IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

MENOMINEE INDIAN TRIBE OF WISCONSIN, Plaintiff, v. THE UNITED STATES DEPARTMENT OF THE INTERIOR; and KENNETH SALAZAR, in his official capacity as Secretary of the United States Department of the Interior, Defendants.	Case No. 09-C-496-WCG

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO CONSIDER EXTRINSIC EVIDENCE

Plaintiff has failed to meet its heavy burden to show extra-record evidence and discovery are appropriate in this record review case. Plaintiff has provided no evidence, let alone the necessary strong showing, to support its speculative allegation of bad faith and improper behavior. The Department of the Interior provided a lengthy explanation for the decision Plaintiff challenges, and has lodged the complete administrative record supporting that decision. Extra-record evidence is therefore inappropriate, and Plaintiff's motion should be denied.

FACTUAL & PROCEDURAL BACKGROUND

In July 2004, Plaintiff Menominee Indian Tribe of Wisconsin applied to the Bureau of Indian Affairs to have the United States Secretary of the Interior take certain lands in Kenosha, Wisconsin, into trust for Plaintiff's benefit. The Secretary's authority to take land into trust is governed by the Indian Reorganization Act, 25 U.S.C. § 465, and its implementing "Part 151" regulations (25 C.F.R. pt. 151). Because Plaintiff intended to use the land to open a casino, the Secretary's review of Plaintiff's application is also governed by Section 20 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719. Specifically, before Plaintiff could operate the casino, the Secretary would need to make the appropriate determination under 25 U.S.C. § 2719(b)(1)(A)—a two-part inquiry commonly referred to as the "two-part determination." Plaintiff supplemented its application with further information on January 14, 2008, and July 31, 2008. *See* AR00003–16; AR01408–61.[1/]

Concurrently with Plaintiff's application, the Department of the Interior ("Department") faced an influx of requests for the Secretary to take land into trust that was a great distance from the applicant-Tribe's reservation, in some cases up to 1,000 miles. To assist in administrative review of these applications, the Department issued two documents to its Regional Directors, the officials responsible for initially reviewing the applications. The first was a September 21, 2007, "Checklist for Gaming Acquisitions." *See* AR12880–94. The second was a January 3, 2008, Guidance Memorandum. *See* AR01487– 92.

Ten months later, on November 7, 2008, fearing its application would be denied, Plaintiff

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[1/] The citation format "ARxxxxx" refers to the Department of the Interior's administrative record. *See* Doc. Nos. 23, 24.

filed suit under the Administrative Procedure Act seeking to prevent the Department from making a decision on Plaintiff's application, arguing the Guidance Memorandum and Checklist are rules that were required to go through public notice and comment. *See Menominee Indian Tribe of Wis. v. U.S. Dep't of the Interior*, Case No. 08-C-950-WCG, Compl. ¶¶ 63–75 (E.D. Wis. Nov. 8, 2008) (attached as Ex. A). Soon thereafter, this Court denied Plaintiff's request for a temporary restraining order. *See Menominee Indian Tribe of Wis. v. U.S. Dep't of the Interior*, Case No. 08-C-950-WCG, Order Denying Temporary Restraining Order (E.D. Wis. Nov. 24, 2008) (attached as Ex. B). A year later, on January 7, 2009, the Department issued a ten-page decision letter denying Plaintiff's application. *See* AR12896–906. Plaintiff voluntarily dismissed its original suit and filed its present suit on May 15, 2009. *See* Compl. (Doc. No. 1).

Plaintiff's present action makes challenges to the Guidance Memorandum and Checklist identical to those Plaintiff made in its November 2008 suit, and also challenges the decision letter itself as arbitrary and capricious under the Administrative Procedure Act. *See* Compl. ¶¶ 55–68. Simultaneously with its Complaint, Plaintiff filed a request for the Court to take judicial notice of thirteen documents. *See* Doc. No. 3. Defendants filed their Answer and a response in opposition to Plaintiff's request for judicial notice on July 27, 2009. *See* Doc. Nos. 10, 11 On January 22, 2010, the Department lodged and produced the administrative record for its decision to deny Plaintiff's application. Plaintiff now asks the Court to allow Plaintiff to depose current and former high-ranking Department of the Interior officials, to complete the administrative record with seven documents, and to consider a total of thirty-three documents as extra-record evidence.

STANDARD OF REVIEW

The Administrative Procedure Act (APA), 5 U.S.C. § 706, limits judicial review of agency action to the agency's administrative record. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Section 706 of the APA directs the reviewing court to evaluate the agency action on "the whole record or those parts of its cited by a party." 5 U.S.C. § 706. Under this record review principle, "the district court is a reviewing court . . . ; it does not take evidence." *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 443 (7th Cir. 1990). The United States Supreme Court has repeatedly emphasized that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 141 (1973) (per curiam); *see USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708, 715 (7th Cir. 1996). The record includes "all materials 'compiled' by the agency that were 'before the agency at the time the decision was made.'" *Calloway v. Harvey*, 590 F. Supp. 2d 29, 36 (D.D.C. 2008) (quoting *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996)). Moreover, "[t]here is a 'standard presumption that the . . . agency properly designated the administrative record.'" *Id.* at 37 (internal quotation omitted).

There are exceptions to the record review principle, but they are limited and narrow. A court should supplement the administrative record with extra-record documents or evidence only in certain circumstances. *See USA Group Loan Servs.*, 82 F.3d at 715 (citing *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988)). A district court may consider evidence outside the administrative record only where: 1) the material is necessary to explain the agency's action; 2) the agency relied upon materials not already included in the record; 3) supplementation is necessary to explain complex or technical material; or 4) the agency acted in

bad faith. *See Animal Defense Council*, 840 F.2d at 1436–37; *Miami Nation of Indians v. Babbitt ("Miami Nation II")*, 55 F. Supp. 2d 921, 923–24 (N.D. Ind. 1999); *accord USA Group Loan Servs.*, 82 F.3d at 715 (noting bad faith exception). The party seeking to expand judicial review beyond the record must make a strong showing that the extra-record materials fall under one of the exceptions. *See Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *Miami Nation of Indians v. Babbitt ("Miami Nation I")*, 979 F. Supp. 771, 779 (N.D. Ind. 1996) (citation omitted). Mere allegations that the court should look beyond the administrative record are not sufficient. *See James Madison Ltd.*, 82 F.3d at 1095.

Further, the exceptions are not intended to open the door to broad discovery. *See Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (noting the limited exceptions are intended to "plug holes in the administrative record . . . [and] are narrowly construed and applied"). The record review principle includes inherent practical considerations that make it imprudent "to consider testimonial and documentary evidence . . . unless the evidence has first been presented to and considered by the agency." *Cronin*, 919 F.2d at 444; *see also Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 196 n.4 (D.D.C. 2005) (citation omitted). Therefore, "in all but exceptional cases, discovery in cases brought under the APA is limited to materials contained in the administrative record." *Sokaogon Chippewa Cmty. v. Babbitt ("Sokaogon I")*, 929 F. Supp. 1165, 1172 (W.D. Wis. 1996) (citations omitted), *rev'd, in part, on reconsideration, Sokaogon Chippewa Cmty. v. Babbitt ("Sokaogon II")*, 961 F. Supp. 1276 (W.D. Wis. 1997). "[T]here must be a strong showing of bad faith or improper behavior before" a court should inquire into the mental processes of administrative decisionmakers. *Overton*

Park, 401 U.S. at 420.

ARGUMENT

Plaintiff has failed to provide any evidence that would trigger one of the narrow exceptions to the record review principle's limit on discovery and extra-record evidence. Plaintiff essentially makes four arguments: 1) the Department acted in bad faith in reviewing Plaintiff's application; 2) the current administrative record is incomplete; 3) several of Plaintiff's proffered documents are judicially noticeable; and 4) extra-record material is necessary to explain the Department's decision. But Plaintiff provides little support or explanation for any of these arguments. Regardless, Plaintiff's proffered materials provide no evidence of bad faith on the part of the Department, and the Department's administrative record is complete. Further, judicial notice is not the appropriate mechanism to supplement the record here, and the Department has already provided a detailed explanation for the decision at issue. Plaintiff's motion should therefore be denied.

I. Extra-Record Evidence and Discovery Are Inappropriate Because Plaintiff Has Failed to Make Any Showing of Bad Faith.

Plaintiff has not met its heavy burden to demonstrate bad faith or improper behavior on the part of Department of the Interior. While all the exceptions to the record review principle are extremely limited, the bad faith and improper behavior exception is particularly narrow. Under the exception, a plaintiff must make a "strong showing" of the alleged bad faith or impropriety. *See Overton Park*, 401 U.S. at 420. Government officials are presumed to act in good faith: "[w]ithout a showing to the contrary," administrative decision-makers "'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Withrow v. Larkin*, 421 U.S. 35, 55 (1975) (quoting *United*

States v. Morgan, 313 U.S. 409, 421 (1941)); *accord FCC v. Schreiber*, 381 U.S. 279, 296 (1965). Thus, Plaintiff "must present 'well-nigh irrefragable proof' of bad faith or bias on the part of government officials in order to overcome this presumption." *China Trade Ctr., L.L.C. v. WMATA*, 34 F. Supp. 2d 67, 70 –71 (D.D.C. 1999) (quoting *Haney v. United States*, 676 F.2d 584, 586 (Ct. Cl. 1982)).

Plaintiff offers nothing but conjecture in support of its argument that the Department has acted in bad faith. Plaintiff states that available evidence supports a reasonable conclusion of bad faith and impropriety, but does not directly disclose what that evidence is. *See* Pl.'s Mem. in Supp. of Mot. to Consider Extrinsic Evidence ("Mem. in Supp.") at 26 (Doc. No. 35).

Nor can Plaintiff extract a strong showing of bad faith from a comment letter submitted by a Tribe opposing Plaintiff's application or an allegation that the Department prematurely cancelled the Environmental Impact Statement (EIS). *See* Mem. in Supp. at 28. A government agency's consideration of public comments on proposed agency action—or the fact that the agency agrees with some of the comments—can hardly be considered improper behavior. Similarly, an e-mail discussing whether a notice to cancel the EIS for Plaintiff's application had been issued does not illustrate any premature decision-making, particularly when the notice was never published. *See* AR12855–58. The additional administrative record materials Plaintiff cites also do not demonstrate pre-judgment in the Department's decision-making. The June 3, 2008 letter from Milwaukee County inquires as to why a decision has <u>not</u> been made. *See* AR12850. And the January14, 2008, e-mail requesting Plaintiff's application file does not demonstrate anything improper (*see* AR12849), particularly when the request occurred on the same day Plaintiff submitted supplemental information for its application.

Similarly, nothing in Plaintiff's proffered extra-record materials constitutes a strong showing of bad faith. And Plaintiff does not attempt to directly make a link. As noted below (*see infra* Part IV), none of the documents relate to or discuss Plaintiff's application. In the introduction to its brief, Plaintiff argues Secretary Kempthorne's alleged bias drove decision-making on its application. The two news articles Plaintiff offers do not support that allegation. The articles state only that economic development projects were an area of concern for the Administration, and that Congress—not the Interior Department—may act to limit off-reservation gaming. *See* Exs. 6, 7 to Decl. of William Wood ("Wood Decl.") (Doc. No. 36). Similarly, then-Assistant Secretary Artman's Congressional testimony states that Secretary Kempthorne was not personally involved in decision-making on applications. *See* Ex. 8 to Wood Decl. at 19.

Thus, Plaintiff's analogy to *Sokaogon II* is vastly misplaced. In *Sokaogon II*, the court found the plaintiff-Tribe had made the requisite strong showing of political pressure to allow for limited discovery. *See* 961 F. Supp. at 1279–84. The *Sokaogon II* plaintiff claimed the Department had been subject to improper political influence from the White House and Congressional members. *See id.* at 1280–84. The court noted that the plaintiff was required to show "sufficient evidence of improper of political influence on agency decisionmaking as to raise suspicions that defy easy explanation." *Id.* at 1281. The plaintiff met that threshold by identifying specific contacts between Congressional staff and the Department; meetings between the Democratic National Committee, White House staff, and Congressional staff; meetings between Democratic National Committee staff and Department officials; meetings between the White House and representatives from parties opposing the project in question; fax

communications between the White House and Department regarding the decision; an admission by the Secretary of the Interior that political pressure had been exerted on him with regard to the decision; and the lack of detail in the actual decision itself. *Id.* at 1281–84.

None of the detailed evidence in *Sokaogon II* is present here. Plaintiff instead offers only speculation that it was somehow treated unfairly. Absent evidentiary support, Plaintiff's own conclusions fall short of the applicable standard. *See James Madison Ltd.*, 82 F.3d at 1095–96 (denying discovery where plaintiff asserted bad faith because agency had an allegedly "predetermined agenda"). Plaintiff "cannot institute discovery in a case involving review of an agency's action simply in hope of finding something wrong in what the agency did." *Apex Const. Co., Inc. v. United States*, 719 F. Supp. 1144, 1147 (D. Mass. 1989) (citation omitted). Allowing such limited accusations to open the door to discovery would eviscerate the APA's standard of review.

Despite its lack of evidence, Plaintiff seeks to depose high-ranking Department of the Interior officials to inquire as to their personal knowledge on the Guidance Memorandum and January 8, 2009, decision letter, as well as the specifics of internal Department discussions and decisions. *See* Mem. in Supp. at 29–30. But this is precisely the type of extra-record inquiry that APA review precludes. The Supreme Court has long recognized that examination into the decision-maker's thought processes is inappropriate in reviewing administrative agency decision-making. *See Morgan*, 313 U.S. at 422. Where the factors supporting an agency's decision are set forth in writing, as they are here, courts have consistently found that it is inappropriate to seek further explanation from the decisionmaking officials. *See, e.g., Camp*, 411 U.S. at 143 (holding *Overton Park* exception did not apply where "there was

contemporaneous explanation of the agency decision," even though such explanation was "curt"); *accord Pension Benefit Guar. Corp. v. LTV Steel Corp.*, 119 F.R.D. 339, 342–43 (noting absence of formal administrative findings). Under these circumstances, Plaintiff must make a "strong showing of bad faith or improper behavior" before the court can take testimony or elicit other evidence from agency officials. *Overton Park*, 401 U.S. at 420 (emphasis added). Plaintiff has failed to do so here, and its request to depose agency officials on those grounds should therefore be denied.

II. The Department's Administrative Record is Complete, and Discovery is Therefore Unnecessary.

Plaintiff also cannot use facial allegations of an incomplete record to compel discovery. The administrative record should include "all documents and materials directly or indirectly considered by agency decision-makers." *Calloway*, 590 F. Supp. at 36 (citation omitted). Here, Plaintiff contradictorily seeks discovery to explore whether the record is complete after arguing only seven additional documents are necessary to complete the record. *See* Mem. in Supp. at 5–8, 23–26. The contradiction aside, discovery is unwarranted because the record is complete.

Under the appropriate standard, the Department agrees to add to the record five of Plaintiff's seven suggested additions. The Department acknowledges that the February 17, 2007, letter from James Cason to Karen Washinawatok, and January 2006 article, "An Impact Analysis of Tribal Government Gaming in California," were unintentionally omitted from the record. Additionally, the Department is removing the privilege designations from the Midwest Regional Director's December 18, 2007, and January 19, 2007, recommendations, and the draft Record of Decision under the National Environmental Policy Act. *See* AR1531, AR1532, AR1868. The Department will move for leave to submit these five documents as a supplemental administrative

record.

Two of Plaintiff's requested documents, however—a notice of cancellation and federal court complaint—should not be added to the record. The record demonstrates that the notice of cancellation for the EIS was never issued and therefore was not before the decision-maker. *See* AR12855. Further, Plaintiff has not demonstrated why the Complaint or other pleadings from its prior suit are appropriately part of the record here. Plaintiff's court filings do not constitute submissions to the Department for purposes of reviewing its application. The documents were therefore not before the decision-maker. *See Stauber v. Shalala*, 895 F. Supp. 1178, 1190 (W.D. Wis. 1995) ("Plaintiffs challenging an agency action do not advance their cause by submitting to the reviewing court evidence that could have been presented to the agency but never was."). Had Plaintiff felt it necessary to place the pleadings before the Department to consider in reviewing the application, it certainly was free to do so. Regardless, as Plaintiff's citations demonstrate (*see* Mem. in Supp. at 6), the record already documents the suit's existence. *See, e.g.,* AR1275 (letter to Wisconsin legislator).

Considering the five additions, the record is complete and discovery to make a determination on completeness is unnecessary. In seeking permission for depositions, Plaintiff contends that the record does not contain any support for the Checklist, demonstrate consideration of the Regional Director's recommendation regarding the IGRA two-part determination, or document certain speculative meetings. *See* Mem. in Supp. at 24. None of the contentions are sufficient to warrant discovery, let alone depositions of high-ranking officials. First, the Checklist, as detailed below, is not a final agency action subject to review under the APA. Information pertaining to the Department's construction of the Checklist is not necessary

for the Court to determine whether the January 7, 2009, decision letter was arbitrary and capricious or contrary to IGRA. Second, the Department is removing its privilege designation from the Regional Director's recommendations, which are part of the record. Third, Plaintiff offers no evidence to support its contention that the record does not reflect Department meetings on Plaintiff's application. *See* Mem. in Supp. at 25. Again, Plaintiff "cannot institute discovery . . . simply in hope of finding something wrong in what the agency did." *Apex Const. Co., Inc.*, 719 F. Supp. at 1147. In fact, Plaintiff cites to record materials documenting casino opposition to support its argument that the record lacks such information. *See* Mem. in Supp. at 25 n.19.

Even if Plaintiff's allegations regarding unsupported decision-making had merit, the remedy is not discovery. Rather, under the applicable standard of review, the decision should be remanded to the Department for reconsideration. *See Camp*, 411 U.S. at 143. "The rationale for this rule derives from a commonsense understanding of [a] court's functional role in the administrative state." *Fund for Animals*, 391 F. Supp. 2d at 196 n.4. Plaintiff's request for discovery to determine whether the record is complete should therefore be denied.

III. Judicial Notice is Not the Appropriate Mechanism for the Court to Consider the Documents Plaintiff Proffers as Extra-Record Evidence.

Plaintiff cannot use judicial notice to buttress the record with information supporting its legal theories. Plaintiff first asked the Court to take judicial notice of thirteen documents. *See* Doc. No. 3. The first five of those thirteen are included in the Department's administrative record. *See* AR01340–94; AR12863–78; AR12880–94; AR01487–92; AR12896–06. Plaintiff's continued request for judicial notice of the remaining eight documents should be denied.

As initial matter, Defendants note that Plaintiff filed its reply brief in support of its request more than seven months after Defendants had filed their response in opposition.

Additionally, Plaintiff's reply brief raises new issues not addressed in Plaintiff's original request, including arguments regarding supplementation of the record. Considering those new arguments, and recognizing Plaintiff effectively incorporates its request for judicial notice into its motion for extra-record evidence (*see* Mem. in Supp. at 11 n.9), Defendants will similarly incorporate Plaintiff's request for judicial into the motion for extra-record evidence.

Regardless, judicial notice is not the proper mechanism for the Court to consider the documents. Federal Rule of Evidence 201 allows judicial notice of adjudicative facts that are not subject to reasonable dispute. *See* Fed. R. Evid. 201(a), (b). Thus, assuming the eight documents are generally known and capable of accurate and ready determination, the Court can certainly take judicial notice of their existence. *See Global Network Commc'ns., Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006) ("A court may take judicial notice of a document filed in another court not for the truth of the matters . . . , but rather to establish the fact of such litigation and related filings."). But Plaintiff seeks to do much more than establish that the documents exist.

Plaintiff makes clear that it would like to use Exhibits 8 and 9 to its request for judicial notice to establish that the Department has created a new rule for off-reservation trust acquisitions. *See* Reply in Supp. of Request for Judicial Notice ("Judicial Notice Reply") at 9–10 (Doc. No. 26). Similarly, Plaintiff offers Exhibits 10 through 13 to its request for judicial notice to allegedly demonstrate the Department previously had a rule that governed the order in which it reviewed applications under the Part 151 regulations and IGRA. *See* Judicial Notice Reply at 7–9. Thus, Plaintiff "offer[s] the documents as law, not as fact, and judicial notice is irrelevant." *Jackson Hole Conservation Alliance v. Babbitt*, 96 F. Supp. 2d 1288, 1296 (D. Wyo.

2000).

Additionally, Plaintiff intends to use Exhibits 6 and 7 to its request for judicial notice as expert testimony to demonstrate there is no evidentiary basis for the January 7, 2009, decision letter. *See* Judicial Notice Reply at 10–12. Given Plaintiff's intended use, Exhibits 6 and 7 are "not the type of document[s] about which there can be no reasonable dispute." *See County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 78 (D.D.C. 2008). Therefore, judicial notice is improper and Plaintiff must meet its burden to show extra-record evidence is appropriate before it can place the documents before the Court. *Id.* at 78–79.

IV. The Decision Letter and Administrative Record Provide Adequate Explanation for the Agency Decision to Deny Plaintiff's Application.

The Department's detailed reasoning in the January 7, 2009, decision letter does not require further explanation from extra-record evidence. Significantly, Plaintiff does not submit the vast majority of its documents to fill explanation gaps in the letter, but to provide an alleged legal basis for its claims that the Guidance Memorandum and Checklist should have gone through notice and comment rulemaking. But Plaintiff does not have a viable legal claim for that challenge. And Plaintiff offers no explanation as to why its proffered materials are necessary for judicial review of the decision letter. Plaintiff's motion to consider extra-record documents should therefore be denied.

A. The Majority of Plaintiff's Proffered Extra-Record Documents Are Unnecessary for the Resolution of Plaintiff's Claims.

Plaintiff proffers all but six of its documents to support arguments for which it cannot state a claim. Thus, for those documents, the Court need not reach the question of whether Plaintiff has met its burden to show that extra-record evidence is appropriate. At this stage,

Plaintiff appears to focus its merits arguments primarily on the theory that the January 7, 2009, decision letter is de facto arbitrary and capricious because it relies upon two "rules"—the Guidance Memorandum and Checklist—that are unlawful for failing to go through public notice and comment. *See* Judicial Notice Reply at 1; Mem. in Supp. at 1–2. In support of that argument, Plaintiff submits several groupings of exhibits: Department decisions to deny land-into-applications from other Tribes (Exs. 8, 9 to Request for Judicial Notice; Exs. 9–19 to Wood Decl.); previously-stated intentions to amend the Part 151 regulations (Exs. 3, 4, 5, 7, 8 to Wood Decl.); and documents allegedly demonstrating historical practices relative to the order of review under Part 151 and IGRA (Exs. 10–13 to Request for Judicial Notice; Exs. 20–24 to Wood Decl.).

Plaintiff's underlying legal theory rests on a legal assumption that this Court has already rejected. Plaintiff argues the Guidance Memorandum and Checklist are legislative rules that failed to go through public notice and comment. *See* Brief at 1 (citing Compl. ¶¶ 31, 52, 53, 62). In order to be legislative rules, however, the two documents must also be final agency actions. *See* 5 U.S.C. § 704; *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 807–08 (D.C. Cir. 2006). Plaintiff premised its previous suit on a theory identical to the one it presently offers. *See Menominee Tribe of Indians*, Case No. 08-C-950, Compl. ¶¶ 63–75. And this Court has rejected that theory. *See Menominee Tribe of Indians*, Case No. 08-C-950, Order Denying Temporary Restraining Order. The only court to determinatively decide the issue also held the Guidance Memorandum does not constitute final agency action. *See St. Croix Chippewa Indians of Wisconsin v. Kempthorne*, Case No. 07-cv-2210-RJL, slip op. at 12–14 (D.D.C. Sept. 30, 2008) (attached as Exhibit C pursuant to Local Civil Rule 7(j)(2)), *also*

available at 2008 WL 4449620 **5–6.[2/] Because the Guidance Memorandum and Checklist are not final agency actions they cannot be legislative rules, and the APA's notice and comment requirements simply do not apply. *See* 5 U.S.C. § 553(b)(A).

Because Plaintiff cannot state a claim to challenge the Guidance Memorandum and Checklist, its only viable claim is that the January 7, 2009, decision letter itself was arbitrary and capricious. But the materials Plaintiff submits are unnecessary for that determination. The exceptions to the record review principle are based on necessity, rather than convenience, and are triggered only where the omission of extra-record evidence would preclude effective judicial review. *See Camp*, 411 U.S. at 142–43; *Fund for Animals*, 391 F. Supp. 2d at 198 (citations omitted). An agency action is arbitrary and capricious where:

> the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Decisions or procedures used on other applications, or previously-stated intentions to amend regulations are not necessary to make that determination. *See Fund for Animals*, 391 F. Supp. 2d 191, 194–195 (D.D.C. 2005) (noting portion of motion to compel production of administrative record was moot where court had determined there was not final agency action). For that reason alone, Plaintiff's request to submit as extra-record evidence Exhibits 3–5 and 7–24 to the Wood

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[2/] The *St. Croix* decision is currently on appeal to the United States Court of Appeals for the District of Columbia Circuit. *See* Case No. 08-5430 (D.C. Cir.). Additionally, the Stockbridge-Munsee Community has challenged the Department's decision to deny that Tribe's application to take land in New York into trust, making arguments similar to those Plaintiff makes here. *See Stockbridge-Munsee Cmty. v. U.S. Dep't of the Interior*, Case No. 08-cv-9333 (S.D.N.Y.).

Declaration, and Exhibits 8–13 to Plaintiff's request for judicial notice, should be rejected.

B. Because the Department Gave a Reasoned Explanation for Its Decision, Further Explanation Through Extra-Record Evidence is Unnecessary and Inappropriate.

Even assuming Plaintiff submits its exhibits to challenge the January 7, 2009, decision letter, the letter requires no further explanation. A court may inquire outside the record when further information is necessary to explain an agency's action. *See Animal Defense Council*, 840 F.2d at 1436. But where the factors supporting an agency's decision are set forth in writing, however, courts have consistently found it inappropriate to do so. *See Camp*, 411 U.S. at 143. And even where further explanation is required, a court's inquiry "is limited to determining whether the agency has considered all relevant factors or has explained its course of conduct or grounds of decision." *See Animal Defense Council*, 840 F.2d at 1436.

Here, the Department stated its reasons for denying Plaintiff's application in the January 7, 2009, decision letter. *See* AR12895–906. The decision letter applies Part 151's relevant regulatory factors and sets forth the Department's reasoning and conclusions. And the Department has certified the administrative record, with the additions noted above, identifying the materials the decision-maker considered in reaching those conclusions. That designation is entitled to a presumption of regularity "absent clear evidence to the contrary." *Bar MK Ranches*, 994 F.2d 735, 740 (10th Cir. 1993). Given the decision document and the certified, complete administrative record, further explanation through extra-record evidence is inappropriate absent a strong showing to the contrary. *See Camp*, 411 U.S. at 143.

Plaintiff's brief discusses in detail what it would like to argue with the proffered documents, but provides no detail as to what it is the Department failed to explain, or what

factors, if any, it failed to consider. Mem. in Supp. at 10–21. Plaintiff's documents can be grouped into six categories: 1) Department decision-making on other applications; 2) draft regulations; 3) Congressional testimony; 4) news and scholarly articles; 5) declarations; and 6) other documents. Plaintiff has failed to meet its burden for each.

1. Decision-making documents on other applications.

Plaintiff submits eighteen documents setting forth Department decision-making with respect to other applications. *See* Exs. 8, 9, 11, 12 to Request for Judicial Notice; Exs. 4, 5, 9–19, 24 to Wood Decl. But the issue before the Court is whether the Department's decision with respect to Plaintiff's application was arbitrary and capricious. In resolving that issue, the Court must determine whether the Department, under the applicable statutory and regulatory factors, made a rational connection between the facts found and the choice made. *See Motor Vehicle Mfrs.*, 463 U.S. at 43. Plaintiff's alleged procedural irregularities do not change that conclusion. If, as Plaintiff's alleges and the Department denies, Departmental review of its application violated IGRA by failing to make a two-part determination prior to a Part 151 determination, that alleged violation of law would exist regardless of how the Department approached other applications. Further, the decision documents themselves would provide little insight into any comparison. To understand why the Secretary denied any individual application, a court would need to consider, as it must with respect to Plaintiff's application, the entire administrative record relating to that application. Plaintiff lacks standing to challenge those decisions.

2. Draft regulations.

Plaintiff also requests that the Court consider old, draft regulations as part of its review. *See* Ex. 3 to Wood Decl. Plaintiff admits the Department never finalized the regulations Plaintiff proffers. Mem. in Supp. at 13. The Department's decision letter, however, explicitly considers applicable regulations in making its decision. Thus, there is no need to supplement the record for further explanation as to which regulatory factors the agency considered. And, as set forth above, Plaintiff seeks to use the regulations, and a number of the other documents, to pursue arguments for which it cannot state a claim.

3. Congressional testimony.

Plaintiff offers Congressional testimony from four separate Congressional committee hearings. *See* Exs. 8, 20, 22 to Wood Decl.; Ex. 6 to Request for Judicial Notice. But, again, Plaintiff does not explain how this material further explains the Department's specific review of Plaintiff's application, or why statements from Congressional witnesses are a factor the Department should have considered in reviewing Plaintiff's application. In fact, none of the subject testimony even discusses Plaintiff's application.

Plaintiff's offer of Congressional testimony as expert evidence is even further removed from the record review principle. *See* Judicial Notice Reply at 2, 10–12; Ex. 6 to Request for Judicial Notice. Plaintiff argues this testimony "shows that there is no support for the Department's conclusion" with respect to Plaintiff's application. Judicial Notice Reply at 2. But APA review focuses on the decision-making process rather than the rationality of the actual decision, and "[i]t is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 50; *see Miami*

Nation II, 55 F. Supp. 2d at 924. As Plaintiff's expert testimony "would address the wisdom of the agency [decision] rather than the process by which the [decision] was reached," *id.* at 925, Plaintiff's attempt to present the information to the Court should be rejected. *See Stauber*, 895 F. Supp. at 1189 (noting that courts are precluded from considering evidence the agency never had a chance to review).

More generally, Plaintiff is incorrect to the extent it argues any alleged disconnect between the Department's decision and the record opens the door for the Court to consider alternative conclusions. Under the APA, a "reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Fla. Power & Light*, 470 U.S. at 744. Any remedy to an unsupported conclusion would not be extra-record evidence, discovery, or de novo review, but a remand to the Department for reconsideration or supplementation of the record. *See Camp*, 411 U.S. at 143.

4. News and scholarly articles.

Plaintiff has also not met its burden with respect to the articles it presents. *See* Exs. 6, 7, 23 to Wood Decl.; Ex. 6 to Request for Judicial Notice. The two news articles do nothing to demonstrate a factor that the Department failed to consider in reviewing Plaintiff's application. *See* Exs. 6, 7 to Wood Decl. In fact, neither article discusses Plaintiff's application, or any application. Similarly, the two scholarly articles are not appropriate extra-record evidence. Exhibit 23 to the Wood Declaration is a law review article that does not discuss the Tribe, the land, or the desired casino. To the extent Plaintiff seeks to admit the article as expert testimony, that request should be denied for the reasons stated above. And Plaintiff's direct attempts to

admit Exhibit 7 to its request for judicial notice as expert analysis (*see* Judicial Notice Reply at 2, 10–12) should be rejected for the same reasons. *See Miami Nation II*, 55 F. Supp. 2d at 925.

5. Declarations.

Plaintiff submits the Declaration of Katherine A. Spilde to dispute the Department's ultimate conclusion on Plaintiff's application. *See* Doc. No. 37; Mem. in Supp. at 21–22. In addition to being expert testimony antithetical to judicial review, Ms. Spilde's articles are already included in, or are being added to, the Department's administrative record. Thus, Plaintiff cannot make a showing that the Spilde Declaration offers explanation not otherwise provided by the agency, nor that it sets forth a factor the agency failed to consider.

Plaintiff also proffers Paragraphs 2 and 3 of the Wood Declaration as extra-record evidence. *See* Doc. No. 36. The Paragraphs, however, do not discuss Plaintiff's application, nor set forth a factor the Department failed to consider. The Paragraphs—via hearsay—only speculate as to the then-Secretary's policy views. And Plaintiff's other exhibits demonstrate that the Secretary was not directly involved in decision-making. *See* Ex. 8 to Wood Decl. at 19.

6. Other documents.

The final three documents Plaintiff offers also should not be admitted as extra-record evidence. *See* Exs. 2, 10, 13 to Request for Judicial Notice. Exhibit 10 to Plaintiff's request for judicial notice is a memorandum agreement between the Department and the National Indian Gaming Commission. The agreement had expired by the date of the January 7, 2009, decision letter, and thus could not be a factor the Department failed to considered or provide further explanation for the Department's decision. *See* Ex. 10 to Request for Judicial Notice at 4. Finally, Exhibits 2 and 13 to Plaintiff's request for judicial notice are briefs filed in separate

judicial actions. Plaintiff has not demonstrated how the Department should have considered the briefs, or their contents, in reviewing Plaintiff's application. Nor could the Department have considered Exhibit 2—the document post-dates the January 7, 2009, decision letter by more than year.

CONCLUSION

Based upon the foregoing, Plaintiff's request for judicial notice and motion to consider extra-record evidence should be denied, and judicial review of Plaintiff's Complaint should be limited to the Department's administrative record.

Respectfully submitted this 13th day of April, 2010,

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2010, Defendants' Response in Opposition to Plaintiff's Motion to Consider Extrinsic Evidence was filed with the United States District Court for the Eastern District of Wisconsin's electronic filing system, to which the following attorneys are registered to be noticed:

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