

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

UNITED STATES OF AMERICA,

Plaintiff,

No. CIV S-09-2445 KJM-EFB

vs.

SIERRA PACIFIC INDUSTRIES, et al.,

ORDER

Defendants.

This matter comes before the court on defendants' June 18, 2012 request for partial reconsideration of the court's June 4, 2012 order granting in part plaintiff's motion for partial summary judgment (ECF 522). (ECF 549).

I. PARTIES' ARGUMENTS

Defendants contend plaintiff did not move for summary judgment on defendants' affirmative defense of failure to mitigate insofar as plaintiff's failure to mitigate involved salvage logging. (ECF 549 at 2.) Defendants contend they accordingly did not present more evidence regarding salvage because they never had the burden of producing evidence. (*Id.*) Defendants contend the court committed clear error in finding defendants failed to carry a burden that never shifted to them. (Reply, ECF 558 at 4.) Plaintiff contends it moved for summary judgment on defendants' entire mitigation defense. (Opp'n, ECF 556 at 2.) Plaintiff contends defendants had

1 the burden of establishing a genuine issue of material fact and failed to do so. (*Id.* at 4.)
2 Moreover, defendants themselves introduced salvage as a mitigation issue in their opposition to
3 the motion for partial summary judgment. (*Id.* at 5.) For the reasons set forth below, the court
4 grants reconsideration and affirms its prior conclusion.

5 II. MOTION FOR PARTIAL SUMMARY JUDGMENT AND ORDER

6 Plaintiff's argument on summary judgment was that defendants' mitigation
7 defense failed because it was based on pre-injury conduct. (ECF 351-1 at 12-13.) Defendants
8 contended in their opposition that plaintiff was incorrect in contending that all the conduct at
9 issue occurred prior to the injury. (ECF 384 at 19-20.) Rather, the United States Forest Service
10 failed to mitigate by failing to promptly salvage timber after the fire. (*Id.* at 20.) In its reply,
11 plaintiff contended defendants failed to meet their burden with regard to salvage and that its
12 decisions regarding salvage were part of its discretionary functions and could not be challenged.
13 (ECF 392 at 10.) The court found defendants failed to raise a triable issue of fact based on the
14 expert declaration they attached to their opposition. (ECF 522 at 11-12.)

15 III. ANALYSIS

16 A. Standard

17 Federal Rule of Civil Procedure 60(b) provides: "On motion and just terms, the
18 court may relieve a party . . . from a final judgment . . . for . . . (1) mistake, inadvertence,
19 surprise, or excusable neglect; . . . or (6) any other reason that justified relief." "The major
20 grounds that justify reconsideration involve an intervening change of controlling law, the
21 availability of new evidence, or the need to correct a clear error or prevent manifest injustice."
22 *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882 F.2d 364, 369 n.5 (9th Cir. 1989) (quotation
23 marks and citation omitted).

24 B. Request for Reconsideration

25 Courts generally will not consider new facts or legal arguments raised for the first
26 time in a reply brief unless they are "limited to matters raised in the opposition papers." *Lerma*

1 v. *Arends*, No. 1:11-cv-00533-LJO-MJS, 2011 U.S. Dist. LEXIS 66379, at *15 (E.D. Cal. Jun.
2 22, 2011). On summary judgment, the moving party bears the initial burden of showing the
3 district court “that there is an absence of evidence to support the nonmoving party’s case.”
4 *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The burden then shifts to the nonmoving
5 party, which “must establish that there is a genuine issue of material fact . . .” *Matsushita Elec.*
6 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 (1986). In carrying their burdens, both
7 parties must “[cite] to particular parts of materials in the record [or show] that the materials cited
8 do not establish the absence or presence of a genuine dispute, or that an adverse party cannot
9 produce admissible evidence to support that fact.” FED. R. CIV. P. 56(c)(1); *see also Matsushita*,
10 475 U.S. at 586 (“[the nonmoving party] must do more than simply show that there is some
11 metaphysical doubt as to the material facts”).

12 Here, plaintiff did not argue in its moving papers that there was no genuine issue
13 of material fact; rather, plaintiff argued that defendants’ mitigation defense failed as a matter of
14 law. Defendants raised salvage as a basis for their defense to show that it did not fail as a matter
15 of law. Therefore, the burden of presenting sufficient evidence never transferred to defendants
16 and it was error for the court to have granted summary judgment on the basis of failure to
17 produce evidence. Accordingly, defendants’ request for reconsideration is granted.

18 C. Motion for Partial Summary Judgment Partially Reconsidered

19 Upon reconsideration, the court does not disturb its grant of summary judgment
20 on defendants’ failure to mitigate affirmative defense.

21 Defendants raised salvage as an issue in their opposition, which plaintiff
22 responded to in its reply by contending its decisions regarding salvage were part of its
23 discretionary functions and therefore may not be challenged. (ECF 392 at 10.) *See Lerma*, 2011
24 U.S. Dist. LEXIS 66379, at *15.

25 As stated in the court’s order at issue, the Federal Tort Claims Act (FTCA)
26 provides: “The United States shall be liable, respecting the provisions of this title relating to tort

1 claims, in the same manner and to the same extent as a private individual under like
2 circumstances, but shall not be liable for interest prior to judgment or for punitive damages.” 28
3 U.S.C. § 2674. The FTCA waives the government’s sovereign immunity for tort claims arising
4 out of negligent conduct of government employees acting within the scope of their employment.
5 “The government can be sued ‘under circumstances where the United States, if a private person,
6 would be liable to the claimant in accordance with the law of the place where the act or omission
7 occurred.’” *Terbush v. United States*, 516 F.3d 1125, 1128-29 (9th Cir. 2008) (quoting 28
8 U.S.C. § 1346(b)(1)).

9 The discretionary function exception to the FTCA “is a qualification on the
10 federal government’s general waiver of sovereign immunity for tort claims,” *Sutton v. Earles*, 26
11 F.3d 903, 907 (9th Cir. 1994), and “provides immunity from suit for ‘[a]ny claim . . . based upon
12 the exercise or performance or the failure to exercise or perform a discretionary function or duty
13 on the part of a federal agency or an employee of the Government, whether or not the discretion
14 involved be abused.’” *Terbush*, 516 F.3d at 1129 (quoting 28 U.S.C. § 2680(a)) (internal
15 alterations in original). The Supreme Court has set out a two-step analysis to determine the
16 applicability of the discretionary function exception: first, a court asks whether the challenged
17 actions involve an element of judgment or choice; second, a court asks whether the judgments
18 involve governmental actions or considerations of public policy. *Id.* (citing *Berkovitz v. United*
19 *States*, 486 U.S. 531, 536-37 (1988) and *United States v. Gaubert*, 499 U.S. 315, 322 (1991));
20 *see also FSLIC v. Huang*, No. CV 85-8305-LTL(Gx), 1986 U.S. Dist. LEXIS 19284, at *5 (C.D.
21 Cal. Oct. 9, 1986) (discretionary function exception does not apply where the counterclaim “does
22 not threaten or hamper the efficiency of government operations or the exercise of regulatory
23 discretion”). “The discretionary function exception will not apply when a federal statute,
24 regulation, or policy specifically prescribes a course of action for an employee to follow.”
25 *Sutton*, 26 F.3d at 907. Moreover, “[t]o be shielded the judgment must be grounded in social,
26 economic, and political policy.” *Id.* Salvage decisions clearly involve an element of judgment

1 involving governmental action and considerations of public policy. As plaintiff states, “[t]he
2 Forest Service’s post-fire salvage was the product of a two-year NEPA analysis that was
3 dominated by discretionary decisions implicating considerations of public policy.” (ECF 556 at
4 6 n.3.) *See Blue Mts. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211-16 (9th Cir.
5 1998).

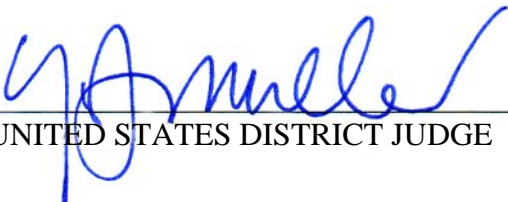
6 Defendants contend “their failure-to-mitigate affirmative defense would be
7 permissible under the recoupment doctrine even if it were based on discretionary conduct” and
8 request the opportunity to brief this matter. (ECF 558 at 5 n.2.) The court has already found that
9 defendants’ recoupment defense fails as a matter of law; although not discussing salvage
10 specifically, the court found: “None of the bases defendants assert for their affirmative defense
11 of recoupment [is] logically connected to the origin of the Moonlight Fire, nor have defendants
12 explained how the facts underlying their defenses ‘substantially overlap’ with the facts
13 surrounding the origins of the Moonlight Fire. As it is undisputed that the fire began on private
14 land [citation], defendants’ claims arising from plaintiff’s acts or omissions after the fire began
15 or years before it ignited are not compulsory counter-claims. As they are not compulsory
16 counter-claims, there has been no waiver of sovereign immunity.” (ECF 522 at 5.) The same
17 reasoning applies to defendants’ claims based on salvage.

18 IV. CONCLUSION

19 For the foregoing reasons, defendants’ request for reconsideration is granted.
20 Upon reconsideration, and for the reasons set forth above, the court affirms the grant of
21 plaintiff’s motion for partial summary judgment.

22 IT IS SO ORDERED.

23 DATED: July 2, 2012.

24
25 
26 UNITED STATES DISTRICT JUDGE