

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GUAM PRESERVATION TRUST, ET)	CIVIL NO. 10-00677
AL.,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
KATHERINE GREGORY, Rear)	
Admiral, Commanding Officer,)	
Naval Facilities Engineering)	
Command, Pacific, et al.,)	
)	
Defendants.)	
_____)	

ORDER DENYING DEFENDANTS' MOTION FOR VOLUNTARY REMAND AND STAY

On May 29, 2011, Defendants Katherine Gregory, Rear Admiral, Commanding Officer, Naval Facilities Engineering Command, Pacific ("NAVFAC"); Kyle Fujimoto, NAVFAC; David Bice, Executive Director, Joint Guam Program Office ("JGPO"); Jacqueline Pfannenstiel, Assistant Secretary of the Navy For Energy, Installations, and Environment; Robert Gates, Secretary of Defense; the NAVFAC; the JGPO; the Department of the Navy ("DoN"); the Department of Defense ("DoD"); and Ray Mabus, Secretary of the Navy (all collectively "Defendants") filed the instant Motion for Voluntary Remand and Stay ("Motion"). Plaintiffs Guam Preservation Trust, National Trust for Historic Preservation, We are Guahan, Joseph E. Quinata, Dr. Marilyn Salas, Julian Aguon, and Jillette Leon-Guerrero (all collectively "Plaintiffs") filed their partial opposition to the

Motion ("Memorandum in Opposition") on June 13, 2011. The parties also submitted letter briefs addressing whether they could reach an agreement on the terms of a remand. This matter came on for hearing on June 17, 2011. Appearing on behalf of Defendants were Charles Shockey, Esq., Samantha Klein Frank, Esq., and Jennifer Allaire, Esq., by phone, and Derrick Watson, Assistant United States Attorney, and appearing on behalf of Plaintiffs were Nicholas Yost, Esq., by phone, and Matthew Adams, Esq., and Carl Christensen, Esq. After careful consideration of the Motion, supporting and opposing documents, and the arguments of counsel, Defendants' Motion is HEREBY DENIED for the reasons set forth below.

BACKGROUND

The instant case arises from the DoN's plans to establish a complex of five firing ranges on Guam as part of a larger relocation of Marines and other service people from Okinawa to Guam.¹ On November 17, 2010, Plaintiffs filed their Complaint for Injunctive and Declaratory Relief ("Complaint") seeking to compel Defendants to comply with the National Environmental Policy Act ("NEPA"), the National Historic Preservation Act ("NHPA"), and the Coastal Zone Management Act ("CZMA") in the selection of the site for the firing range

¹ In the instant action, Plaintiffs do not contest the larger relocation of Marines and other personnel to Guam. [Complaint at ¶ 5.]

complex, which is to encompass more than 1,000 acres and accommodate both machine gun and rifle firing. [Complaint at ¶¶ 1, 4.]

Plaintiffs argue that Defendants have chosen Pãgat Village and its surrounding area as the site for the firing range complex. Plaintiffs state that Pãgat Village is a sacred site to the Chamorro people, the indigenous people of Guam, and that Pãgat Village has been listed on the National Register of Historic Places since March 13, 1974. The National Trust for Historic Preservation also named Pãgat Village as one of the eleven Most Endangered Historic Places in America for 2010. [Id. at ¶¶ 1-3.]

The DoN prepared an Environmental Impact Statement ("EIS") regarding "Guam and CNMI Military Relocation, Relocating Marines from Okinawa, Visiting Aircraft Carrier Berthing, and Army Air and Missile Defense Task Force". The DoN made the Draft EIS available to the public on November 20, 2009, and released the Final EIS on July 28, 2010. The NAVFAC, at Pearl Harbor, Hawai`i, received public and agency comments on the EIS, and the NAVFAC and the JGPO managed the EIS. [Id. at ¶ 4.] In September 2010, the DoN and the Department of the Army ("DoA") issued a "Record of Decision for Guam and CNMI Military Relocation including Relocating Marines from Okinawa, Transient Nuclear Aircraft Carrier Berth, Air and Missile Defense Task Force"

("Record of Decision"). [Motion, Exh. A.] The Record of Decision states that there are two alternate sites being considered for the firing range complex; both sites are in the Pãgat area. Plaintiffs therefore assert that there has been a final agency decision to establish the complex in the Pãgat area. [Complaint at ¶ 4.]

Plaintiffs challenge the choice of the Pãgat area, and they argue that Defendants failed to adequately consider alternative sites which are reasonable and feasible, such as the sites that Plaintiffs identified in comments on the EIS. Plaintiffs contend, *inter alia*, that the failure to adequately consider these alternatives and the failure to adequately examine the environmental consequences of the choice of the Pãgat area violate the NEPA. Further, Plaintiffs argue that Defendants violated the NHPA by failing to obtain the required consultations prior to project approval. Plaintiffs also argue Defendants violated the CZMA by failing to make a timely and adequate consistency determination before the final decision to place the firing range in the Pãgat area and by taking a final action that is inconsistent with the Guam Coastal Management Program. [Id. at ¶ 6.]

Plaintiffs seek review of the decision pursuant to Chapter 7 of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, and Section 305 of the NHPA, 16 U.S.C. § 470W-4.

[Id. at ¶ 8.] Plaintiffs seek, *inter alia*: a declaratory judgment that Defendants violated the NEPA, the NHPA, the CZMA, and the APA; a mandatory injunction requiring further circulation of a new or supplemental EIS and a new or amended Record of Decision; a preliminary injunction preventing any actions or preparations in furtherance of establishing the firing range in the Págat area; attorneys' fees and costs; and any other appropriate relief. [Id. at pgs. 81-86.]

At the February 14, 2011 Rule 16 Scheduling Conference, this Court set the hearing on the expected cross-motions for summary judgment for September 19, 2011. The Court ordered Plaintiffs to file their opening brief/motion for summary judgment by June 15, 2011, and the Court ordered Defendants to file their answering brief/cross-motion for summary judgment by July 15, 2011. [Minutes, filed 2/14/11 (dkt. no. 47).] Defendants filed their Answer to the Complaint on April 15, 2011. [Dkt. no. 56.] On May 27, 2011, in light of a stipulation between the parties, this Court vacated the September 19, 2011 hearing date and the corresponding deadlines and gave Defendants leave to file the instant Motion. [EO: Granting in Part & Denying in Part First Joint Stip. & Order to Extend Deadlines; Request for Expedited Ruling, Submitted May 27, 2011 (dkt. no. 59).] The instant Motion followed.

In the instant Motion, Defendants request that the

Court remand the case to the DoN while it "conducts and completes an ongoing review and analysis with respect to the siting of the live-fire training range complex" [Motion at 2.]

Defendants also ask that the Court stay this case for ninety days while the DoN conducts the review. [Id.] Defendants represent that the DoN does not anticipate taking any actions during the ninety-day period that would preclude it from selecting a different site for the firing range complex. Defendants state that, as a condition of the stay, they will agree to provide the Court and Plaintiffs with fifteen days' notice if there are any material changes to the current plans. [Id. at 3.]

In their Memorandum in Opposition, Plaintiffs state that they will agree to the remand if: 1) Defendants agree to allow various forms of public involvement in the remand process;² and 2) assuming that the remand reaffirms Defendants' decision to site the firing range complex in the Págat area, Plaintiffs have a comparable amount of time after the remand to brief and argue the case, and to await this Court's decision, "before ground disturbing activities take place." [Mem. in Opp. at 4-5.] Plaintiffs reaffirmed this position in their June 15, 2011 letter

² At the hearing, Plaintiffs clarified that they request the opportunity for public comment in four areas: 1) the "scoping" period - the period in which Defendants will define what they will look at in the remand; 2) comment on draft of Supplemental Information Report ("SIR") that Defendants plan to prepare as part of the remand process; 3) comment on final SIR; and 4) a hearing.

brief, [dkt. no. 70,] and at the hearing on the Motion.

Plaintiffs suspect Defendants will not use the remand to seriously consider alternate sites for the firing range complex, but that Defendants plan to use the remand to buttress the record concerning the original choice of the Pãgat area.

In their June 16, 2011 letter brief, which Defendants filed as their reply in support of the Motion, [dkt. no. 71,] and at the hearing on the Motion, Defendants stated that they would agree to: provide a public comment period on the draft SIR; address comments received on the draft SIR in the final SIR; and publish the final SIR and make it available. If Defendants ultimately decide to focus on another site for the firing range complex, they will conduct whatever review is necessary under the NEPA and will issue a supplemental EIS. If Defendants prepare and issue a supplemental EIS, they will provide for all of the public participation that the NEPA requires. Defendants, however, will not agree to Plaintiffs' request for other forms of public participation in the remand process, and Defendants will not agree to a prohibition of any ground disturbing activities in the Pãgat area. For example, Defendants argue that some of the investigatory work to determine the feasibility of the Pãgat area may be considered ground disturbing. Defendants, however, represented that, due to budgetary constraints, they do not anticipate undertaking any construction-related ground disturbing

activities in the Pãgat area during the remainder of the current fiscal year or during the 2012 Fiscal Year. Defendants represent that they will in fact consider other sites for the firing range complex, including sites that Plaintiffs have suggested.

DISCUSSION

The issue currently before the Court is limited - whether to grant Defendants' request for a voluntary remand for further consideration of the future location of the firing range complex. Thus, at this time, the Court will not make any findings regarding the merits of this case.

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 Electric Co., 621 F.2d 1084, 1086 (10th Cir. 1980). See also Lute v. Singer Co., 678 F.2d 844, 846 (9th Cir. 1982) (discussing Trujillo). Voluntary remand also promotes judicial economy by allowing the relevant 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) ("We 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 (collecting cases); cf. Marathon Oil v. EPA, 564 F.2d 1253, 1268-69 (9th Cir. 1977) (discussing motion for voluntary remand).

Natural Res. Def. Council, Inc. v. United States Dep't of Interior, 275 F. Supp. 2d 1136, 1141 (C.D. Cal. 2002)

(alterations in original); see also Natural Res. Def. Council v. Norton, No. 1:05-CV-01207 OWW LJO, 2007 WL 14283, at *8 (E.D. Cal. Jan. 3, 2007) (quoting NRDC v. United States Dept. of the Interior, 275 F. Supp. 2d 1136, 1141 (C.D. Cal. 2002)).

Plaintiffs argue that a voluntary remand to the agency is only appropriate where either there have been intervening events beyond the agency's control or the agency has acknowledged that the original decision was incorrect. [Mem. in Opp. at 22-23 (quoting Assiniboine & Sioux Tribes of Fort Peck Indian Reservation v. Norton, 527 F. Supp. 2d 130, 135-36 (D.D.C. 2007)).] Plaintiffs argue that neither of these conditions exists in this case.

Defendants, however, argue that an agency may request remand, even without either intervening events or a confession of agency error. [Mem. in Supp. of Motion at 16 (citing SKF USA, Inc. v. United States, 254 F.3d 1022, 1028-29 (Fed. Cir. 2001); Citizens Against Pellissippi Parkway Extension v. Mineta, 375 F.3d 412, 417 (6th Cir. 2004)).] According to Defendants, a court should only deny a motion for voluntary remand if it is frivolous or in bad faith. [Id. (citing SKF USA, 254 F.3d at 1029 (citing Lutheran Church-Missouri Synod v. Fed. Communications Comm'n, 141 F.3d 344, 349 (D.C. Cir. 1998)).]

Neither the parties nor this Court have found any controlling Ninth Circuit case law addressing when a court should

grant a motion for voluntary agency remand. In the absence of controlling authority, this Court finds that the reasoning of the Federal Circuit in SKF USA and the Sixth Circuit in Citizens Against Pellissippi Parkway Extension v. Mineta, Inc.

("Pellissippi") is persuasive.³ The Federal Circuit in SKF USA noted that, when a court reviews an agency action, there are generally five positions that the agency may take. 254 F.3d at 1027-28.

First, it may choose to defend the agency's decision on the grounds previously articulated by the agency. Second, it may seek to defend the agency's decision on grounds not previously articulated by the agency. Third, the agency may seek a remand to reconsider its decision because of intervening events outside of the agency's control. Fourth, even in the absence of intervening events, the agency may request a remand, without confessing error, to reconsider its previous position. Finally, as in the present situation, the agency may request a remand because it believes that its original decision was incorrect on the merits and it wishes to change the result.

Id. at 1028 (emphasis in original). As to the fourth position, which describes Defendants' stance in the instant Motion, the

³ The Court notes that the portion of Assiniboine & Sioux Tribes that Plaintiffs quoted, [Mem. in Opp. at 22,] relied upon SKF USA for the proposition that: "Voluntary remands are appropriate where an agency seeks to consider 'intervening events outside of the agency's control, [] reconsider its previous position . . . [or where an agency] believes that its original decision is incorrect on the merits and it wishes to change the result.'" 527 F. Supp. 2d at 136 (alterations in Assiniboine & Sioux Tribes) (quoting SKF USA, Inc. v. United States, 254 F.3d 1022, 1028-29 (Fed. Cir. 2001)).

Federal Circuit stated:

even if there are no intervening events, the agency may request a remand (without confessing error) in order to reconsider its previous position. It might argue, for example, that it wished to consider further the governing statute, or the procedures that were followed. It might simply state that it had doubts about the correctness of its decision or that decision's relationship to the agency's other policies. Here, **the reviewing court has discretion over whether to remand.** See Southwestern Bell Tel. Co. v. Fed. Communications Comm'n, 10 F.3d 892, 896 (D.C. Cir. 1993) (noting that the court had previously allowed a remand to the FCC where the FCC sought voluntary remand "to give further consideration to the matters addressed in the [FCC's] orders"), cert. denied, 512 U.S. 1204, 114 S. Ct. 2673, 129 L. Ed. 2d 809 (1994); Wilkett v. Interstate Commerce Comm'n, 710 F.2d 861, 863 (D.C. Cir. 1983) (noting that the court had granted the Commission's motion for remand for purposes of reconsideration); see also Anchor Line Ltd. v. Fed. Maritime Comm'n, 299 F.2d 124, 125 (D.C. Cir.) (noting that "when an agency seeks to reconsider its action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency"), cert. denied, 370 U.S. 922, 82 S. Ct. 1563, 8 L. Ed. 2d 503 (1962).

Id. at 1029 (alteration in original) (emphasis added). Further, where an agency requests remand without any intervening events and without confessing error, "[a] remand **may** be refused if the agency's request is frivolous or in bad faith." Id. (emphasis added). The Federal Circuit, however, noted that "if the agency's concern is substantial and legitimate, a remand is usually appropriate." Id.

In Pellissippi, the Sixth Circuit emphasized that agencies have "the inherent authority" to reconsider prior agency

decisions. 375 F.3d at 416 (citations omitted). This authority, however, is qualified by the requirement that the agency's attempted reconsideration cannot be "unwarranted, . . . abusive[,] . . . 'arbitrary, capricious, or an abuse of discretion.'" Id. at 417 (quoting Macktal v. Chao, 286 F.3d 822, 826 (5th Cir. 2002)). Further, the attempted reconsideration must "occur within a reasonable time." Id. at 418 (citation and quotation marks omitted). "These limitations recognize that there are 'two opposing policies [that] immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other.'" Id. (alteration in Pellissippi) (quoting Civil Aeronautics Bd. v. Delta Air Lines, Inc., 367 U.S. 316, 321, 81 S. Ct. 1611, 6 L. Ed. 2d 869 (1961)).

This Court therefore concludes that, where an agency's motion for voluntary remand does not rely on either new evidence, a change in the law, or an admission of error in the original agency decision, this Court has discretion whether to grant or deny the remand, see SKF USA, 254 F.3d at 1029 (citations omitted), but the Court should not grant remand where the remand may be unwarranted, abusive, arbitrary, capricious or an abuse of the agency's discretion, or where the remand would be untimely, see Pellissippi, 375 F.3d at 417-18. The Court recognizes that Plaintiffs are concerned that Defendants' proposed remand is

merely an attempt to buttress the administrative record supporting the choice of the Págat area as the site for the firing range complex and that Plaintiffs are wary of Defendants' assurance that they will take another look at alternate sites during the proposed remand. While the Court understands Plaintiffs' desire to protect the Págat area, the Court cannot find, based on the existing record, that the proposed remand is unwarranted, abusive, arbitrary, capricious, untimely or otherwise an abuse of the agency's discretion.

The Court must therefore decide whether to exercise its discretion to grant the voluntary remand. Defendants want to reexamine the proposed location of the firing range complex, and they may decide to focus on a site outside of the Págat area, or they may reaffirm their decision to focus on the two previously identified sites within the Págat area. Although Defendants have sought both Plaintiffs' consent to and the Court's approval of the remand with a stay of this litigation, Defendants are not willing to give Plaintiffs their requested opportunities to participate in the remand process. Defendants acknowledge that they must provide for the full level of public participation under the NEPA if they ultimately decide to focus on a new site for the firing range complex, which will require the preparation of a supplemental EIS. Defendants, however, argue that the level of public participation that Plaintiffs request in the remand is

not required by law for the review that Defendants plan to conduct during the proposed remand. At the hearing, defense counsel argued that, if Plaintiffs believe that they have information that will be helpful to Defendants in the remand process, Plaintiffs are free to offer that information. Defendants, however, will not agree to be bound to the public participation which Plaintiffs request as a condition of the remand.

In the Court's view, Defendants want to have their cake and eat it too. They want to conduct the reconsideration process and they want to stay Plaintiffs' litigation of this case while they do so, but they only want to allow Plaintiffs a very limited role in the reconsideration process. Defendants can conduct their internal reconsideration process even if this Court denies the Motion. If Defendants do decide to forego the previously identified sites within the Págat area and to focus on other locations, Defendants can file a new motion for remand and stay at that time. This Court would likely construe a motion for a voluntary remand and stay under those circumstances as a request to reconsider the agency decision because the original decision to focus on the Págat area sites was incorrect. See SKF USA, 254 F.3d at 1029. Further, if Defendants decide to focus on a site outside of the Págat area, they will have to go through the EIS process again, and the Court would be inclined to grant a motion

for voluntary remand and stay to accommodate that process. The Court FINDS that, under the facts of this case, a remand and stay are not appropriate at this time. The Court exercises its discretion and DENIES Defendants' Motion. The denial is without prejudice to the filing of a new motion for remand and stay, if warranted after Defendants' internal reconsideration process.

Although this Court has denied Defendants' Motion, the Court acknowledges Defendants' concern that there appears to be a threshold issue in this case regarding the finality of the agency decision in this matter. Defendants represented at the hearing that, if the Court denied the voluntary remand, they would file a motion to dismiss on this issue. The Court agrees that the parties should address the finality issue before proceeding to motions for summary judgment on the overall merits of the case.

The Court therefore ORDERS Defendants to file their motion to dismiss on the finality issue by no later than **July 29, 2011**. If Defendants need more time to file their motion to dismiss, Defendants may request an extension via a letter brief to the Court, with a copy to Plaintiffs' counsel. If Plaintiffs oppose Defendants' request for an extension, Plaintiffs may state their opposition in a letter brief to the Court, with a copy to Defendants' counsel. Defendants' letter brief, if necessary, is due by **July 8, 2011**, and Plaintiffs' opposing letter brief, if any, is due by **July 15, 2011**.

CONCLUSION

On the basis of the foregoing, Defendants' Motion for Voluntary Remand and Stay, filed May 29, 2011, is HEREBY DENIED WITHOUT PREJUDICE. The Court ORDERS Defendants to file their motion to dismiss, addressing whether there is a final agency decision in this matter, by no later than **July 29, 2011**. After the Court receives Defendants' motion to dismiss and sets the motion for hearing, the Court will hold a further scheduling conference to address other deadlines in this case.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, June 30, 2011.



/S/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

GUAM PRESERVATION TRUST, ET AL. V. KATHERINE GREGORY, ET AL.;
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