UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STAND UP FOR CALIFORNIA!, et al.,	)	
Plaintiffs,	)	
	)	
PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS,	)	
Plaintiffs,	)	
	)	
v.	)	
	)	**Case No. 1:12-cv-02039-BAH**
	)	**Case No. 1:12-cv-02071-BAH**
	)	**Judge Beryl A. Howell**
UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,	)	
Defendants,	)	
	)	
NORTH FORK RANCHERIA OF MONO INDIANS	)	
Intervenor-Defendant	)	

Response in Opposition to Stand Up for California's Motion to Supplement the Record and Compel Production of a Privilege Log

INTRODUCTION

The Stand Up plaintiffs' motion to supplement the record should be denied. Stand Up has offered no evidence that any of the disputed documents were actually considered by the decision-maker. Nor are the documents relevant or adverse to the decision to accept land into trust. Stand Up seeks to add to the record letters that postdate the Secretary's decision to take land-into-trust for the North Fork Rancheria of Mono Indians ("North Fork Rancheria" or "the Tribe") as well as documents that concern a separate petition from a group that uses a name

resembling the name of the federally recognized Indian Tribe, for which the decision at issue in this litigation was made.[1]

Three of the documents concern a petition submitted by a group with a name resembling the name of a federally recognized Indian Tribe, the North Fork Rancheria. Stand Up's Mem. of Pts. & Auths., 6-15 (Pls.' Mem) (ECF No. 85). Stand Up believes that these documents "bear on the question of tribal identity," id. at 2, but that characterization is incorrect—the North Fork Rancheria is a federally recognized Tribe, 49 Fed. Reg. 24,084 (June 11, 1984), 50 Fed. Reg. 6,055 (Feb. 13, 1985), and these documents relate only to an unrelated group's incomplete petition for federal recognition, a petition which would be unnecessary if the petitioners were identical to the North Fork Rancheria. Even so, Stand Up, in its prior motion to supplement, admitted that "nothing in the trust decision ROD" discussed the issues they claim are raised by these three documents. Mot. to Supplement the Administrative Record, at 12 (ECF No. 58). That admission reveals one reason why those documents were not included in the administrative record—they were not, in fact, "before" the decision-maker, either directly or indirectly.

Stand Up also contends that letters dated July 16, 2013, August 9, 2013, and November 20, 2013, belong in an administrative record for a decision that pre-dates those letters. Because the administrative record supports the September 1, 2011, decision that the land was eligible for gaming under the Indian Regulatory Act, 25 U.S.C. §2701-21, and the November 26, 2012, decision to acquire the Madera site in trust, it is not possible for the letters to have been before

[1] Stand Up has also requested that the CDC Master Plan be included in the record. During the meet and confer process, the Federal Defendants disputed Stand Up's interpretation of that document and documents that reference it, but did not make clear that it will be added to the record. The document Plaintiffs have provided with their Motion to Supplement the record (ECF. No. 85-11), will be included in the administrative record. Federal Defendants, nevertheless, do not believe the record supports Stand Up's characterization of this document or other portions of the administrative record.

the decisionmaker, either directly or indirectly, when the decisions were made.[2] See Certification of the Administrative Record, ECF. No. 83-1. Despite those uncontested facts, Stand Up alleges that it has "put forth credible, non-speculative evidence that the requested documents were known by Federal Defendants at the time they made the challenged decisions." Stand Up's Mem. In Support of Mot. to Supplement Admin Record ("Pls.' Mem.") at 1 (ECF No. 85). These letters are unrelated to administrative record and instead, relate to the claim Stand Up added after the administrative record was filed. This new, unrelated claim should not slow down the briefing for the challenged land-into-trust decision.

Stand Up also asks the Court to compel Federal Defendants to produce a privilege log. For documents outside of the administrative record no privilege log is necessary. Stand Up seeks to compel production of a privilege log or certification of deliberative process privilege for documents that are not part of the administrative record, and for that reason, the Federal Defendants respectfully request that this Court deny Stand Up's motion to compel.

LEGAL STANDARD

"[I]t is a widely accepted principle of administrative law that the courts base their review of an agency's actions on the materials that were before the agency's actions on the materials that were before the agency at the time its decision was made." Tindal v. McHugh, 945 F. Supp. 2d 111, 123 (D.D.C. 2013) (quoting IMS, P.C. v. Alvarez, 129 F.3d 618, 623 (D.C. Cir. 1997)). The D.C. Circuit has recognized three narrow instances in which supplementation of an administrative record may be appropriate: "(1) if the agency 'deliberately or negligently excluded documents that may have been adverse to its decision,' (2) if background information

[2] Stand Up contends that there was a new final decision as a result of the remand, but the Court granted remand without vacatur. Order of December 16, 2013, at 6, 8-9 (ECF No. 77).

was needed 'to determine whether the agency considered all the relevant factors,' or (3) if the 'agency failed to explain administrative action so as to frustrate judicial review.'" Id. (quoting City of Dania Beach v. F.A.A., 628 F.3d 581, 590 (D.C. Cir. 2010).

An "agency enjoys a presumption that it properly designated the administrative record absent clear evidence to the contrary." Maritel, Inc. v. Collins, 422 F. Supp. 2d 188, 196 (D.D.C. 2006). "To overcome that presumption, 'a plaintiff must put forth concrete evidence that the documents it seeks to add to the record were actually before the decisionmakers." Tindal, 945 F. Supp. 2d at 123 (quoting Marcum v. Salazar, 751 F. Supp. 2d 74, 78 (D.D.C. 2010). The plaintiff "must identify reasonable, *non-speculative grounds* for its belief that the documents were *considered* by the agency and not included in the record." Marcum, 751 F. Supp. 2d at 78 (quoting Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs, 448 F. Supp. 2d 1, 6 (D.D.C. 2006)). To show that information was withheld from the record, a plaintiff must have concrete evidence that the documents at issue (1) were known to the agency at the time it made its decision, (2) "are directly related to the decision," and (3) "are adverse to the agency's decision." Public Citizen v. Heckler, 653 F. Supp. 1229, 1237 (D.D.C. 1986). The principle that review is confined to the administrative record "exerts its maximum force when the substantive soundness of the agency's decision is under scrutiny," Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989), and consideration of extra record evidence "is the exception, not the rule." Theodore Roosevelt Conservation P'ship v. Salazar, 616 F.3d 497, 514 (D.C. Cir. 2010).

ARGUMENT

A. Stand Up's Documents Are Neither Relevant Nor Adverse to the Decision.

Stand Up seeks to supplement the record with documents that are not related or adverse to the decision to accept land into trust and, thus, are outside of the administrative record. Public

Citizen, 653 F. Supp. at 1237. Stand Up has not alleged that the absence of these documents is due to bad faith, or that their exclusion prevents effective judicial review. Id.; Fund for Animals v. Williams, 391 F. Supp. 2d 191, 198 (D.D.C. 2005) (stating what plaintiffs must show to supplement the record).

First, Stand Up contends that the "North Fork Band" documents it would add to the record are relevant "to the Secretary's Carcieri[v. Salazar, 555 U.S. 379 (2009)] determination in the record of decision to acquire the Madera Site in trust." Pls.' Mem. at 6. None of those documents, however, relate or are adverse to the Secretary's decision to accept land into trust for the North Fork Rancheria. In any event, this motion is not the appropriate place to reach the merits of Carcieri, nor, as explained below, would the North Fork Band documents be relevant to any summary judgment briefing. The record itself explains why the North Fork Rancheria was a recognized Tribe under federal jurisdiction in 1934. See, e.g., Administrative Record (AR 0041138) (2012 ROD 55). For the purposes of this motion, it is enough that the documents submitted by Stand Up are not relevant or adverse to the decision discussed in the administrative record, much less is there any proof that their exclusion was in any way deliberate or negligent. Second, North Fork contends that documents that post-date the decisions supported by the administrative record are relevant to the administrative record. For the three letters postdating the decisions certified by the administrative record, Stand Up claims the letters relate to the publication of a Federal Register notice announcing the approval of the gaming compact on October 22, 2013. Pls.' Mem. at 16. The Court should deny Stand Up's motion to supplement the administrative record with irrelevant documents.

1. The "North Fork Band" Documents Are Neither Relevant Nor Adverse to the Challenge Decisions

A letter of intent, a petition, and a letter of obvious deficiency (the "North Fork Band documents"), proffered by Stand Up, relate to an incomplete petition for federal acknowledgment by a group of individuals whom Stand Up refers to as the "North Fork Band of Mono Indians." Pls.' Mem. at 4. Nothing in these documents calls into question whether the North Fork Rancheria is a federally recognized Tribe and, in any event, the Tribe's federally recognized status cannot be disputed. See 49 Fed. Reg. 24,084 (June 11, 1984) (announcing the North Fork Rancheria's restoration to federal recognition).

Rather than having any relevancy to the North Fork Rancheria, the "North Fork Band Documents," concern an unrelated group's incomplete and unsuccessful application for acknowledgment as an Indian Tribe and thus have nothing whatsoever to do with a land into trust decision for a federally recognized Indian Tribe. One of the North Fork Band Documents is a letter of intent from Ron Goode which says nothing about the North Fork Rancheria. Another is entitled "Petition For Federal Acknowledgment." It includes a document list that the petitioner wanted the Secretary to consider. It does not discuss the North Fork Rancheria's status. The final document is a 1991 letter written describing the "obvious deficiencies and significant omissions" in the petition. The present case concerns a decision to accept land into trust on behalf of an entirely different entity, a federally recognized Indian Tribe. Indian Entities Recognized and Eligible to Receive Services From the Bureau of Indian Affairs, 79 Fed. Reg. 4748, 4751 (Jan. 29, 2014). The North Fork Band Documents are not relevant because they neither discuss that decision nor in any way concern the North Fork Rancheria.

The North Fork Band Documents Cannot Alter the Status of the North Fork Rancheria. The North Fork Band documents are also irrelevant because, even if Stand Up correctly asserts that the members of that group share a common ancestry with members of the North Fork Rancheria, it would have no effect on the status of the North Fork Rancheria. Recognition of the North Fork Rancheria of Mono Indians was restored by the Tillie Hardwick litigation (No. C-79-1710) (N.D. Cal). On issues of federal acknowledgment, the Secretary, not Stand Up, is the authority on which Tribes are federally recognized. See United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 551 (10th Cir. 2001) (Determinations about tribal recognition "should be made in the first instance by the Department of Interior since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations.") The Tillie Hardwick litigation conclusively establishes that the North Fork Rancheria was under federal jurisdiction in 1934. The administrative record makes clear that the North Fork Rancheria was under federal jurisdiction in 1934. See, e.g., 2012 ROD 55, Administrative Record (AR 0041138). The North Fork Band documents have no effect on North Fork Rancheria's status in 1934.

Stand Up seems, despite their lack of standing to assert such claims, to believe that the North Fork Band should also be recognized. Even if the North Fork Band were recognized, it would not alter the rights of the North Fork Rancheria—the "North Fork Band" documents are thus, doubly irrelevant because they have nothing to do with the North Fork Rancheria, and, even if the petition plaintiffs believed is relevant were granted, doing so would have no effect on the rights of the North Fork Rancheria.

Case law provides no support for Stand Up's position that a petitioner "must demonstrate that it, and not some other group, was under federal jurisdiction in 1934." Pls.' Mem. at 6. Butte

County v. Hogen, 613 F.3d 190 (D.C. Cir. 2010), examined "two legal propositions," neither relevant to this motion, which were "important to the disposition of [Butte County]." Id. at 194. First, an agency "must explain why it decided to act as it did" and it must "articulate a satisfactory explanation" for its action, and second, an agency should not refuse to consider evidence included in a comment. Id. In Butte County, a comment provided the Secretary with a copy of a report that "gave numerous reasons why the Tribe's land did not constitute 'restored land." Id. at 195. But the Secretary did not respond to or consider the report and the decision provided "no basis upon which we could conclude that it was a product of reasoned decisionmaking." Id. (citations omitted). The situation here could not be more different. First, unlike the Butte County plaintiffs, Stand Up did not submit the North Fork Band documents to the agency as part of their comments. Second, the documents in Butte County concerned the Tribe at issue, not another group. Third, the documents were not before the decision maker in this case, as they were in Butte County. Fourth, Butte County did not involve a plaintiff trying to add documents to the record, it concerned whether documents in the record for that case were properly considered by the agency. Butte County does not provide the Plaintiffs with any support.

Why Having Similar Names Is Especially Irrelevant. Moreover, that two groups have a similar name or that they are both in California does not demonstrate the North Fork Band documents to the North Fork Rancheria or the challenged decision. Attempting to extrapolate commonalities or deficiencies in the North Fork Band's petition, Pls.' Mem. at 6-7 ("claiming common ancestry, common history, and ties to the North Fork Rancheria") is irrelevant to whether the North Fork Rancheria was under federal jurisdiction in 1934, and this Court should not afford Stand Up the opportunity to add documents that do not remark upon or concern the

North Fork Rancheria's status under federal jurisdiction in 1934. The Secretary can recognize the differences between two different groups. James v. U.S. Dep't of Health and Human Services, 824 F.2d 1132, 1138 (D.C. Cir. 1987) (Interior "employs experts in the fields of history, anthropology and geneology, to aid in determining tribal recognition . . . weighs in favor of giving deference to the agency by providing it with the opportunity to apply its expertise."). The North Fork Band Documents are irrelevant; they are documents from another group's petition for federal acknowledgment which have nothing to do with a land into trust decision for a federally recognized Indian tribe.

The Mishewal Wappo Documents Are Irrelevant. Stand Up also errs when it claims that the United States' position in Mishewal Wappo Tribe of Alexander Valley v. Jewell, (5:09-cv-02502) (N.D. Cal) is inconsistent with this case. Pls.' Mem. at 13-15. The Mishewal Wappo plaintiffs, much like Stand Up, "conflate[d] the Alexander Valley Rancheria" with the unrecognized "Mishewal Wappo Tribe." ECF No. 85-18 at 8. Here, Stand Up has confused the North Fork Rancheria with a group that submitted an unsuccessful petition. The Alexander Valley Rancheria did hold a vote under the IRA in 1935, and as Indians living at the Alexander Valley Rancheria, they were an "Indian tribe" until such status was terminated. The Alexander Valley Rancheria was comprised of those Indians residing thereon, rather than the entirety of a larger group of Mishewal Wappo Indians. Most of the Mishewal Wappo plaintiffs descend from the larger group of Mishewal Wappo Indians, and not from the distributees of the Alexander Valley Rancheria. The Mishewal Wappo plaintiffs, therefore, are not similar to the North Fork Rancheria. Moreover, recognition of the North Fork Rancheria of Mono Indians was restored by the Tillie Hardwick litigation (No. C-79-1710) (N.D. Cal), whereas, recognition of the Mishewal Wappo plaintiffs was not. Id. Stand Up makes a flawed argument that conflates a Rancheria

with a potentially larger group of Indians. Although once restored, a Rancheria may expand or restrict its membership as it deems appropriate, the restoration of a terminated Rancheria may be effected only by undoing the termination. Thus, membership in the Mishewal Wappo group is not equivalent to membership in the Alexander Valley Rancheria. Stand Up's mistake here, is to confuse a recognized Tribe with a group that unsuccessfully petitioned for recognition over two decades ago. Contrary to the assertions of Stand Up, the existence of individuals and groups who descend from a larger group of Indians and who are not members of the North Fork Rancheria does not call into question the existence of the North Fork Rancheria now, or its status under federal jurisdiction in 1934.

Although the Mishewal Wappo case does not support the relevancy of the North Fork Band documents, the arguments made by the United States in that case, ECF No. 85-18, p. 8-14 (discussing effects of termination on Rancherias, distinguishing between Rancherias and larger Indian cultural groups, and the effect of termination of Rancherias upon other groups), aptly demonstrate the errors of Stand Up's arguments in this case.

2. The Three Letters that Post-Date the Challenged Decisions Are Neither Relevant Nor Adverse to the Challenge Decisions

The three letters post-dating the IGRA and land-into-trust decisions are irrelevant to those decisions and should not be included in the record. First, these letters, dated between July 16, 2013 and November 20, 2013, were written long after the September 1, 2011 decision that the land was eligible for gaming under the Indian Regulatory Act, 25 U.S.C. §2701-21, and the November 26, 2012, decision to acquire the Madera site in trust. Documents cannot be relevant when they do not exist at the time a decision is made. Second, North Fork alleges that these letters concern the Tribal-State compact. Pls.' Br. at 16-18. The land-into-trust decision, the

subject of the administrative record, occurred months before the Tribal-State Compact was even submitted to the Secretary, and many months before the Federal Register notice announcing the deemed approval of the Tribal-State gaming compact on October 22, 2013. See 78 Fed. Reg. 62649 (Oct. 22, 2013). Third, Stand Up could have challenged the Federal Register notice during the pendency of the remand—the challenge is unrelated to the land-into-trust decision. Instead, Stand Up waited until May 23, 2014, to challenge the Tribal-State gaming compact, weeks after the administrative record itself was filed. Stand Up asserts that documents it believes are related to a claim it first filed May 23, 2014, should be included in an administrative record filed two weeks before. Fourth, the relief sought by Stand Up for its challenge to the land-into-trust decision is independent of the relief it seeks for its new challenge to the Tribal-State compact.

This new claim cannot be part of the same administrative record that supports the land-into-trust decision, because the relief sought by Stand Up is substantially different. Stand Up's new claim deals with the publication of a Tribal-State gaming compact, and the paragraphs of that claim do not cite or mention the decisions covered by the administrative record. Second Amended Complaint, Claim 5, ¶¶ 99-104, (ECF No. 84) ("May 23, 2014 Compl."). Stand Up's May 23, 2014, Complaint adds a new request for relief related to its challenge to the Tribal-State gaming compact, asking the Court to "declare that the Secretary's decision to take no action on the compact and allow it to be considered approved after the expiration of 45 days was arbitrary, capricious, an abuse of discretion, and not in accordance with the law, and thereby set aside the Secretary's approval of the compact." May 23, 2014 Compl. at p. 28, part F. The land-into-trust decision does not rise and fall with the new claim related to the Federal Register notice of the Tribal-State gaming compact. It is independent, and the land may be in trust with or without a

Tribal-State gaming compact. This new claim, which Federal Defendants believe should not delay summary judgment briefing on the land-into trust decision (which should begin as soon as possible after this motion is resolved), should be briefed separately from the land-into trust decision and should not be, post-hoc, incorporated into a prior and independent decision to accept land-into-trust.

To show that information was withheld from the record, a plaintiff must have concrete evidence that the documents at issue (1) were known to the agency at the time it made its decision, (2) "are directly related to the decision," and (3) "are adverse to the agency's decision." Public Citizen, 653 F. Supp. at 1237. Stand Up has not accomplished any of those things. Nor has Stand Up made even a threshold showing that there was any "bad faith or improper behavior" or that the record is "so bare that it prevents effective judicial review." Fund for Animals, 391 F. Supp. 2d at 198. There is no showing that the three post-dated letters or "North Fork Band Documents" that this Court's review of the decisions covered by the administrative record will be at all impeded. For these reasons, the motion to supplement the record should be denied.

B. Stand Up's Documents Were Not Before The Decision-Maker At The Time Of The Decision

The proper question is whether Interior's decision-maker considered, directly or indirectly, North Fork Band Documents and the three post-dated letters that Stand Up seeks to add to the administrative record. It is not, as Stand Up would have it, whether documents exist, somewhere, in the agency's general files, but rather whether the documents were before the decision-maker. Stand Up's argument to add to the administrative record letters post-dating the decisions and regarding a different matter is likewise deficient.

1. The North Fork Band Documents Were Not Considered By the Decision-Maker

Stand Up's motion cannot be granted because to supplement the record, a plaintiff "must identify reasonable, *non-speculative grounds* for its belief that the documents were *considered* by the agency and not included in the record." Marcum, 751 F. Supp. 2d at 78 (quoting with emphasis Pac. Shores, 448 F. Supp. 2d at 6). Stand Up does not make this showing. It is not enough for Stand Up to assert that the documents are relevant (they are not), or were in front of the decision-maker but "were inadequately considered" (a claim not made by Stand Up). Pac. Shores, 448 F. Supp. 2d at 6. Instead, Stand Up "must prove that the documents were before the actual decisionmakers involved in the determination." Sara Lee, 252 F.R.D. at 34. There is no evidence of this. Stand Up argues that its documents are relevant and possessed by Interior but offers no evidence to show that the documents were in fact directly or indirectly considered. Id. Lacking such evidence, Stand Up proffers its own theory that, that if "documents were in BIA files somewhere" that means "they were known to the agency at the time it made its determination." Pls.' Mem. at 7-8. That is not the law; the documents must be in the file directly or indirectly considered by the decisionmakers.

The Relevant Legal Standard Is Not Merely "Possession" of a Document, the Document Must Be Before the Decision-Maker. The mere possession or production of a document does not, contrary to Stand Up's arguments, obligate an agency to include it in the administrative record, even if it is, unlike these documents, relevant. Pac. Shores, 448 F. Supp. 2d at 7. (finding that the agency was "not obligated to include every potential relevant document existing within its agency."). "A plaintiff cannot merely assert . . . that materials were relevant or were before an agency when it made its decision." Marcum, 751 F. Supp. 2d at 78 (citing Sara Lee Corp. v. Am. Bakers Ass'n, 252 F.R.D. 31, 34 (D.D.C. 2008); Pac. Shores, 448 F.

Supp. 2d at 6). A document must be before the decision maker for that specific document to be included in the administrative record. Overton Park, 401 U.S. at 420 (holding that an administrative record consists of documents before the decision-maker). Even inclusion on a citation chain in a document cited in the administrative record—and Stand Up does not allege that any of the documents are cited in the administrative record—does not establish that the document was considered directly or indirectly by the decision-maker. Grunewald v. Jarvis, 2013 WL 634495, at *1-2 (D.D.C. Feb. 21, 2013) (citing Ctr. for Native Ecosystems v. Salazar, 711 F. Supp. 2d 1267, 1277 (D. Colo. 2010)) ("consideration through citation argument stretches the chain of indirect causation to its breaking point and cannot be a basis for compelling completion of an Administrative Record.")). Simply put, again, "it is not enough for [plaintiffs] to state that the documents were before the entire [agency], but rather [plaintiffs] must instead prove that the documents were before the [agency's] decisionmaker(s)." Pac. Shores, 448 F. Supp. 2d at 6.

Not only has Stand Up failed to show that the decision-maker considered these documents, the cases they cite fail to support their claims. In Am. Wild Horse Pres. Campaign v. Salazar, plaintiffs challenged the Bureau of Land Management's approach to gelding horses and sought to supplement the record with expert reports on gelding horses. 859 F. Supp. 2d 33, 44 (D.D.C. 2012). In "timely filed comments" with the agency, the plaintiffs "relied extensively" on the expert reports. Id. The Court allowed supplementation because the plaintiffs "specifically directed the agency to [the reports] in their timely-filed comments" and just two hours after the comment period ended sent the agency the full expert declarations. Id. at 45. Stand Up has

made no such effort here.[3] Stand Up does not allege that their comments referenced the North Fork Band documents or relied specifically upon them. Likewise, in Fund for Animals v. Williams, the documents added to the administrative record were part of the agencies files for the challenged decision. 391 F. Supp. 2d 191, 196 (D.D.C. 2005). Stand Up has cited no authority which would obviate the need to show that the disputed documents were actually considered by the decision-maker. The North Fork Band documents may be in files, but so are documents for myriad petitions and decisions. None of those relate to the decisions at hand and therefore those documents are not in the North Fork Rancheria file for the challenged decisions, and that is the relevant inquiry here.

Stand Up Acknowledges That The North Fork Band Documents Were Not Discussed or Considered in the Record. In connection with the North Fork Band Documents Stand Up has admitted that "nothing in the trust decision ROD," discusses the issues they claim are raised by these documents. Mot. to . . . Supplement the Administrative Record, at 12 (ECF No. 58). By Stand Up's admission, these documents were not before the decision-maker. There is nothing more to suggest these North Fork Band Documents were considered. Moreover, their irrelevancy—they concern an entirely different group seeking federal acknowledgment, not the challenged land into trust decision—suggests that there is no reason to consider them. Stand Up has not met this Court's standard for supplementing the record: "it is not enough for [Stand Up] to state that the documents were before the entire [agency], but rather it must instead prove that the documents were before the [agency's] decisionmaker(s)." Pacific Shores, 448 F. Supp. 2d at 6.

[3] Similarly, the plaintiffs in Wilderness Society v. Wisely sought to supplement the record with documents timely submitted to the agency in conjunction with their request for Endangered Species Act listing of a plant species. 524 F. Supp. 2d 1285 (D. Colo. 2007).

Stand Up's Belief That The North Fork Band Documents Are Relevant Does Not Establish That They Were Considered. Stand Up's claims regarding these documents' alleged relevance does not bear on the pivotal inquiry of whether the documents were actually considered by the decision-maker. The documents Stand Up seeks to add to the administrative record are not documents produced in conjunction with the challenged decision. In Marcum v. Salazar, plaintiffs sought to supplement the record with guidelines withdrawn by the agency and not used during the 15 years before the challenged decision. 751 F. Supp. 2d at 80. Denying the motion to supplement with those documents, the Marcum Court found that "neither the materials' purported relevance nor plaintiffs' references to [the earlier litigation] during the permitting process constitute concrete evidence that the [agency] considered the materials, either directly or indirectly." 751 F. Supp. 2d at 80.

Stand Up also contends that the North Fork Band documents were before the decision maker because 1) some of the petitioners alleged that they had a common ancestor with some members of the North Fork Rancheria; 2) that the North Fork Band petition included a reference to a church, and that church is also mentioned in the history of the North Fork Rancheria; 3) some of the same historical acts and documents are referenced in the administrative record and the deficient petition Plaintiffs seek to add to the record. Pls.' Mem. at 9-10. None of this establishes that the North Fork Band documents were before the decision maker. Stand Up may believe that the documents are relevant, but that belief is nothing more than speculation about whether the documents were actually considered, directly or indirectly, by the decision-maker.

This Court should deny Stand Up's Motion to Supplement the Record because the documents were not before the decision-maker.

2. The Letters Written After the Decisions Were Not Before the Decisionmaker.

Stand Up also contends that letters dated July 16, 2013, August 9, 2013, and November 20, 2013, belong in an administrative record for decisions made in November of 2012 and September of 2011. The administrative record is certified for "both the September 1, 2011 decision pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq., and the November 26, 2102 decision to acquire" the Madera Site in trust. Certification of the Administrative Record, Dkt. No. 83-1. The three letters are unrelated to the decision to accept land-into-trust and instead relate to the new claim plaintiffs added to an amended complaint filed on May 23, 2014. There is no certified administrative record for the publication of the gaming compact in the Federal Register, and this new, unrelated claim should not be used to slow down briefing on the land-into-trust dispute.

Stand Up attempts to remedy its problem by claiming that the record was reopened because of the Court granted the Federal Defendants' request for a limited remand without vacatur. Pls.' Mem. at 18. This position is not supported by the remand order. Order of December 16, 2013. The Court recognized that "plaintiffs seek more than a limited remand, asking the Court to vacate the entire trust determination, of which the conformity determination is only a small piece." Id. at 6. The remand was for the narrow purpose of remedying a procedural error, id. at 6-7, related to the Clean Air Act. The Court did not vacate the land-into-trust decision. Moreover, even if the record was reopened, it was not reopened to add documents that concern a different matter, the Tribal-State gaming compact.

The three post-dated letters are relevant to the claim added to Stand Up's most recent complaint, but not the IGRA or land-into-trust decisions. This new claim raises a separate question, concerning a separate alleged final agency action. See Amador County v. Salazar, 640

F.3d 373 (D.C. Cir. 2011). Federal Defendants will consult with the other parties about how to proceed with this claim. Although the approval of the Tribal-State Compact was announced by the Federal Register on October 22, 2013, Stand Up has only now decided to challenge the publication of the Compact. The administrative record does not address the publication of the Tribal-State compact. Stand Up's new challenge to the Tribal-State compact should not delay the underlying challenge to the land-into-trust dispute. The remedies for these two claims are independent. The Madera Site may be held in trust for the North Fork Rancheria with or without a Tribal State compact. And the Tribal-State Compact could be agreed to and approved with or without holding the Madera Site in trust.

There is no evidence that three letters, each of which postdated the decisions addressed by the administrative record, were before the decision-maker for the IGRA land-into-trust determination.

C. A Privilege Log is Not Necessary for Materials That Are Not Part of the Administrative Record.

"Deliberative documents are excluded from the [administrative] record because, when a party challenges agency action as arbitrary and capricious, the reasonableness of the agency's action 'is judged in accordance with its stated reasons.'" Nat'l Ass'n of Chain Drug Stores v. HHS, 631 F. Supp. 2d 23, 27 (D.D.C. 2009) (quoting In re Subpoena Duces Tecum Served on Office of Comptroller of Currency (In re Subpoena I), 156 F.3d 1279, 1279 (D.C. Cir. 1998). "[T]he actual subjective motivation of agency decision makers is immaterial as a matter of law – unless there is a showing of bad faith or improper behavior." In re Subpoena I, 156 F.3d at 1279. Deliberative materials and non-record materials are, as a matter of law in this Circuit, not a part of the administrative record. In re Subpoena I, 156 F.3d at 1279; Chain Drug Stores, 631 F.

Supp. 2d at 27-28 ("As they are not a part of the administrative record to begin with, defendants' pre-decisional deliberative documents do not need to be logged as withheld from the administrative record.").

It is well established that documents containing internal agency deliberations need not be included in the administrative record. See Norris & Hirschberg v. SEC, 163 F.2d 689, 693 (D.C. Cir. 1947) ("Internal memoranda made during the decisional process . . . are never included in a record."); Fund for Animals, 391 F. Supp. 2d at 197 (an agency may exclude from an administrative record material that "reflects internal deliberations"). This principle derives from the "arbitrary or capricious" standard for judicial review under the APA. *See* U.S.C. § 706(2)(A). Under that standard, the role of the federal courts is to judge the agency action "based on an agency's stated justification, not the predecisional process that led up to the final, articulated decision." Ad Hoc Metals Coal. v. Whitman, 227 F. Supp. 2d 134, 143 (D.D.C. 2002). That predecisional process is immaterial to the question before the Court. In re Subpoena I, 156 F.3d at 1279.

Courts have long recognized the importance of precluding from judicial review information that reveals the internal deliberative process. See United States v. Morgan, 313 U.S. 409, 422 (1941). And the D.C. Circuit has consistently upheld the exclusion of documents reflecting deliberations from an administrative record. See PLMRS Narrowband Corp. v. FCC, 182 F.3d 995, 1001-02 (D.C. Cir. 1999) (videotape of agency meeting not part of record); New Mexico v. EPA, 114 F.3d 290, 295 (D.C. Cir. 1997) (denying motion to supplement the record with documents summarizing pre-decisional policy discussions between agencies); Kan. State Network v. FCC, 720 F.2d 185, 191 (D.C. Cir. 1983) (granting motion to strike transcript of

agency deliberations from the record); Nat'l Courier Assoc. v. Bd. of Governors of the Fed. [not ital] Reserve Sys., 516 F.2d 1229, 1242-43 (D.C. Cir. 1975) (denying motion to supplement).

Stand Up contends that the Federal Defendants "position is unclear and evasive regarding whether documents that are part of the administrative record were withheld." Pls.' Mem. at 19. The Federal Defendant's position is neither unclear or evasive, but rather could not be more precise: the administrative record consists of the documents certified by the agency as being part of the administrative record. It is not necessary to provide Stand Up with a log of every document ever generated by the Department of the Interior, in order to convince Stand Up that the Federal Defendants are not "shielding documents from plaintiffs and this Court without accountability by asserting unidentified documents need not be listed if they claim they are not a part of the record." Pls.' Mem. at 20. Stand Up's standard is vague and would require Interior to identify every document that it deemed not part of the record—an impossible burden.

This Court rejected the need to impose the burden of identifying every document that is not a part of the administrative record. When the administrative record is certified, it is not necessary to provide an additional certification. In Blue Ocean Institute v. Gutierrez, the Court explained that "production of the materials [plaintiff] seeks would transform the process of judicial review of administrative decisions greatly even if limited to specific instances of claimed deficiencies in the administrative record." 503 F. Supp. 2d 366, 372 (D.D.C. 2007). In that case, plaintiffs sought to have the agency catalogue agency reports, minutes meetings, notes, emails, and records of telephone conversations reflecting internal deliberations among government staffers and scientists. Id. at 368, 371-72. The Court held that the agency did not need to catalogue all of these documents even if the agency would have asserted the deliberative process privilege to protect them, because it would create an unnecessary burden, even it were only for a

limited number of documents. Id. at 372. Stand Up's argument that Interior has not properly justified these withholdings is incorrect. Interior is not required to certify that documents are properly withheld once it has certified the administrative record and excluded these documents. See Chain Drug Stores, 631 F. Supp. 2d at 27-28. Fundamentally, an "agency enjoys a presumption that it properly designated the administrative record absent clear evidence to the contrary." Maritel, Inc. v. Collins, 422 F. Supp. 2d 188, 196 (D.D.C. 2006).

To the extent that Stand Up contends that the Interior must produce a privilege log for all deliberative materials and documents withheld from the record, or to certify that the documents are withheld subject to the deliberative process privilege and deemed by Interior to not be a part of the administrative record, the Court should deny the motion.

CONCLUSION

Federal Defendants respectfully request that the Court deny Stand Up's motion to supplement the record and deny their motion to compel production of a privilege log.

Dated: June 23, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of June, 2014, I electronically filed the foregoing document with the clerk of court by using the CM/ECF system which will send notice of electronic filings to all counsel of record. Copies of the Administrative Record and this Filing will be sent to all counsel of record:

Dated: June 23, 2014

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