IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

CITIZENS AGAINST CASINO GAMBLING IN ERIE COUNTY, et al.,	)	
Plaintiffs,	)	
- v -	)	09-CV-0291-WMS
TRACIE STEVENS, et al.,	)	
Defendants.	)	

UNITED STATES' RESPONSE TO PLAINTIFFS' MOTION FOR AN ORDER COMPELLING PRODUCTION OF ADMINISTRATIVE RECORD DOCUMENTS AND AUTHORIZING DISCOVERY TO SUPPLEMENT THE ADMINISTRATIVE RECORD

Introduction

Defendants, Tracie Stevens, in her official capacity as Chairwoman of the National Indian Gaming Commission ("Chairwoman");[1/] the National Indian Gaming Commission ("NIGC"); the United States Department of the Interior ("DOI"); Ken Salazar, in his official capacity as Secretary of the Interior ("Secretary"); and Barack Obama, in his official capacity as President of the United States (collectively, "United States"), by undersigned counsel, hereby oppose Plaintiffs' motion to compel discovery and supplement the record. This case concerns a challenge, brought pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, to the NIGC'S January 20, 2009 decision to approve an amended Class III Gaming Ordinance for the Seneca Nation of Indians ("Nation" or "SNI").

[1/] Pursuant to Fed. R. Civ. Pro. 25(d), Tracie Stevens has been substituted for Phil N. Hogen as Chairwoman of the NIGC.

Plaintiffs move this Court to permit virtual unlimited discovery and supplementation of the certified administrative record. In an APA challenge, however, judicial review is strictly confined to the administrative record except in extremely narrow circumstances not present here. Their efforts to wholly convert this record review case into an ordinary lawsuit are without support and would only serve one purpose – further delay. Moreover, their assertions that the deliberative process privilege is improperly asserted are baseless. Their allegations of bias are also unfounded and irrelevant to the final agency action at issue in this case and Plaintiffs are not entitled to the extra-record discovery and supplementation they seek.

Background

A. The Final Agency Action at Issue and the Submission of the Administrative Record for Judicial Review

Plaintiffs' Complaint makes a number of allegations related to the SNI's operation of a lawful gaming facility in Erie County, New York, in an effort to prevent the SNI from operating the facility as a means of economic development. Compl. ¶ 1. In pursuit of this goal, Plaintiffs challenge the NIGC's January 20, 2009 decision to approve an amended Class III Gaming Ordinance for the SNI pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721. Plaintiffs' First Claim asserts that approximately nine acres of land in the City of Buffalo, Erie County, New York ("the Buffalo Parcel"), held by the Nation in restricted fee is not Indian land because the Seneca Nation Land Claims Settlement Act ("Settlement Act"), 25 U.S.C. §§ 1774-1774h, is unconstitutional, Compl. ¶¶ 95-98, 108; the Nation's Class III gaming compact with New York does not apply to the Parcel, Compl. ¶¶ 61-64, 99-102;[2/] and restricted

[2/]The Tribal-State Compact went into effect as a matter of law. Compl. ¶¶ 63, 100.

fee land is neither Indian land under IGRA nor Indian country pursuant to 18 U.S.C. § 1151, Compl. ¶¶ 103-109.

Plaintiffs' second claim asserts that there was only one way for the DOI to acquire new land for an Indian tribe at the time of IGRA's passage – through the Indian Reorganization Act, 25 U.S.C. § 465 – therefore, Congress "had no reason to specifically mention 'restricted fee' land when, in enacting IGRA, it decided to prohibit gambling on after-acquired lands (Section 20 of IGRA)." Compl. ¶ 114. As such, Plaintiffs assert that the DOI's new Regulations for Gaming on Trust Lands Acquired After October 17, 1988 ("Section 20 Regs"), 73 Fed. Reg. 29354 (May 20, 2008), 73 Fed. Reg. 35579 (June 24, 2008), violate the APA and are contrary to Congress' intent to prohibit gaming on Indian lands acquired after 1988. Compl. ¶¶ 119, 123. Finally, Plaintiffs' third claim asserts that to the extent restricted fee Indian lands are subject to Section 20's prohibition on gaming on lands acquired after 1988, the Nation's lands in Buffalo cannot qualify for the settlement of a land claim exception, 25 U.S.C. § 2719(b)(1)(B)(i), to the prohibition listed in Section 20 of IGRA. Compl. ¶¶ 125-135.

Despite all of these claims, however, there is only one final agency action at issue in this case. That action is the NIGC's approval of the SNI's Class III amended gaming ordinance. As part of that ordinance approval, the NIGC issued an Indian lands determination. That Indian lands determination first concludes that the Buffalo Parcel fits within the definition of Indian lands in IGRA, 25 U.S.C. § 2703(4); 25 C.F.R. § 502.12. The legal determination goes on to discuss the new DOI Section 20 Regs and the application of those regulations to the amended ordinance, concurring in the regulations and concluding that Section 20 of IGRA, 25 U.S.C. § 2719, does not apply to restricted fee Indian lands and even if Section 20 did apply, the SNI's

Buffalo Parcel would fit within the "settlement of a land claim" exception to Section 20's general prohibition to gaming on lands acquired after October 17, 1988.[3/] This ordinance approval and the underlying legal determination are the only relevant agency actions being challenged by the Plaintiffs – indeed, the ordinance approval is the only final agency action taken regarding the Buffalo Parcel since this Court's decision in CACGEC II.

1. United States' Motion for Partial Dismissal

The United States filed a motion for partial dismissal on June 15, 2009, Dkt. No. 11, arguing for the dismissal of Plaintiffs' first claim in its entirety. On March 30, 2010, this Court partially granted the United States' motion, dismissing subpart "A" and "B" of Plaintiffs' first claim. Dkt. No. 21 at 29.[4/] The United States then filed an answer, responding to the remainder of Plaintiffs' claims. Dkt. No. 23.

2. The Administrative Record Filings

After filing the answer, the NIGC filed its certified administrative record with the Court on May 11, 2010, Dkt. Nos. 24, 25, and DOI filed its certified administrative record on August

---

[3/]As the Chairman notes in the determination, although this Court has already decided the settlement of a land claim issue in the context of Citizens Against Casino Gambling in Erie County v. Hogen, No. 07-CV-0451S, 2008 WL 2746566 (W.D.N.Y. July 8, 2008) ("CACGEC II"), NIGC is now applying the Section 20 Regs to ordinance approvals. In light of this, the Chairman provided the legal analysis of the new settlement of a land claim portion of the regulations. Letter from Philip N. Hogen to Barry E. Snyder (Jan. 20, 2009) (approving SNI Class III gaming ordinance) available at http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/senecanationny/SenecaOrdinanceApproval12009.pdf (attached as Exhibit C to the Declaration of Cornelius D. Murray in support of Plaintiffs' motion ("Murray Decl.")).

[4/]This Court's March 30, 2010 Decision and Order also addresses the SNI's motion to intervene in the case, denying the motion. Dkt. Nos. 10, 21. The SNI appealed the part of the decision denying intervention to the Second Circuit, which affirmed this Court's order denying intervention. Dkt. Nos. 28, 34.

27, 2010. Dkt. Nos. 31-32. The NIGC record contained the documents that the decision-maker – the Chairman – relied upon in approving the amended gaming ordinance. The certified administrative record of DOI also contained documents that the NIGC Chairman relied on in approving the amended gaming ordinance. The DOI administrative record further included the deliberative process documents underlying a DOI M-Opinion (M-37023)[5/] issued by Solicitor David L. Bernhardt on January 18, 2009, although those underlying documents were not before the decision-maker[6/] and Plaintiffs do not challenge the M-Opinion in their claims.

3. Plaintiffs' Request for Supplementation of the Record

On October 7, 2010, Plaintiffs contacted the undersigned counsel for the United States requesting supplementation of the administrative record, requesting the administrative record for the Section 20 Regs; the release of the deliberative process documents withheld from DOI's M-Opinion record – arguing for the release of those documents as "post-decisional" and alleging that the deliberative process privilege was being asserted to withhold communications with the SNI; and documents related to the recusal of Edith Blackwell, then Associate Solicitor of Indian Affairs at DOI, from matters involving the SNI. Pls.' Letter Requesting Production of Documents (Murray Decl. Ex. N).

[5/] Available at http://www.doi.gov/solicitor/opinions.html (Murray Decl. Ex. D). The Solicitor is authorized, "[t]o issue final legal interpretations, in the form of M-Opinions published in Decisions of the United States Department of the Interior, on all matters within the jurisdiction of the Department, which shall be binding, when signed, on all other Departmental offices and officials and which may be overruled or modified only by the Solicitor, the Deputy Secretary, or the Secretary." Departmental Manual, U.S. Dep't of the Interior, Part 209, Ch. 3, 3.2(A)(11) available at http://elips.doi.gov/elips/release/3537.htm (Declaration of Gina L. Allery (Ex. C) Ex. 1.

[6/] The NIGC Chairman only relied on the finalized M-Opinion at the time the decision was made, not the underlying documents.

In a letter response dated October 18, 2010, undersigned counsel explained that the M-Opinion is not specific to the SNI, and that because the NIGC Chairman only had before him the final M-Opinion, the documents withheld from the M-Opinion portion of the record were not part of the underlying documents before the decision-maker as part of the ordinance approval. Defs.' Response to Letter Requesting Production of Documents (Murray Decl. Ex. O). However, DOI included the administrative record for the M-Opinion because it is referenced in DOI's response to NIGC, dated January 18, 2009, and in the final NIGC January 20, 2009 ordinance approval. Id.

The undersigned counsel's response also explained that the documents withheld from the M-Opinion record are not "post-decisional" as the M-Opinion is separate from the regulations and that no deliberative process privilege was asserted for any documents circulated to the SNI. Id. The response also explains that the documents related to Edith Blackwell's recusal were not before the decision-maker (Phil N. Hogen), and are therefore, not properly part of the administrative record.[7] Id. Finally, although Plaintiffs do not make a facial challenge to the Section 20 Regs, DOI agreed to supplement the record and provide additional materials relating to the development of those regulations. Id. Accordingly, the DOI record was supplemented on December 1, 2010 to include additional documents from the notice and comment rulemaking for the Section 20 Regs, despite the fact that those documents were not before the decision-maker –

[7]As discussed below and in the declaration of Melinda J. Loftin, the Ethics Official at the U.S. Department of the Interior within the Office of the Solicitor, contrary to Plaintiffs' current allegations, Ms. Blackwell was authorized to participate in the development of Solicitor Opinion M-37023. See Loftin Decl. ¶ 3 (Ex. A).

the NIGC Chairman – at the time of the decision and Plaintiffs' complaint does not make a facial challenge to those regulations. Dkt. No. 33.

Over six months after the supplementation of the record, Plaintiffs filed the instant motion to compel supplementation of the administrative record, which is unwarranted and will only cause further delay and prevent the merits of this case from being decided.[8/]

B. Edith Blackwell's Recusal

Plaintiffs' motion is based on their erroneous and irrelevant contention that Ms. Blackwell, a career attorney at DOI, "un-recused" herself to reverse the longstanding DOI position on Section 20's application to restricted fee Indian lands. Mot. to Compel at 8-13. In support of their allegation, Plaintiffs speculate about the relationship between Ms. Blackwell and Michael Rossetti, a partner in the law firm of Akin Gump Strauss Hauer & Feld ("Akin Gump"), and cite to irrelevant Inspector General reports and testimony. These allegations are wildly off-base – Ms. Blackwell and Mr. Rossetti are married to each other, Ms. Blackwell did not participate in the development of the portion of the Section 20 Regs regarding restricted fee Indian lands, and the Inspector General testimony cited relates to the Mineral Management Service, not the Bureau of Indian Affairs or the Solicitor's Office – and provide no support for their motion.

Despite Plaintiffs' attempts to characterize the situation otherwise, this is a very straight-forward situation in which one spouse works for the United States, and the other spouse is in

---

[8/]The United States notes that the SNI temporary casino remains open during this delay and the rulings in Citizens Against Casino Gambling in Erie County v. Kempthorne, 471 F. Supp. 2d 295 (W.D.N.Y 2007) ("CACGEC I") and CACGEC II are being held in abeyance in the Second Circuit awaiting the outcome of this case. Any further delay prevents all of these issues from being resolved.

private practice. In this common situation, the agency Ethics Office provides advice to the United States employee regarding his or her participation in matters that might present a conflict of interest. As set forth in the attached declaration from Melinda J. Loftin, the Ethics Official at the U.S. Department of the Interior within the Office of the Solicitor, Ms. Blackwell is recused from all matters that involve Akin Gump Strauss Hauer & Feld L.L.P. absent authorization from the Ethics Office. Loftin Decl. ¶ 2 (Ex. A).

The Ethics Official's declaration also confirms, contrary to Plaintiffs' allegations, that Ms. Blackwell did not "un-recuse" herself to participate in the M-Opinion. Rather, prior to participating in the development of the M-Opinion, Ms. Blackwell consulted with the Ethics Office, and the Office determined that Ms. Blackwell could participate in the development of the M-Opinion. Loftin Decl. ¶ 3 (Ex. A).

Moreover, during the Section 20 rulemaking process, Ms. Blackwell, in an abundance of caution, "did not participate in the aspect of the rulemaking involving the interpretation that Section 20 does not apply to restricted fee lands." Skibine Decl. ¶ 6 (Ex. B) (emphasis in original). "Whenever the issue of restricted fee lands arose during discussions of other aspects of rulemaking, Ms. Blackwell would excuse herself from the room." Id. As a result, Ms. Blackwell had no input into that aspect of the development of the regulations. The Declaration of Mr. George Skibine, Deputy Assistant Secretary for Management, Indian Affairs, further states that as the Director of the Office of Indian Gaming at the time of the Section 20 rulemaking, he had primary responsibility for the Department's Section 20 Regs. Id. at ¶ 5. These responsibilities, "included the responsibility to make decisions as to the substantive content of the regulatory language that would be presented to the Assistant Secretary – Indian Affairs as the recommended

regulatory package." Id. In that capacity, Mr. Skibine made the "decision to include a definition of newly acquired lands within the final Section 20 regulations that referenced only lands taken into trust after October 17, 1988, and to exclude from that definition any newly created restricted fee lands." Id. at 7. "In making that decision, I received legal advice from attorneys within the Office of the Solicitor, but not from Edith Blackwell. She provided me with no input on that decision." Id.

In sum, not only did Ms. Blackwell receive authorization from the DOI Ethics Office to participate in the M-Opinion, she also self-recused from the portion of the Section 20 Regs that addresses the application of Section 20 to restricted fee Indian lands, so she had no role in the original decision to change DOI's position regarding the restricted fee issue. Plaintiffs' allegations that Ms. Blackwell was "directly involved in the reversal of the DOI's longstanding prior position on the applicability of Section 2719 to restricted fee land," Mot. to Compel at 2, are completely unfounded and insupportable.

Argument

Plaintiffs' motion amounts to an effort to convert this APA case into an ordinary lawsuit in which discovery could be had on a number of issues, a result which cannot be reconciled with the bedrock principle in APA cases that judicial review is limited to the administrative record. The record review concept is fundamental to Administrative law and is a condition that Congress placed on its waiver of Federal sovereign immunity. See 5 U.S.C. § 706 ("the court shall review the whole record or those parts of it cited by a party"). The APA requires that the "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, 142 (1973).

There are two well-recognized reasons justifying the presumption against supplementation of the record or extra-record discovery. First, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 50 (1983) (citation omitted). Requiring those who challenge an agency decision to take their arguments to the agency first provides the defending agency with "an opportunity to address a party's objections . . . [to] apply its expertise . . . [and to] exercise its informed discretion," a process likely to "create a more finely tuned record for judicial review." Adams v. EPA, 38 F.3d 43, 50 (1st Cir. 1994); see also Xiao Je Chen v. U.S. Dept. of Justice, 471 F.3d 315, 321 (2d Cir. 2006). Second, enforcing the rules about administrative record-making "solidifies the agency's autonomy by allowing it the opportunity to monitor its own mistakes and by ensuring that regulated parties do not simply turn to the courts as a tribunal of first resort." Adams at 50.

In its motion to compel discovery and supplement the record, Plaintiffs now seek the release of documents withheld from DOI's administrative record based on the deliberative process privilege, and also seek to conduct depositions,[9/] and written extra-record discovery.[10/] Their unwarranted allegations, however, do not satisfy the requirement of a strong and

---

[9/]It is unclear which individuals Plaintiffs are seeking to depose as their motion generally states, "the evidence raises extremely serious questions, more than sufficient to warrant discovery in the form of document discovery and depositions." Mot. to Compel at 25.

[10/]Although Plaintiffs state in broad terms the types of discovery they wish to pursue, their Motion is unaccompanied by any specific discovery papers. Should the Court determine Plaintiffs are entitled to discovery, the United States reserves the right to object to any specific requests, mindful of the fact that discovery in an APA case, in those rare instances where permitted, is to be narrowly tailored and strictly limited. See Schaghticoke Tribal Nation v. Norton, No. 3:06-cv-81(PCD), 2006 WL 3231419, at *6 (D. Conn. 2006) (providing detailed and limited parameters to discovery where granted). Allery Decl. Ex. 2.

compelling preliminary showing of bad faith on the agency's part that is needed to justify granting any part of their motion.

A. Plaintiffs Are Not Entitled to the Release of Documents Protected Under the Deliberative Process Privilege

Plaintiffs challenge all assertions by the DOI of the deliberative process privilege over withheld documents. Those privileges were properly asserted and their demand for the release of these documents should be rejected. As discussed below, Plaintiffs' demand is not only unjustified, it is also unnecessary because the subjective motivation of DOI is not properly at issue here, as the decision under review was made by NIGC, not DOI.

1. The Deliberative Process Privilege Has Not "Evaporated" Because of Plaintiffs' Allegations

Plaintiffs rely on the recent decision by Magistrate Judge Peebles in New York v. Salazar, 701 F. Supp. 2d 224 (N.D.N.Y. 2010),[11/] to argue that they are entitled to the deliberative process documents withheld because that privilege evaporates once the decision-making process is the subject of the litigation. Motion to Compel at 20-21. Plaintiffs incorrectly interpret New York v. Salazar as dissolving the deliberative process privilege whenever an allegation of bias, however tenuous, is made.

[11/] Although the Magistrate Judge in New York v. Salazar employed the wrong standard, the approach used there provides no support for Plaintiffs' argument. The subjective motivation of DOI is not properly at issue here, as the decision under review was made by NIGC, not DOI. The allegations of bias – which do not even appear in the Complaint and are not part of the cause of action – by Ms. Blackwell are irrelevant and so insubstantial that they cannot put into serious question the subjective motivation of either DOI or NIGC. Plaintiffs incorrectly interpret New York v. Salazar as dissolving the deliberative process privilege whenever an allegation of bias, however tenuous, is made.

The Magistrate's decision was based on the case law that, "if the party's cause of action is directed at the government's intent in rendering its policy decision and closely tied to the underlying litigation then the deliberative process privilege 'evaporates.'" Children First Foundation, Inc. v. Martinez, Civ. No. 1:04-CV-0927 (NPM/RFT), 2007 WL 4344915, at *7 (N.D.N.Y. 2007) (citations omitted) (emphasis added) (Murray Decl. Ex. PP). In the New York v. Salazar litigation, the State of New York's amended complaint contains such an allegation in the fifth cause of action. Plaintiffs' Second Amended Complaint, New York v. Salazar, 6:08-cv-00644-LEK-DEP, Dkt. No. 94 at 37 (Allery Decl. Ex. 3). The State of New York specifically alleges that the State's due process rights were violated because the determination was "infected with bias toward the OIN [Oneida Indian Nation]." Id. The State also made specific allegations regarding contact between Thomas L. Sansonetti, a former Assistant Attorney General for the Environment and Natural Resources Division at the Department of Justice, and James E. Cason, the former Associate Deputy Secretary of the Interior, who was the decision-maker. Id. at 20-21.

Assuming that Magistrate Judge Peeble's ruling in New York v. Salazar accurately reflects the law regarding deliberative process privilege, that ruling still does not provide support for Plaintiffs' arguments because Plaintiffs' Complaint fails to include a cause of action alleging bias or violation of their due process rights. The Complaint only alleges that the decision to approve the Ordinance and the underlying Indian lands determination were arbitrary, capricious, or otherwise not in accordance with law. Compl. ¶¶ 108, 118, 124, 135. As such, it is an ordinary APA review case. If courts were to find that any Plaintiff challenging an agency action pursuant to the APA is entitled to the release of privileged documents and to extra-record

discovery based on an allegation that the agency acted in an arbitrary and capricious manner, then the deliberative process would evaporate in all APA cases, regardless of whether a plaintiffs' allegations are supported or not.

Despite the fact that Plaintiffs failed to present a claim for bad faith or bias in violation of their due process rights, they attempt to elevate general allegations about the timing of the final publication of the regulations and the expiration of the statutorily-mandated 90-day approval period for tribal gaming ordinances on Inauguration Day in their Complaint to indicate bias or bad faith on the agency's part. Motion to Compel at 21. Plaintiffs also allege that "one or more individuals on behalf of SNI 'lobbied' officials within the DOI and/or the NIGC to change their position on the applicability of Section 2719 to restricted fee land, so that the Buffalo Parcel could qualify for Class III gambling . . . ." Mot. to Compel at 21. First, communications between any DOI or NIGC officials and SNI or anyone acting on behalf of SNI are not privileged and would therefore be disclosed. Furthermore, DOI was aware at the time the Tribal-State Compact was approved in 2002 that the SNI and the State of New York disagreed with DOI's interpretation that Section 20 applied to restricted fee Indian lands. CACGEC II AR00112-28 (Allery Decl. Ex. 4). Indeed, SNI argued as much in the CACGEC I, No. 06-CV-0001S, Dkt. No. 56 at 9-10 (Allery Decl. Ex. 5), and CACGEC II, No. 07-CV-0451S, Dkt. No. 46-2 at 51 (Allery Decl. Ex. 6), litigation, so it should be no surprise to anyone involved in this litigation that SNI wanted the United States to change its position. That can hardly be considered inappropriate "lobbying" regarding an issue.[12/] In spite of SNI and the State of New York's

[12/]In fact, all parties had an opportunity to provide comments to the agency during the notice and comment rulemaking for the Section 20 Regs.

position regarding restricted fee Indian lands, it was not until the Section 20 Regs were finalized that DOI officially changed its interpretation.

There is also nothing in the record for the NIGC decision, the M-Opinion, or the Section 20 Regs that indicates inappropriate lobbying by SNI. These allegations are insufficient to support Plaintiffs' motion because there is no basis for them and Plaintiffs failed to include a separate cause of action regarding the decision-making process itself.

Furthermore, there are no allegations in the Complaint regarding the decision-maker – Philip N. Hogen – being biased in favor of SNI. Instead, Plaintiffs rely on the participation of a career member of the Solicitor's Office staff, Ms. Blackwell, who was not the decision-maker and did not participate in the formulation of the portion of the Section 20 Regs that the Chairman addresses in his determination and was not the decision-maker for the M-Opinion (issued by the Solicitor, not staff attorneys).

In short, Plaintiffs are seeking the release of the deliberative process documents that are irrelevant to the claims raised in Plaintiffs' Complaint, and Plaintiffs have presented no evidence that would warrant release of the documents even if they were relevant. The case law does not support Plaintiffs' argument that the deliberative process privilege evaporated in this case and they are not entitled to the release of privileged documents.

2. The Documents Withheld From the M-Opinion Record are Not Post-Decisional

Plaintiffs' next argue that even if the deliberative process privilege did not evaporate, they are entitled to the documents underlying the M-Opinion that were withheld because these documents are post-decisional. Mot. to Compel at 21-22. As noted earlier, the documents at

issue are irrelevant to this Court's review of the NIGC's decision because they were not before then NIGC Chairman Hogen. Even if the documents were relevant, they are not post-decisional because all of the documents predate the finalization of the M-Opinion. The government may assert the deliberative process privilege over a document by establishing that it is "(1) an inter-agency or intra-agency document; (2) predecisional; and (3) deliberative." Tigue v U.S. Dep't of Justice, 312 F.3d 70, 76 (2d Cir. 2002) (internal quotations and citations omitted). "There should be considerable deference to the [agency's] judgment as to what constitutes . . . 'part of the agency give-and-take - of the deliberative process - by which the decision itself is made.'" Chemical Mfrs. Ass'n v. Consumer Prod. Safety Comm'n, 600 F. Supp. 114, 118 (D.D.C. 1984) (quoting Vaughn v. Rosen, 523 F.2d 1136, 1144 (D.C. Cir. 1975)).

Plaintiffs mischaracterize the M-Opinion in support of their argument, alleging that it was "generated to justify -- or to back-fill -- a decision that was already made." Mot. to Compel at 22. To begin with, it is not unusual or remarkable for the Solicitor to issue an M-Opinion that opines on statutes, regulations, or policies that are within DOI's authority. As discussed supra, the Solicitor is authorized, "[t]o issue final legal interpretations, in the form of M-Opinions published in Decisions of the United States Department of the Interior, on all matters within the jurisdiction of the Department . . . ." Departmental Manual, Dep't of the Interior, Part 209, Ch. 3, 3.2(A)(11) (Allery Decl. Ex. 1).[13/] Courts have routinely rejected the argument that the privilege cannot possibly cover documents that explain or discuss decisions already made. Mapother v. Department of Justice, 3 F.3d 1533, 1535-40 (D.C. Cir. 1993) (protecting under the

[13/]Opinions that have been issued since 1993 are available at http://www.doi.gov/solicitor/opinions.html.

privilege a report that did not develop new policies); Formaldehyde Institute v. Department of Health & Human Services, 889 F.2d 1118, 1123-24 (D.C. Cir. 1989) (rejecting the argument that an interpretive letter was not protected because no policy decision was the subject of the deliberations).

In this instance, opinion M-37023 discusses not just the regulations, but also Secretary Norton's November 12, 2002, non-approval letter and DOI's position on the Non-Intercourse Act's application to off-reservation parcels of land. M-37023 at 4-7. As stated in the opinion, "the Department has not previously opined on this precise question, Federal restrictions under the Non-Intercourse Act . . . ." M-37023 at 6. Regarding Secretary Norton's November 12, 2002 letter, it is not unusual for the Solicitor to issue an M-Opinion to officially reverse a legal position or policy. See M-37013 (Withdrawal of M-37013 - The Meaning of "In Danger of Extinction Throughout All or a Significant Portion of its Range."); M-37011 (Rescission of 2001 Ancillary Use Opinion) (available at http://www.doi.gov/solicitor/opinions.html). The documents withheld under the deliberative process privilege contain deliberations of the issues addressed in the final M-Opinion, including DOI's legal interpretation of the Non-Intercourse Act, the status of Secretary Norton's letter, as well as the Section 20 Regs. While the decision had already been made on the regulations, DOI had not yet issued a decision on the other matters. Therefore, the documents were not "post-decisional" and were properly withheld.

3. Plaintiffs fail to show that the privilege does not apply as a matter of law or that the public interest requires disclosure of privileged documents

Plaintiffs claim that the deliberative process privilege "evaporates" upon their mere assertions regarding Ms. Blackwell and that even if the privilege applies, the Court should order

disclosure of the documents pursuant to a balancing test that weighs the interests of plaintiffs and the public in ordering disclosure against the government's interest in protecting the deliberative process of public agencies. Motion to Compel at 20, 22-23. Neither assertion is correct.

The approach that Plaintiffs would like this Court to apply is from State of New York v. Salazar, 701 F. Supp. 2d 224 (N.D.N.Y. 2010). As discussed above, Plaintiffs cannot meet the New York v. Salazar standard. Furthermore, the Second Circuit has not endorsed this approach, and it has been specifically rejected by the Federal Circuit. In contrast, the Federal Circuit approach balances five factors: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the 'seriousness' of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable." Mobil Oil Corp. v. Dep't of Energy, 520 F. Supp. 414, 417 (N.D.N.Y. 1981). Here, the determinative factors are the first and the fifth.

The internal DOI documents are irrelevant to the resolution of Plaintiffs' APA claims challenging NIGC's decision. The documents at issue were never considered or even available to the decision-maker, then NIGC Chairman Hogen. Moreover, the APA is not a fishing license to obtain and review all internal Federal government documents in hopes of finding an irregularity. To the contrary, the APA presumes the regularity of decision-making. As the Supreme Court held in United States v. Chemical Found., 272 U.S. 1, 14-15 (1926), "[t]he presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." Accordingly, APA claims do not inherently put into question government officials' deliberations.

With regard to the fifth factor–the chilling effect on government employees–Plaintiffs would have this Court adopt a view that virtually every APA claim can, by mere mention of a bias of an agency employee, put at issue the propriety of the decision-making process. Such a low threshold for dissolving the privilege is inconsistent with the strong public policy justifications that underlie the privilege and should be rejected. There is no automatic waiver here, and Plaintiffs have not shown an evidentiary need that outweighs the harm from disclosure.

B. Plaintiffs are not Entitled to Extra-Record Discovery

Plaintiffs seek extra-record discovery on the grounds of the narrow bad faith exception to the record rule, relying once again on Magistrate Peebles decision in New York v. Salazar, 701 F. Supp. 2d at 224. Mot. to Compel at 24-25. The exception is present only where "there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers." Nat'l Audobon Soc'y v.Hoffman, 132 F.3d 7, 14 (2d Cir. 1997) (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 420 (1971). The requirement of a strong showing cannot be met on the basis of bare allegations or assertions of bad faith in connection with aspects of the administrative record that a party finds objectionable. Friends of the Shawangunks, Inc. v. Watt, 97 F.R.D. 663, 667 (N.D.N.Y. 1983) ("However, bald assertions of bad faith are insufficient to require agency officials to submit to depositions."). Instead, plaintiffs "must show specific facts to indicate that the challenged action was reached because of improper motives." Id. at 668. This requirement is necessary "[b]ecause accusations of improper political influence are easy to make [and] courts have to be careful in determining just which of those accusations are substantial enough to merit further consideration and extra-record discovery." Sokaogon Chippewa Cmty. (Mole Lake Band of Lake Superior Chippewa) v.

Babbitt, 961 F. Supp. 1276, 1280 (W.D. Wis. 1997). Moreover, because Plaintiffs seek to conduct depositions, they must be held to a correspondingly higher burden of demonstrating bad faith on DOI's part. See Schaghticoke, 2006 WL 3231419 at *6 n.12 (Allery Decl. Ex. 2); Cmty. Fed. Sav. and Loan Ass'n v. Fed. Home Loan Bank Bd., 96 F.R.D. 619, 621 (D.D.C. 1983) ("the more senior the official to be deposed the stronger the showing [of bad faith] to be demanded").

As discussed supra, in New York v. Salazar, Magistrate Peebles ordered the release of documents and the deposition of Deputy Secretary James Cason based on evidence that plaintiffs presented to the court that Deputy Secretary James Cason (the decision-maker) had inappropriate contacts with a lobbyist, Thomas Sansonetti. This coupled with DOI's alleged "stonewalling" on New York's FOIA request were sufficient for Magistrate Judge Peebles, based on the argument that the delayed FOIA prejudiced New York on the National Environmental Policy Act analysis because they could not comment without the FOIA documents. New York v. Salazar, 701 F.Supp.2d at 241, 243 (finding "sufficient showing to warrant limited discovery on the issue of bias and bad faith, and [the court] will thus permit the plaintiffs to depose James E. Cason."). However, Plaintiffs in the instant case have failed to allege bias in the decision-making process or a violation of their due process rights. Plaintiffs have also failed to offer any proof of wrongdoing by decision-makers at DOI or NIGC. All Plaintiffs have produced is speculation of bias on behalf of a career employee that was not the decision-maker. Plaintiffs' speculation is easily disposed of by the Declaration of Melinda Loftin, the Ethics Official from DOI, outlining the procedures taken regarding Edith Blackwell's participation in the M-Opinion and the Declaration of George Skibine, Deputy Assistant Secretary for Management – Indian Affairs,

stating that Edith Blackwell did not participate in the portion of the Section 20 Regs at issue in this case. See Loftin Decl. (Ex. A), Skibine Decl. (Ex. B).

Plaintiffs also cite Schaghticoke Tribal Nation v. Norton, No. 3:06-cv-81(PCD), 2007 WL 867987 (Murray Decl. Ex. QQ), where the court permitted the deposition of two DOI officials in order to determine if improper political influence was behind DOI's reversal of a prior administrative decision granting the Schaghticoke Tribal Nation's petition for federal recognition as an Indian tribe. Among the evidence proffered by plaintiffs in an attempt to make the requisite strong preliminary showing that DOI's about-face on its prior decision was the result of bad faith was (1) Connecticut's congressional delegation met with DOI officials four times to demand reversal; (2) the State Attorney General had ex parte contacts with DOI in spite of a standing court order prohibiting such contacts; (3) other ex parte contacts by the lobbyists employed by opposition groups in spite of the standing court order prohibiting such communications; and (4) ex parte contacts between congressional delegates and the Interior Board of Indian Appeals, the administrative agency tasked with considering the appeal of the original recognition decision which, in turn, vacated and remanded the original decision approving recognition. Schaghticoke, 2006 WL 3231419 at *5-*6 (Allery Decl. Ex. 2).

No such evidence exists in this case. Rather, in support of their argument that they are entitled to discovery, Plaintiffs again rely solely on the participation of a career member of the Solicitor's Office staff, Ms. Blackwell, who was neither the decision-maker nor a participant in the portion of the Section 20 Regs at issue in this case. Plaintiffs' disagreement with various aspects of the decision process and its final substance do not suffice to establish the necessary strong showing of bad faith conduct to warrant an exception to the rule in APA cases.

While allegations that DOI's decision is arbitrary and capricious may be relevant for review on the merits, "[s]uch allegations do not amount to bad faith." United States v. Iron Mountain Mines, Inc., 987 F. Supp. 1250, 1261 (E.D. Cal. 1997) (rejecting plaintiffs' "invit[ation] to decide whether EPA's decisionmaking was arbitrary and capricious" in the context of determining whether plaintiff is entitled to discovery on bad faith grounds). To the extent Plaintiffs' bad faith "evidence" requires this Court to adopt their legal view that aspects of the decision are irrational or arbitrary and capricious, they are inappropriately arguing the merits of their case because such arguments are irrelevant to a showing of whether the decision was made in bad faith. See NLRB v. Honaker Mills, Div. of Top Form Mills, 789 F.2d 262, 266 (4th Cir. 1986) ("Even assuming that these rulings were incorrect, [plaintiff] may not establish a sufficient case of bias merely by questioning the correctness of . . . evidentiary rulings. Rather, [plaintiff] must make a showing of bias stemming from sources outside the decisional process.") (internal citations omitted); Haltmier v. Commodity Futures Trading Comm'n, 554 F.2d 556, 562 (2d Cir. 1977) (minor factual errors insufficient to establish bias). As previously discussed, Plaintiffs only establish that they disagree with positions taken by DOI, not that DOI's positions are indefensibly arbitrary and capricious.[14/]

Plaintiffs are not entitled to discovery based on their disagreement with a legal determination made by DOI.

[14/]Indeed, it is recognized that DOI's decisionmaking authority under the IRA and IGRA requires "the Department of the Interior to consider a wide range of information" and accordingly contacts that might be "strictly taboo" in the case of a formal adjudication are permissible in the fact-finding context. Sokaogon, 961 F. Supp. at 1279.

Conclusion

Plaintiffs are not entitled to the release of privileged documents or to conduct extra-record discovery.[15/] The withheld deliberative process documents underlying the M-Opinion were never before the decision-maker and those documents are irrelevant to this Court's review of the NIGC action being challenged. Even if they were relevant, Ms. Blackwell obtained authorization from the Ethics Office to work on the M-Opinion. In sum, Plaintiffs have not made any credible showing of bias or bad faith in the decision-making process, let alone the "strong showing" that is required, Nat'l Audubon, 132 F.3d at 14, that would justify allowing discovery in this record review case. For the foregoing reasons, Plaintiffs' motion should be denied.

Dated: July 15, 2011

Respectfully submitted,

IGNACIA S. MORENO
Assistant Attorney General
Environment and Natural Resources Division

MARY E. FLEMING
United States Attorney's Office
Western District of New York

/s/ Gina L. Allery
GINA L. ALLERY
Trial Attorney
United States Department of Justice
Environment and Natural Resources Division
Indian Resources Section
P.O. Box 44378
L'Enfant Plaza Station

[15/]Should the Court nevertheless decide to order the release of the deliberative process privileged documents, it should do so in a manner that minimizes harm to the United States by placing documents withheld entirely by the deliberative process privilege (leaving the remaining privileges intact) under seal and issuing a protective order that limits disclosure to the Court, its staff, and Plaintiffs' counsel, and prohibits disclosure or dissemination of the documents to any other individuals.

Washington, D.C. 20026-4378
(202) 305-0261
Gina.Allery@usdoj.gov

Of Counsel:
Jeffrey Nelson
Department of the Interior
Office of the Solicitor
1849 C Street
Washington, DC 20240

Michael Hoenig
Staff Attorney
National Indian Gaming Commission