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, Defendant-Intervenor.	Case No. 11-cv-00278-RWR

FEDERAL DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE

Plaintiffs Clark County, Washington, *et al.* ("Clark County"), and the Plaintiff in the related case of *Confederated Tribes of the Grand Ronde Community of Oregon v. Salazar*, Case No. 11-cv-00284-RWR (D.D.C.) ("Grand Ronde"), have moved to strike the Department of the Interior's October 1, 2012, Supplemental Record of Decision ("Supplemental ROD"). But the motions misunderstand the Supplemental ROD's legal effect, contort the Court's order in response to the Department's motion for voluntary remand, and ignore the practical effect of Plaintiffs' requested relief. The motions should therefore be denied.[1]

[1] Federal Defendants' consolidated response to the two motions will be filed on both dockets.

BACKGROUND

These two related cases challenge a Department of the Interior December 17, 2010, Record of Decision in which Interior decided to acquire land in trust for the benefit of the Cowlitz Indian Tribe under the Indian Reorganization Act, 25 U.S.C. §§ 461–479, and determined that the land at issue would be eligible for gaming under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701–2721. Collectively, the cases involve four legal claims brought under the Administrative Procedure Act (APA): (1) violation of the Indian Reorganization Act, 25 U.S.C. §§ 465 and 479, because the Cowlitz Tribe was not federally recognized or under federal jurisdiction in 1934; (2) violation of the National Environmental Policy Act, 42 U.S.C. § 4332; (3) violation of IGRA, 25 U.S.C. §§ 2701–2721, because the land in question is not eligible for gaming; and (4) an additional claim by Clark County against the National Indian Gaming Commission challenging the Commission's 2005 approval of a gaming ordinance and 2008 approval of a gaming ordinance amendment. *See* Compl. for Declaratory and Injunctive Relief ("Clark Cnty. Compl.") ¶¶ 67–94 (ECF No. 1 in Case No. Case No. 11-cv-00278-RWR); Compl. for Declaratory and Injunctive Relief ("Grand Ronde Compl.") ¶¶ 47–78 (ECF No. 1 in Case No. 11-cv-00284-RWR).

Plaintiffs in both cases filed their opening summary judgment briefs on July 20, 2012. *See* Pls.' Mot. & Mem. of P. & A. in Supp. for Summ. J. ("Clark Cnty. Br.") (ECF No. 53 in Case No. 11-cv-00278-RWR); Mem. of P. & A. in Supp. of Pl.'s Mot. for Summ. J. ("Grand Ronde Br.") (ECF No. 45 in Case No. 11-cv-00284-RWR). With respect to Interior's determination that the land in question is eligible for gaming under IGRA, Plaintiffs argued, in part, that Interior had violated the APA because, in making an "initial reservation determination," the agency had not adequately explained its decision and had failed to consider

factual evidence that Plaintiffs had submitted.[2] *See* Clark Cnty. Br. at 40–45; Grand Ronde Br. at 39–41. Grand Ronde explicitly requested that the matter be remanded to the agency. Grand Ronde Br. at 39–41.

In response to Plaintiffs' arguments with respect to the initial reservation determination, Interior recognized that it had misplaced and overlooked a number of documents that Plaintiffs had submitted during the administrative process. The Department therefore moved for a voluntary remand of the initial reservation determination. *See* Fed. Defs.' Mot. for Voluntary Remand and Stay of Litigation ("Mot. to Remand") (ECF No. 56 in Case No. 11-cv-00278-RWR; ECF No. 48 in Case No. 11-cv-00284-RWR). Interior noted that the overlooked documents directly related to that determination. Mot. for Remand at 3. The Department informed the Court that it "intend[ed] to carefully examine the documents submitted by Plaintiffs . . . [and,] [d]epending on the decision reached by [Interior] on remand, some or all of Plaintiffs' claims in this lawsuit may be rendered moot." Mot. for Remand at 4. Interior estimated it could complete its reconsideration by September 25, 2012, and noted that its final action upon reconsideration would either "deny or reaffirm the initial reservation gaming determination." Mot. for Remand at 4, 11. Interior also requested that the litigation be stayed during the pendency of the remand. Mot. for Remand at 11.

Plaintiffs in both cases opposed the remand. *See* Pls.' Opp'n to Fed. Defs.' Mot. for Voluntary Remand & Stay of Litigation ("Clark Cnty. Remand Opp'n) (ECF No. 63 in Case No. 11-cv-00278-RWR); Pl.'s Opp'n to Fed. Defs.' Mot. for Remand & Stay of Litigation ("Grand Ronde Remand Opp'n") (ECF No. 50 in Case No. 11-cv-00284-RWR). The Court ultimately

[2] A determination that the land in question is a tribe's initial reservation is one of the exceptions to IGRA's gaming prohibition for lands that are acquired into trust after October 17, 1988. *See* 25 U.S.C. § 2719(b)(1)(B).

denied the remand request, determining that "[n]either a remand nor a stay . . . is necessary to enable the federal defendants to review and reconsider the determination." Mem. Order at 3 (Aug. 29, 2012) (ECF No. 66 in Case No. 11-cv-00278-RWR; ECF No. 56 in Case No. 11-cv-00284-RWR). The Court instead extended Federal Defendants' deadline to respond to Plaintiffs' motions for summary judgment and ordered that Federal Defendants notify the Court if they decide "in the interim to rescind or otherwise alter" the initial reservation determination. Mem. Order at 3.

Interior completed its reconsideration in light of the previously-overlooked materials on October 1, 2012, and immediately notified the Court of the resulting Supplemental ROD. *See* Notice of Filing Supplemental ROD (ECF No. 67 in Case No. 11-cv-00278-RWR; ECF No. 57 in Case No. 11-cv-00284-RWR). Pursuant to the Court's order in response to Federal Defendants' motion for voluntary remand, Federal Defendants filed their response to Plaintiffs' motions for summary judgment and cross-motion on October 5, 2012. *See* ECF Nos. 71, 72 in Case No. 11-cv-00278-RWR; ECF Nos. 61, 62 in Case No. 11-cv-00284-RWR. Plaintiffs now seek to strike the Supplemental ROD on the grounds that it violates the APA and is contrary to the Court's order denying Federal Defendants' motion for voluntary remand. *See* Pls.' Mot. to Strike Fed. Defs.' Supplemental R. of Decision ("Clark Cnty. Mot.") (ECF No. 77 in Case No. 11-cv-00278-RWR); Pl.'s Mot. to Strike Fed. Defs.' Supplemental R. of Decision ("Grand Ronde Mot.") (ECF No. 67 in Case No. 11-cv-00284-RWR).

ARGUMENT

The Department of the Interior has the inherent authority to reconsider its decisions. It acted under that authority in reconsidering the initial reservation determination in light of documents it had previously misplaced and overlooked, and in issuing the Supplemental ROD,

which superseded the relevant portions of the December 2010 ROD. Plaintiffs' requested relief would therefore require the parties to brief claims that are now moot and for which the remedy would be a remand that, in effect, has already occurred. The motions should be denied.

First, Plaintiffs entirely ignore the 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." *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (citing *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950)). That principle has been recognized by federal courts of appeals across the country. *See Friends of Boundary Waters Wilderness v. Bosworth*, 437 F3d 815, 823 (8th Cir. 2006) (citing *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965)); *Belville Min. Co. v. United States*, 999 F.2d 989, 997 (9th Cir. 1993); *Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 193 (2d Cir. 1991); *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977). This Court, in ruling on Federal Defendants' motion for voluntary remand, also implicitly recognized the Department's ability to undertake additional review. *See* Mem. Order at 3 (noting that remand is not required "to enable the federal defendants to review and reconsider the determination"). Clark County greatly contorts, and ultimately misinterprets, the Court's order in implying that the Court effectively enjoined further administrative review. *See* Clark Cnty. Mot. at 2, 4–5. Notably, Grand Ronde does not argue that the Court foreclosed Interior's ability to reconsider the initial reservation determination. As the agency represented to the Court, and as is within the agency's authority, Interior reconsidered its initial reservation determination and, as a result, issued the Supplemental ROD.

Second, Plaintiffs incorrectly label the Supplemental ROD as a *post hoc* rationalization of the December 2010 initial reservation determination. The Supplemental ROD is not a *post hoc*

rationalization; it is an entirely new agency action that replaces the 2010 initial reservation determination. *See* Supplemental ROD (ECF No. 67-1 in Case No. 11-cv-00278-RWR; ECF No. 57-1 in Case No. 11-cv-00284-RWR). The Supplemental ROD is not an after-the-fact explanation in a judicial proceeding; it is the agency decision document that resulted from the administrative reconsideration of materials that the agency had overlooked in its previous decision-making. Indeed, part of Grand Ronde's opposition to Interior's remand request was based upon the premise that any new ROD would be a new agency action. *See* Grand Ronde Remand Opp'n at 5–6. It is also not surprising that the Supplemental ROD addresses some of the issues that the Clark County Plaintiffs raised in their opening summary judgment briefs. *See* Clark Cnty. Mot. at 5. Those parties largely repeat to this Court the same arguments that they made as part of the administrative proceedings. *Compare e.g.,* Grand Ronde Br. at 35–39 *and* Clark Cnty. Br. at 45 (adopting Grand Ronde's arguments) *with* AR136031–108 (attempting to distinguish documents).

Because the Supplemental ROD is a new agency action, the cases Plaintiffs cite in their respective motions are completely off-point. *See* Clark Cnty. Mot. at 6–7; Grand Ronde Mot. at 3–4. In *Consumer Federation of America*, for example, the agency had submitted a declaration during the district court proceedings that explained why the agency had selected a certain test rate in the challenged regulations, which established proficiency standards for individuals that review certain lab results. *Consumer Fed'n of Am. & Pub. Citizen v. U.S. Dep't of Health & Human Servs.*, 83 F.3d 1497, 1505–07 (D.C. Cir. 1996). The court rejected the agency's explanation, in part, because the agency set forth an entirely new theory in the judicial proceedings, rather than as part of the administrative rulemaking proceedings. *Id.* at 1506–07. The Supplemental ROD, by contrast, is the result of Interior's administrative reconsideration of

the initial reservation determination. The other cases upon which Plaintiffs rely are similarly distinguishable. *See Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539–40 (1981) (explanation set forth in briefs rather than in administrative decision); *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 419–20 (1971) (noting lower court relied upon affidavits submitted as part of judicial proceedings); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962) (noting findings were not set forth in administrative action); *LePage's 2000, Inc. v. Postal Regulatory Comm'n*, 642 F.3d 225, 231 (D.C. Cir. 2011) (reasoning set forth in brief rather than administrative proceedings); *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623–24 (D.C. Cir. 1997) (noting affidavits at issue were not available as part of administrative proceedings); *Ctr. for Auto Safety v. Fed. Highway Admin.*, 956 F.2d 309, 314 (D.C. Cir. 1992) (holding information not relied upon during administrative stage cannot be relied upon during judicial stage); *AT&T Info. Sys. Inc. v. Gen. Servs. Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (affidavits submitted as part of judicial proceedings); *Walter O. Boswell Mem. Hosp. v. Heckler*, 749 F.2d 788, 793–94 (D.C. Cir. 1984) (affidavits submitted by amicus in judicial proceedings); *United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 87–88 (D.D.C. 2011) (agency directive used in judicial proceedings that was not part of administrative proceedings, but nonetheless part of record because it would have been before agency).

Third, Plaintiffs' motions seek to strike from the judicial docket the only document that can serve as the basis for their challenges to the initial reservation determination. In its place, Plaintiffs would have the parties brief, and the Court ultimately adjudicate, a portion of the December 2010 ROD that no longer has any legal effect. Plaintiffs bring their claims under the APA, which provides for review of "final agency action." 5 U.S.C. § 704; *see also* 5 U.S.C. §§ 702, 706; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882–83, 890–91 (1990). The final agency

action that serves as the basis of Plaintiffs' complaints is the December 2010 ROD. Clark Cnty. Compl. ¶ 66; Grand Ronde Compl. ¶¶ 5, 27. With respect to Interior's initial reservation determination, however, that decision has been withdrawn and superseded. "[Federal courts] are not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong." *Spencer v. Kemna*, 523 U.S. 1, 18 (1998). The initial reservation-related challenges to the December 2010 ROD are now moot, and any such claim would need to proceed as a challenge to the Supplemental ROD.[3] *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1114 (10th Cir. 2010) (when agency issued new, superseding biological opinion, challenge to precursor opinion was moot and court could provide "no effective relief"); *Gulf of Me. Fisherman's Alliance v. Daley*, 292 F.3d 84, 90 (1st Cir. 2002); *Nat'l Mining Ass'n v. U.S. Dep't of the Interior*, 251 F.3d 1007, 1011 (D.C. Cir. 2001). Because APA review is based upon the agency's stated reasons for the decision at issue, the fact that Interior reached a similar determination upon reconsideration does not revive the initial reservation-related portions of December 2010 ROD for purposes of judicial review. *See Fund for Animals v. Norton*, 390 F. Supp. 2d 12, 15 (D.D.C. 2005); *see also Bowen v. Hood*, 202 F.3d 1211, 1219 (9th Cir. 2000) ("It can hardly be doubted that 'an agency is free on remand to reach the same result by applying a different rationale'").

Plaintiffs' remaining contentions are similarly misplaced. The Supplemental ROD does not evade this Court's jurisdiction. *See* Clark Cnty. Mot. at 3. To the contrary, like the

[3] Plaintiffs in both cases have represented that they believe the Supplemental ROD remains legally deficient. *See* Clark Cnty. Mot. at 2; Grand Ronde Mot. at 4. Given the current procedural posture of these cases, in which both sides have filed their opening briefs, Federal Defendants do not oppose allowing those representations to effectively amend the complaints as also challenging the Supplemental ROD. This will avoid the need to restart briefing in its entirety, which would be particularly inefficient given that the majority of briefing in these cases relates to claims under the Indian Reorganization Act and National Environmental Policy Act, which were not affected by the Supplemental ROD.

December 2010 ROD, the Supplemental ROD is subject to judicial review under the APA. *See City of Los Angeles v. U.S. Dep't of Transp.*, 165 F.3d 972, 977–78 (D.C. Cir. 1999) ("[w]hile we are mindful that [the agency] has adhered to the position it first took in the decision that we remanded, . . . our review is still a matter of determining whether the agency's final decision 'was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'") (citation omitted). And Clark County's contention that Interior is required to make a gaming eligibility determination prior to accepting land into trust is simply wrong. *See* Clark Cnty. Mot. at 8 n.2. IGRA includes no such requirement. *Cf. N. Cnty. Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 747 (9th Cir. 2009). The regulatory provision to which Clark County cites, 25 C.F.R. § 292.3, similarly does not require the Secretary to make a determination. The section's title states: "How does a tribe seek an opinion on whether its newly acquired lands meet, or will meet, one of the exceptions in this subpart?" *Id.* The provision was added to the regulations "in response to comments requesting guidance on the process for seeking opinions under [25 U.S.C. § 2719]." Gaming on Trust Lands Acquired After Oct. 17, 1988, 73 Fed. Reg. 29,354, 29,358 (May 20, 2008). It merely puts forth the procedure through which a tribe can request a determination, should it desire one.

Granting Plaintiffs' their requested relief would also 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. *See Camp v. Pitts*, 411 U.S. 138, 142–43 (1973); *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 338 (D.C. Cir. 1989); *Envtl. Def. Fund v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981). Indeed, that is the very relief that Grand Ronde seeks in its opening summary judgment brief. Grand Ronde Br. at 39–41. And Clark County's arguments

are based upon the premise that remand is necessary for the agency to consider documents that the agency admittedly overlooked. *See* Clark Cnty. Br. at 43–45. The remand has now occurred and the documents have now been considered. Indeed, the Supplemental ROD remedies one of Plaintiffs' procedural concerns—that Interior overlooked certain materials in making its 2010 determination. Plaintiffs are certainly free to argue that Interior's reconsidered initial reservation determination remains arbitrary and capricious. In fact, Plaintiffs' based their opposition to Interior's remand request, in part, on a representation to the Court that briefing could proceed because a remand would not cure the deficiencies in the initial reservation determination. *See* Clark Cnty. Remand Opp'n at 2, 7–9; Grand Ronde Remand Opp'n at 5. Similarly, though the relief would likely be contrary to the APA, nothing about the Supplemental ROD removes Plaintiffs' ability to argue that factual evidence in the administrative record requires a judicial declaration that the land is ineligible for gaming. But striking the very agency action that now provides the basis for judicial review of the initial reservation determination is not the means to that end.

CONCLUSION

Based upon the foregoing, Plaintiffs' motions to strike should be denied.

Respectfully submitted this 19th day of October, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2012, I electronically filed the foregoing document and its attachments using the Court's CM/ECF system, which will send notice to all parties.

*s/ Kristofor R. Swanson*_____
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