**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| STAND UP FOR CALIFORNIA!, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF INTERIOR, et al.,<br><br>Defendants,<br><br>and<br><br>WILTON RANCHERIA, CALIFORNIA,<br><br>Intervenor-Defendant. | Civil Case No. 1:17-cv-00058 (TNM) |

**MOTION TO COMPLETE AND/OR SUPPLEMENT THE ADMINISTRATIVE RECORD IN ACCORDANCE WITH 5 U.S.C. § 706; AND FOR LEAVE TO CONDUCT DISCOVERY; MEMORANDUM IN SUPPORT**

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## I. INTRODUCTION

This case challenges the Department of the Interior's decision to acquire 36 acres of land in trust in Elk Grove, California for the Wilton Rancheria during the waning hours of the Obama Administration. Over a two-month period beginning just after the 2016 Presidential election, Federal Defendants issued a Notice of (Gaming) Land Acquisition Application for an entirely new location, sought and processed public comment on that new application, issued a Notice of Availability of a final environmental impact statement (FEIS) for the new request, purportedly reviewed and responded to the comments it received on the FEIS overnight, and issued a record of decision (ROD) granting the Tribe's application, apparently by 5:50 p.m. on January 19, 2017.

The administrative record (AR) Defendants filed with the Court on October 17, 2017, for that decision is as flawed as Defendants' sham review of the Tribe's application. Plaintiffs gave Defendants notice of numerous omissions, improper redactions, missing emails, and other irregularities. Yet Defendants refuse to correct even the most basic deficiencies in its AR. They will not, for example, include the actual draft environmental impact statement (DEIS) in the AR, pointing instead to an internal and incomplete administrative draft that does *not* include at least two appendices and over 100 pages of content. Defendants will not include the technical reports they expressly rely on in their DEIS. And with respect to their redaction of non-privileged metadata such as email authors, recipients, transmission times, and subject lines, Defendants insist that they may withhold such information. Defendants have excluded from the AR more than a third of all relevant documents (1,098 of 3,225) as allegedly privileged, and that number does not include the files of Defendants' environmental consultant, which Defendants refuse to search.[1]

[1] Plaintiffs filed a Freedom of Information Act (FOIA) request with the Department of the Interior on January 24, 2017. *See* Attachment 1, Declaration of Odin Smith dated April 16, 2018 (Smith Decl.) at ¶ 5. The Department responded to that request on September 29, 2017, by producing the AR it filed in this case, stating that there were 3,225 responsive documents, but that the Department was withholding 1,098 of those documents as privileged. Smith Decl. at ¶ 6. Plaintiffs appealed that response on February 12, 2018, but the Department has not timely resolved Plaintiffs' appeal or produced the Vaughn index requested. Smith Decl. at ¶ 7.

These obvious record deficiencies are only a part of the problem. Review of the AR indicates that Defendants' post-election "consideration" of the Tribe's new fee-to-trust application was a farce. The AR indicates that Defendants predetermined the outcome of the Tribe's new application before Defendants received comments on the final EIS and worked around the clock to process—but not meaningfully consider—the environmental impacts of the proposed action. In fact, Defendants' review process was so rushed that the AR is completely devoid of evidence indicating that the Principal Deputy Assistant Secretary actually reviewed the decision documents that he purportedly signed on January 19, 2017. Nor was Defendants' consideration of the application the sort of independent analysis the law requires. The Tribe was intimately involved throughout the review process, setting deadlines, coordinating reviews, and transmitting comment documents between Defendants' offices. The Senate Committee on Indian Affairs separately pressured Defendants to issue a decision before January 20, 2017, improperly interceding in the review process. In fact, the AR makes clear that Defendants' representations to this Court that they could not predict when a decision would be made or whether it would be adverse to Plaintiffs during emergency proceedings were far from forthright. There is more than ample evidence of bad faith and improper behavior to warrant extra-record review.

The Court should order Defendants to (1) conduct a complete review of their agency files, including email correspondence involving key decision-makers and the environmental contractor; (2) produce a complete AR by including all such responsive documents from that search, including Defendants' communications with its environmental contractor in un-redacted form; and (3) for every relevant document Defendants withhold based on deliberative process claims (or any other asserted privilege or protection), list each document on a privilege log with detail sufficient to allow Plaintiffs and the Court to evaluate the sufficiency of Defendants' claim.

## II. BACKGROUND

On January 11, 2017, Plaintiffs Stand Up for California!, Joe Teixeira, Patty Johnson, and Lynn Wheat filed a Complaint and Emergency Motion for a Temporary Restraining Order and

Preliminary Injunction asking the Court to enjoin the Department from immediately acquiring title to the Elk Grove Site in trust upon making a final trust decision, which Plaintiffs anticipated would occur immediately prior to President Trump's inauguration. Dkt. 1, 2. During emergency proceedings on January 13, 2017, the Court asked Defendants regarding the timing of the decision. Dkt. 25 at 37:9-12. Defendants represented that they did not know whether a final decision would be issued before January 20, 2017, because they did not know whether comments would be submitted or how long it would take to respond to those comments or whether that decision would be adverse. *See generally id.* 37:13 – 41:14. The Court denied Plaintiffs' motion for emergency relief on January 13, 2017. Six days later, the Principal Deputy Assistant Secretary issued the Record of Decision (ROD) approving the Tribe's November 17, 2016, trust application.

On August 2, 2017—after Defendants completed deliberations regarding the finality of the January 19, 2017, ROD—the Court reset deadlines in the case, ordering Plaintiffs to file their First Amended Complaint by August 16, 2017; the parties to file dispositive motions not dependent on the administrative record by October 1, 2017; and Defendants to produce the administrative record by October 31, 2017. Dkt. 23. On October 1, 2017, Plaintiffs moved for summary judgment with respect to two non-record dependent claims raised in the Amended Complaint. Dkt. 33. Following Plaintiffs' filing of that motion, Defendants sought—among other things—relief from producing the portion of the AR dating from January 20, 2017, to July 13, 2017. Dkt. 35. The Court issued a minute order on October 17, 2017, staying the requirement that Defendants produce the portion of the AR covering January 20, 2017, to July 13, 2017, and vacating the October 31, 2017, deadline for Defendants' production of the AR and associated deadlines. Defendants nonetheless filed and served the AR on October 17, 2017, Dkt. 37, along with an index and affidavit of Paula Hart, Director of the Office of Indian Gaming. Dkt. 37-1 and 37-2.

Following the Court's decision of February 28, 2018, denying Plaintiffs' motion for summary judgment and granting Defendants' and Intervenor-Defendants' cross-motions, the

parties agreed that Plaintiffs would file any motion related to the sufficiency of the administrative record by April 16, 2018. On April 5, 2018, Plaintiffs notified Defendants of numerous deficiencies in the AR. *See* Smith Decl. at ¶ 2. Plaintiffs identified to Defendants additional concerns and noted where they had located missing or otherwise deficient documents on April 10 and April 12, in the course of continuing their review of the AR. Smith Decl. at ¶ 3.

On April 13, 2018, Defendants responded to Plaintiffs' communications, by asserting the specific privileges claimed for 11 unexplained redactions and offering to produce three omitted Excel spreadsheets of wastewater information and one omitted attachment to an email. As to the rest of Plaintiffs' concerns, Defendants denied any deficiencies in the AR and refused to include any documents identified by Plaintiffs. Smith Decl. at ¶ 4 (Letter from C. McBride to J. MacLean dated Apr. 13, 2018 (DOJ Resp.)).

## III. LEGAL STANDARDS

### A. The "Whole Record" Requirement

Judicial review of agency decision-making must proceed on "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *see also* 5 U.S.C. § 706. "The 'whole' administrative record . . . consists of *all documents and materials directly or indirectly considered by agency decision-makers* and includes evidence contrary to the agency's position." *Conservation Force v. Ashe*, 979 F. Supp. 2d 90, 98-99 (D.D.C. 2013) (quoting *Stainback v. Sec'y of the Navy*, 520 F. Supp. 2d 181, 185 (D.D.C. 2007) (emphasis added)). Documents reflecting the work and recommendations of subordinates must be included if the agency decision was based on that work and recommendations. *See Cnty. of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 71 (D.D.C. 2008).

### B. Completing/Supplementing the Record

Generally, agencies are entitled to a presumption of regularity in designating an AR. *See, e.g.*, *Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006). Plaintiffs may nonetheless seek to include documents that were improperly

excluded, as well as evidence that was not before the agency at the time of decision. *See Univ. of Colo. Health at Memorial Hosp. v. Burwell*, 151 F. Supp. 3d 1, 13 (D.D.C. 2015); *see also The Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 113-14 (D.D.C. 2009). To prevail on a motion to complete an AR where documents have been improperly excluded, plaintiffs need only "'put forth concrete evidence' and 'identity reasonable, *non-speculative grounds* for [their] belief that the documents were *considered* by the agency and not included in the record.'" *Charleston Area Med. Ctr. v. Burwell*, 216 F. Supp. 3d 18, 23 (D.D.C. 2016) (citation omitted); *see also, e.g., Univ. of Colo*., 151 F. Supp. 3d at 15; *Cape Hatteras*, 667 F. Supp. 2d at 114.

**C. Deliberative Process Privilege and Bad Faith and Improper Behavior**

"The deliberative process privilege protects agency documents that are both predecisional and deliberative." *Judicial Watch, Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006) (citation omitted). A document is predecisional "if it was generated before the adoption of an agency policy and deliberative if it reflects the give-and-take of the consultative process." *Id.* (internal quotation marks omitted); *see also In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997). The deliberative process privilege must be applied "as narrowly as consistent with efficient Government operation." *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)). "[D]iscussions of objective facts, as opposed to opinions or recommendations, are not protected by the privilege." *Cobell v. Norton*, 213 F.R.D. 1, 6 (D.D.C. 2003) (citing *In re Subpoena Served Upon Comptroller of Currency, and Sec'y of Bd. of Governors of Fed. Reserve Sys.*, 967 F.2d 630, 634 (D.C. Cir. 1992)). Thus, non-exempt portions of a document must be disclosed unless they are "inextricably intertwined with exempt portions." *Wilderness Soc. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 1, 18 (D.D.C. 2004) (quoting *Mead Data Ctr., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977)).

The D.C. Circuit does not treat deliberative process documents as part of an AR. As a result, agencies ordinarily do not produce a privilege log identifying deliberative materials. *Am.*

*Petroleum Tankers Parent, LLC v. United States*, 952 F. Supp. 2d 252, 267 (D.D.C. 2013). "[P]redecisional and deliberative materials which have not been included in the administrative record are 'immaterial' *absent a showing of bad faith or improper behavior by the agency*." *Oceana, Inc. v. Pritzker*, 217 F. Supp. 3d 310, 319 (D.D.C. 2016) (citing *In re Subpoena Duces Tecum*, 156 F.3d 1279, 1279 (D.D.C. 1998)) (emphasis added); *see San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 44-45 (D.C. Cir. 1986) (en banc) (requiring a showing of bad faith before evaluating an agency's internal deliberations).

### D. Application of Privilege to Outside Consultants

Outside consultants qualify for the deliberative process privilege where consultants are retained by a federal agency to assist it in performing one of its functions. The privilege does not, however, shield documents or communications in circumstances where a consultant has an interest that is meaningfully different than the interests of the agency. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12-15 (2001); *see also 100Reporters LLC v. United States Dep't of Justice*, 248 F. Supp. 3d 115 (D.D.C. 2017) (stating that the consultant corollary doctrine applies "where the party providing information to the agency was not advocating for itself or a client").

## IV. ARGUMENT

The AR Defendants produced is deficient. Critical documents are missing, many communications are improperly redacted, and there is concrete evidence that Defendants' searches are inadequate. These deficiencies more than overcome any presumption of regularity in Defendants' compilation of the record. *See e.g., Styrene Information and Research Ctr., Inc. v. Sebelius*, 851 F. Supp. 2d 57, 62 (D.D.C. 2012) (discussing evidence that rebuts presumption of regularity). Moreover, the evidence indicates that Defendants engaged in improper behavior and acted in bad faith in reviewing the Tribe's fee-to-trust application. *See e.g., id.* at 63 (listing grounds for considering "extra-record evidence," including deliberative process). The Court should compel Defendants to complete the AR and produce improperly withheld documents and a privilege log, as set forth below.

## A. Because the AR is deficient, the Court must order Defendants to correct the AR

Defendants have declined to include documents that are indisputably part of the AR. They have also refused to correct improperly redacted documents. In this Circuit, the Court must order Defendants to supplement the record if: "(1) if the agency deliberately or negligently excluded documents that may have been adverse to its decision, (2) if background information was needed to determine whether the agency considered all the relevant factors, or (3) if the agency failed to explain administrative action so as to frustrate judicial review." *City of Dania Beach v. F.A.A.*, 628 F.3d 581, 590 (D.C. Cir. 2010) (citing *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)) (internal quotation marks omitted). Defendants have failed on all three counts.

### 1. The AR is missing important substantive and procedural documents

***Missing Environmental Documents***

The AR does not include the DEIS—a document that agencies must prepare by law in the course of complying with NEPA. *See* 40 C.F.R. § 1502.9(a). Defendants inexplicably refuse to include the DEIS, directing Plaintiffs to x16728. [2] *See* DOJ Resp. at 2. But x16728 is the internal administrative DEIS and it is *not* the same as the DEIS Defendants made publicly available. The internal administrative DEIS omits at least two appendices and over 100 pages of content compared to the final DEIS. *Compare* AR at x16728 (2370 pages) with DEIS at http://www.wiltoneis.com/draft-eis/ (2489 pages).

Defendants have also refused to include in the AR various technical documents that they used in preparing the EIS, including:

- Draft and Final Environmental Impact Report (EIR) for the City of Elk Grove, Lent Ranch Marketplace Special Planning Area Environmental Impact Report, As Approved by City Council on June 27, 2001, cited at AR x11591; x12963 (Draft EIR) but not included in substance;

[2] Defendants have designated documents within the AR with a 12-place code—i.e., WR_AR0000001. Because there is only one AR in this case, Plaintiffs refer to the specific records only by reference to the pagination—i.e., x364.

- City of Elk Grove, 2013a. Sphere of Influence Amendment Area Financial Municipal Service Review, August 2013, cited at AR x11591 but not included in substance;
- Elk Grove Water District (EGWD), 2015 Urban Water Management Plan, cited at AR x11594, but not included in substance;
- Sacramento County Water Agency (SCWA), 2005. *Zone 40 Water Supply Master Plan*, February 2005, cited at AR x11600, but not included in substance;
- *South Coast Citizens for Responsible Growth v. City of Elk Grove* (2004 Cal. App. Unpub. LEXIS 1208), cited at AR x11600, but not included in substance; and
- *Sacramento County General Plan of 2005-2030*, amended November 9, 2011, and associated documents available at the URL listed, cited at AR x11599, but not included in substance.

Defendants refuse to include these documents in the AR, arguing that NEPA regulations allow agencies to incorporate documents by reference in an EIS. DOJ Resp. at 3 (citing 40 C.F.R. § 1502.21). But that response simply conflates NEPA requirements with APA requirements. The fact that NEPA regulations allow agencies to incorporate material by reference into an EIS does not mean that an agency can exclude the material from an AR. To the contrary, an AR must include any findings or reports on which the agency's decision is based. *Am. Wildlands*, 530 F.3d at 1002 (quoting Fed. R. App. P. 16(a)); *see also Conservation Force*, 979 F. Supp. 2d at 98-99 (stating that the "whole" AR includes "all documents and materials directly or indirectly considered by agency decision-makers").[3]

[3] Plaintiffs also requested that the Department include a Departmental guidance document regarding trust acquisitions. Smith Decl. at ¶ 8 (Solicitor of the Interior, Checklist for Solicitor's Office Review of Fee-to-Trust Applications (Checklist) (Jan. 5, 2017)). This guidance was in effect before, and therefore applicable to, the January 19 ROD. In addition, Defendants represented to the Court that Lawrence Roberts was appointed to the position of Principal Deputy, Dkt. 50 at 15 (citing Connor Memorandum and Plumbook), and that there are a number of emails from January 19, 2017 regarding his role. The AR should include the internal emails the Department cited in the January 9, 2018 hearing. Finally, the record should be supplemented to include an extra-record document necessary for the Court's review. Smith Decl. at ¶ 11. A March 6, 2017 memorandum from the Sacramento County Water Agency to the County of Sacramento addresses the availability of water supplies in the local service area, and clearly states that the water agency's "water supply portfolio is fully allocated" in the project area. Despite being raised by multiple commenters, the Department failed to adequately explain its conclusion that unallocated local water supplies were available for the Tribe's casino project, so as to frustrate judicial review. *See James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.D.C. 1006).

Defendants further refuse to include another technical report entitled, Sacramento County Water Agency, 2010 Zone 41 Urban Water Management Plan, July 2011, which Defendants cite at AR x17472. With respect to that document, they contend: "It is not the case that the Department cited to or relied upon a Sacramento County Water Agency, 2010 Zone 41 Urban Water Management Plan, July 2011, in the FEIS, and we are otherwise unaware of this document." DOJ Resp. at 3. Obviously, Defendants are incorrect. These omissions, coupled with Defendants' refusal to include the documents in the AR (or, apparently, to take Plaintiffs' objections seriously), indicate that Defendants have both "deliberately or negligently excluded documents that may have been adverse to its decision," and refuse to include "background information . . . needed to determine whether the agency considered all the relevant factors." *City of Dania Beach*, 628 F.3d at 590.

Any presumption of regularity Defendants might have been entitled to in their designation of the AR has been rebutted.

***Missing Attachments***

The environmental documents are not the only documents Defendants improperly excluded. The AR also appears to be missing both attachments to various emails as well as parent emails associated with various loose attachments. Although Plaintiffs requested a chart associating attachments with parent emails, Defendants have refused to provide such documentation, preventing Plaintiffs from being able to determine whether certain documents are missing.

Defendants simply assert that all attachments have been produced and indexed immediately following the parent document, and that for all instances where this is not the case, Defendants have withheld the attachments in full as privileged, or have otherwise deemed the attachment "non-responsive" or duplicative. DOJ Resp. at 4. It is unclear as to why Defendants would attach a non-responsive document to a responsive email and Defendants provide no explanation.

In any case, it does not appear that Defendants are correct in representing that all non-privileged attachments have been produced. For example, AR x214 is an email that refers to "above-listed documents" which are not included in the AR, and the subject lines are blank (not redacted). Those documents cannot be privileged, as they were provided to Defendants *by the Tribe*. The email also states that the referenced documents had previously been forwarded and reviewed by BIA, AR x214, but the AR does not contain any emails or attachments that meet that description. Defendants respond that "[i]t appears that in document x00214 the 'above-referenced documents' are the title commitment documents mentioned in the previous sentence," and cite emails at AR x3369 and x3594, with one presumed attachment x3595. DOJ Resp. at 6. But that explanation is not plausible. The documents referred to in x214 are described as documents that the title insurance company wanted the Department to sign, but x3595 is a contract between the title insurance company and the Howard Hughes Corporation, which sold the Elk Grove site to the Tribe Boyd Gaming Corporation, with Boyd and the Tribe as the proposed insured parties, and x3369 is a title commitment insuring the Tribe and its developer. There is no need for BIA to sign either document. Moreover, x3595 and x3369 are dated January 19, 2017, while x214 is dated January 18, 2017.

More significantly, the documents referred to in x214 are described as documents under which the Department would assume liability for an insurance policy. AR x214-215. This is a very unusual request, as is evidenced by the facts that the Department's Realty Specialist and Supervisory Realty Specialist "indicated that they were unfamiliar with these documents," AR x215, and that they required review by the Solicitor's office, who informed the Tribe's attorney that the Department did not have the authority to assume liability for a policy by signing the documents. AR x214. The referenced documents have not been included in the record. There also appears to be at least one email message missing or possibly improperly redacted in its entirety from the email chain. *See, e.g.,* AR x2211, x3673, x5294 x6013. Email AR x2630 is an email from the Tribe chairman to BIA and AES sharing what appears to be a link to documents produced by Sacramento County in response to a public records request. However, except for

correspondence with BIA, none of the underling request, the county's response, or the produced documents appear to be included in the AR. If the Department saw fit to include this email in the AR, the underlying records request, response, and produced documents should be included as well.

***Missing Procedural Documents***

It also appears that the Department has improperly excluded important procedural documents. Agencies include within an AR documents relating to notice, publication, internal approvals, and other administrative bookkeeping documents. That is why, for example, this AR contains publication notices for scoping, availability of the DEIS, and other notices,[4] and (partial) surnaming records for the Notices of Availability for the DEIS and FEIS (AR x10190, x10220, x10184). Yet the AR excludes similar records for the January 19, 2017 ROD, as well as for the Notices of Application for trust acquisition for both the Galt and Elk Grove sites in California. This information is needed to confirm that an agency has complied with various procedural requirements, as well as internal review requirements. Given their relevance, the Court should order Defendants to produce such evidence or attest to the fact that Defendants did not comply with notice or internal procedures, as applicable.

**2. Defendants have improperly redacted documents in the AR**

A large number of documents have been improperly redacted. Defendants refuse to produce the metadata (meaning in this instance the text at the top of an email message before the body begins, including whether the message was forwarded, the message's sender and

[4] *See* AR x1765 Notice of Intent (NOI) to prepare an EIS (Nov. 26, 2013); x4852 NOI to prepare an EIS (Dec. 4, 2013) (FR version); x21670 Notice of Availability (NOA) of DEIS (Dec. 29, 2015) (FR version); x882 EPA NOA of DEIS (Jan. 15, 2016); x24414 NOA of FEIS (document undated; index date given is Dec. 1, 2016); x651 same notice as x24414, except stretched to 6 pp instead of 4 pages and index dated as Dec. 7, 2017; x13648 same notice as x651, except stamped as received by AS-IA, Office of Indian Gaming, on Dec. 14, 2016; x12703 same notice as x24414 (Dec. 14, 2016) (FR version); x12704 same notice as x12703, except issued by BLM rather than BIA (Dec. 14, 2016) (FR version); x12709 EPA NOA of FEIS (Dec. 16, 2016) (FR version); x4488 notice of acquisition signed by Roberts and dated Jan. 19, 2017 (never published).

recipient(s), the date of the message, the subject line, the presence, type, and name of any attached documents, and any copied or blind copied recipients).[5] Instead, they refer Plaintiffs to the AR index only, claiming that it "identifies all documents redacted and specifies (for those redacted pursuant to the attorney-client privilege, the deliberative process privilege, or the attorney work product privilege) the relevant privilege." DOJ Resp. at 1-2, 6. That response is insufficient. First, Defendants already acknowledged that "due to an oversight," their index failed to identify the basis for redactions for a number of documents. *Id.* at 2. Second, the index does not accurately identify all recipients in every case. Third, the index in some cases identifies parties to whom privilege could not reasonably attach. And fourth, there is no justification for redacting the non-privileged information Plaintiffs must have to verify Defendants' assertions of privilege.

For example, the Department redacted large swaths of text and metadata in AR x214, x1403, x2853, x3184, x5845, x6017, x6026, x6550. In some cases, Defendants list the sender and recipient(s) of older emails in the chain in the index, but not the parties for whom Defendants claim privilege. *See, e.g.,* AR x5845. In other cases, the index provides only a partial list of senders and recipients of emails with redacted metadata. *See, e.g.,* AR x6550. Similarly, metadata is routinely missing from earlier-in-time email messages included within email chains, but that were not produced as separate documents, and some email documents end with truncated email chains, or fail to include the recipients of messages within the chain. *See, e.g.,* AR x511 (example of both).

Defendants' invocation of privilege is also deficient, and it is impossible to verify the information without the redacted metadata. Defendants cite attorney client privilege with respect

[5] The Department has also in several instances redacted entire pages of text, in addition to non-privileged metadata. *See, e.g.,* AR x2853, x3184, x5840, x6305. Factual information within a deliberative document may be withheld only when it is impossible to reasonably segregate meaningful portions of that factual information from the deliberative information. *See Wilderness Soc.,* 344 F. Supp. 2d at 18. Defendants simply assert that no factual information has been redacted. DOJ Resp. at 2.

to documents AR x5845 and x6026, for example, yet they identify the recipient as Plaintiffs' counsel. Attorney-client privilege obviously does not extend to communications with opposing counsel. Defendants respond that the redacted metadata show that those emails were actually sent by the Department of Justice to the Department of Interior, but refuse to identify the recipients or provide that metadata necessary to verify the assertion of privilege. DOJ Resp. at 2.

In any case, there is no basis for redacting or omitting information regarding the sender, recipients, date of transmission, or even the subject line. *See e.g.*, *Morley v. C.I.A.*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (stating that the "minimal information given in the affidavit and Vaughn index provide the court with no way of knowing if the CIA has properly applied [the deliberative process]," particularly because "the CIA has deleted the identities of the author and recipient in the document that was partially released") (citations and internal quotation marks omitted)); *see also Loop AI Labs, Inc v. Gatti*, No. 15-cv-00798-HSG, 2017 WL 111591, at *2 (N.D. Cal. Jan. 11, 2017) (concluding that subject line of email not subject to attorney-client privilege because it does not provide legal advice); *Morriss v. BNSF Ry. Co.*, No. 8:13CV24, 2014 WL 128393, at *1 (D. Neb. Jan. 13, 2014) (directing defense counsel not to redact the date and address lines of otherwise privileged emails to be produced). Defendants' refusal to correct the index where attorney-client is invoked and to produce documents with the metadata included prevents Plaintiffs from verifying their privilege claims and raises the question of whether Defendants are hiding adverse information. The Court should order Defendants to produce these documents without the improper redactions.

**3. Defendants have not searched all relevant fileholders**

Defendants assert that "[t]he Department's record search included all possible file holders," DOJ Resp. at 4, but that is not accurate. The AR, for example, includes numerous calendar invitations for conference calls involving various officials in the Department, tribal representatives, lobbyists, and Boyd Gaming employees and representatives. *See, e.g.,* AR x237 (Dec. 23, 2014 conference call with AES (the environmental contractor), the Tribe, Boyd Gaming, various lobbyists and counsel, and Departmental employees); x4520 (Jan. 21, 2015 call

with Tribe and Departmental employees); x5823 (Nov. 14, 2016 call with Principal Deputy Roberts and Tribe, Department officials, and Solicitor's office employees). These invitations for conference calls establish that the Department has not produced materials from all relevant file holders.

But the AR contains very few duplicates of the conference call invitations, despite the large number of Department employees who received invitations. Chad Broussard and John Rydzik, as well as numerous AES employees, appear as invitees on roughly biweekly calls dating from December 2013 to January 2017, yet the AR includes only one email invitation for all, or for nearly all, of the calls. Similarly, the AR includes an invitation for a conference call on January 11, 2017, listing the Principal Deputy Assistant Secretary and several other Department employees as organizers or invitees, yet the record includes only two invitations to that call, sent at different times. *See e.g.*, AR x5817, x5799.

Defendants respond to Plaintiffs' concern by stating that "[t]he Department did not produce every individual invitation for each conference call. To do so would be unduly cumbersome and repetitive." DOJ Resp. at 4. But there is nothing in Defendants' certification to indicate that they eliminated duplicative documents. And, in fact, the AR contains many duplicative documents, including of lengthy documents. *See, e.g.*, AR x3400 (ROD), x4539 (ROD), x5434 (ROD), x5847 (ROD), x6146 (ROD), x12611 (ROD), x13977 (ROD), x24430 (ROD). Given that the AR contains numerous duplicates of other emails, and the Department has not represented that it performed any kind of systematic de-duplication of documents in compiling the AR, Defendants' claim that the Department has searched all relevant file holders is not credible.

In addition, the AR does not include any other documents relating to these conference calls, e.g., agendas, notes, or minutes. It is highly implausible that no such documents were generated in preparing for, in the course of, or following any of these very frequent calls. Communications with third parties are not privileged—nor are notes summarizing such communications. Defendants should therefore have included in the AR any agendas, notes, or

minutes corresponding to any of these very frequent conference calls. Defendants nevertheless insist that there are no agendas or minutes from conference calls with outside parties, and that any notes taken were solely for personal use and not circulated to colleagues or added to agency files. DOJ Resp. at 4. If that is accurate, Defendants' admission establishes that there were gross procedural irregularities in the course of the Department's decision-making and compilation of the AR warranting the extra-record review Plaintiffs request. *See supra,* Section B. Departmental guidance directs that "substantive meetings relevant to the decision-making process should be sufficiently documented" and "contemporaneous memoranda that document relevant oral communications, confusing emails, and other matters that demonstrate the agency's decision-making process should be written or collected" and included in the decision file. *Standardized Guidance on Compiling a Decision File and an Administrative Record,* U.S. Dep't of the Interior, at *4, 7-8 (June 27, 2006).[6] Failure to document these calls or to create contemporaneous memoranda violate basic federal policies designed to ensure that a decision-maker has adequate information to render a well-reasoned decision, protect the public interest in government documents, and compile an AR sufficient to defend a decision. *Id.* at 2.

That the AR is missing a wide variety of documents is further bolstered by emails from Chairman Raymond Hitchcock transmitting third-party comments to Paula Hart, Director of the Office of Indian Gaming. *See* AR x4677, x4843, x4872, x5156. The comments that the Chairman attached to his emails are not included in the AR or at least do not follow the emails in the index. Because Defendants have refused to provide a chart linking attachments to emails, Plaintiffs cannot confirm that these attachments are in the AR at all. Nor is there any basis for asserting privilege when the comments were shared with the Tribe, so those documents cannot legitimately be treated as deliberative process documents excluded from the AR.

More curious is how the Chairman obtained the documents in the first place (or why it was necessary for him to forward comments filed with the Regional Office to the Office of

[6] Available at: https://www.fws.gov/midwest/endangered/permits/hcp/pdf/DecFileAdminRecordGuidance.pdf.

Indian Gaming). Defendants have not produced any emails transmitting the documents from the Department to the Chairman. Two of the emails appear to forward documents that Plaintiffs transmitted to the Regional Office by email, AR x4, mere hours before the Tribe transmitted the comments to the Office of Indian Gaming. *See, e.g.*, AR x 4872, x5156 (time-stamped 1:51 p.m., and attaching what appears to be Plaintiffs' comments on the FEIS). It would appear that the Regional Office emailed the comments to the Tribe, but excluded those communications from the AR. Alternatively, the Regional Office might have forwarded these comment letters to the environmental contractor, AR x3064, who then forwarded the communications to the Tribe, calling into question the Department's oversight of the decision-making process. Plaintiffs, however, cannot discern what occurred based on the AR Defendants have designated, nor what was actually attached, thus frustrating judicial review of the challenged decision.[7]

**B. There is concrete evidence of improper agency behavior and bad faith**

Based on Plaintiffs' review of the AR, it is apparent that Defendants engaged in improper agency behavior and have acted in bad faith. Both are valid grounds for the Court to order production of extra-record evidence. *See IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997); *see also Cape Hatteras Access Pres. Alliance*, 667 F. Supp. 2d at 116. Plaintiffs have rebutted the presumption of regularity by offering proof that specifically identified materials were omitted from the record. *Banner Health v. Sebelius*, 945 F. Supp. 2d 1, 17 (D.D.C. 2013). In this case, "resort to extra-record information [is necessary] to enable judicial review to become effective." *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). Extra-record discovery is appropriate "if a party makes a significant showing—variously described as a strong,

[7] Plaintiffs are aware of other materials relevant to the decision but not included in the AR. For example, records produced by the City of Elk Grove in response to a public records request include a December 19, 2013 email between John Rydzik, BIA, and Jennifer Alves, Assistant City Attorney for the City of Elk Grove. Smith Decl. at ¶ 9. Other emails in the chain were included in the AR, *see* AR x368, but not the one cited above. Another document that the Department has produced but failed to include in the AR a December 1, 2016 email from Alison Grigonis to Larry Roberts. Smith Decl. at ¶ 10. While some of these materials are not particularly substantive, the Department's failure to include them in the AR confirms that its certification that the record is complete is unreliable.

substantial, or prima facie showing—that it will find material in the agency's possession indicative of bad faith or an incomplete record." *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487-88 (D.C. Cir. 2011) (citation and internal quotation marks omitted).

As described below, Plaintiffs present evidence that meets this standard. "Strong evidence of unalterably closed minds" can establish bad faith or improper behavior and "justify discovery into the [agency's] decisionmaking process." *Id.* (quoting *Klamath*, 532 U.S. at 8-9) (internal quotation marks omitted).

**1. The AR indicates that Defendants engaged in improper conduct and acted in bad faith by conducting a sham review**

Two days after the 2016 Presidential election, the Chairman contacted Defendants regarding the Tribe's application. Internal emails indicate that the Tribe "obviously wants this done before January." AR x5554-55. On November 9, 2016, Alison Grigonis asked the Principal Deputy whether she should have "Faith start scheduling this," to which the Principal Deputy responded, "Sure." *Id.* Within a week, the Office of Indian Gaming issued a memorandum indicating that its review of the FEIS was complete, AR x1926, even though it appears from subsequent emails that the Office had not received or reviewed comments from the cooperating agencies on the administrative draft FEIS, AR x3229. In fact, Defendants continued to edit the FEIS, weeks after the Office indicated that its review was complete. *See, e.g.*, AR x6561 (November 18 email discussing internal review of FEIS and asking for comments on DEIS); AR x6067 (December 1 email "still working on our review of the underlying FEIS"); x4743 (redacted email from December 7 discussing continuing review of FEIS in Assistant Secretary's office).

It is evident that the Department committed to publishing the public notices of availability despite not having completed its review of the underlying FEIS, foreclosing any real

possibility of identifying and addressing substantive concerns.[8] The AR repeatedly confirms that the goal was "to push this gaming application through before the administration changes." AR x3753; *see also* x6236 (asking on November 28, 2016 if it would be "possible for us to get the EIS out this week"). Numerous emails—including several partially redacted—confirm Defendants' rush to publish notices to allow for final decision before January 20, 2017. AR x6063 (discussing need to publish Federal Register notice on December 1, 2016); x6064 (reflecting communication from Principal Deputy that notice must be published "today"); x6065 (same, but partially redacted).

The AR also reflects the Tribe's clear understanding that Defendants would approve the application. Defendants informed the Tribe on or about November 16, 2016 that they would give the Tribe a "qualified endorsement." AR x3753. The Chairman called and emailed Defendants repeatedly about the schedule, including to warn Defendants that if the notice for the FEIS was not "surnamed by 12/9, [it] may not be complete by 1/19/17." AR x5814. On December 21, 2016, a title company contacted Defendants to ask about appropriate forms for draft deeds and acceptance by the Department, the Tribe's gaming investor having informed the title company "that the BIA would like to have the land taken into trust before 1/20/17." AR x3248. Defendants expressed no surprise as to that representation and did not indicate that the decision was discretionary. *Id.*

The Senate Committee on Indian Affairs also apparently pressured Defendants to approve the project before the end of the Obama Administration, apparently on behalf of Senator Reid. On December 5, 2016, the Senate Committee on Indian Affairs contacted Defendants on behalf of Senator Reid asking about the status of the review process. AR x5798; *see also* x5807. Defendants informed the Senate Committee on December 6, that once the notice for the FEIS is

[8] Moreover, during this time, there was substantial legal uncertainty as to the applicability of a local development agreement, encumbrances on title, and impacts on the FEIS. AR x23961 (email from Tribe indicating that elimination of development agreement would clear title); x1200 (email from Stand Up indicating that development agreement might still apply because signatures being gathered for referendum); x3225 (noting issue for FEIS).

published, they will have "30 days to complete the project," which would "entail[] reviewing the ROD." AR x5775. There is no deadline for completing the project, and agencies are supposed to base the ROD on the EIS. The Committee contacted Defendants again on December 7 to state:

> It is our understanding that Acting Assistant Secretary Roberts must sign off on the EIS no later than this Friday, December 9, in order for the EPA to publish the Notice of Availability next Friday, December 16, which is the last day that will allow land to be put in trust by January 19, 2017. . . . Consequently, this matter is extremely time sensitive and we urge Interior to endeavor to get this under wire before the new administration comes in.

AR x5634. Defendants responded, "Yes we are aware of the deadline and have every intention of meeting it." *Id.*

The AR unquestionably indicates that Defendants' consideration of the Tribe's application was a foregone conclusion. The Department represented to the Senate Affairs Committee that it had "every intention of meeting" the deadline that "will allow land to be put in trust by January 19, 2017." AR x5634. The title company stated to Defendants "that the BIA would like to have the land taken into trust before 1/20/17," and Defendants did not object. AR x3248. Defendants and their environmental contractor processed the comments they received on the FEIS on January 17, 2017 and issued a signed Recommendation Memorandum by 8:00 p.m. on January 18, 2017. AR x3673. The email attaches a notice that appears to be a Federal Register Notice for the trust decision dated *December 7*, which Defendants have withheld. *Id.* The email also redacts discussion following the mention of the attached notice. *Id.* And all of this was completed before Defendants addressed questions regarding a conflict of interest involving the Regional Director's relationship with tribal members. *See* AR x189, x5691.

By 5:15 p.m. eastern time, Elizabeth Appel emailed PDFs of the Wilton letter, the *signature* page of the ROD, and a signed Federal Register notice (which was never published, as agency regulations require, 25 C.F.R. § 151.12(c)). AR x4487. She left all of those documents in her unlocked office on a round table. *Id.* None of this is proper agency conduct.

### 2. There is no evidence in the AR that the Principal Deputy actually reviewed any of the decision documents

Plaintiffs raised this issue with Defendants, who responded that "[a]ll documents and correspondence in support of the Record of Decision, which were not deliberative or protected by attorney-client privilege, are already part of the record." DOJ Resp. at 4. Defendants also stated, however, that "[i]f the Department were to discover any additional record documents, they of course would be added to the record." *Id.* Defendants cannot simply add documents to the AR, if they just happen to discover any additional record documents. This statement also belies Defendants' insistence that its search was complete.

In any case, based on the AR now, there are no documents at all to indicate that the Principal Deputy received copies of any of the decision documents to review, including the Regional Office's recommendation memorandum. In fact, none of the documents in the AR dated January 19 seem to indicate review of any of the decision documents. Instead, it appears that the documents were complete prior to the close of the comment period, with the exception of bracketing the comment letters received. *See, e.g.*, AR x5377 (inviting edits to draft ROD, dated January 12); AR x6047.

The Principal Deputy issued a significant number of decisions on January 19, 2017. He issued a 48-page gaming determination for the Shawnee Tribe.[9] He assumed jurisdiction from the Interior Board of Indian Appeals of an appeal of a decision to acquire land in trust for the Santa Ynez Chumash Indians, dismissed the appeal on January 19, 2017, and directed that the land be acquired in trust, which it was on January 20, 2017.[10] He also executed two Memoranda of Agreement on January 19, one between the Department and the Death Valley Timbi-sha Shoshone Tribe, and the other between the Department of the Interior and the Redding Rancheria. He issued a restored lands determination for the Coquille Tribe, which is not publicly

[9] https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/gaming-applications/2017.01.19%20Shawnee%20sigd%20%28cover%20letter%20with%202%20Part%29.pdf.

[10] *See* Complaint at 17, *County of Santa Barbara v. Haugrud*, No. 2:17-cv-00703 (C.D. Cal. Jan. 28, 2017), Dkt. 1.

available. He also signed a rule adjusting civil monetary penalties contained in BIA's regulations. Civil Penalties Inflation Adjustments; Annual Adjustments, 82 Fed. Reg. 7649 (Jan. 23, 2017) (filed Jan. 19, 2017).

This is a remarkable amount of decisions to issue in a single day. Given the number of decisions the Principal Deputy issued on the same day and the lack of any AR evidence to indicate whether or when he actually reviewed the decision documents in this case, resort to extra-record information is necessary to enable effective judicial review.

**3. By structuring the Third-Party Agreement with the environmental contractor to evade the APA, Defendants acted improperly and waived any claim to privilege**

The AR includes numerous communications between Department employees and employees of Analytical Environmental Services (AES)—the environmental contractor—that have been redacted under a deliberative process privilege claim. *See, e.g.*, AR x411, x517, x522, x541, x560, x563, x568, x635, x763, x769, x986, x988, x990, x1183, x1202, x1403, x1474, x1636, x1761, x1812, x 2060, x2066, x2203, x2357, x2409, x2853, x3155, x3184. It is also likely that many of the documents omitted from the AR have been withheld on the same basis. Defendants' treatment of AES documents, however, is inconsistent and is obviously intended to shield communications between AES, the Tribe, and others.

Defendants want to eat their cake and have it too. Pursuant to Section 7.0 of the Three-Party Agreement (Agreement), Defendants "own" all records that BIA "use[s]" to comply with NEPA. AR x249. The AES records BIA does not use "shall be the property of AES and deemed outside the services identified in this Agreement." *Id.* Such arrangement is not permitted under federal law. Pursuant to 36 C.F.R. § 1222.32, agency officials responsible for administering contracts must ensure that contractors "performing Federal government agency functions create and maintain records that document these activities." Contractor records, like agency records, are subject to FOIA. *Id.*; *see also* 5 U.S.C. § 552(f)(2).

By disclaiming control over a broad range of AES documents and refusing to search AES file holders, Defendants have relinquished the requisite control over AES to entitle their

communications to deliberative process privilege. As DOJ has stated, "[a]gency 'control' is the predominant consideration in determining whether records generated or maintained by a government contractor are 'agency records' under the FOIA." *See* U.S. Dept. of Justice, *FOIA Guide, 2004 Edition: Procedural Requirements*, "Agency Control" (updated July 23, 2014) (citing cases), https://www.justice.gov/oip/foia-guide-2004-edition-procedural-requirments. If Defendants do not control documents in AES's possession related to this application, they do not have sufficient control over AES to assert deliberative process privilege. To conclude otherwise would violate the Federal Records Act and the APA.

That conclusion is required for another reason. In *Klamath*, 532 U.S. 1, the Supreme Court narrowed the scope of the "consultant corollary" doctrine, under which the deliberative process privilege is applied to outside consultants. The Court explained that "the records submitted by outside consultants played essentially the same part in an agency's process of deliberation as documents prepared by agency personnel might have done," even though such contractors are "not assumed to be subject to the degree of control that agency employment could have entailed." *Id.* at 10. However, it must also be the case that the outside contractor does not "represent an interest of its own, or the interest of any other client." *Id.* at 11. "[C]onsultants whose communications have typically been held exempt have not been communicating with the Government in their own interest or on behalf of any person or group whose interests might be affected by the Government action addressed by the consultant." *Id.* at 12. That must be the case to justify "calling their communications 'intra-agency.'" *Id.*

As the AR shows, AES quite clearly represents the Tribe's interests. But even if that conclusion were not readily apparent, Defendants cannot verify the contractor's relationship with the applicant because they have relinquished *control* over significant aspects of AES's work. Defendants do not even appear to understand the terms of the parties' Agreement in resisting Plaintiffs' objections. AR x248. Defendants assert that "the Department retained AES, not the Tribe, and accordingly deliberative communications between the Department and AES have been properly withheld under the deliberative process privilege." DOJ Resp. at 3. But they are

wrong. The Agreement expressly states that *the Tribe* retained AES pursuant to a separate consulting contract (that is not included in the AR) and is solely responsible for payment of all of AES's fees. AR x248 § 2.0; *see also* x16151 (Tribal resolution requesting BIA to approve AES as environmental contractor), and x16154 (letter approving the Tribe's selection). Furthermore, Defendants do not know the terms of the Tribe's consulting contract with AES and therefore cannot represent that AES does not represent the Tribe's interests in this proceeding.

Because Defendants have relinquished control over significant aspects of AES's work—control over documents consistent with federal law and the nature of AES's consulting contract with the Tribe, deliberative process privilege cannot apply to Defendants' communications with AES. Defendants cannot have it both ways. Either Defendants control AES's work, which means AES must preserve and produce *all records* in accordance with federal law (FOIA and the APA) entitling Defendants to assert deliberative process privilege or they do not, defeating any claim of privilege. By structuring their Agreement in a manner that evades the APA and the Federal Records Act, Defendants have acted improperly and in bad faith, but more importantly, have waived any right to claim privilege.

The Court should order Defendants to produce all communications with AES in their entirety.

## V. CONCLUSION

The administrative record submitted by Defendants is so deficient as to preclude effective review by the Court. The Court should grant Plaintiffs' motion for an order compelling the Defendants to search all relevant file holders, including AES, and to complete the record with all documents improperly withheld or redacted. Plaintiffs also request that Defendants be required to produce an index of each document withheld as privileged, and that Plaintiffs be given an opportunity to object to the assertions of privilege, and if necessary, to request that this Court conduct an in camera review of the documents to determine whether the Defendants properly asserted privilege.

Dated this 16th day of April 2018.

Respectfully submitted,

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