IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR VOLUNTARY REMAND AND STAY OF LITIGATION

Federal Defendants – after having reviewed Plaintiffs' summary judgment brief for weeks – ask the Court to grant voluntary remand so that they might now examine a compilation of documents that they misplaced, when duplicates of almost all of the documents in that compilation appear elsewhere in the administrative record available at the time of decision.[1] Clark County and Vancouver, Washington, Citizens Against Reservation Shopping, Al Alexanderson, Greg and Susan Gilbert, Dragonslayer Inc., and Michel's Development LLP (Plaintiffs) respectfully request that the Court deny Federal Defendants' motion for "a voluntary remand to review these documents" for the following reasons.

[1] Federal Defendants filed their Motion for Voluntary Remand and Stay of the Litigation on July 19, 2012 (Dkt. No. 58), the 29th day, and with an extension, a week before their cross-motion for summary judgment and oppositions were due.

First, as fully briefed by Plaintiffs, the Secretary lacks the authority to make any trust acquisition for the Cowlitz Tribe under *Carcieri v. Salazar*, 555 U.S. 379 (2009). That threshold issue should be resolved before any more time and resources are expended on shoring up a gaming determination for land that the Secretary has no authority to acquire in trust.

Second, Federal Defendants' claimed need to review facts from the misplaced compilation of documents as the basis for remand is pretextual. After a careful review of the record by Plaintiffs, it appears that only a few pages of the compilation Plaintiffs provided were missing from the record, and those few pages consist of brief summaries of historic material that appear in substance in multiple places in the record. The Secretary's errors in making the initial reservation determination are many, but losing documents so that complete review was impossible is not one of them. Rather, the Secretary's error was dismissing without addressing the evidence before him. Federal Defendants should not be permitted remand in the middle of litigation to "repair" the initial reservation determination by claiming that they need to review documents that were in the record at the time the Secretary rendered his decision.

Third, the facts on which the Secretary relies for the initial reservation determination fall far short of meeting the regulatory standard for an initial reservation determination. There is no need for the Secretary to reconsider adverse facts when the most favorable facts the Tribe and the Secretary could assemble cannot satisfy regulatory standards. Remand to consider Plaintiffs' facts would be pointless.

If Federal Defendants wish to correct their arbitrary and capricious decision-making, they should do so by withdrawing the Record of Decision (ROD) in its entirety. Federal Defendants' proposed piecemeal reconsideration at this juncture without admission of error based on the

claim that they need to review documents that were available at the time of decision is an abuse of the process, as set forth below.

1. The Court Should First Resolve the Threshold Question of the Secretary's Authority

The Supreme Court held in *Carcieri v. Salazar*, 555 U.S. 379 (2009), that the Secretary cannot acquire land in trust for tribes that were not recognized and under federal jurisdiction in 1934. In this case, the Secretary determined that he had the authority to acquire land in trust for the Cowlitz Tribe through an attempted end-run around *Carcieri*. Plaintiffs here challenge that determination. In seeking voluntary remand, Federal Defendants do not propose to withdraw the Secretary's trust decision, but rather propose only to consider facts underlying the Tribe's claim of a significant historical connection to the proposed trust land in order to qualify it for gambling. There is no basis for remanding the decision only to expend additional time and resources considering documents already reviewed without first answering the threshold question of the Secretary's authority.

2. The Remand Request Is Not Warranted Because Federal Defendants Had All Relevant Facts at the Time of Decision

Federal Defendants lost a CD containing a compilation of documents addressing the Tribe's purported connection to the proposed trust land submitted to the Department in 2007 by one of the Plaintiffs in this case. (Dkt. No. 53-2). Plaintiffs reproduced that compilation for Federal Defendants in April for inclusion in the administrative record, (*id.*), which Federal Defendants produced and certified on April 30, 2012 (Dkt. Nos. 46, 48-1, 49).

Plaintiffs filed their Motion for Summary Judgment on June 10, 2012. (Dkt. No. 53). Relying on *Butte Cnty., Cal. v. Hogen*, 613 F.3d 190 (D.C. Cir. 2010), Plaintiffs argued in that motion that the Secretary violated the Administrative Procedure Act (APA) by failing to address historic material filed by Plaintiffs and Grand Ronde *and* by losing a portion of that evidence

filed by one of Plaintiffs in this case. (Dkt. No. 53, 43-44 ("[T]here is no analysis of the material that BIA did not lose, no response to the evidence Plaintiffs and Grand Ronde provided - in short, no evidence that BIA did anything other than rely on the Tribe's submissions.")).

Eleven days ago, Federal Defendants requested a voluntary remand to review the misplaced documents, stating that "DOI intends to carefully examine the documents submitted by Plaintiffs that address the gaming determinations." (Dkt. No. 58, 4). In response, Plaintiffs carefully reviewed the administrative record and discovered that the documents comprising the compilation are available scattered throughout the record that the Department certified in February 15, 2012.[2] (Dkt. No. 43). Thus, the Secretary had available at the time of decision and considered the documents that Plaintiffs provided in compiled form in April, as is evident from Federal Defendants' certification of the record. (Dkt. No. 43-1 (in certifying the record, Federal Defendants represented the following: "To the best of my knowledge, these documents were considered by the decision maker in connection with the agency action.")).

There is no reasonable justification for remanding the initial reservation determination on the basis of the documents Plaintiffs provided to Federal Defendants in April. Every significant historical document included in that compilation was separately submitted to Federal Defendants at other times during the process and "considered by the decision maker." (Dkt. No. 43-1). The

[2] Mr. Alexanderson's cover letter produced in April in the supplement at AR135988 already appeared at AR018770, the restored lands brief produced in April at AR135993 already appeared at AR009375; the Summary under the Criteria and Evidence for Proposed Finding Cowlitz Tribe of Indians produced at AR136110-671 already appeared at AR125696; the Boxberger report produced at AR136672 was already in the record at AR014370; Perkins Coie's brief addressing NIGC's restored lands determination produced in April at AR136681 was already in the record at AR000969; a second Perkins Coie brief addressing restored lands produced at AR136681 was already produced at AR000969; Mr. Alexanderson's paper entitled Clark County Indians were not Cowlitz Indians produced in April at AR136722 was already available at AR0014741; and the two historical analyses written by Mike Lawson produced in April at AR136774-841 and AR136842-951 were produced *in their entirety* at AR124396 and AR004976.

fact is that the Secretary declined to address *any* of Plaintiffs materials, affirmatively concluding that he did not *need* to do so. The Secretary stated that "BIA is entitled to rely on findings of its own experts in the Branch of Acknowledgement, now known as the Office of Federal Acknowledgement, as well as findings made by a federal tribunal, the [Indian Claims Commission (ICC)], and the conclusions of the [National Indian Gaming Commission (NIGC)], *rather than accepting the ethnographic interpretations of other groups*." AR000072 (ROD, 43 (emphasis added)). The Secretary therefore rejected the interpretations of Plaintiffs and other groups, including the materials that were also included in the compilation. He did so not on the basis of reasoned analysis or consideration of their relevance to the ultimate decision, but because he had access to the government's and the Tribe's materials and decided that resort to those materials was sufficient. Such an approach violates the APA, as held in *Butte Cnty., Cal.*, 613 F.3d 190. The Secretary does not get a do-over in the middle of briefing by citing a need to review documents that were not, in fact, missing at the time of his decision. See *Corus Staal B.V. v. United States*, 29 C.I.T. 777, 783 (2005), *aff'd*, 186 F. App'x 997 (Fed. Cir. 2006) ("The Government . . . cannot simply ask for a do-over any time it wishes.").

Moreover, the notion that the Department did not have the opportunity to review the record – an inference that Federal Defendants would apparently like the Court to make – is specious for another reason. The NIGC's 2005 restored lands determination relied on the same historical facts as the initial reservation determination. (*See* Dkt. No. 58, 3 ("Because [the Department of the Interior's (DOI's) Indian Gaming Regulatory Act (IGRA)] determination relies, in part, on the facts of the NIGC's restored lands determination, the documents also potentially impact DOI's determination.")). The same attorney who worked on the restored lands determination in 2005 for NIGC, including reviewing all of the historical materials

(including many of the same documents included in the compilation) – Jeff Nelson – also assisted in preparing the draft of the initial reservation determination for the Secretary in 2010. *See* Ex. 1, Administrative Record Index for the NIGC and Ex. 2, Administrative Record Index for the Assistant Secretary – Indian Affairs. There is no reasonable basis for claiming that the Secretary did not have the benefit of Plaintiffs' materials when the *same attorney* was involved in preparing both decisions and expressly acknowledged receiving and considering Plaintiffs' materials in 2005 – however cursory that review might have been. *See* NIGC AR001644 (stating that "[i]n addition to the Tribe's Request and several supplemental submissions received from the Tribe, *we also have received and considered* opposition comments and analyses provided by the Confederated Tribes of the Grand Ronde Community of Oregon, two non-Indian card room operations in La Center, the City of La Center, State Representative Richard Curtis, the American Land Rights Association, and number of other groups and private citizens.")

The manner in which Federal Defendants raise this request underscores that their claimed basis for seeking remand is pretense. After waiting several months from the time they added the compilation to the record, Federal Defendants now propose to consider a thousand pages of Plaintiffs' historic materials that they have had for years (and that took NIGC over six months to cull through) by September 25, 2012, at which point it will issue a new determination.[3] (Dkt. No. 58). But what Federal Defendants are really seeking is an opportunity to redo the initial reservation determination – bolstering its justification – without admitting error and without withdrawing the entire trust decision. Based on Plaintiffs' and Grand Ronde's motions for summary judgment, Federal Defendants know that the Secretary's initial reservation

[3] Federal Defendants' delay in raising the issue forecloses remand. See *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Norton*, 527 F. Supp. 2d 130, 136 (D.D.C. 2007) (denying voluntary remand when the case had been pending for over a year).

determination is arbitrary and capricious. Federal Defendants' eleventh-hour "realization" that they need to address a problem that they were aware of for months (and that is not truly a problem) underscores that they are seeking to avoid a decision on the merits and get a second bite at the decision.

If Federal Defendants wish to avoid an adverse decision, they should withdraw the ROD mooting the case in its entirety. See, *e.g., Lutheran Church-Missouri Synod v. F.C.C.*, 141 F.3d 344, 349 (D.C. Cir. 1998) (denying motion for voluntary remand where the agency did not confess error on the merits and the motion appeared to be a "legal tactic[] . . . to avoid judicial review"); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) ("A remand may be refused if the agency's request is frivolous or in bad faith.").

3. Remand Is Not Warranted Because the Initial Reservation Determination Is Arbitrary and Capricious and Will Not Be Corrected by a Review of Plaintiffs' Factual Material

Plaintiffs also argued in their Motion for Summary Judgment that the Secretary had failed to explain his initial reservation determination in the ROD. (*See* Dkt. No. 53, 41 n. 35 (arguing that the ROD does not explain "how the Secretary interpreted significant historical connection or what specific facts the Secretary relied on to find that the initial reservation exception was met")). In their motion to remand, however, Federal Defendants clarify that "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," (Dkt. No. 58, 6), apparently referring to the Solicitor Opinion dated December 14, 2010 (appearing at AR001316) and entitled Cowlitz Indian Tribe – Initial Reservation Opinion. (Ex. 3). Federal Defendants' motion for remand states, "The Secretary adopted the legal opinion in accepting the land in trust." (Dkt. No. 58, 6). Thus, it is now clear that if the ROD is remanded

to the agency, the Secretary will use this Solicitor Opinion's reasoning to shore up the ROD's insufficient initial reservation decision. But that reasoning is wrong as a matter of law.

The relevant (and only) means by which the Tribe could possibly establish a "significant historic connection" to the proposed trust site is by demonstrating the facts that meet the regulatory requirement of "the existence of the Tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." 25 C.F.R. § 292.2; *see also id.* § 292.6(d). The Solicitor's Opinion finds that the Tribe has a "significant historical connection" to the proposed trust parcel involved pursuant to 25 C.F.R. § 292.2 because the Tribe "occupied and made subsistence use of the area." (Ex. 3, 1-2).

But the Solicitor's Memorandum cites to evidence of occasional, transient use by the Tribe at other locations (at best).[4] This evidence falls far short of meeting the regulatory requirement, as interpreted by the Secretary in other cases. In contrast to the evidence relied on for the Cowlitz Tribe, the Secretary has made clear elsewhere that "[s]ubsistence use and occupancy requires *something more than a transient or occasional presence* in the area. . . . 'Occupancy' can be demonstrated by a *consistent* presence…." Scotts Valley Band of Pomo Indians, Office of the Secretary (May 25, 2012) at 13. The site must be "located in the vicinity of *specific sites or specific areas* for which the [tribe] can offer historical documentation." Guidiville Band of Pomo Indians, Office of the Secretary (Sept. 1, 2011) at 14. The conclusions of the Office of the Solicitor Memorandum regarding the Cowlitz Tribe – which the Secretary will apparently adopt – are entirely inconsistent with the standard the Secretary has announced in other decisions and is required by the regulations.

[4] The evidence to which Federal Defendants cite is remarkably thin and cannot reasonably be argued to demonstrate consistent presence at specific sites or areas. *See generally* Ex. 3, at 4-6 (discussing examples of transient or intermittent use only, such as river tolls, trade routes, temporary camps, and a battle with the Chinook Tribe).

Thus, there is no need to remand the initial reservation determination to consider Plaintiffs' evidence because the facts on which the Secretary relies (which are the most compelling the Tribe had to offer) fall far, far short of the Secretary's legal standard. No reference to Plaintiffs' facts is necessary for this Court to reject the Secretary's decision, and no reconsideration of Plaintiffs' facts alone is going to change the *legal* error the Secretary committed.

Conclusion

The Court should deny Federal Defendants' request for voluntary remand. The controlling issue of the Secretary's authority to make any trust acquisition for the Cowlitz Tribe should be resolved by the Court, thereby mooting the gaming qualification issue. The predicate for remand—a need to review overlooked facts—is incorrect, making remand solely a do-over or litigation fix. Remand is also futile since the Secretary applied the wrong legal standard to the most favorable facts the Tribe could marshal. Before any reconsideration of facts is conducted, the Court should first rule on the appropriate legal standard to conserve the resources of all involved.

In the alternative, if the Court grants the Motion for Voluntary Remand, Federal Defendants should be limited to affirming or denying the initial reservation determination on the basis of the supplement Plaintiffs filed in April alone, without alteration of any other aspect of the decision. If Federal Defendants wish to expand their revisions, they should do so under the appropriate administrative procedures, without attempting to maintain the appearance that their decision is sound and without keeping Plaintiffs and this Court in limbo. They should withdraw the ROD in its entirety.

DATED : July 26, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of July, 2012, I have caused service of **PLAINTIFF'S OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR VOLUNTARY REMAND AND STAY OF LITIGATION** to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

Dated: July 30, 2012
Washington, D.C.

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