UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STAND UP FOR CALIFORNIA! *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF INTERIOR *et al.*,

Defendants,

and

WILTON RANCHERIA, CALIFORNIA

Intervenor-Defendant.

Case No. 1:17-cv-00058 (TNM)

MEMORANDUM ORDER

The Plaintiffs challenge a decision by the U.S. Department of the Interior (the "Department") to approve the acquisition of land in trust for Wilton Rancheria, a federally recognized Native American tribe (the "Tribe"). Believing the administrative record to be inadequate, they have filed a second motion to compel the production of several documents and privilege log entries. The Department has since agreed to supplement the privilege log. And the Court finds that the requested documents are protected by the attorney-client and deliberative process privileges. Thus, it will deny the Plaintiffs' motion.

I.

In considering the Plaintiffs' first motion to compel, the Court described the background and history of this case. *See Stand Up for California! v. U.S. Dep't of Interior*, 315 F. Supp. 3d 289 (D.D.C. 2018). To summarize, federal law authorizes the Department to acquire parcels of

land in trust for Native American tribes. *See* 25 U.S.C. § 5108. In 2013, the Tribe asked the Department to acquire land on its behalf for a casino. Am. Compl. 10, ECF No. 26. The Department identified a 282-acre site in Galt, California, as the location for the proposed project. *Id*. It also listed "five other reasonable alternatives, including an approximately 28-acre site in Elk Grove." *Id*. at 10-11. For the next two years, the Department appeared to focus on the Galt site as the location for the proposed project. For example, in 2015 it issued a "Notice of Availability" announcing its intent to file a Draft Environmental Impact Statement. *Id*. at 11. *See also* 80 Fed. Reg. 81,352 (Dec. 29, 2015). The Notice stated that the "proposed fee-to-trust property is located within the City of Galt . . . ." *Id*.

Then, days after the 2016 Presidential election, the Department issued a Notice of Land Application, but for the Elk Grove site. Am. Compl. 11. And, less than a month later, it published a final Environmental Impact Statement describing the Elk Grove site as the proposed location. *Id*. Despite the Plaintiffs' efforts to slow the process, the Department approved the Elk Grove location and finalized its decision on the last day of the Obama Administration. *See* Am. Compl. 11-14.

The Plaintiffs argue that the rapid change and related actions were arbitrary, capricious, and violated several federal laws. *See* Am. Compl. 21-25. They also contend that the administrative record is inadequate. In their first Motion to Compel, the Plaintiffs sought additional discovery and a privilege log. *See Stand Up for California!*, 315 F. Supp. 3d at 294. The Court denied the motion for additional discovery but granted their request for a privilege log. *Id*. at 294-296. It found that the Plaintiffs had made a *prima facie* showing of bad faith sufficient to warrant "the production of a privilege log to facilitate review of the Defendants' assertion of privilege." *Id*.

The Plaintiffs now ask the Court to order the Department to take three more actions. First, they want the Department to add 400 documents to the privilege log. Second, they want it to produce all documents related to the Department's defense against an earlier motion for a temporary restraining order ("TRO") and preliminary injunction filed by the Plaintiffs. And third, they want the Department to produce all deliberative documents related to the Elk Grove decision from November 2016 to January 2017. *See* Pls.' Second Mot. to Compel 2, ECF No. 70 ("Pls.' Mot.").

II.

The Plaintiffs' first request is denied as moot. The Department has agreed to "treat [the 400] documents as part of the record here; [to] provide a log identifying the privilege basis for any withholdings; and [to] produce anything determined to be not privileged." Fed. Defs.' Resp. to Pls.' Second Mot. to Compel 26, ECF No. 72 ("Fed. Defs.' Resp.").

The Plaintiffs' second request is also denied, as the documents they seek are protected by attorney-client privilege. Two weeks before the Department issued its Elk Grove decision, the Plaintiffs moved for a TRO and injunction. Pls.' Mot. at 8. They contend that, in response the Department "clearly coordinated" its "litigation strategy with the Tribe." *Id*. at 10. Because the Department had not yet issued its decision, they argue, "the interests of the [Department] and the Tribe were not and could not lawfully be aligned." Thus, "any communication regarding the TRO, the preliminary injunction . . . or other topics is not privileged." *Id*.

Not so. The Plaintiffs rely on two emails from attorneys within the Department's Solicitor's Office. The first shows that a Department attorney spoke with the Tribe's counsel about the "Wilton TRO hearing tomorrow and need for decision." Pls.' Mot. at 9. It also states that the Tribe's attorney "agrees that the 30 days period between [the Department's final]

decision and trust transfer [of the land] makes sense [,] but she is still talking to her client and the other Wilton attorneys." *Id*. The second email notes a discussion between the Tribe's attorney and the Department about the Tribe potentially terminating an agreement so that it could prevail on the Plaintiff's request for an injunction. *Id*. at 10.

True, it is "axiomatic that 'any voluntary disclosure by the holder of the [attorney-client] privilege is inconsistent with the confidential relationship and thus waives the privilege.'" *Id*. (quoting *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)). But neither email reveals a voluntary disclosure by the Department of attorney advice about its litigation strategy. Rather, the emails appear to show the Department asking about *the Tribe's* positions on the TRO and preliminary injunction. And it is common for parties involved in a litigation, even opposing parties, to discuss their litigation postures without revealing confidential attorney-client information.

Moreover, as the Department notes, federal regulations require conversations between the Department and tribes about the land acquisition process before the release of a decision. Fed. Defs.' Resp. at 29-30. *See also* 25 C.F.R. §§ 151.12, 151.13 (requiring the Department to be able to "[i]mmediately" acquire the land in trust upon approving an application and permitting the Department to "require [of a tribe] the elimination of . . . liens, encumbrances, or infirmities prior to taking final approval action on the acquisition"). Thus, these emails and the conversations they summarize do not warrant a finding that the Department has waived attorney-client privilege for documents or internal conversations relating to the motion for a TRO and injunctive relief.

Finally, the Court denies the Plaintiffs' third request. The deliberative process privilege is "unique to the government" and protects "predecisional" deliberative documents from

disclosure. *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). It allows agencies to "withhold documents and other materials that would reveal advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (cleaned up).

A party can invade this privilege if it can establish "an adequate basis for believing that the documents [sought] would shed light upon government misconduct." *Hall & Assoc. v. EPA*, 14 F. Supp. 3d 1, 9 (D.D.C. 2014) (cleaned up). This exception is applied narrowly, and the Court must find that the "policy discussions sought to be protected with the deliberative process privilege were so out of bounds that merely discussing them was evidence of a serious breach of the responsibilities of representative government. The very discussion, in other words, was an act of government misconduct . . . ." *Id*.

The Plaintiffs have failed to clear this high bar. Instead, they rely largely on arguments made in their first Motion to Compel. They note that they have "already established a prima facie case of bad faith." Pls.' Mot. at 12. True. But that *prima facie* case prompted the Court's order requiring the production of a privilege log. *See Stand Up for California!*, 315 F. Supp. 3d at 296-298. The Plaintiffs have offered no arguments about the documents identified in the privilege log. Nor have they provided an adequate basis for believing that any of these documents would shed light on government misconduct beyond that already alleged based on the existing record.

For instance, the Plaintiffs suggest that the "record leaves little doubt that the Defendants pre-determined the outcome of the Tribe's application and agreed with the Tribe to acquire the land in trust before the new Administration took over." Pls.' Rep. in Supp. 6, ECF No. 74. They

cite many previously produced emails and documents in support of their contention. *See id*. at 7-10; Pls.' Mot. at 12-13. These are arguments about the merits of the Plaintiffs' underlying claims, not about the documents they seek. The "relevant consideration" for the government misconduct exception "is the egregiousness of the contents of the discussion [in the documents sought], not the egregiousness of the underlying conduct that the discussion concerns." *Judicial Watch, Inc. v. U.S. Dep't of State*, 285 F. Supp. 3d 249, 254 (D.D.C. 2018). Thus, the Plaintiffs' request to invade the deliberative process privilege is denied.

For these reasons, it is hereby

ORDERED that the Plaintiffs' Second Motion to Compel Adequate Administrative Record and Privilege Log is DENIED; it is also

ORDERED that the Defendants' and the Intervenor-Defendant's Motions for Leave to File Surreply are GRANTED; it is also

ORDERED that the parties shall file a status report with a proposed summary judgment briefing schedule no later than 20 days after Congress has restored appropriations to the Department of Justice and the Department of the Interior.

SO ORDERED.

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Dated: January 16, 2019

TREVOR N. McFADDEN
United States District Judge