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MENOMINEE INDIAN TRIBE OF WISCONSIN

IN THE UNITED STATES THE 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, et al., Defendants.	Case No. 1:09-cv-496 WCG **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION TO CONSIDER EXTRINSIC EVIDENCE**

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I. INTRODUCTION

This action challenges the Secretary of the Interior's denial of the Tribe's application to take land into trust under Section 5 of the Indian Reorganization Act ("IRA") , 25 U.S.C. § 465, and the regulations in 25 C.F.R. Part 151. The Tribe claims, *inter alia*, that the denial was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2).

Four elements of the Tribe's APA argument are relevant for the Tribe's Motion to Consider Extrinsic Evidence (Dkt. # 29-1). First, the Tribe maintains that the Secretary denied the Tribe's application pursuant to two rules – the Guidance Memorandum commutability rule and the Checklist order rule – that themselves were put into effect in violation of the APA's notice and comment rulemaking requirements. Complaint (Dkt. # 1) ¶¶ 31, 52, 53, and 62. Second, the Tribe argues that the decision to deny its application was made well in advance of the January 7, 2009 denial letter (the "Denial") – perhaps as early as 2007 – and that the Guidance rule and the Checklist rule were adopted to give a veneer of legitimacy to the arbitrary, capricious, and unlawful denial of Menominee's and 12 other tribes' fee-to-trust applications for off-reservation gaming projects. *Id*. ¶¶ 35, 47. Third, the Tribe asserts that the Denial was made in bad faith, coming at the end of a biased and procedurally flawed decisionmaking process driven by former Secretary of the Interior Dirk Kempthorne that resulted in the denial of Menominee's and the other tribes' applications. *Id*. ¶¶ 35, 47. Fourth, the Tribe claims that both the Guidance rule and the Denial are arbitrary and capricious and clearly

erroneous because there is no evidence (in the record or anywhere else) to support the factual conjectures on which they are based. *Id*. ¶¶ 35, 36, 51, 57, and 59.

The administrative record the Department filed in this action (Dkt. # 24) contains material supporting the Tribe's arguments, but the record is incomplete. Several documents referenced in the Denial and elsewhere in the record are missing from it and should be included. In addition, the record does not include information regarding the two rules – the Checklist rule and the Guidance rule – which are themselves challenged in the Tribe's Complaint and form the basis for the Denial.

The record also needs to be supplemented, as it does not tell the entire story behind the Denial. Supplementing the record is appropriate where, as here, an agency's action is not adequately explained in the record before the court and an agency considered evidence it failed to include in the record. *See, e.g., Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989); *Pension Benefit Guaranty Corp. v. LTV Steel Corp.*, 119 F.R.D. 339, 341 (S.D.N.Y. 1988).

Moreover, available evidence provides a reasonable factual basis to support the Tribe's contentions of bad faith and procedural impropriety, enabling the Tribe to conduct discovery. *See, e.g., Sokaogon Chippewa Community v. Babbitt*, 961 F.Supp. 1276, 1279-81 (W.D. Wis. 1997) ("*Sokaogon II*"). The Tribe is also entitled to discovery in order to ensure that the administrative record before the Court is complete. *See, e.g., LTV Steel*, 119 F.R.D. at 341. In short, supplementing the administrative record and discovery are appropriate here because the record filed with the Court is incomplete and incapable of telling the whole story behind the Denial. The Tribe thus moves the Court to order

DOI to complete the record, allow supplementation of the record, and permit the Tribe to conduct discovery, namely to depose former and current agency officials.

II. COMPLETING AND SUPPLEMENTING THE ADMINISTRATIVE RECORD ARE NECESSARY AND DISCOVERY IS WARRANTED

While there is a general rule in APA cases that evidence is confined to the administrative record, *see, e.g., Sokaogon Chippewa Community v. Babbitt*, 929 F.Supp. 1165, 1172 (W.D. Wis. 1996) ("*Sokaogon I*") (citing 5 U.S.C. § 706; *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985); *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)); *see also* Defendant's Response in Opposition to Plaintiff's Request for Judicial Notice (Dkt. # 11) ¶ 2, courts are permitted to go beyond the record provided by the agency in several circumstances, including those present here. As explained below, the administrative record filed with the Court is incomplete and does not fully explain the Denial and the Department's actions surrounding it.

Without supplementing the record the Court cannot determine, as it must, whether DOI "approached the problem in the right way, properly considered the evidence before it and issued a decision supported by the record in front of it." *Stauber v. Shalala*, 895 F.Supp. 1178, 1190 (W.D. Wis. 1995) (citing *Bradley v. Weinberger*, 483 F.2d 410, 414-415 (1st Cir. 1973)). *Cf. LTV Steel*, 119 F.R.D. at 341 (citations omitted) (supplementing the record is appropriate where agency action is not adequately explained in the record before the court); *see also Yeutter*, 876 F.2d at 991. Furthermore, discovery is warranted because available evidence supports the Tribe's claims of bad faith and procedural impropriety, *see Sokaogon II*, 961 F.Supp. at 1279-81, and because it is necessary to

ensure that the administrative record before the Court is complete. *See LTV Steel*, 119 F.R.D. at 341 (citations omitted).

A. The Need to Complete the Record

Several documents are missing from the record here. Principal among them is a February 13, 2007 letter from then Associate Deputy Secretary James Cason (who was also Acting Assistant Secretary - Indian Affairs) to the Tribe regarding its fee-to-trust application. *See* Declaration of William Wood in Support of Plaintiff's Motion to Consider Extrinsic Evidence (Dkt. # 29-3) (hereinafter "Wood Dec.") ¶ 4, Exh. 1. In this letter, Mr. Cason informed the Tribe that DOI would "be reviewing the regulations that govern the processing of fee-to-trust applications (25 CFR Part 151)[,]" and that DOI "anticipate[d] changes to the rules that may result in fewer off-reservation properties being accepted into trust[]" and "expect[ed] to consider a paradigm where the likelihood of accepting off-reservation land into trust decreases with the distance the subject parcel is from the Tribe's established reservation … and the majority of tribal members." *Id.* The Tribe's response to Mr. Cason's letter is in the record (AR 234-237), and Mr. Cason's letter is referenced in DOI's reply to the Tribe's response letter (AR 225). Mr. Cason's February 13, 2007 letter should be included in the administrative record.[1]

Another document missing from the record is the December 18, 2007 Bureau of Indian Affairs ("BIA") Midwest Regional Office's memorandum to BIA's central office recommending that Menominee's fee-to-trust application be approved under the criteria

[1] The Tribe assumes that this letter was inadvertently omitted when the Department compiled the record. To the extent the Department may argue that the letter is not part of the record, however, the Tribe directs the Court to the discussion at Part II.B, pages 14-16 *infra*, of identical letters that were sent to other tribes with (then-)pending fee-to-trust applications for off-reservation gaming projects.

in 25 C.F.R. Part 151. Although cited in the Denial (AR 12897, 12900), this document is marked as privileged (AR 1531) and excluded from the record given to the Tribe. AR 1531; Dkt. # 23-2 p. 4. And despite its being excluded from the record as privileged, this document is referenced and purportedly quoted in correspondence from Rothstein Donatelli, attorneys for the Forest County Potawatomi Community – an Indian tribe that operates an off-reservation casino in Milwaukee, Wisconsin, over 220 miles from its reservation, and has for years publicly and vehemently opposed Menominee's application – to the Department on November 19, 2008.[2] AR 1280. Given that the December 2007 regional office recommendation was cited in the Denial and is now a public document (or at least that it has been shared with the Forest County Potawatomi Community's attorneys), it should be included in the record.[3]

[2] The document quoting the Midwest Regional Office's recommendation is listed in the administrative record's index as "Fax of memo and other documents from Rothstein Donatelli re: Menominee Application" (AR 1278-1305). Included in this fax are comments that the Forest County Potawatomi Community ("FCPC") submitted to DOI through its attorney, Eric Dahlstrom of Rothstein Donatelli, by a letter dated January 17, 2006. The relationship among FCPC, the County of Milwaukee, the City of Milwaukee, and their representatives – and these parties' role in the denial of Menominee's fee-to-trust application – is discussed *infra* in footnote 19 and the accompanying text, where the Tribe explains the need to depose Mr. Dahlstrom in order to find out how his firm's correspondence purports to quote from a document excluded from the record on privilege grounds.

[3] The Department's assertion that the regional office's recommendation is privileged is inconsistent with its actions in a pending case involving the Stockbridge-Munsee Indian Community, another tribe that is challenging, on APA grounds, the Department's denial of its fee-to-trust application and the Guidance Memorandum. The administrative record produced in that case includes the BIA regional office's Part 151 recommendation memorandum. *See* Wood Dec. ¶ 5, Exh. 2, Mem. of Law in Opp'n to Defendants' Mot. to Dismiss and in Support of Plaintiff's Cross-Mot. for Summary Judgment, *Stockbridge-Munsee Indian Cmty. v. U.S. Dep't of Interior*, Case No. 08 Civ. 9333 (S.D.N.Y.), at p. 17 (citing memorandum in record).

Also missing from the record is the draft Record of Decision prepared by the BIA Midwest Regional Director in May 2007 (and attached to the regional office's Part 151 recommendation) and cited in the January 7, 2009 Denial. AR 12897, 12904 ("[T]he draft ROD is included in the administrative record."). A fourth document missing from the record is the notice of cancellation of the Tribe's Environmental Impact Study, which, according to documents in the record, was supposed to have been issued as early as January 9, 2008 (a year before the Tribe's denial letter was issued) but for some reason was not. The notice of cancellation is discussed in a chain of e-mails from June 2009. AR 12855-12858.

The Department also failed to include in the record the complaint (as well as the accompanying request for judicial notice and exhibits which are referenced in the complaint) the Tribe filed in an earlier lawsuit involving the Tribe's fee-to-trust application and its imminent denial, *Menominee Indian Tribe of Wisconsin v. Department of the Interior*, No. 1:08-cv-00950-WCG (E.D. Wis.) (dismissed without prejudice on March 31, 2009). The record shows there were several meetings and e-mail communications about the lawsuit before DOI issued the Denial. AR 1275-1277, 12805-12807, 12808-12809.

Furthermore, the Department failed to include a publication cited in the Denial at AR 12905 (citing Center for California Native Nations, An Impact Analysis of Tribal Government Gaming in California: A Summary of Key Findings (Jan. 2006)), presumably for the proposition that the Tribe's owning and operating the proposed casino in Kenosha would negatively impact life on the Tribe's Reservation. DOI clearly

considered this publication when issuing the Denial, and the document should be included in the administrative record.

And the Department failed to include in the record any documentation pertaining to the BIA central office's consideration of the Tribe's request for a determination under Section 20 of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719(b)(1)(A). The record reflects that the central office received the regional office's recommendation for the Section 20 two-part determination in January 2007 (AR 2, 1532) but contains nothing further in this regard other than a reference in the Denial (AR 12897).[4] It is possible that no one at BIA's central office looked at or did anything at all with the regional office's recommendation (and the Tribe seeks to conduct discovery to determine if anything was done). But if there was any consideration of the regional office's two-part recommendation, it should be reflected in the record.[5] And the regional office's

[4] The record does include the Tribe's request for the determination (AR 11086-11103), and it contains correspondence between the Department and the Tribe (AR 12494-12494, 12502-12506), the Department and the City and County of Kenosha (AR 1801-1802, 12497-12498, 12508-12512), and the Department and the Governor of Wisconsin (AR 12499-12500) regarding the Tribe's request.

[5] The information provided by the Tribe in support of its request for a two-part determination – and analyzed by the regional office – includes information regarding many of the same criteria considered under the regulations in 25 C.F.R. Part 151.11, and, importantly, information regarding criteria added in the Guidance Memorandum and applied to the Tribe's application: projected tribal employment and job training opportunities, and possible negative impacts to the Tribe. *See* AR 12890 (Checklist for Gaming Acquisitions, Gaming-Related Acquisitions and IGRA Section 20 Determinations, p. 8). As explained by the former head of the BIA, "[t]he two-part determination requirements of Section 20 and the 151 process involve some overlap ...." (Wood Dec., ¶ 23, Exh. 20, Statement of Kevin Gover, Assistant Secretary - Indian Affairs, Department of the Interior, Before the Committee on Indian Affairs, at p. 2); *see also* Wood Dec., ¶ 25, Exh. 22, Testimony of George T. Skibine, Acting Deputy Assistant Secretary - Indian Affairs for Policy and Economic Development, Department of the Interior, at p. 1 ("[T]he Secretary applies her discretion [under IRA section 5] after consideration of the criteria for trust acquisitions in our '151' regulations (25 CFR Part

Section 20 2-part recommendation, which is cited in the Denial, should be provided to the Tribe and the Court.

B. The Need to Supplement the Record

Supplementing the record is necessary because the Department's action is not adequately explained in the record before the Court, and additional evidence is necessary to understand why the Department acted as it did. *See Yeutter*, 876 F.2d at 991; *LTV Steel*, 119 F.R.D. at 341 (citations omitted). A just resolution of this dispute can be achieved only if the Court has all of the relevant evidence before it, including evidence not presently in the record. *Cf. Sokaogon II*, 961 F.Supp. at 1280.

When reviewing agency action under the arbitrary and capricious standard in 5 U.S.C. § 706(2)(A),[6] a court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park*, 401 U.S. at 416. While a court does not second-guess the agency's decision, its job is to "ask … whether the agency approached the problem in the right way, properly considered the evidence before it and issued a decision supported by the record in front of it." *Stauber*, 895 F.Supp. at 1190 (citing *Bradley v. Weinberger*, 483 F.2d at 414-15). *See also Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency cannot interpret or apply law in a way that is clearly wrong or that is not supported by or rationally connected to the available evidence);

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151).... [W]hen the acquisition is intended for gaming, consideration of the requirements of IGRA [Section 20] are simultaneously applied to the decision whether to take the land into trust."). Indeed, the Tribe's request for the two-part determination under IGRA Section 20 was made as part of its application to take the Kenosha land into trust. AR 11086-11103, 11703-12490.

[6] The Tribe argues that DOI's actions violated not only 5 U.S.C. § 706(2)(A) but also 5 U.S.C. §§ 706(2)(C) and (D) and 5 U.S.C. §§ 553(b) and (c).

Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1575 (10th Cir. 1994) (arbitrary and capricious standard "focuses on the rationality of an agency's decisionmaking process rather than on the rationality of the actual decision."); *Cybertech Group, Inc. v. United States*, 48 Fed.Cl. 638, 646 (2001) ("[T]he court must ascertain whether (1) there was subjective bad faith on the part of the … officials; (2) there was a reasonable basis for the … decision; (3) the … officials abused their discretion; and (4) pertinent statutes or regulations were violated."). The Court cannot answer that question based on the record before it.

Courts routinely allow parties to supplement the record where, like here, the record is incomplete and the agency action is not adequately explained in the record before the court. *See, e.g., Yeutter*, 876 F.2d at 991; *Ad Hoc Metals Coalition v. Whitman*, 227 F.Supp.2d 134, 137 (D.D.C. 2002) ("[A] court may permit supplementation of the … record when … necessary to provide a fuller explanation of the agency's decision." (citing *James Madison Ltd. v. Ludwig*, 82 F.2d 1085, 1095 (D.C. Cir. 1996)); *LTV Steel*, 119 F.R.D. at 341 ("Courts have also permitted litigants to supplement the … record with … material that explains the administrative officials' basis for their action.") (citations omitted). *Cf. Environmental Defense Fund v. Blum*, 458 F.Supp. 650 (D.D.C. 1978) ("The agency may not … skew the 'record' for review in its favor by excluding from that 'record' information in its own files which has great pertinence to the proceeding in question.").

Moreover, supplementing the record is especially warranted where the procedural validity of the agency's action is challenged. *See Yeutter*, 876 F.2d at 991; *Cape Cod Hospital v. Sebelius*, __ F.Supp.2d __, 2009 WL 4981330, No. 08-1751 (RCL), Slip. Op.

at *6 (D.D.C. Dec. 22, 2009);[7] *Fund for Animals v. Williams*, 391 F.Supp.2d 191, 199 (D.D.C. 2005). The Tribe explicitly challenges the procedural validity of DOI's actions, and to this end seeks to supplement the record. The Tribe intends to show that there were procedural improprieties leading up to the issuance of the Guidance rule and the denial of the Tribe's application.[8]

The documents submitted with the Tribe's Motion to Consider Extrinsic Evidence and Request for Judicial Notice play an integral role in explaining the Denial and the Department's actions surrounding it, and they are necessary so that the Court can understand the story behind the Denial and the flawed procedures by which it was issued. As discussed below, the Tribe seeks to supplement the record with evidence which shows that (1) DOI, through the Checklist rule, altered its procedure for review of off-reservation gaming fee-to-trust applications in a manner contrary to the Part 151 regulations and in violation of the APA; (2) the new criteria and standards adopted in the Guidance rule and applied to the Tribe's application, including the irrebuttable "commutable distance" presumption, constitute changes to DOI policy and rules that are subject to APA's notice and comment rulemaking procedures; (3) there is no basis (in the record or elsewhere) for the new "commutable distance" rule embodied in the Guidance

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[7] In accordance with Civil Local Rule 7(j)(2), a copy of this unpublished decision is filed as Dkt. # 30-1.

[8] With proper evidence, the Tribe expects to show that Secretary Kempthorne was determined to deny Menominee's application along with other applications pending at DOI, and that after the Department realized it was too late in the Administration to adopt new, more restrictive rules for processing off-reservation fee-to-trust applications through formal rulemaking, the Guidance rule was adopted (without notice and comment) so that Menominee's and 12 other tribes' applications could be denied with a veneer of legitimacy.

and the Tribe's denial letter; and (4) the Denial was issued in bad faith and as a result of improper political influence. Without this evidence, the Tribe would be denied the opportunity to properly present its case to the Court.[9]

The Tribe seeks to supplement the administrative record with the following evidence, for the reasons explained:

* December 16, 2005 Preliminary Draft 25 C.F.R. Part 151 Regulations [Wood Dec., ¶ 6, Exh. 3]. The standards and criteria used by the Secretary to evaluate off-reservation fee-to-trust are found in the regulations at 25 C.F.R. Part 151, often referred to as the "Part 151 regulations." These regulations establish the policies and procedures used by the Secretary to decide whether to take land into trust under the authority granted to him in Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465. The Department's new rule, expressed in the Guidance and applied to Menominee and other tribes, changed not just the information Indian tribes are required to submit and the criteria used for Part

[9] The reasons for considering the documents submitted with the Tribe's Request for Judicial Notice (Dkt. # 2) are more fully explained in the Tribe's Reply to Defendants' Response in Opposition to Plaintiff's Request for Judicial Notice (Dkt. # 26) (discussing Request for Judicial Notice Exhibits 6 through 13 and citing Complaint ¶¶ 46-48, 50, n.6). The Memorandum of Agreement and the IGRA two-part determination letters are needed to show the Checklist switch rule effected a change in policy for processing fee-to-trust applications for off-reservation gaming projects that is contrary to the regulations in 25 C.F.R. Part 151 (the Department has argued elsewhere that there was no change in policy because it never had a policy to change, and the Tribe needs these letters and the Memorandum of Agreement to show otherwise). *See* Reply to Defendants' Response in Opposition to Plaintiff's Request for Judicial Notice (Dkt. # 26), pp. 7-9; *see also* Wood Dec., ¶ 27, Exh. 24. The letter denying the St. Croix Chippewa Indians' fee-to-trust application and the January 4, 2008 DOI press release show that the "commutable distance" presumption in the Guidance has been applied in an irrebuttable and binding fashion such that the Guidance itself is final agency action subject to judicial review. *See id*. at pp. 9-10. (The denial letters sent to the 11 tribes mentioned in the January 4, 2008 press release are discussed in footnote 14 *infra*.) The testimony of Kevin Washburn and the article by Kathryn Rand, Alan Meister and Steven Light (experts in the Indian gaming field) show that there is no evidentiary basis for the "commutable distance" rule or for DOI's denying Menominee's application based on it. *See id*. at pp. 10-12.

151 determinations, but also the test DOI applies when determining whether to accept off-reservation land into trust and the evidentiary burdens applied as part of that test – particularly when the land is "beyond a commutable distance" from a tribe's reservation. *See* Complaint ¶¶ 28-29, 32-33.

When, in the past, DOI proposed to change the rules for processing off-reservation fee-to-trust applications by adding criteria, imposing a more demanding standard of review, and/or changing the evidentiary burdens imposed on tribes, the Department went through notice and comment rulemaking. In 1995, DOI amended the Part 151 regulations to specifically address off-reservation acquisitions and to require that "as the distance between the tribe's reservation and the land ... increases, the Secretary shall give greater scrutiny the tribe's justification of anticipated benefits ...." 25 C.F.R. § 151.11.

In 1999, DOI again undertook to amend the Part 151 regulations, to change the process and standards for off-reservation fee-to-trust applications, and published a proposed rule in the Federal Register. *See* Complaint ¶ 41 (citing 64 Fed. Reg. 17574 (Apr. 12, 1999) ("We now propose to amend these regulations to make clearer that we will follow a process that is somewhat different, and ... will apply a standard which is somewhat more demanding ... for 'off-reservation lands'[]"). A final rule revising and clarifying the procedures, criteria, and standard for off-reservation fee-to-trust applications was adopted in January 2001 but was withdrawn in November 2001, when

the Department promised to consult with Indian tribes before adopting a new rule. *See* Complaint ¶ 41 (citing 66 Fed. Reg. 56608, 56609 (Nov. 9, 2001)).[10]

In December 2005, the Department developed preliminary draft regulations governing the process, criteria, and standards for off-reservation fee-to-trust applications. These 2005 draft regulations contained the same "more demanding" standard for off-reservation applications set forth in the 2001 final rule – and they proposed, for the first time, to apply criteria about commutability and "preservation of the reservation community and identity." Wood Dec., Exh. 3, at p. 12 (draft 25 C.F.R. § 151.8(c)(2)). While the 2005 draft regulations were never adopted, the new standard and criteria proposed in these regulations were ultimately imposed through the Guidance rule that is at issue here.

These 2005 draft regulations are important because they demonstrate DOI's recognition that notice and comment rulemaking is necessary before requiring Indian tribes to meet new criteria about commutability and impacts on reservation life as a pre-condition to having land taken into trust. The 2005 draft regulations (like the Department's previous efforts in 1991 to 1995 and 1999 to 2001) demonstrate that DOI in fact pursued such notice and comment rulemaking when it proposed to change the rules

[10] In withdrawing the final rule, DOI informed tribes that it would consult with them when promulgating a new rule for "the standards of review used in reaching on determination of whether to accept land into trust ...." 66 Fed. Reg. at 56609-56610. DOI also noted that "clarifying the standards contained in the final rule" was a specific area of concern identified in comments it received, and that it was withdrawing the rule in whole to address this concern and others (including the burdens of proof required for an applicant tribe and those opposing a trust application). 66 Fed. Reg. at 56609.

this way in the past.[11] This, in stark contrast to DOI's failure to go through notice and comment rulemaking before implementing in the Guidance the same criteria proposed in the 2005 draft regulations and the more demanding standard proposed in the 2001 final rule.[12]

* The February 13, 2007 letter from James Cason to the Stockbridge-Munsee Community and the December 21, 2006 letter from James Cason to the St. Regis Mohawk Tribe [Wood Dec., ¶¶ 7 and 8, Exhs. 4 and 5, respectively]. These letters, like the February 13, 2007 letter from James Cason to the Menominee Tribe discussed *supra* at p. 4, state that the Department would "be reviewing the regulations that govern the processing of fee-to-trust applications (25 CFR Part 151)[,]" and that DOI "anticipate[d] changes to the rules" and "expect[ed] to consider a paradigm where the likelihood of

[11] Available evidence indicates that the Department planned to conduct consultation with Indian tribes regarding the 2005 draft regulations in early 2006 and that these regulations were due for notice in the Federal Register in June 2006, but that, for reasons unknown, DOI did not follow through with its plans. *See* Wood Dec., ¶ 11, Exh. 8, p. 7; 71 Fed. Reg. 22763, 22822-22823 (Apr. 24, 2006). *See also* p. 17 *infra*. And, as noted, the February 13, 2007 letter(s) that James Cason sent to Menominee and other tribes indicated that DOI was reviewing the Part 151 regulations and would again be conducting consultation regarding changes to the rules for off-reservation fee-to-trust applications. *See supra* at p. 4; *infra* at pp. 14-15.

[12] Indeed, the standard imposed in the Guidance and the Denial is even more demanding than the one proposed in the 2001 final rule and the 2005 draft regulations. Whereas the test proposed in those regulations required tribes to show that the benefits to the tribe outweighed any negative impacts to the local community surrounding the land to be acquired (*see* Wood Dec., Exh. 3, at pp. 19-20 (draft 25 C.F.R. § 151.18(b)); 64 Fed. Reg. 17574, 17576, 17585-17586 (proposed 25 C.F.R. § 151.14(h)) (Apr. 12, 1999); 66 Fed. Reg. 3452, 3455, 3463 (final 25 C.F.R. § 151.14(a)(2)) (Jan. 16, 2001)), the Guidance and Denial test requires a tribe to show that the benefits to the tribe would not be outweighed by (supposed) negative impacts to the tribe itself (AR 1489-1490, 12896).

accepting off-reservation land into trust decreases with the distance the subject parcel is from the Tribe's established reservation … and the majority of tribal members." [13]

These letters demonstrate that DOI was explicitly contemplating a rule change to impose stricter burdens and requirements on off-reservation fee-to-trust applications for gaming projects. They support the Tribe's argument that the new paradigm and "commutable distance" presumption applied in the Guidance and the Denial effected such a change, and that notice and comment rulemaking was required for this change. The letters also support the Tribe's claim that DOI was still considering notice and comment rulemaking as late as February 2007, but that the Department changed course sometime thereafter upon deciding there was not enough time left in the last Administration to pursue consultation and formal rulemaking, as DOI had told tribes it would do.

* February 15, 2007 Indianz.com News Story: "Interior Department wary of off-reservation gaming" [Wood Dec., ¶ 9, Exh. 6]. According to this source, James Cason, then Associate Deputy Secretary and Acting Assistant Secretary - Indian Affairs, told a summit of Indian tribes that DOI was reviewing its off-reservation gaming policy and was "'in the process of trying to reconcile [Secretary Kempthorne's] views as governor and his activities as governor with his role as secretary.'" (Mr. Kempthorne's actions and positions taken against off-reservation gaming when he was governor of Idaho are well documented and are noted in this news story.) Mr. Cason discussed as part of this

[13] Available evidence indicates that identical letters were sent to other Tribes on February 13, 2007, *see* Wood Dec., ¶ 9, Exh. 6, and the Tribe seeks copies of these letters as well. Should the Department refuse to produce these other letters to supplement the administrative record, the Tribe intends to obtain these documents through discovery. A copy of DOI's letter to the St. Regis Mohawk Tribe was also submitted as Exhibit 11 to the Tribe's Request for Judicial Notice (Dkt. # 11).

process the February 13, 2007 letters sent to Menominee and other tribes informing them that DOI anticipated "changes to the rules" governing the taking of off-reservation land into trust for gaming purposes.

* April 12, 2007 Indianz.com News Story: "Artman jumps into new job as head of BIA" [Wood Dec., ¶ 10, Exh. 7]. According to this source, newly-appointed Assistant Secretary - Indian Affairs Carl Artman said in an April 2007 interview that "the BIA hopes to make some long term impacts by revamping the entire land-into-trust process. He didn't have a time frame on the development of new regulations but said he would consult tribal leaders before coming to any conclusions about the changes ...." This statement, attributed to Mr. Artman by the persons who apparently conducted the interview, supports the Tribe's argument that DOI was required (and DOI officials knew the agency was required) to go through notice and comment rulemaking before changing the fee-to-trust requirements, and that DOI at some point realized it was too late in the Bush Administration to pursue formal rulemaking and therefore adopted the new rules in the guise of a guidance memorandum instead.

* Testimony Before the February 27, 2008 House Natural Resources Committee: Oversight Hearing on the Department of Interior's Recently Released Guidance on Taking Land Into Trust for Indian Tribes and Its Ramifications ("HNRC Testimony") [Wood Dec., ¶ 11, Exh. 8]. Testimony from this hearing, in particular the testimony of AS-IA Carl Artman and St. Croix Chippewa Indians of Wisconsin Chairwoman Hazel Hindsley, is especially relevant to the Tribe's arguments. In response to a question from Congresswoman Napolitano about whether the Department "changed the rules [for off-reservation fee-to-trust applications] midstream" when it adopted the Guidance, Mr.

Artman replied: "Not at all. Not at all. Not at all." Wood Dec., Exh. 8, at p. 12. This testimony seems to contradict the letters Menominee and other tribes received back in February 2007, wherein James Cason informed them that DOI was reviewing the Part 151 regulations and would be "chang[ing] the rules" for off-reservation fee-to-trust applications, particularly those for gaming purposes. Wood Dec., Exhs. 1 and 4 (at p. 1), and Exh. 5 at p. 1-2.

Mr. Artman's testimony also suggests that DOI considered going through notice and comment rulemaking but that the Department decided against it (Wood Dec., Exh. 8, at pp. 6-7), and that there were more draft Part 151 regulations other the December 2005 version (which, if they exist, should also supplement the record here). *Id*. at p. 6. When asked about the 2005 draft Part 151 regulations and consultation with Indian tribes that was proposed for early 2006, Mr. Artman said he would prepare and submit to the committee a report on what happened with these consultation efforts. *Id*. at p. 7. There is no evidence of any such report. And, importantly, Mr. Artman's testimony shows that the decisions to deny 11 of the 13 fee-to-trust applications denied under the Guidance rule (and perhaps all 13, including Menominee's) were made before the Guidance was issued, *id*. at p. 20, and that these decisions were all made as part of a new policy. *Id*.; *id*. at p. 16 ("This was not developed in a vacuum.").

Written testimony from this Congressional hearing submitted by The Honorable Hazel Hindsley, Chairwoman, St. Croix Chippewa Indians of Wisconsin, also supports the Tribe's argument that DOI decided to forego notice and comment rulemaking when changing the rules for off-reservation fee-to-trust acquisitions not because formal rulemaking was unnecessary, but rather because there was not enough time left in the

Bush Administration for DOI to change the rules through formal rulemaking and deny Menominee's and other tribes' applications under the new rules. *Id*. at p. 49. *See also id*. p. 5 (testimony of AS-IA Artman).

* Letters dated January 4, 2008 from the Department of the Interior denying the off-reservation gaming fee-to-trust applications for the Stockbridge-Munsee Community of Wisconsin, the St. Regis Mohawk Tribe, and nine other Indian tribes [Wood Dec., ¶¶ 12-22, Exhs. 9-19].[14] These letters, which are essentially form letters that quote verbatim from the Guidance and reflect the language and structure of draft letters to Menominee in the record (AR 174-178, 12902, 12905-12906), show that DOI has applied the unsupported "commutable distance" presumption across the board in a binding manner to all fee-to-trust applications for off-reservation gaming projects. *See* Complaint ¶¶ 38-39.[15]

* Statement of Kevin Gover, Assistant Secretary - Indian Affairs, Before the Senate Committee on Indian Affairs, May 12, 1998 [Wood Dec., ¶ 23, Exh. 20]. This statement to Congress shows that DOI policy from 1988, when IGRA was passed,

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[14] These other nine tribes are the Big Lagoon Rancheria, the Chemehuevi Indian Tribe, the Hannahville Indian Community, the Lac Du Flambeau Band of Lake Superior Chippewa Indians of Wisconsin, the Los Coyotes Band of Cahuilla and Cupeno Indians, the Mississippi Band of Choctaw Indians, the Pueblo of Jemez, the Seneca-Cayuga Tribe of Oklahoma, and the United Keetoowah Band of Cherokee Indians, all of whom presumably received letters from James Cason in February 2007. The DOI press release discussing these 11 denial letters and the Guidance was submitted as Exhibit 8 to the Tribe's Request for Judicial Notice. A thirteenth denial letter sent to the St. Croix Chippewa Indians of Wisconsin on January 13, 2009, a week after Menominee's Denial was issued, was submitted as Exhibit 9 to the Tribe's Request.

[15] As noted, these letters use language similar to that found in the Guidance and in drafts of Menominee's denial letter, and they, together with other available evidence, show that the decision to deny at least eleven of the off-reservation gaming fee-to-trust applications pending at the Department – and perhaps Menominee's too – was made as early as 2007.

through at least 1998 was to make two-part determinations under IGRA Section 20 before deciding whether to take land into trust (i.e., to determine whether land was eligible for gaming under IGRA before deciding whether to take it into trust for gaming purposes). Wood Dec., Exh. 20, at pp. 2-3. This evidence supports the Tribe's argument that the switch in the order of making the IGRA two-part determination and the fee-to-trust determination was a complete and abrupt change from the previous DOI policy that was consistently applied for almost twenty years following IGRA's passage.[16]

* Testimony of George T. Skibine, Acting Deputy Assistant Secretary - Indian Affairs Before the Senate Committee on Indian Affairs, July 27, 2005 [Wood Dec., ¶ 25, Exh. 22]. Like the statement of AS-IA Kevin Gover, this testimony demonstrates that DOI's pre-2007 policy was, as the Part 151 regulations require, to determine whether land was eligible for gaming under IGRA before deciding whether to take it into trust for gaming purposes under the IRA: "[T]he Secretary applies her discretion [under IRA section 5] after consideration of the criteria for trust acquisitions in our '151' regulations

[16] This statement, together with other evidence, makes clear that the Department had a consistent policy – applied to at least six fee-to-trust applications for off-reservation gaming projects over the course of two decades – of deciding, as it is required to do under the Part 151 regulations, whether land can actually be used for gaming before taking it into trust for gaming purposes, and supports the Tribe's argument that reversing the order of these decisions is contrary to the Part 151 regulations. These six fee-to-trust applications include those for the Forest County Potawatomi Community, the Confederated Tribes of Siletz Indians, the Sault Ste. Marie Tribe, the Coushatta Tribe of Louisiana, the St. Regis Mohawk Tribe, and a consortium of tribes pursuing a project in Hudson, Wisconsin. The two-part determination letters for St. Regis and the Hudson project were submitted as Exhibits 11 and 12, respectively, to the Tribe's Request for Judicial Notice. The two-part determination letter for the Sault Ste. Marie Tribe is attached as Exhibit 21 to the Tribe's Motion to Consider Extrinsic Evidence.

AS-IA Gover's statement also addresses the overlap between the criteria used for making the two-part determination under IGRA and the Part 151 criteria, as discussed in footnote 9 *supra*.

(25 CFR Part 151).... [W]hen the acquisition is intended for gaming, consideration of the requirements of IGRA are simultaneously applied to the decision whether to take the land into trust." Wood Dec., Exh. 22, at p. 1.

* Law Review Article by Mary Jane Sheppard [Wood Dec., ¶ 26, Exh. 23]. Like the statements to Congress from Messrs. Gover and Skibine, this law review article – authored by a former staff attorney in the Division of Indian Affairs, Office of the Solicitor, Department of the Interior (and before that a staff attorney for the National Indian Gaming Commission) who practiced federal Indian law with respect to fee-to-trust applications while at DOI – shows that the Department's policy was to determine whether the land was eligible for gaming under IGRA before deciding whether to take it into trust for gaming purposes under the IRA. *See* Mary Jane Sheppard, Taking Indian Land Intro Trust, 44 S.D. L. Rev. 681, 687 (1999) ("*Before* the Department can exercise its power to take land into trust for gaming purposes, it must *first* find that the acquisition 'would not be detrimental to the surrounding community.'") (quoting 25 U.S.C. § 2719(b)(1)(A)) (emphasis added).

* July 13, 2007 Letter from George Skibine to Robert Adler [Wood Dec., ¶ 27, Exh. 24]. This letter shows that some time during the summer of 2007 or before, the Department made an abrupt and unannounced change to the policy it had consistently followed for more than 15 years. Rather than first determining whether land is eligible for gaming under IGRA before deciding whether to take it into trust for gaming purposes under the IRA, DOI changed its procedures so as to first make the trust decision and only later consider whether the land could actually be used for gaming.

* Declaration of William Wood. As discussed in paragraphs 2 and 3 of this declaration, George Skibine, the author of the Tribe's denial letter, explained to Associate Deputy Secretary Cason and Secretary Kempthorne that the proposed Checklist switch rule would result in an improper application of the Part 151 regulations because land could be taken into trust for an illegal purpose under the new approach (the same argument the Tribe makes in its Complaint at ¶ 47), but Messrs. Cason and Kempthorne were not concerned with this potential result. Their lack of concern stemmed from the fact that they had already decided to deny the off-reservation gaming fee-to-trust applications then pending before the Department – presumably including Menominee's – so that the problem of DOI's taking land into trust for gaming purposes and then determining it could not be used for gaming would never arise. Mr. Skibine spoke publicly about this discussion at a law conference held in April 2009, after the Tribe's denial was issued.

* Declaration of Dr. Katherine A. Spilde. The Denial cites, and presumably is based on, the findings of research conducted by Dr. Spilde. As explained in Dr. Spilde's declaration, however, no one from the Department contacted her regarding the publications cited in the Denial or her research or findings regarding the benefits and any harms to Indian tribes from owning and operating casinos, whether on- or off-reservation. Dr. Spilde's declaration also shows that there is no basis (at least not in the publications cited in the Denial or any other of her research) for concluding that there are negative on-

reservation impacts from off-reservation casinos or that there would be negative impacts on the Menominee Reservation from a Tribally-owned casino in Kenosha, Wisconsin.[17]

C. The Need for Extra-Record Discovery

Extra-record discovery is appropriate here for two reasons. First, discovery is necessary to ensure that the administrative record presently before the Court is complete. *See, e.g.*, *LTV Steel*, 119 F.R.D. at 341 (citing *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982); *Public Power Council v. Johnson*, 674 F.2d 791, 793-94 (9th Cir. 1982); *Natural Resources Defense Council, Inc. v. Train*, 519 F.2d 287, 292 (D.C. Cir. 1975); *Tenneco Oil Co. v. Dep't of Energy*, 475 F.Supp. 299, 317 (D. Del. 1979); *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 33-34 (N.D. Tex. 1981)); *Bar MK Ranches v. Yeutter*, 994 F.2d 735, 740 (10th Cir. 1993) ("When a showing is made that the record may not be complete, limited discovery is appropriate to resolve that question."). Discovery is also appropriate where, as here, a plaintiff provides a reasonable factual basis to suspect bad faith and improper behavior surrounding the agency's actions – i.e., the Denial and the adoption of the Checklist and Guidance rules that led up to it. *Cf. Sokaogon II*, 961 F.Supp. at 1279-81.

[17] *See, e.g.*, *Overton Park*, 401 U.S. at 416 (agency action is arbitrary and capricious if it is based on a clear error of judgment). *See also Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency cannot interpret or apply that law in a way that is clearly wrong or that is not supported by or rationally connected to the available evidence). *Cf. Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 238 (8th Cir. 1975) (citing *Overton Park*, 401 U.S. at 420-21) (noting that a court "conducting the 'plenary review' mandated by *Overton Park*" can go outside the administrative record to consider expert testimony regarding whether there is an adequate basis in the administrative record for an agency rule).

1. Discovery Is Needed to Determine Whether the Record Is Complete

Without discovery, the Court cannot be sure that the record before it is complete. One of the Tribe's central arguments is that there is no evidentiary basis for the presumption embodied in the Guidance rule and implemented in the Denial. The record does not show what reports or studies the Department relied on in reaching the conclusion reflected in the Guidance and the Denial that there are "negative impacts on reservation life" from a tribally-owned economic enterprise that is more than a "commutable distance" from a tribe's reservation. AR 1489; *see also* AR 12896, 12906. It is, however, clear from the Denial that DOI's decision to deny Menominee's fee-to-trust application turned (at least ostensibly) on this presumption. AR 12896.

The Tribe and Court thus need to know what, if any, studies or other evidence the Department looked at before concluding there would be significant negative impacts to the Tribe from the proposed Kenosha casino such that the land should not be taken into trust for the project. The Tribe proposes to conduct discovery regarding the existence of any such reports, studies or data (aside from the two included at AR 1493 and AR 1505 which do not support that conclusion). At the February 2008 Congressional hearing, AS-IA Artman was twice asked about any such reports or studies but avoided answering the question. *See* Wood Dec.,¶ 11, Exh. 8, at p. 18.

The Tribe also wants to know whether the Department considered any data or evidence regarding the experiences of the Forest County Potawatomi Community, the Kalispel Tribe, and the Keweenaw Bay Indian Community – the only three Indian tribes that operate casinos more than a "commutable distance" from their reservations (and for whom over a decade's worth of information is available) – before concluding that off-

reservation casinos negatively impact life on the reservation. The experiences of these three tribes comprise the world of available evidence on whether and, if so, how off-reservation casinos negatively impact reservation life (as opposed to the unfounded speculation in the Guidance and Denial), and it would be arbitrary and capricious for DOI to conclude there are "negative impacts on reservation life" from a tribally-owned economic enterprise located more than a "commutable distance" from a tribe's reservation – and to then apply that conclusion against tribes across the board – without examining the experiences of these three tribes.

The administrative record is likewise devoid of any studies or analysis supporting the Checklist switch rule, and of evidence that anyone at BIA's central office took any action on the regional office's IGRA Section 20 two-part recommendation after it was received in January 2007. As explained above in Part II.A *supra* (at pp. 7-8), it is more than reasonable to assume that persons in the Office of Indian Gaming or others at BIA's central office considered the regional office's two-part recommendation memorandum. It is of course possible that the memorandum just sat in Washington for almost two years without anyone taking any action, and that is what the Tribe is trying to find out.[18]

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[18] The regional office's two-part recommendation memorandum arrived in Washington on or about January 19, 2007 (almost a year before BIA's central office received the regional office's Part 151 recommendation memorandum on or about December 18, 2007) at a time when DOI's policy was to process off-reservation gaming fee-to-trust applications by making the IGRA two-part determination *before* deciding whether to take the land into trust. If BIA's central office began preparing a two-part determination for Menominee and then stopped, it would show that the DOI changed its policy mid-stream with respect to the Tribe's application, as the Tribe claims. Moreover, as noted above in Part II.A *supra* (at pp. 7-8), whether DOI considered any of the information in the regional office's two-part recommendation memorandum is relevant in determining whether the Denial was arbitrary and capricious for two reasons. First, it is relevant because the information considered for both determinations is similar, so that the Tribe needs to know what, if anything, the central office concluded vis-à-vis the Tribe's two-

The Tribe also wants to question agency officials about whether there were meetings regarding the Tribe's application that the record does not properly reflect, and meetings between agency officials and persons opposing the application in particular, besides the May 2008 meeting AS-IA Artman had with Messrs. Scott Fitzgerland and Michael Huebsch and the June 2008 meeting Associate Deputy Secretary Cason had with Scott Walker.[19] Deposing agency officials is appropriate because they have relevant

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part application and whether any such analysis was considered as part of determining whether to take the Kenosha land into trust. It is also relevant because the Secretary must determine whether the land can be used for gaming before making a rational and informed decision whether to take the land into trust for gaming purposes.

[19] The Tribe knows about these two meetings only because they are indirectly referenced elsewhere in the record, and this fact makes the Tribe question whether there were other meetings that are not referenced elsewhere in the record and, therefore, about which the Tribe is totally in the dark. The May 2008 meeting, for example, is referenced in a June 13, 2008 letter from Messrs. Fitzgerald and Huebsch to James Cason (AR 1465), although Mr. Artman's "visit" to Messrs. Fitzgerald and Huebsch is not otherwise reflected in the record (with even a meeting entry, for example). Also missing from the record is any entry for a June 2008 meeting among James Cason and Milwaukee County Executive Scott Walker and Ed Eberle, Mr. Walker's Chief of Staff. This June 2008 meeting is, however, referenced in a September 17, 2008 calendar entry for a meeting among Messrs. Cason, Walker and Eberle. AR 012847 ("[T]hey were here in June, want an updated meeting."). The Tribe was not aware of either of these meetings until its attorneys were given the administrative record.

The meetings and communications discussed above are particularly important because they involve people who were adamantly and publicly opposed to the Tribe's application and who managed to meet with DOI officials repeatedly, receive information about the Tribe's pending application, and obtain promises regarding that application without the Tribe's knowledge. As noted, the Forest County Potawatomi Community operates a casino in Milwaukee, over 220 miles from its reservation. Under the terms of the compact pursuant to which the casino is operated (available at http://www.doa.state.wi.us/subcategory.asp?linksubcatid=1285&linkcatid=694&linkid=117&locid=7), the City of Milwaukee receives an annual payment equal to between six and seven percent of the casino's net win. The annual payment to Milwaukee County is 1.5% of net win, or $3.24 million, whichever is greater. The record is replete with documents from Milwaukee City and County officials and representatives (including Mr. Walker) and others expressing their opposition to the proposed Kenosha casino because of a perceived threat to the revenue streams from the Forest County Potawatomi Casino on which they depend. AR 219-222, 330-341, 343-368.

first-hand personal knowledge of and information regarding these and other matters that are material to DOI's decision – and that is not available elsewhere – and because the inadequacy of the administrative record makes it otherwise impossible to effect judicial review. *Cf. Cmty. Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (D.D.C. 1983) (citations omitted).

2. Discovery Is Warranted Because There Is Evidence of Bad Faith and Procedural Impropriety

Extra-record discovery is also warranted so that the Court can determine whether the integrity and fairness of the review process was irrevocably tainted. The available evidence provides a reasonable factual basis to suspect that bad faith or improprieties may have influenced agency decisionmakers. The Tribe need not prove such bad faith or impropriety to get extra-record discovery; it only needs to show – and it has shown – that, drawing all inferences in the Tribe's favor, there is enough evidence of potential bad faith and impropriety to warrant discovery. *See Sokaogon II*, 961 F.Supp. at 1280; *Sokaogon I*, 929 F.Supp. at 1176 ("When there are adequate grounds to suspect bad faith or improper behavior that are not apparent from the administrative record, depositions of the decisionmakers are appropriate.") (citing *Cmty. Fed. Sav. & Loan Ass'n*, 96 F.R.D. at 621 (citing *United States v. Morgan*, 313 U.S. 409, 422 (1941)).[20] The Tribe raises questions

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[20] The Supreme Court in *Overton Park* stated that extra-record examination of agency officials should be allowed only upon a "strong showing of bad faith or improper behavior." *Overton Park*, 401 U.S. at 420. Examining the cases interpreting the *Overton Park* bad faith exception, the U.S. District Court for the Western District of Wisconsin concluded that "[i]f any principle emerges from the[se] cases ... , it is that a court must scrutinize each matter carefully and individually while holding plaintiffs to their significant evidentiary burden." *Sokaogon I*, 929 F.Supp. at 1178. When that court on reconsideration reversed its earlier finding that the plaintiff tribes had not adduced evidence necessary to invoke the exception, it explained that under the *Overton Park*

not raised in the average agency proceeding and has adduced evidence of the type that few litigants claiming agency bad faith and procedural impropriety will possess. *Cf. Sokaogon II*, 961 F.Supp. at 1280, 1281.

When determining whether there is a reasonable factual basis to show bad faith or procedural impropriety so as to allow discovery, all reasonable inferences from the undisputed facts are drawn in the plaintiff's favor, *see id*. at 1281, and the court should consider the limited means plaintiffs have at the early stages of a proceeding when making this determination. *Id*. at 1280-81. Even if the questions raised by the Tribe's evidence did not by themselves arouse much suspicion (the Tribe contends they do), they certainly make the showing necessary for extra-record discovery when considered in combination. *See id*. at 1281.

The Tribe has adduced evidence showing bad faith and procedural impropriety in the issuance of the Denial, and it needs to conduct depositions to answer questions surrounding the Department's decisions and actions. For example, the Tribe plans to depose Eric Dahlstrom, an attorney who represents the Forest County Potawatomi Community and whose fax number appears on November 19, 2008 correspondence in the

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"strong showing" standard, "a court must scrutinize each matter carefully and individually …." and a plaintiff need only show "there are adequate grounds to suspect that an agency decision was tainted …." in order to get extra-record discovery. *Sokaogon II*, 961 F.Supp. at 1280 (citing *Overton Park*, 401 U.S. at 420; *Sokaogon I*, 929 F.Supp. at 1177-78).

Cases outside of the Seventh Circuit are in accord. *See, e.g.*, *Applications Research Corp. v. Naval Air Development Ctr.*, 752 F.Supp. 660, 667 (E.D. Pa. 1990). ("[I]n instances in which … a plaintiff specifically alleges bad faith on the part of agency officials and provides a *reasonable factual basis* for such an allegation, discovery … is permissible and appropriate if limited to the bad-faith allegation.") (citations omitted) (emphasis added). *See also Buffalo Central Terminal v. United States*, 886 F.Supp. 1031, 1046 (W.D.N.Y. 1995) (same); *Apex Constr. Co. v. United States*, 719 F.Supp. 1144, 1147 (D. Mass. 1989) (same).

record, to find out how this correspondence from his law firm purports to quote from the BIA Midwest Regional Office's Part 151 recommendation memorandum (AR 1278), a document that is excluded on privilege grounds from the record given to the Tribe and the Court (AR 1532). This document bearing Mr. Dahlstrom's fax number provides reasoning used in the Denial (AR 12901-12902; *cf.* AR 1279-1281) but which does not appear in any of DOI's earlier drafts of the denial letter in the record (AR 168-178). The Tribe suspects that Mr. Dahlstrom's firm, acting on the Forest County Potawatomi Community's behalf, may have provided DOI with some of the rationale used in denying the Tribe's application, so that its apparent access to supposedly privileged documents is particularly interesting and relevant. In addition, the Tribe intends to ask Mr. Dahlstrom about a call he made to George Skibine a week before those comments were submitted. AR 012808.

The Tribe also intends to depose Donald Sutherland, a former environmental specialist in the BIA's central office, to find out who instructed him to draft a notice of cancellation of the Tribe's Environmental Impact Statement in early January 2008, apparently some time before January 9, and whether this person informed him why the EIS was being cancelled. AR 12858-12859. Deposing Mr. Sutherland could allow the Tribe to determine whether the decision to deny Menominee's application and cancel the EIS for it was actually made back in January 2008, or perhaps earlier.[21]

[21] Other evidence in the record suggests that it may have been, including a June 3, 2008 letter from Scott Walker to James Cason which suggests that the decision to deny Menominee's application was perhaps made in discussions with Secretary Kempthorne in early January 2008. AR 12850. The record contains an undated draft letter denying the Tribe's application (AR 168-173) which the record indicates may be from January 2008 (the letter is from after December 18, 2007 and before March 27, 2008; an e-mail in the

The Tribe seeks to depose Carl Artman as well, since Mr. Artman has first-hand personal knowledge of several matters relevant to the Department's decision and whether it was influenced by bad faith or procedural impropriety. Regarding the development of the Department's new off-reservation gaming policy and the "commutable distance" rule, for example, when and how did the Department conclude that it would forego notice and comment rulemaking because there was not enough time left in the last Administration? Did Mr. Artman ever, as he told Congress he would, investigate what happened with the consultation proposed with Indian tribes for early 2006 regarding the draft amended Part 151 regulations prepared in December 2005 (and if he did, what was the result of that investigation)?

Mr. Artman also has personal knowledge of important matters specific to the denial of the Tribe's application. For example, what "promises" did he make to Scott Walker, the Milwaukee County Executive, regarding Menominee's application and why did he make them? AR 012850. When in May 2005, between the time Mr. Artman announced his resignation as Assistant Secretary – Indian Affairs and his last day on the job, did he visit Scott Fitzgerald and Mike Huebsch, and what was the purpose of this visit? AR 001465. When in January 2008 did Mr. Artman discuss Menominee's application with Messrs. Fitzgerald and Huebsch, and what specific topics were discussed? AR 1271. The Tribe also wants to find out what, if anything, Mr. Artman may know about how the Midwest Regional Office's Part 151 recommendation came to be quoted in comments from attorneys for the Forest County Potawatomi Community,

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record (AR 12859) suggests that a draft letter was prepared on or around January 14, 2008).

also a client of the law firm Mr. Artman joined as a partner just five months after leaving the Department of the Interior.

Lastly, the Tribe seeks to depose George Skibine, the Principal Deputy Assistant Secretary – and the author of the Denial – to find out more about his conversation(s) with Secretary Kempthorne and Associate Deputy Secretary Cason (apparently some time in 2007) in which they made it clear they were determined to deny the off-reservation gaming fee-to-trust applications pending before the Department, presumably including Menominee's. *See* Wood Dec. ¶¶ 2-3. The Tribe also proposes to ask Mr. Skibine about whether he or anyone else in the Office of Indian Gaming (which Mr. Skibine headed at the time) or BIA's central office did anything with the regional office's two-part recommendation memorandum, and/or whether that memorandum's analysis was considered in issuing the Denial.

III. CONCLUSION

For the reasons set forth above, the Tribe respectfully requests that the Court grant the Motion to Consider Extrinsic Evidence.

Dated: March 5, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2010, Plaintiff's Memorandum of Points and Authorities in Support of 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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