**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

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| **CLARK COUNTY, WASHINGTON, *et al.*,** | ) | |
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| ***Plaintiffs,*** | ) | |
| | ) | |
| | ) | **Case No. 1:11-cv-00278-RWR** |
| **v.** | ) | Judge Richard W. Roberts |
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| **UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*** | ) | |
| | ) | |
| ***Defendants,*** | ) | |
| | ) | |
| **and** | ) | |
| | ) | |
| **COWLITZ INDIAN TRIBE,** | ) | |
| | ) | |
| ***Defendant-Intervenor.*** | ) | |

**FEDERAL DEFENDANTS' MOTION FOR VOLUNTARY REMAND AND STAY OF THE LITIGATION AND MEMORANDUM IN SUPPORT THEREOF**

Federal Defendants, the United States Department of the Interior ("DOI"), Kenneth L. Salazar, in his official capacity as Secretary of the Interior, the Bureau of Indian Affairs ("BIA"), Donald Laverdure,[1] in his official capacity as Acting Assistant Secretary of the Interior – Indian Affairs, the National Indian Gaming Commission ("NIGC"), and Tracie Stevens, in her official capacity as Chairwoman of the NIGC (collectively "Federal Defendants"), by undersigned counsel, hereby move the Court for a voluntary remand of DOI's initial reservation determination, which is at issue in the above-captioned litigation and the related case of Confederated Tribes of the Grand Ronde Community v. Salazar, Case No. 11-cv-00284-RWR

[1] Mr. Laverdure is substituted for Larry Echo Hawk pursuant to Federal Rule of Civil Procedure 25(d).

(D.D.C.).[2] Federal Defendants further move to stay all proceedings in this case, including the summary judgment briefing schedule, until DOI takes final action on the remanded initial reservation determination.

Federal Defendants have conferred with counsel for Plaintiffs and Intervenor-Defendants to ascertain their clients' respective positions on this motion. Plaintiffs oppose the motion and Intervenor-Defendant does not oppose the motion.

## I. INTRODUCTION

This action centers around DOI's December 17, 2010, decision to acquire land in trust for the benefit of the Cowlitz Indian Tribe ("Cowlitz" or "Cowlitz Tribe") for economic development purposes pursuant to the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461-479. 76 Fed. Reg. 377-01 (January 4, 2011). The land at issue is comprised of nine parcels equaling approximately 151.87 acres located in Clark County, Washington ("the Clark County Property") on which the Cowlitz plans to construct and operate a gaming facility under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721. Id.

Plaintiffs filed their lawsuits on January 31, 2011 (Case No. 11-cv-00278-RWR ("Clark County Plaintiffs")), and February 1, 2011 (11-cv-00284-RWR ("Grand Ronde Plaintiff"), alleging that the Secretary's decision to acquire the land into trust: violates Sections 5 and 19 of the IRA, 25 U.S.C. §§ 465, 479, because the Cowlitz Tribe was not federally recognized or under Federal jurisdiction in 1934; violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321 et. seq.; and violates the IGRA, 25 U.S.C. §§ 2701-2721, because the Clark County Property is not eligible for gaming. The Clark County Plaintiffs filed additional claims against

[2] The instant motion will be filed in the related case as well, but for ease of reference the docket numbers referenced herein are from the Clark County case docket.

the NIGC, challenging the NIGC's 2005 approval of a gaming ordinance and the 2008 approval of a gaming ordinance amendment for the Cowlitz Indian Tribe and the underlying gaming eligibility determination for the Clark County Property.

On July 13, 2011, the Cowlitz Indian Tribe moved to intervene in this action. Dkt. No. 25. On December 23, 2011, the Court granted the Cowlitz Tribe's motion to intervene. On February 10, 2012, the Court entered a scheduling order adopting the schedule proposed by Plaintiffs, Federal Defendants and Intervenor-Defendants. Dkt. No. 42. Pursuant to the February 10, 2012 scheduling order, the Federal Defendants lodged DOI's administrative record with the Court. Dkt. No. 43. On or around March 13, 2012, one of the Clark County Plaintiffs' attorneys, Jena MacLean, contacted counsel for Federal Defendants regarding documents that were missing from DOI's administrative record. Dkt. No. 53-2 at ¶ 7. DOI was unable to locate some of the documents and therefore, requested the materials from Plaintiffs' attorney. Id. at ¶ 8-9. These documents address the merits of the NIGC's gaming determination for the Clark County Property. Id. at ¶¶ 3-5.[3] Because DOI's IGRA determination relies, in part, on the facts of the NIGC's restored lands determination, the documents also potentially impact DOI's determination. The Federal Defendants supplemented the administrative record with these

[3] As discussed below, IGRA prohibits gaming on land acquired into trust after October 17, 1988, unless the land qualifies for one of the exceptions to that prohibition. See 25 U.S.C. § 2719. As part of its land into trust decision, DOI found that the Clark County Property would qualify for the initial reservation exception to the prohibition, 25 U.S.C. § 2719(b)(1)(B)(ii), while the NIGC found that the Property would qualify for the restored lands exception, 25 U.S.C. § 2719(b)(1)(B)(iii), when it issued its gaming ordinance approval. See Cowlitz Indian Tribe ordinance approval dated 11/23/2005 ("NIGC Approval"), available at http://www.nigc.gov/Reading_Room/Gaming_Ordinances.aspx.

documents and some additional materials that were inadvertently left out of the initial DOI record production. Dkt. No. 46.

Federal Defendants respectfully request a voluntary remand to review these documents. DOI intends to carefully examine the documents submitted by Plaintiffs that address the gaming determinations. Depending on the decision reached by DOI on remand, some or all of Plaintiffs' claims in this lawsuit may be rendered moot. Accordingly, to conserve the resources of the parties and the Court, Federal Defendants also request a stay of all proceedings in this case until DOI completes its review and takes final action to deny or reaffirm the initial reservation gaming determination. Pursuant to the February 10, 2012 scheduling order as extended on June 15, 2012, Plaintiffs filed their motions for summary judgment and supporting memorandum on June 20, 2012 (Dkt. No. 53); Federal Defendants' and Intervenor-Defendants cross-motions for summary judgment are currently due on July 27, 2012. Dkt. No. 54.

## II. STATUTORY BACKGROUND

### A. The Indian Reorganization Act

In deciding to accept the Property into trust, the Secretary acted pursuant Section 5 of the IRA. Section 5 of the IRA provides in pertinent part that:

> [t]he Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in land, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
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> …
>
> Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is

> acquired, and such lands or rights shall be exempt from state and local taxation.

25 U.S.C. § 465.

The regulations implementing Section 5 of the IRA are set forth in 25 C.F.R. Part 151. They provide that the Secretary may acquire land into trust "when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. § 151.3(a)(3). Section 151.10 requires the Secretary to notify the state and local governments having regulatory jurisdiction over the proposed land of the proposed trust acquisition so that they can provide written comments on the potential impacts on jurisdiction, taxes and assessments. Id. The provision also obligates the Secretary to consider factors such as: the need of the tribe for the land, the purposes for which the land will be used, the impact on the state and its political subdivisions resulting from the removal of the land from its tax rolls, jurisdictional problems and potential conflicts of land use, whether the BIA is equipped to discharge any additional responsibilities resulting from the trust status, and compliance with NEPA. See id. § 151.10(b)-(d), (f)-(h).

However, the IRA limits the Secretary's authority to acquire land into trust under Section 5 to those that fit within the definition of Indian in Section 19 of the Act, 25 U.S.C. § 479. The relevant portion of the definition in this case is "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479.

**B. The Indian Gaming Regulatory Act**

IGRA was enacted "to provide express statutory authority for the operation of such tribal gaming facilities as a means of promoting tribal economic development, and to provide regulatory protections for tribal interests in the conduct of such gaming." Grand Traverse Band

of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan, 198 F. Supp. 2d 920, 933 (W.D. Mich. 2002); see 25 U.S.C. § 2702.

In general, IGRA prohibits gaming activities on land acquired into trust by the United States on behalf of a tribe after October 17, 1988. 25 U.S.C. § 2719(a)(1). There are several exceptions, referred to as the "Section 20" exceptions, to this general prohibition, including when:

> (B) lands are taken into trust as part of --
>
> (i) a settlement of a land claim,
>
> (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the federal acknowledgment process, or
>
> (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

25 U.S.C. § 2719(b)(1)(B).

Here, the DOI Office of the Solicitor opined that the Clark County Property will qualify as the Cowlitz Tribe's "initial reservation" under Section 2719(b)(1)(B)(ii) if it is taken into trust and declared a reservation. The Secretary adopted the legal opinion in accepting the land into trust. 76 Fed. Reg. 377-01 (January 4, 2011).

Pursuant to Sections 2710(d)(1)(A)-(2)(A) of IGRA, a tribe desiring to conduct Class II[4] gaming must also adopt, enact, and submit to the Chairman of the NIGC for his approval a

[4] Under IGRA, gaming is divided into three classes. Tribes have exclusive authority over "Class I" social and traditional games with prizes of minimal value. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class II gaming, which includes bingo and certain "non-banking" card games, see id. § 2703(7), can occur if the state allows such gaming for other groups. See id. §§ 2704, 2710(b). The Tribes and NIGC share regulatory duties over Class II gaming. Id. § 2710(b). Class III gaming, which includes more traditional "casino" games, including slot machines, roulette, poker, etc., can occur lawfully only pursuant to a tribal-state "compact." Id. § 2710(d). Regulatory and

gaming ordinance. Unless the Chairman determines that the ordinance does not meet the content and submission requirements, that it was not adopted in compliance with the governing documents of the Indian tribe, or that the governing body of the tribe was unduly influenced in its adoption of the ordinance, the Chairman "shall approve such ordinance." 25 U.S.C. §§ 2710(d)(2)(B); 2710(e).

The Chairman of the NIGC approved the Cowlitz Tribe's Class II gaming ordinance on November 23, 2005, and in doing so, adopted the legal opinion of the NIGC's Office of General Counsel that the Clark County Property will qualify as "the restoration of lands for an Indian tribe that is restored to Federal recognition" under Section 2719(b)(1)(B)(iii) if the land is taken into trust. See NIGC Approval.

## III. ARGUMENT

### A. VOLUNTARY REMAND OF THE INITIAL RESERVATION DETERMINATION IS APPROPRIATE

As stated above, DOI was unable to locate certain documents submitted by some of the Plaintiffs in this case addressing the merits of the NIGC's determination that the Clark County Property qualifies as restored lands under IGRA. Dkt. 53-2 at ¶¶ 3-5. Because DOI's initial reservation determination relies in part on the facts of the restored lands decision, the documents also potentially impact DOI's IGRA determination. Therefore, the initial reservation determination should be voluntarily remanded to DOI so the agency can review its determination in light of the documents.

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enforcement oversight of Class III gaming activities is also provided under IGRA by NIGC. Id. §§ 2705(a), 2710(d).

A "voluntary remand" is a request by an agency for "remand without [judicial] consideration of the merits," while "a court-generated remand" is "a remand after consideration of the merits." Central Power & Light Co. v. United States, 634 F.2d 137, 145 (5th Cir. 1980). "The jurisdiction to review the orders of [the agency] is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." Ford Motor Co. v. NLRB, 305 U.S. 364, 373 (1939).

Courts have inherent authority to allow an agency to reconsider a decision and to prevent needless litigation over potentially moot issues from occurring pending completion of the agency's reconsideration. For example, the APA states that a court may "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. Moreover, courts possess ample discretion to grant agency requests for voluntary remands. See, e.g., Loma Linda Univ. v. Schweiker, 705 F.2d 1123, 1127 (9th Cir. 1983).

A voluntary remand is consistent with the principle that "[a]dministrative agencies have an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider." Trujillo v. General Elec. Co., 621 F.2d 1084, 1086 (10th Cir. 1980) (citing Albertson v. FCC, 182 F.2d 397, 399 (D.C. Cir. 1950)); see also Citizens Against the Pellissippi Parkway Extension v. Mineta, 375 F.3d 412, 416 (6th Cir. 2004); SKF USA Inc. v. United States, 254 F.3d 1022, 1030 (Fed. Cir. 2001). It also serves the interests of judicial economy by allowing an agency to reconsider and rectify an erroneous decision without further expenditure of judicial resources. See, e.g., Ethyl Corp. v. Browner, 989 F.2d

522, 524 (D.C. Cir. 1993) (granting EPA's opposed motion for voluntary remand to consider newly developed evidence). Courts "commonly grant such motions [for voluntary remand], preferring to allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete." Id. at 524 n.3.

For example, in Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993), the court considered a challenge to the United States Environmental Protection Agency's ("EPA") denial of an application for a waiver from an otherwise applicable requirement of the Clean Air Act. 989 F.3d at 523. EPA sought voluntary remand, and the D.C. Circuit granted the agency's request. Id. at 524. The court expressed a general preference for granting motions for voluntary remand to avoid "wasting the courts' and the parties' resources." Id.

Here, DOI plans to reevaluate its determination in light of documents provided by Plaintiffs. Granting DOI's request for a remand and stay of the proceedings in this case will conserve judicial resources and allow the parties to avoid unnecessary litigation. See e.g. Ethyl Corp, 989 F.2d at 524. Wasting judicial resources is an appropriate concern here, because DOI's review of the challenged decision could result in reversal of the initial reservation determination. These actions, if taken, could render moot or otherwise resolve some or all of Plaintiffs' claims. For example, Plaintiffs contend that the Clark County Property is ineligible for gaming. See Pls. Mot. Summ. J., Dkt. No. 53, at 40-45. DOI's review on remand could address this concern because the review will focus on whether the Clark County Property is eligible for gaming.

A voluntary remand is preferable to litigating the merits of the initial reservation determination because such litigation risks wasting the parties' and the Court's resources. DOI proposes to review the initial reservation determination by September 25, 2012, based on a

review of the administrative record filed on February 15, 2012, Dkt. No. 43, and a review of the supplemental administrative record documents filed on April 30, 2012, Dkt. No. 46, which includes the subject documents. As part of its review of the initial reservation determination, DOI intends to revisit "the significant historical connections" analysis. 25 C.F.R. § 292.6(d). The new determination could render moot or otherwise resolve Plaintiffs' claims. See e.g. Ethyl Corp., 989 F.2d at 524 (granting EPA's opposed motion for voluntary remand). If the Plaintiffs are satisfied with the agency's new initial reservation determination, it may obviate the need for further litigation. If the Plaintiffs are dissatisfied after remand, they may renew their challenges at that time. Proceeding now will not result in meaningful judicial review.

Moreover, if the parties were to litigate this case and the Court found that the Secretary's initial reservation determination were arbitrary and capricious, the law is well settled that the proper course would be to remand the agency actions for reconsideration. Camp v. Pitts, 411 U.S. 138, 142 (1973); Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 338 (D.C. Cir. 1989); Environmental Def. Fund v. Costle, 657 F.2d 275, 285 (D.C. Cir. 1981). The Supreme Court has acknowledged the limited scope of circumstances in which a court may order an executive agency to make a specific discretionary determination. See Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 333 (1976) (judicial review of agency action ordinarily requires remand to agency so that agency can exercise its discretion); Citizens for Balanced Env't & Transp. v. Volpe, 650 F.2d 455 (2d Cir. 1981) (court's role is limited; it may not substitute its judgment for that of the agency). Courts have adhered to this doctrine in land into trust cases. Butte County, Cal. v. Hogen, 613 F.3d 190, 196-197 (D.C. Cir. 2010) ("[f]or all of these reasons, we set aside the Secretary's final action to take the Tribe's lands into trust. The case is remanded for further proceedings consistent with this opinion."). Accordingly,

granting Federal Defendants' request for voluntary remand of the initial reservation determination will result in the same relief to which Plaintiffs would be entitled after successful litigation of the merits, while conserving the resources of the parties and this Court.

**B. THE PROPOSED REMAND SCHEDULE IS APPROPRIATE**

As stated above, DOI proposes to complete its review of the initial reservation determination by September 25, 2012. DOI needs this amount of time on remand to review the administrative record documents provided by Plaintiffs. DOI needs until September 25, 2012, to finish that review and to issue a new determination. Based on the foregoing and as set forth more fully in the attached declaration, Federal Defendants believe that the requested time is warranted.

Finally, Federal Defendants request only a remand of its initial reservation determination and stay of the proceedings pending DOI's action on remand, rather than a vacatur of its decision. Remanding without vacatur is appropriate where, as here, the Court does not render a decision on the merits. See Ford Motor Co. v. Nat'l Labor Relations Bd., 305 U.S. at 375 (affirming lower court's decision to grant agency's request for remand, reasoning that unless precluded by statute, it is entirely consistent with principles of judicial review to "giv[e] an administrative body an opportunity to meet [a challenged party's] objections to its order"); Boise Cascade Corp. v. EPA, 942 F.2d 1427, 1431 (9th Cir. 1991) (granting agency's motion for voluntary remand so that the agency could reconsider the challenged decision).

**CONCLUSION**

For the foregoing reasons, the Court should grant Federal Defendants' motion for a voluntary remand and stay of all proceedings in this case, and the related case, pending DOI's review of the initial reservation determination issued pursuant to Section 2719 of IGRA. In

addition, DOI will notify the Court and the parties within 1 business day of taking final action on the remanded determination.

Respectfully submitted this 19 day of July, 2012.

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