors submit that it is noteworthy what issues the Government did not seek reconsideration. The United States does not seek reconsideration of this Court's finding that the "government [was] in error to demand identification of plaintiffs and proofs of descent throughout this case, under the Indian Judgment Distribution Act."<sup>28</sup> The Government likewise does not seek reconsideration of the Court's order reimbursing the Plaintiffs and the Plaintiff-Intervenors for the costs of determining eligibility.<sup>29</sup> Finally, the United States' motion notably fails to request reconsideration of this Court's finding that the Government displayed an "unjustified litigation position," which caused Plaintiffs and Plaintiff-Intervenors to "expend resources that should have been borne by the government."<sup>30</sup>

Instead, the United States sets forth three reasons for reconsideration. None of the three reasons articulated by the Government – all grouped under the third "clear error/manifest injustice" prong in *Wolfchild II* - meet the required "strong showing of clear error." The Court of Claims has found

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<sup>28</sup> August 5, 2011 Opinion and Order, p. 38.

<sup>29</sup> *Id.*, at 39.

<sup>30</sup> *Id.*

that the standard found under the third exception is a “stringent one.”<sup>31</sup> In *United States v. Turtle Mountain Band of Chippewa Indians*, the Court stated, “[t]he purpose of the law-of-the-case principle is to provide finality to judicial decisions.” A strong showing of clear error therefore is required before a court should reexamine its decision.<sup>32</sup>

The United States’ motion for reconsideration fails to establish a “strong showing of clear error.” The Court made a well-reasoned decision based upon a complete summary judgment record on each of the three issues briefed by the Government. The Plaintiff-Intervenors otherwise adopt the reasons set out by the Plaintiffs in their response in opposition, which concluded that the “Court has acted responsibly.”<sup>33</sup> We agree.

**C. THE MOTION FAILS TO ESTABLISH THAT THE AUGUST 5 ORDER WOULD WORK A CONCRETE MANIFEST INJUSTICE AGAINST THE UNITED STATES**

The Government motion does not specifically address the “manifest injustice” requirement of the third prong of the *Wolfchild II* analysis. This oversight renders the motion defective as a matter of federal law.

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<sup>31</sup> *Short v. United States*, 228 Ct. Cl. 535 (1981), 661 F.2d 150, 154 (1981), citing *Northern Helex Co. v. United States*, 225 Ct. Cl. 194, 201 (1980), 634 F.2d 557, 561 (1980);

<sup>32</sup> 222 Ct. Cl. 1, 8 (1979).

<sup>33</sup> Plaintiffs’ Response in Opposition to U.S. Motion to Reconsider, Doc. # 1104, p. 4.

There are, however, possibly two colorable, indirect references in the Government's motion to the operation of "manifest injustice" against the United States concerning the Defendant's complaint regarding the distribution plan. However, the United States must not only show "clear error," but must also establish the presence of manifest injustice, as well. Accordingly, the Defendant's challenge to the Court's ruling on the Federal Reports Elimination Act and the Government's request for a final, rather than interlocutory, judgment fail as reasons for reconsideration based upon a lack of a clear showing of manifest injustice.

The Government must also base its motion upon a strong showing of manifest injustice – not speculation. A mere suspicion of error, no matter how well supported, does not warrant reopening an already decided point.<sup>34</sup>

The Defendant complains that the Court's requirement that completion of a distribution plan within one year of the Order and Judgment "would require Interior to begin its efforts pending any appeal and prior to a final, non-appealable, judgment, and *may result* in unnecessary expenditure of resources in the event this Court's judgment is reversed or modified."<sup>35</sup>

The Defendant argues that this Court's order directing the Secretary of Interior to "submit the distribution plan one year from the date of the Court's

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<sup>34</sup> *Northern Helex*, 225 Ct. Cl. at 201.

<sup>35</sup> U.S. Br. at 3; (emphasis added).

judgment is inconsistent with 25 U.S.C. § 1402(a).”<sup>36</sup> It then asserts that to comply with the Court’s order “would require significant effort by Interior that *may* not be necessary, or change, as a result of any further proceedings in this matter.”<sup>37</sup>

In each of the above examples, the Government’s motion for reconsideration is based upon what “may” happen in the interim. However, the Defendant’s speculation does not rise to provide a sufficient legal basis for establishing manifest injustice. Consequently, the motion should be denied in all respects.

### **CONCLUSION**

WHEREFORE, the Plaintiffs-Intervenors request this Court to overrule the United States’ Motion for Reconsideration of this Court’s August 5, 2011 Opinion and Order, as corrected, for the reasons stated herein and for such other and further reasons as this Court deems just and proper.

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<sup>36</sup> U.S. Br. at 19.

<sup>37</sup> *Id.*, (emphasis added).

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**CERTIFICATE OF SERVICE**

The Plaintiffs/Intervenor-Plaintiffs, by and through their respective undersigned counsel, herewith certify that they transmitted the foregoing Plaintiff-Intervenors' Response in Opposition to the United States' Motion for Reconsideration by ECF transmittal, this 7th day of October, 2011.

s/ R. Deryl Edwards, Jr.  
R. Deryl Edwards, Jr.  
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