IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON,

Plaintiffs,

v.

SALAZAR, *et al.*,

Defendants,

and

COWLITZ INDIAN TRIBE,

Defendant-Intervenor.

Case Nos. 11-cv-00284-BJR and 11-cv-278-BJR

ORDER DENYING PLAINTIFFS' MOTION TO STRIKE, DENYING PLAINTIFFS' MOTION TO SUSPEND THE SCHEDULING ORDER, AND DISMISSING THE CASE

## I. INTRODUCTION

Before the Court is Plaintiffs' Clark County and City of Vancouver, Washington, Citizens Against Reservation Shopping, Al Alexanderson, Greg and Susan Gilbert, Dragonslayer Inc., Michel's Development LLP, and the Confederated Tribes of the Grand Ronde Community of Oregon ("Plaintiffs") Motion to Strike Federal Defendants' Supplemental Record of Decision and Federal and Intervenor-Defendants' Reliance Thereon. (Dkt. No. 77).[1] Plaintiffs also move to suspend the scheduling order pending resolution of their motion to strike. (Dkt. No. 78.). 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

[1] Substantially similar motions were filed in the two related cases. For ease, the Court will cite to the docket in *Clark County v. United States Department of Interior*, 11-cv-00278 (BJR).

Laverdure,[2] 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") oppose the motions. (Dkt. Nos. 79 and 80.). Having reviewed the briefing by the parties together with all other relevant materials, the Court now finds and rules as follows:

## II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This action centers around DOI's December 17, 2010 decision (the "2010 ROD") to acquire land in trust for the benefit of the Cowlitz Indian Tribe ("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 Tribe 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), and February 1, 2011 (11-cv-00284-RWR), alleging that the Secretary's decision to acquire the land into trust violates: (1) 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; (2) the National Environmental Policy Act ("NEPA"), 42 U.S.C. 4321 *et. seq*.; and (3) 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 the NIGC, challenging the NIGC's 2005 approval of a gaming ordinance and the 2008 approval of a gaming ordinance amendment for the Cowlitz Tribe and the underlying gaming eligibility determination for the Clark County Property. On July

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

13, 2011, the Cowlitz Tribe moved to intervene in this action, which the Court allowed on December 23, 2011. 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 contacted counsel for Federal Defendants regarding documents that were missing from the administrative record. (Dkt. No. 53-2 at ¶ 7.). Accordingly to the Federal Defendants, DOI was unable to locate the documents and 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.). The Federal Defendants supplemented the administrative record with these documents, certifying that they were "before the Secretary at the time of his 2010 ROD." (Dkt. No. 48.). The Federal Defendants certified that the administrative record was final and closed. (*Id.*). It is now clear that while Plaintiffs documents were before the Secretary at the time he issued the final decision, they were "overlooked," and were, therefore not considered in 2010 ROD. (Dkt. No. 69 at 3.).

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. 45). Plaintiffs argued that the 2010 ROD is unauthorized under the IRA, violates the IGRA, and fails to comply with the NEPA. (*Id.*). Plaintiffs claimed that during the underlying administrative proceedings, they provided DOI with expert reports and other factual materials pertaining to the Cowlitz Tribe's alleged historical connection to the Clark County Property. (*Id.* at 39.). They argued that the 2010 ROD does not consider or otherwise address Plaintiffs' materials, nor does it articulate what legal standard the Secretary applied in reaching his decision.

(*Id.*). Therefore, Plaintiffs argued, at a minimum, this case should be remanded because the Secretary failed to provide a reasoned explanation for his decision. (*Id.*).

Plaintiffs assert that once the Federal Defendants reviewed Plaintiffs' summary judgment motions, the Federal Defendants realized that Plaintiffs were correct—the Secretary had not provided a reasoned explanation for his decision. (Dkt. No. 77 at 3.). Thereafter, the Federal Defendants requested that the Court remand the case so that the DOI could "carefully examine the documents submitted by Plaintiffs." (Dkt. No. 48 at 4.). They argued that a remand was necessary so that the agency could "review and take[] final action to deny or affirm the initial reservation gaming determination" … because "[d]epending on the decision reached by DOI on remand, some or all of Plaintiffs' claims…may be rendered moot." *Id.*

Plaintiffs opposed the motion to remand, arguing that the Federal Defendants' claim that the DOI needed to "carefully consider" the material was pretextual and what they really sought was an opportunity to create a post-hoc justification of the 2010 ROD. (Dkt. No. 63 at 2.). They claimed that only a few pages were missing from the administrative record and the information contained on those pages appear in substance in multiple places in the record. (*Id.*). "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." *Id.*

United States District Court Judge Roberts denied the Federal Defendants' motion for voluntary remand, determining that "[n]either a remand nor a stay [] is necessary to enable the federal defendants to review and reconsider the [initial reservation gaming determination]." (Dkt. No. 66 at 3.). However, Judge Roberts also stated that "[p]rinciples of judicial economy counsel in favor of affording the federal defendants a reasonable opportunity to reconsider and

potentially rescind the challenged determination." (*Id*. at 2.). Accordingly, Judge Roberts extended the deadline within which the Federal Defendants had to respond to Plaintiffs' summary judgment motions so that the DOI could review the records. (*Id*. at 2-3.) The Court further held that "[s]hould the federal defendants decide in the interim to rescind or otherwise alter their determination, they shall file promptly a notice of such action." (*Id*. at 3.).

On October 1, 2012, Federal Defendants filed a "Notice of Filing Supplemental ROD." (Dkt. No. 67.). The Notice included a one-page "Memorandum" signed by Michael Black, the Acting Assistant Secretary—Indian Affairs wherein he "adopt[s] the Revised Initial Reservation Opinion [] for the Cowlitz Indian Tribe [] from the Associate Solicitor, Division of Indian Affairs [] dated October 1, 2012." (*Id*. at Ex. 1.). The Memorandum states that the October 1, 2012 Revised Initial Reservation Opinion "replaces and supersedes" the December 14, 2010 Initial Reservation Opinion issued by the Office of the Solicitor in the Division of Indian Affairs. *Id*. It further states that the October 1, 2012 Revised Initial Reservation Opinion "does not alter the Assistant Secretary—Indian Affairs' December 17, 2010 determination to acquire the land in trust or his determination that the Cowlitz Parcel qualifies as the Tribe's initial reservation. The [October 1, 2012 Revised Initial Reservation] Opinion, is, therefore, incorporated into the [2010 ROD]." (*Id*.).

The October 1, 2012 Revised Initial Reservation Opinion that Mr. Black "incorporated" into the 2010 ROD is a 24-page memorandum from the Associate Solicitor, Division of Indian Affairs, to Mr. Black. (Dkt. No. 67 at Ex. 2.). This 24-page memorandum purports to set forth the Secretary's reasons for determining that the Cowlitz Parcel qualifies as the Cowlitz Tribe's initial reservation. It also relies on gaming qualification decision for two other tribes, which were prepared after the 2010 ROD that Plaintiffs challenge in this case. (*Id*.).

Thereafter, the Federal Defendant proceeded to file their summary judgment briefs, addressing the October 1, 2012 Revised Initial Reservation Opinion, rather than the 2010 Initial Reservation Opinion on which the Secretary based the 2010 ROD. (*See e.g*. Dkt. Nos. 71, 72.). Plaintiffs now move to strike the supplemental record decision and to prohibit the Federal Defendant and Intervenor-Defendants' reliance thereon. (Dkt. No. 77.). They also seek to suspend the current scheduling order pending the Court's resolution of the motion to strike. (Dkt. No. 79.). The matter was reassigned to this United States District Court Judge on November 5, 2012. (Dkt. No. 83.). This Court heard oral arguments on the pending motions on March 7, 2012.

## III. DISCUSSION

Plaintiffs move to strike the Supplemental Record of Decision ("Supplemental ROD") for the following reasons. First, they claim that the Federal Defendants acted in contravention of Judge Roberts' order. They point out that the Court denied the request for remand and only allowed the Federal Defendants extra time "to reconsider and potentially rescind the challenged determination." (Dkt. No. 77 at 2 quoting Dkt. No. 66 at 2.). However, Plaintiffs argue, the Federal Defendants did not rescind or otherwise alter the challenged decision; instead, they chose to re-write the 2010 Initial Reservation Opinion to strengthen the administrative record on which the 2010 ROD rests. (Dkt. No. 77 at 6 3; TR at 15.). To wit, the Federal Defendants filed the 2012 Revised Initial Reservation Opinion, a "point-by-point" rebuttal to Plaintiffs' summary judgment arguments, and now purport to have "supplemented" the 2010 ROD with it. (TR at 6.). Plaintiffs assert that this legal maneuvering violates Judge Roberts' order.

Next, Plaintiffs argue that the DOI cannot supersede the 2010 ROD with an "entirely new" agency action without first obtaining leave of this Court. (Dkt. No. 82.). Plaintiffs assert that the filing of an appeal of an agency action in district court is an "event of jurisdictional significance."

(*Id*. at 4.). Once a district court assumes jurisdiction over an appeal of a final agency decision, no further agency action is permissible. (*Id*.). In Plaintiffs' view, to hold otherwise would mean that an agency could strip a reviewing court of its jurisdiction at any time by simply re-opening and/or altering its decision post-filing.

Plaintiffs further argue that under the Administrative Procedures Act ("APA"), courts are only allowed to review agency decisions that are final. According to Plaintiffs, the finality requirement preserves the proper role of federal courts under Article III by ensuring that courts do not review tentative agency decision. (*Id*. at 6.). Plaintiffs claim that if an agency was allowed to unilaterally change a decision after a court assumed jurisdiction, then courts would always run the risk of reviewing tentative agency decisions. (*Id*. at 7.). "To be sure, an agency can admit error, rescind its decision, and move to have a case dismissed as moot. But it cannot rewrite a portion of a final decision in the midst of litigation and claim that the new explanation is incorporated into a decision made two years prior, without violating the principles of the doctrines of finality, ripeness, and exhaustion protect." (*Id*.).

Plaintiffs charge that the Federal Defendants' actions in this case epitomizes the very type of post-hoc rationalization that the APA prohibits. (Dkt. No. 77 at 6 citing *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539-40 (1981) ("[P]ost hoc rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action")). Plaintiffs argue that the Supplemental ROD is nothing more than a "well-dressed" post-hoc justification for a decision made almost two years ago, and as such, cannot be the bases for the DOI's decision. "[T]he record to be considered by [this Court] 'consists of the administrative record compiled by the agency in advance of litigation, not any record thereafter constructed in the

reviewing court.'" (Dkt. No. 77 at 8 quoting *AT&T Info. Sys. Inc. v. Gen. Servs. Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987).).

In Plaintiffs' view, the Federal Defendants have two options here. They can either rescind the 2010 ROD, thereby rendering this case moot, or they can defend the 2010 ROD based on the record as it existed at the time the decision was made. What they cannot do, Plaintiffs argue, is "reach a new decision during litigation and pretend it happened two years ago." (Dkt. No. 77 at 3.). Accordingly, Plaintiffs move to strike the Supplemental ROD.

Federal Defendants counter that the DOI has the inherent authority to reconsider its decisions, and that it acted pursuant to this authority when it reconsidered the 2010 ROD in light of documents it had previously overlooked, and when it issued the Supplemental ROD. (Dkt. No. 79 at 4.). They argue that Plaintiffs' contention that the Supplemental ROD is a post-hoc rationalization is off-point because the Supplemental ROD is not an after-the-fact explanation in a judicial proceeding; rather, it is an entirely new agency action. *Id.* at 5-6. Federal Defendants further argue that Plaintiffs seek to strike from the judicial docket the only document that can serve as a basis for their challenges to the agency's reservation determination. *Id.* at 7. What Plaintiffs propose, Federal Defendants argue, would result in having the parties brief, and the Court adjudicate, a portion of the 2010 ROD that no longer has any legal effect. *Id.* "Granting Plaintiffs' their requested relief would [] result in an impractical waste of the parties' and the Court's resources. If the parties were to proceed with litigation over the initial reservation determination in the December 2010 ROD, the remedy would be a remand to the agency for further consideration…[t]he remand has now occurred…" *Id.* at 7-8.

The Court agrees with Plaintiffs that Judge Roberts' order did not give the Federal Defendants carte blanche to modify the 2010 ROD any way they saw fit. Judge Roberts *denied*

the Federal Defendants' motion to remand. (Dkt. No. 66 at 3.). He did, however, recognize that if the agency reviewed the previously "overlooked" documents and decided to reconsider or rescind its decision based on that review, it would be a waste of judicial resources to force the parties to continue in this litigation on the 2010 ROD. Therefore, in the interest of "judicial economy," Judge Roberts afforded the Federal Defendants an opportunity to "reconsider and potentially *rescind* the challenged determination." (*Id*. at 2) (emphasis added). "An extension will conserve judicial resources, as well as those of the parties, *by preventing litigation that may be premature or moot*." (*Id*.) (emphasis added). The Federal Defendants' contention that Judge Roberts' instruction that they notify the Court if they decide to "rescind or otherwise alter their determination" gave them the freedom to supplement the 2010 ROD takes the language of Judge Roberts' order too far. Reading the order as a whole, it is clear that Judge Roberts contemplated that the Federal Defendants would either rescind the 2010 ROD, thereby rendering this litigation moot, or defend the 2010 ROD on the record as it existed at the time that the decision was made.

Nor can the agency unilaterally decide to change or alter the 2010 ROD. The Federal Defendants argue that it is a "well-established legal 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.'" (Dkt. No. 69 at 5 quoting *Trujillo v. Gen. Elec. Co*., 621 F.2d 1084, 1086 (10th Cir. 1980).). Federal Defendants cite a number of cases in support of this proposition. (Dkt. No. 79 at 5.). Not one of those cases, however, involved agency reconsideration of a final agency decision while the action was under review by a federal court. *See Trujillo*, 621 F.2d at 1086 (EEOC had authority to rescind initial right-to-sue letter in response to a request for reconsideration before judicial review); *Dun & Bradstreet Corp. v. U.S. Postal Service*, 946 F.2d 189, 193 (2d Cir. 1991) (plaintiff filed a takings claim based on Postal

Service's reversal of interim decision prior to judicial review); *Friends of Boundary Waters Wilderness v. Bosworth*, 437 F.3d 815, 823 (8th Cir. 2006) (federal agency revised quotas "to correct a major error" prior to judicial proceedings); *Belville Min. Co. v. United States*, 999 F.2d 989, 997 (9th Cir. 1993) (Office of Surface Mining reversed initial determination as to mining rights prompting judicial challenge of reversal). These cases do not stand for the proposition that an agency may unilaterally correct its final decision *after* a case has been filed in district court.

To allow the Federal Defendants to unilaterally change the 2010 ROD would run afoul of the APA's limits on administrative review and undermine this Court's jurisdiction. Under the APA, a district court may not review an agency decision until it is final. *American Petroleum Institute v. EPA*, 683 F.3d 382, 386 (D.C. Cir. 2012). The APA finality requirement serves a critical purpose. It preserves the proper role of federal courts under Article III by ensuring that courts do not review tentative agency decisions, preventing courts from "'entangling themselves in abstract disagreements over administrative policies, and …protect[ing] the agencies from judicial interference'" in an ongoing decision-making process. *Id*. at 386*; Panvano v. Shalala*, 95 F.3d 147, 150 (2d Cir. 1996) ("Parties are generally required to exhaust their administrative remedies, in part because of concerns for separation of powers"). It is for this reason that once a district court assumes jurisdiction over an appeal of a final agency decision, the agency's authority over the decision is divested. *See Doctors Nursing & Rehabiliation Center v. Sebelius*, 613 F.3d 672, 677-78 (7th Cir. 2010) (stating that an agency may not divest a district court of jurisdiction simply by reopening and reconsidering a final agency decision). Accordingly, this Court finds that the Federal Defendants did not have the authority to supplement the 2010 ROD with the 2012 Revised Initial Reservation Decision.

Nor can the Federal Defendants supplement the administrative record with the 2012 Revised Initial Reservation Decision. It is black letter law that the record to be considered by this Court "consists of the administrative record compiled by the agency in *advance of litigation*, not any record thereafter constructed in the reviewing court." *AT&T Info. Sys. Inc. v. Gen. Servs. Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (emphasis added) (rejecting agency's attempt to submit a litigation affidavit as a post hoc rationalization of the agency's action); *see also, Center for Auto Safety v. Federal Highway Admin.*, 956 F.2d 309, 314 (D.C. Cir. 1992) (rejecting agency's rationale as post hoc rationalization not included in administrative record); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539-40 (1981) ("[P]ost hoc rationalization of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action"). Accordingly, the Federal Defendants cannot "incorporate" a 2012 explanation into a 2010 ROD by characterizing it as a "Supplemental Record of Decision."

However, the Court is now in a conundrum. The Court notes that Plaintiffs opposed the Federal Defendants' motion to remand, yet remand is the relief that they sought on the initial reservation determination because the agency had failed to provide a "reasoned explanation for his decision." The Secretary has now provided such a reasoned explanation. Plaintiffs again oppose remand and ask the Court to strike the Supplemental ROD. If the Court were to grant Plaintiffs' request, the parties would be litigating the 2010 Initial Reservation Determination, a determination that has been withdrawn and superceded. The Court will not waste its or the parties' resources on such a fruitless endeavor. *See Spencer v. Kemna*, 523 U.S. 1, 18 (1998) ("[Federal courts] are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong"). The Court is also cognizant of the fact that the parties have been locked in this battle for nearly eleven years. (TR at 13.). However, the APA

requires that the Federal Defendants conform to its dictates, disallowing amendments to a final decision once a case has been filed in district court. Accordingly, the Court will remand this action to the agency with instructions to rescind the 2010 ROD. Since this is a case where the agency has already reconsidered and revised its final decision and since the parties represent to the Court that the agency is not required to provide public notice under IGRA (which is the only portion of the 2010 ROD being supplemented), the Court will require the agency to issue a new decision of record within sixty (60) days of the date of this order, unless good cause is shown why it cannot do so. *See Fulton v. FPC*, 512 F.2d 947, 955 (D.C. Cir. 1975).

## IV. CONCLUSION

For the foregoing reasons, it is HEREBY ordered that:

(1) Plaintiffs' motion to strike the Supplemental ROD is DENIED;

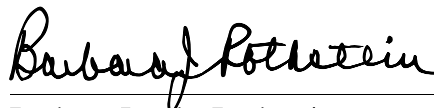
(2) Plaintiffs' motion to suspend the scheduling order pending resolution of the motion to strike is DENIED as moot;

(3) This case is remanded to the DOI;

(4) The agency must issue a new decision of record within sixty (60) days of the date of this order; and

(5) This case is hereby DISMISSED as moot.

Dated this 13th day of March, 2013.



Barbara Jacobs Rothstein
U.S. District Court Judge