IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Safari Club International, *et al.*, Plaintiffs, v. **S.M.R. Jewell,** in her official capacity as Secretary of the United States Department of Interior, *et al.*, Defendants.	Case No. 14-cv-00670-ABJ **Opposition to Plaintiffs' Request for Reconsideration and Cross-Motion to Compel Production of the Administrative Record [ECF No. 28] & Incorporated Notice regarding Minute Order of June 18, 2014**

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' REQUEST FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING FEDERAL DEFENDANTS' MOTION FOR RELIEF FROM LCvR 7(n) AND CROSS-MOTION TO COMPEL PRODUCTION OF THE ADMINISTRATIVE RECORD

Courts evaluate motions for reconsideration of a non-final order under the "as justice requires" standard. *Lewis v. D.C.*, 736 F. Supp. 2d 98, 102 (D.D.C. 2010); *Moore v. Johnson*, CV 00-953 (RWR), -- F.R.D. --, 2014 WL 821305, at *1 (D.D.C. Mar. 4, 2014). This standard involves considerations such as whether the court "has patently misunderstood a party, has made a decision outside the adversarial issues presented to the court by the parties, has made an error not of reasoning, but of apprehension, or where a controlling or significant change in the law or facts has occurred since the submission of the issue to the court." *Lewis*, 736 F. Supp. 2d at 102 (quoting *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004) (internal quotations and marks omitted). Plaintiffs have not met this standard in their Request for Reconsideration. *See* Pls.' Request for Reconsideration & Cross-Mot. ("Pls.' Record Mot."), ECF No. 28.

As explained in our Motion for Relief, ECF No. 25, the Court will not need a certified list of the contents of the administrative record to resolve the pending Motion to Dismiss, ECF No.

11, or any supplemental Motion to Dismiss filed under the Court's schedule[1] because the applicable scope of review is not based on the administrative record. Moreover, Federal Defendants have relied only on the Complaints and judicially noticeable documents to make their arguments for dismissal. Because the Court must determine these jurisdictional issues prior to proceeding to the merits, if the Motion to Dismiss is granted, no administrative record will be required in this case. Thus, Plaintiffs seek to impose a burden and a waste of scarce agency resources by asking the Court to require Federal Defendants to gather and review the administrative record before the Court decides the pending Motion to Dismiss. Additionally, Plaintiffs incorrectly argue that Local Civil Rule 7(n) ("Rule 7(n)") requires the production of the administrative record. The plain language of Rule 7(n) is clear that it does not.

Thus, for the foregoing reasons as well as the following, the Plaintiffs' Record Motion does not meet the standard for reconsideration and should be denied. The June 16, 2014 Minute Order does not work an injustice and was not based on a misunderstanding or an error of reasoning, and no significant change in facts or law has occurred since June 16. For similar reasons, Plaintiffs' incorporated Cross-Motion to compel production of the administrative record should also be denied.

1. In accord with other courts in this Circuit, the Court reasonably granted Federal Defendants' Motion for Relief because the administrative record is not needed to resolve motions to dismiss.

Since Rule 7(n) was amended in October 2013, Federal Defendants have consistently taken the position that the filing of a certified list of the contents of the administrative record contents is not necessary to a court's disposition of motions to dismiss under either 12(b)(1) or 12(b)(6). *See, e.g.*, *Friends of Animals v. Ashe*, 1:13-cv-1580, Dkt. 19, at 2-3 (Dec. 20, 2013).

[1] Federal Defendants interpret the order of June 16, 2014 as a Court-approved extension of the answer deadline under Fed. R. Civ. P. 15(a) for Plaintiffs' Amended Complaint. We presented this interpretation to Plaintiffs, who did not disagree. Relying on this uncontested interpretation, Federal Defendants will submit a Supplement to the Motion to Dismiss on July 3, as our timely response to the Amended Complaint.

Given the ambiguity between the plain language of Rule 7(n) and the explanatory notes, which suggest that Rule 7(n) applies primarily to motions for summary judgment, *see* Mot. for Relief at 5, however, we have filed motions for relief from filing the list of administrative record contents in many other similar cases. Courts in this district have routinely granted these motions for relief, even when they are opposed. *See, e.g.*, *U.S. Ass'n of Reptile Keepers, Inc. v. Jewell*, 1:13-cv-2007, Min. Order (D.D.C. Jan. 28, 2014) (granting motion for relief from filing certified list of record contents until 30 days after motion to dismiss resolved); *Friends of Animals v. Ashe*, 1:13-cv-1580, Min. Order (D.D.C. Dec. 23, 2013); *Friends of Animals v. Ashe*, 1:13-cv-1607, Min. Order (D.D.C. Dec. 13, 2013).

It was wholly reasonable for the Court to grant Federal Defendants' Motion for Relief from Rule 7(n) in connection with the filing of our Motion to Dismiss. Plaintiffs' interpretation, that a list of the contents of the record must be filed with the Court upon the filing of a motion to dismiss, is in tension with judicial economy, and their further gloss, that the entire administrative record must be provided to the opposing party at that time, is entirely absent from the plain language of Rule 7(n). For example, should the Court adopt Plaintiffs' interpretation of Rule 7(n), federal defendants may be discouraged from filing early motions to dismiss, because of the burden on the agency staff to quickly prepare and certify the administrative record at the time of the motion. If federal defendants must always prepare a record *before* the Court determines that plaintiffs have even stated a valid claim or have demonstrated jurisdiction, this could encourage the filing of non-meritorious claims not as a means to challenge agency action, but as a mechanism for document production.

Plaintiffs wrongly claim that it is the "self-evident" purpose of Rule 7(n) that "all litigants have equal access to the documents that would otherwise be available only to governmental defendants." Pls.' Record Mot. at 3-4. For this unsupported statement Plaintiffs admit they rely only on an "implication." *See id.* at 6. They contend that the Rule 7(n) requirement to file a list of the contents of the administrative record implies that the entire administrative record also must be presented to the parties. *Id.* This implication is incorrect. First, the local rules provide no

obligation or deadline to serve the administrative record on the opposing party. Rather, the local rules explain that, upon the filing of a dispositive motion, a *list* of the contents of the administrative record should be filed with the Court.[2] *Compare* Fed. R. App. P. 17 (explaining that the *administrative record* is to be filed within a certain time limit). Second, the comment to Rule 7(n) explains that the purpose of the rule is to assist the *Court* in cases where it might be burdensome to sift through a voluminous record. *See* Local Civ. R. 7(n) (comments). Thus, the rules do not state, nor even suggest, that the administrative record must be produced at the same time as the list of its contents, even if Rule 7(n) does apply to motions to dismiss. Moreover, the comment to Rule 7(n) demonstrates that the rule was implemented for the benefit of the Court—which is ideally positioned to determine whether it needs the list of administrative record contents at the motion to dismiss stage, and not for the purpose of providing Plaintiffs' early access to documents. For all of these reasons, Plaintiffs' interpretation of Rule 7(n)'s purpose is incorrect.

Finally, as a practical matter, should the Court eventually deny Federal Defendants' Motion to Dismiss in whole or in part, this order will clarify the scope of the administrative record. In this case, as Federal Defendants will explain in their Supplement to the Motion to Dismiss, Plaintiffs have not challenged final agency action. For example, the Service is continuing to review documents related to the interim Zimbabwe finding. Also, because Plaintiffs' members have not applied for a permit related to sport-hunted elephant trophies from Tanzania, there is no final agency action, *i.e.*, a decision to grant or deny a permit, for which a complete record may be produced. Should the Service be required to serve an administrative record on July 3, as Plaintiffs unreasonably request, well before the Court decides the Motion to Dismiss and any Supplement thereto, the Service will need to make assumptions about what

[2] Plaintiffs' mischaracterization is pervasive. Pls.' Record Mot. at 2 ("obligation to make the AR available to [Plaintiffs]"); *id.* ("fail[ed] to file the AR at the time that they filed their original dispositive motion"); *see also id.* at 3 n.3 (discussing the "requirement for the simultaneous filing of the AR with a dispositive motion"); *id.* at 5 (characterizing Rule 7(n) as creating a requirement "for filing and serving the AR").

documents to include in the record that may turn out to be incorrect depending on the outcome of the pending Motion to Dismiss because the Plaintiffs appear to have challenged activities that are ongoing. Federal Defendants seek only short-term relief from any administrative record requirements until such time as the Court determines those requirements apply. The parties will proceed to briefing the merits, should the Court deny Federal Defendants' Motion to Dismiss, and Defendants shall expeditiously complete their compilation of the record and serve it on the parties.

2. The Court does not need the administrative record to decide the pending Motion to Dismiss and should therefore deny Plaintiffs' Request for Reconsideration and Cross-Motion.

There are few, if any, issues of fact to be resolved by the Court in the Motion to Dismiss, thus the administrative record is not necessary for the Court's review of the Motion. As the parties agree, because the Motion to Dismiss involves a facial attack on the Amended Complaint, a "court must accept as true the allegations in the complaint, and consider the factual allegations of the complaint in the light most favorable to the non-moving party." Pls.' MTD Opp., ECF No. 22, at 2 (citations omitted). Moreover, in support of their Motion to Dismiss, Federal Defendants intend to cite only the Complaint and Amended Complaint, and the documents cited in those Complaints as well as judicially noticeable documents. Under Rule 201 of the Federal Rules of Evidence, a court may take judicial notice of an adjudicative fact "not subject to reasonable dispute" in one of two circumstances: it is either "(1) generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b). Plaintiffs note that the Motion to Dismiss relied upon several prior non-detriment and enhancement findings for Tanzania. Pls.' Record Mot. at 4-5. These are findings made by decisionmakers at the Service and produced on official letterhead. *See* Fed. Defs.' MTD, Decl., of Rosemarie Gnam, ECF No. 11-2 at 12-81 (Tanzania non-detriment findings); Fed. Defs.' Reply to MTD, ECF No. 23-1 (Tanzania enhancement finding). These types of documents are subject to judicial notice, as is the Federal

Register notice cited in support of Federal Defendants' mootness argument. *See* 44 U.S.C. § 1507 ("The contents of the Federal Register shall be judicially noticed...."); *Al-Aulaqi v. Panetta*, CV 12-1192 (RMC), -- F. Supp. 2d --, 2014 WL 1352452, *8 (D.D.C. Apr. 4, 2014) ("Further, judicial notice may be taken of public records and government documents available from reliable sources." (citation omitted)). The documents cited are attached to Federal Defendants' briefs for the Court's review.[3]

Moreover, Plaintiffs have not demonstrated prejudice. Plaintiffs submitted a Freedom of Information Act ("FOIA") request for documents related to the Tanzania and Zimbabwe findings. Plaintiffs' FOIA request appears to be much broader than the standard for the administrative record. Pls.' Record Mot. at 7 (characterizing their FOIA request as seeking "all documents *related* to the decisions that SCI/NRA challenged in this litigation." (emphasis added)*; cf. Pac. Shores Subdivision v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (The "whole record" consists of "all documents and materials that the agency 'directly or indirectly considered' . . . and nothing more nor less." (citation omitted)). Plaintiffs therefore have already requested through the FOIA process and begun to receive documents well beyond the administrative record. Thus it is difficult to understand how Plaintiffs could be prejudiced by a lack of documents when they have already received (and will continue to receive) even *more* documents than would be in the administrative record.

In addition, the document Plaintiffs cite in support of their argument of prejudice, as an example of a key document in support of their futility argument, Pls.' Record Mot. at 8-9, is a cover letter for the transmission of the challenged Tanzania findings to a representative of the

[3] Should the Court find that the documents are not subject to judicial notice or otherwise properly considered in its review of the Motion to Dismiss, Federal Defendants' mootness, standing, and statute of limitations arguments are adequately presented without those documents, given the limited reliance on the documents to present uncontested facts. *See* Fed. Defs.' MTD at 14 (citing prior non-detriment findings for the proposition that they expire at the end of the year so that the Court cannot simply resurrect prior findings); Fed. Defs.' Reply to MTD, ECF No. 23, at 21(citing the 1997 enhancement finding as an example of the uncontested fact that the Service has never provided notice and comment on enhancement findings for either Tanzania or Zimbabwe).

Tanzanian government. *See* ECF No. 28-2. This document confirms, as explained in our Motion to Dismiss, that the agency retains an open mind and will consider altering its findings when it receives information that "indicates a significant improvement for elephants in Tanzania." *Id.* The standard for futility is whether "following the administrative remedy would be futile *because of certainty of an adverse decision.*" *Freedom Watch v. C.I.A.*, 895 F. Supp. 2d 221, 227 (D.D.C. 2012) (citation omitted). Plaintiffs have not shown with this document that submitting a permit application would be futile. Plaintiffs have not shown that the administrative record is necessary to resolve the Motion to Dismiss or that they have suffered prejudice because they do not yet have it—indeed they seem quite able to obtain through FOIA documents to support their Opposition and to notify the Court of their existence.

On the other hand, as explained in our Motion for Relief, ECF No. 25, at 6, the Service will be unnecessarily burdened by Plaintiffs' request if the Court grants the Motion to Dismiss in whole or in part. Biologists must divert time from addressing species' conservation needs to compile the administrative record (as they have already done to respond to Plaintiffs' FOIA request). *See* Decl. Bryan Arroyo, Assistant Director for the International Affairs Program of the U.S. Fish and Wildlife Service ("Arroyo Decl."), Exhibit 1 (attached), at ¶ 3. Requiring them to expend further resources unnecessarily prejudices Federal Defendants.

3. If the Court grants Plaintiffs' Cross-Motion and orders that the record must be produced within a certain time because it is inclined to deny the Motion to Dismiss, the Service can produce the administrative record within approximately 45 days.

In compliance with the Court's Minute Order of June 16, 2014, the Service has begun and will continue to compile the documents that could be included in an administrative record for the challenged April 17, 2014, interim Zimbabwe enhancement finding and the Tanzania findings for 2014. *See* Arroyo Decl. at ¶ 3. However, before a record may be completed, Federal Defendants still need to finish identifying all documents in the administrative record, conduct a privilege review, and prepare the administrative record index, among other tasks. *See id.* at ¶¶ 3-6. Thus, while Federal Defendants will compile documents relied upon for the challenged

findings, they respectfully request an opportunity to review the Court's order on the Motion to Dismiss before certifying the record.

In light of the foregoing, Federal Defendants respectfully request that the Court decline to order a filing deadline for the certified administrative record until after it resolves any Supplement to the Motion to Dismiss.[4] However, if the Court is inclined to order a date by which the administrative record be served on Plaintiffs, we ask that it be no earlier than August 8, 2014.

NOTICE REGARDING MINUTE ORDER OF JUNE 18, 2014

In response to the Court's minute order of June 18, 2014, Federal Defendants provide this Notice. As explained above and indicated in the attached supporting declaration of Bryan Arroyo, Federal Defendants have already begun compiling the administrative record for this litigation. Based on a review of workload, funding constraints, and a highly disruptive office move resulting in the inability of agency staff to access their files for several days, the Service currently estimates that it will need approximately a further 45 days of work to complete compilation of the record and file the certificated index, or until August 8, 2014. *See* Arroyo Decl. at ¶¶ 3-7.

Dated: June 20, 2014

Respectfully submitted,

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[4] If the Court denies the Motion to Dismiss, Federal Defendants respectfully reserve the ability to file an open administrative record, i.e., one subject to supplementation.

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Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Safari Club International, *et al.*, Plaintiffs, v. **S.M.R. Jewell,** in her official capacity as Secretary of the United States Department of Interior, et al., Defendants.	Case No. 14-cv-00670-ABJ

DECLARATION OF BRYAN ARROYO

I, Bryan Arroyo, hereby declare as follows:

1. I am the Assistant Director for the International Affairs Program of the United States Fish and Wildlife Service (FWS), an agency of the U.S. Department of the Interior, located in Washington, D.C. In my capacity as Assistant Director, I am responsible to the Director of the FWS and to the Secretary of the Interior for the U.S. administration of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) under the authority of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.* (Act), as well as the administration of the Act with respect to the FWS's implementation of importation and exportation of all listed species, and the interstate and foreign commerce and take of foreign-listed species.
2. I submit this declaration in support of Federal Defendants' opposition to Plaintiffs' cross-motion to compel production of the administrative record on or before July 3, 2014. Plaintiffs' proposed deadline for production of the administrative record is not feasible.

The FWS will need until at least August 8, 2014, to compile the administrative record, for the reasons described below.

3. In accordance with the Court's Order of June 16, 2014, my staff has begun to compile the administrative record. Completing compilation of the administrative record for this litigation will, however, be a substantial undertaking and require the diversion of significant resources toward this effort. Biologists on my staff will need to delay their other work on species conservation in order to complete compilation of the administrative record. They have already spent significant time responding to Plaintiffs' requests for documents under the Freedom of Information Act (FOIA). Even though much of the response to these requests has been completed, the process for responding to a FOIA request is different than compiling an administrative record, and the office must compile all materials the decision makers considered and complete the process explained below, which is not the same as responding to a FOIA request.

4. The FWS will first need to complete compilation of all responsive documents. The Service will need to make assumptions about what documents to include that may turn out to be incorrect about the Court's ultimate holding on the pending motion to dismiss because the Plaintiffs appear to have challenged activities that are ongoing. The record includes the large number of relevant documents the FWS reviewed in the process of making its findings, as well as all relevant communications records of the multiple staff that were involved in the decision-making process. Although my staff has already begun compiling these documents, given the large number of documents reviewed and the different staff members involved in making the relevant findings, I anticipate this will take the FWS two additional weeks to complete.

5. Once the records are compiled, the FWS must review the documents to determine whether they contain any privileged information. If so, the record may need to have information redacted, or some items may need to be withheld in full. If the FWS anticipates asserting any privilege, the Department of the Interior's Office of the Solicitor must review the document to determine whether the privilege is appropriate. I estimate this review process will take approximately two weeks.
6. Once the records have been compiled and reviewed, the FWS must create a detailed index of all records stating the types of records and information included in the record. It must then assign each page a unique number for future reference. I estimate this process will take one week.
7. The FWS Headquarters office in Arlington, Virginia, where my staff members are located, is currently in the process of moving to a new location. As such, FWS Headquarters facilities will be closed to all non-relocation staff on July 24th and 25th. Due to necessary packing and unpacking activities that will occur immediately prior to and after these dates, FWS Headquarters staff will not have access to any office files for two weeks and will have limited or no ability to work on the administrative record during this time. Therefore, the total time required for submitting the administrative record is, at minimum, seven weeks.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed in Washington, DC, on this 19th day of June 2014.

Bryan Arroyo
Assistant Director – International Affairs
U.S. Fish and Wildlife Service
Department of the Interior