UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CLARK COUNTY, WASHINGTON; CITY OF VANCOUVER, WASHINGTON; CITIZENS AGAINST RESERVATION SHOPPING (CARS); AL ALEXANDERSON; GREG AND SUSAN GILBERT; DRAGONSLAYER INC.; and MICHELS DEVELOPMENT LLP,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; KEN L. SALAZAR, in his official capacity as Secretary of the Interior; BUREAU OF INDIAN AFFAIRS; KEVIN K. WASHBURN, in his official capacity as Assistant Secretary of the Interior – Indian Affairs; NATIONAL INDIAN GAMING COMMISSION; and TRACIE STEVENS, in her official capacity as Chairwoman of the National Indian Gaming Commission,

Defendants,

and

COWLITZ INDIAN TRIBE,

Intervenor-Defendant.

Case No. 1:11-cv-00278-RWR

Judge Richard W. Roberts

PLAINTIFFS' MOTION TO STRIKE
FEDERAL DEFENDANTS' SUPPLEMENTAL RECORD OF DECISION AND FEDERAL AND INTERVENOR-DEFENDANTS' RELIANCE THEREON

Plaintiffs move to strike Federal Defendants' Supplemental Record of Decision ("Supplemental ROD") for what it is—a post-hoc justification of the Secretary's final decision of December 17, 2010, created to cure legal defects discovered after summary judgment briefing. The Supplemental ROD does not comport with the Court's August 29, 2012 order, which *denied* Federal Defendants' request for voluntary remand, but "in the interests of judicial economy," allowed

Federal Defendants extra time "to reconsider and potentially rescind the challenged determination" to avoid having to litigate a case "that might be premature or moot." Aug. 29, 2012 Order 2 (Dkt. No. 66). Federal Defendants had sought a remand to "carefully examine" documents that were already in the record that they certified and lodged with this Court last Spring. *See* Fed. Defs.' Am. Mot. to Remand 3-4 (Dkt. No. 58); Pls.' Opposition to Mot. to Remand 1 (Dkt. No. 63). Thus, Federal Defendants' justification for issuing a Supplemental ROD—to review documents that were lost or not available at the time of the Record of Decision ("ROD") in 2010—is demonstrably incorrect.[1]

The Court's Aug. 29 Order gave Federal Defendants the choice of filing summary judgment briefs by October 5, 2012 or promptly filing a notice with the Court of their decision "to rescind or otherwise alter their determination." Aug. 29, 2012 Order 3 (Dkt. No. 66). Federal Defendants, however, fashioned their own approach, an approach that violates the authorities the Court's Order respected: the Administrative Procedure Act ("APA"), Supreme Court precedent, and the agency's own regulations. Twenty-one months after issuing the 2010 ROD that Plaintiffs challenge in this case and briefed in June, Federal Defendants issued an unpublished "new explanation," which they claim is now "incorporated" into the 2010 ROD. Fed. Defs.' Supplemental ROD (Dkt. No. 67-1) (entitled "Adoption of Revised Initial Reservation Opinion for the Cowlitz Indian Tribe and Incorporation into the Record of Decision Dated December 17, 2010"). That new explanation – which, like its predecessor, adopts an unreasonable interpretation of the regulations and the facts –

[1] The new opinion on the initial reservation declaration states that Federal Defendants "fully reviewed and evaluated" documents that Plaintiffs submitted, but cites to the previously certified administrative record (AR) not the AR Supplement for most of the documents it claims were reviewed. *See Oct. 1, 2012 Revised Initial Reservation Opinion for the Cowlitz Indian Tribe* 3 n.13-16 (Dkt. No. 67-2). It is clear that the reason for the new "opinion" is to correct error and gain a litigation advantage, and that the claimed reason of reviewing documents newly available is pretext. As Plaintiffs noted in their Opposition to Federal Defendants' Motion to Remand, all of the documents that made up the record supplement were already located elsewhere in the record, albeit not as a single compilation. *See* Pls.' Opp. to Mot. to Remand 4 n. 2 (Dkt. No. 63).

attaches and relies upon gaming qualification decisions for two other tribes, which were prepared well after the 2010 ROD that Plaintiffs challenge in this case. *See* Fed. Defs.' Revised Cowlitz Indian Lands Opinion (Dkt. No. 67-2). Federal Defendants then proceeded to file a summary judgment brief, addressing the 2012 "Revised Initial Reservation Opinion for the Cowlitz Indian Tribe," rather than the 2010 opinion on which Federal Defendants based their 2010 ROD – that is, the ROD that has actually been challenged in this case. *See* Fed. Defs.' Cross-Mot. Summ. J. and Opp. to Pls.' Mot. Summ. J. (Dkt. Nos. 71, 72); *see also* Cowlitz Tribe's Cross-Mot. Summ. J. and Opp. to Pls.' Mot. Summ. J. (Dkt. Nos. 73, 74).

If Federal Defendants can change their ROD *and* unilaterally modify a certified administrative record without so much as leave of Court, no agency action would ever be final for litigation, and the purpose and implementation of the APA would be thwarted. Federal Defendants' mid-litigation Supplemental ROD disregards APA limits on administrative record review, undermines the Court's jurisdiction, and epitomizes post-hoc agency decision-making. If a federal agency is permitted to modify its ROD after a plaintiff files its initial brief on summary judgment to paper over legal vulnerabilities, it could presumably do the same after a final brief or after the Court has received oral argument on an APA challenge. The practice undermines the Court's jurisdiction and defeats APA review – which evaluates whether an agency conducted reasoned decision-making *at the time it issued its decision* by evaluating the record on which *that decision* was based. Federal Defendants can always repudiate an agency decision and start over, but they cannot reach a new decision during litigation and pretend it happened two years ago. The Court should strike Federal Defendants' Supplemental ROD and any reliance on it in Federal Defendants' and the Cowlitz Tribe's oppositions and cross-motions for summary judgment.

BACKGROUND

On December 17, 2010, the Secretary signed a ROD to acquire land in trust for gaming for the Cowlitz Tribe. As set forth in Plaintiffs' summary judgment brief, filed in June, the 2010 ROD does not discuss any evidence submitted by Plaintiffs years ago that shows that the Cowlitz cannot meet the statutory exemptions necessary to qualify the trust parcel for gambling, a finding that is prerequisite to acquiring land in trust for that purpose. 25 C.F.R. part 292. *See also* Pls.' Summ. J. Br. 40-45 (Dkt. No. 53). The 2010 ROD does not address the legal standard being applied or any evidence in support of the Cowlitz historical connection to the trust parcel. *Id.* at 41-43. The 2010 ROD instead only generally refers to materials submitted by the Tribe and prior agency findings as the sources of information on which their summary conclusion of initial reservation is purportedly based. *Id.* at 42 (describing BIA's general references to non-specific ICC and NIGC findings). In fact, the 2010 ROD does not even reference the December 14, 2010, opinion supporting an initial reservation declaration that Federal Defendants refer to in their Amended Motion to Remand and that this new "opinion" is claimed to supersede. *See* Pls.' Opp. to Mot. to Remand 7 (Dkt. No. 63).

After reviewing Plaintiffs' brief, Federal Defendants moved for a voluntary remand for reconsideration of the initial reservation decision and a stay of the briefing schedule. Fed. Defs.' Am. Mot. to Remand (Dkt. No. 58). Plaintiffs opposed remand arguing that Federal Defendants' claim that it needed to "carefully consider" material already in the record was pretextual and what Federal Defendants really sought was an opportunity to create a post-hoc justification of the December 2010 ROD, rather than a genuine request to reconsider. *See* Pls.' Opp. to Mot. to Remand (Dkt. No. 63). On August 29, the Court denied the motions for remand and a stay as unnecessary to Federal Defendants' stated wish to reconsider. Aug. 29, 2012 Order (Dkt. No. 66). The Court ordered Federal Defendants to provide the Court with prompt notice of any intent to

rescind or alter its December 2010 final decision or to file their dispositive brief on October 5. *Id.* at 3.

Instead, Federal Defendants simply took the voluntary remand the Court denied, but did not rescind any decision or appear even to have genuinely considered doing so. On October 1, 2012, Federal Defendants filed the Notice of Supplemental Record of Decision, with an entirely new analysis that purports to "replace[] and supersede[] the December 14, 2010 Office of the Solicitor Initial Reservation Opinion." Oct. 1, 2012 Memo. Adoption of Revised Initial Reservation Opinion (Dkt. No. 67-1). Federal Defendants' new "opinion" reads like a brief, with a point-by-point refutation of Plaintiffs' litigation arguments, and expressly "supersedes" the December 14, 2010 initial reservation opinion. Federal Defendants also filed as support gaming qualification decisions for two other tribes that were prepared after the 2010 ROD. On the same day, Federal Defendants issued a one-page memorandum stating that the decision maker adopts the 2012 opinion and incorporates it, *nunc pro tunc*, into the 2010 final ROD. *See id.* (explaining that the "Revised Opinion does not alter" the 2010 trust decision or the decision that "the Cowlitz Parcel qualifies as the Tribe's initial reservation," and that it "is, therefore, incorporated into the 2010 Record of Decision"). Federal Defendants then moved to exceed page limits for a brief that defends the 2010 ROD by pointing to the 2012 Revised Cowlitz Initial Reservation Opinion rather than the 2010 Solicitor's Opinion on which the Secretary based the 2010 ROD. Fed. Defs.' Mot. to Exceed Page Limits (Dkt. No. 68).

ARGUMENT

Federal Defendants cannot unilaterally reopen the administrative record or modify a two-year old ROD with materials that were not in existence and with an explanation on which the Secretary did *not* base a final agency action. The administrative record in the case cannot be altered

in the midst of briefing to gain a litigation advantage. The Court's Scheduling Order required Defendants to serve the final administrative record by February 17, 2012. (Dkt. No. 42). On February 15, 2012, Federal Defendants filed their first certified administrative record (the "AR"). Notice of Filing AR (Dkt. No. 43). Federal Defendants then supplemented the AR on April 26 with a compilation of documents that were separately included in the administrative record and that were certified as being before the Secretary at the time of his 2010 ROD. May 2, 2012 Notice of Filing Supp. AR (Dkt. No. 48). Federal Defendants certified the administrative record as final and closed. *Id.* Plaintiffs filed their summary judgment motion shortly thereafter on June 20, in which they argued that Federal Defendants failed to address evidence Plaintiffs submitted and failed to discuss the legal standard for or facts supporting their initial reservation decision. Pls.' Summ. J. Br. (Dkt. No. 53). Federal Defendants cannot reasonably supplement the AR with a newly-created document after briefing has occurred without leave of the parties or the Court, with a document that cannot possibly have played any role in the decision under challenge.

There is simply no legal basis for Federal Defendants to supplement the administrative record with a post-hoc justification after Plaintiffs filed their summary judgment briefs. While an agency may supplement a record to "to provide, for example, background information or evidence of whether all relevant factors were examined by an agency," the agency's supplement must be "merely explanatory of the original record and *should contain no new rationalizations*.'" *AT & T Info. Sys. Inc. v. Gen. Servs. Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987) (rejecting agency's attempt to submit litigation affidavit to provide post hoc rationalization of the agency's action) (*quoting Envtl. Defense Fund v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981)) (emphasis added). Federal Defendants are not demonstrating "whether all relevant factors were examined." Indeed they cannot; they have conceded that they did not bother to examine all relevant factors, like Plaintiffs' submissions. The new opinion is a new explanation entirely. An agency is not permitted to produce a new theory in

the midst of litigation. *See also Consumer Fed'n of Am. & Pub. Citizen v. U.S. Dep't of Health & Human Servs.*, 83 F.3d 1497, 1507 (D.C. Cir. 1996) (holding that an agency may not submit affidavits offering an "entirely new theory"); *see also Center for Auto Safety v. Federal Highway Admin.*, 956 F.2d 309, 314 (D.C. Cir. 1992) (rejecting agency's rationale for its bridge inspection regulations as post hoc rationalization not included in administrative record).

In fact, where there is a "contemporaneous explanation of the agency decision ... [that] indicate[s] the determinative reason for the final action taken[,] ... *[t]he validity of the [agency's] action must stand or fall on the propriety of that finding.*" *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (emphasis added). Federal Defendants identified, as their contemporaneous explanation, a December 14, 2010 Solicitor Opinion entitled Cowlitz Indian Tribe – Initial Reservation Opinion, and stated that it served as the basis of as the initial reservation finding and trust decision. *See* Fed. Defs.' Am. Mot. to Remand. 6 (Dkt. No. 58). ("The Secretary adopted the legal opinion in accepting the land in trust."). And in their Supplemental ROD, Federal Defendants represent that the newly-crafted Revised Initial Reservation Opinion attached to the Notice "replaces and supersedes the December 14, 2010 Office of the Solicitor Initial Reservation Opinion." Oct. 1, 2012 Memo. Adoption of Revised Initial Reservation Opinion 1 (Dkt. No. 67-1).

Federal Defendants' Supplemental ROD in this case is nothing more than a well-dressed post-hoc justification for a decision made almost two years ago. "[P]ost hoc rationalizations of the agency or the parties to this litigation cannot serve as a sufficient predicate for agency action." *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539-40 (1981) (*citing Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). "An agency may not assert post hoc reasoning as the basis for its decision." *Burlington Truck Lines*, 371 U.S. at 168-69 (1962); *accord Citizens to Protect*

Overton Park, 401 U.S. at 419. The notion that an agency can "incorporate" a 2012 explanation into a 2010 ROD, by characterizing it as a "Supplemental Record of Decision" – without undergoing the processes that apply to federal decision-making – is absurd. The Supplemental ROD cannot be the "predicate" for a decision made almost two years earlier. Indeed, this Circuit has stated that the record to be considered by the reviewing 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*, 810 F.2d at 1236.

The conclusion here is simple: Federal Defendants may defend their final ROD based on the *certified administrative record*, and the Court will decide whether that agency action violates the APA, **OR** Federal Defendants may withdraw the final decision of 2010 and reach a new final decision that meets the procedural requirements of the APA.[2] Plaintiffs (and the public, which has not had any opportunity to know of or review Federal Defendants' latest explanation for their decision) will then have the right to decide whether to challenge that new decision. But Federal Defendants cannot have it both ways by pretending that a 2012 opinion corrects a 2010 final decision in order to gain advantage in pending litigation that challenges the 2010 ROD.

[2] When a tribe asks the Secretary to acquire land in trust on its behalf for gaming purposes, the Secretary must first determine whether gaming would be permissible on the land in question, if that land is ultimately placed in trust. *See* 25 C.F.R. §§ 292.3(b). Without a determination that the land is eligible for gaming, the Secretary cannot acquire land for that purpose; doing so without confirming the permissibility of the stated purpose would be arbitrary and capricious. 25 C.F.R. § 151.10(c) (requiring a statement of the purposes for which the trust land will be used). If the Secretary determines that gaming is permissible on the land involved, he can then make his trust decision, which – among other requirements – must be published in the Federal Register. 25 C.F.R. § 151.12. In 2010, the Secretary decided to acquire land for gaming purposes based on an opinion that Federal Defendants have effectively conceded was insufficient by superseding it. In 2012, Federal Defendants are attempting, without public notice and comment and without complying with the trust regulations, to modify their 2010 trust decision, by substituting a new analysis for the insufficient opinion on which the 2010 decision is based.

Dated: October 12, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2012, a copy of the foregoing **PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' SUPPLEMENTAL RECORD OF DECISION AND FEDERAL AND INTERVENOR-DEFENDANTS' RELIANCE THEREON** was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF. System.

Dated: October 12, 2012

Respectfully submitted,

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