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

HEVERD GUTIERREZ,

Petitioner,

No. CIV S-11-1064 GGH P

vs.

GARY SWARTHOUT, Warden,

Respondent.

ORDER

_____ /

On May 24, 2011, petitioner filed a request for reconsideration of the magistrate judge’s order filed May 9, 2011, summarily denying petitioner’s application for writ of habeas corpus pursuant to Habeas Corpus Rules in § 2254 cases, Rule 2. As petitioner has consented to the undersigned’s jurisdiction, the instant motion is construed as seeking to set aside the court’s findings and/or alter the judgment. Fed. R. Civ. Proc. 52(a)(6), 52(b), 59(e).

Under the “law of the case” doctrine, “a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case.” Thomas v. Bible, 983 F.2d 152, 154 (9th Cir.) (cert. denied 508 U.S. 951, 113 S.Ct. 2443 (1993)). The doctrine is not a limitation on a tribunal's power, but rather a guide to discretion. Arizona v. California, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391 (1983). A court may have discretion to depart from the law of the case where: 1) the first decision was clearly

1 erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is
2 substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would
3 otherwise result. Failure to apply the doctrine of the law of the case absent one of the requisite
4 conditions constitutes an abuse of discretion. Thomas v. Bible, 983 F.2d at 155.

5 Here, upon review of the entire file, the court finds that its earlier ruling was not
6 clearly erroneous; nor do any of the other enumerated conditions exist for reconsidering the
7 judgment. Thus the court lacks discretion to depart from the law of the case in this matter.

8 Therefore, IT IS HEREBY ORDERED that the court's order of May 9, 2011, is
9 affirmed.

10 DATED: July 12, 2011

11 /s/ Gregory G. Hollows
12 UNITED STATES MAGISTRATE JUDGE

13 GGH:14
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