IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STAND UP FOR CALIFORNIA!, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	Civil Action No. 1:12-cv-02039-BAH Consolidated with: Civil Action No. 1:12-cv-02071-BAH Honorable Beryl A. Howell
PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	

REPLY MEMORANDUM IN SUPPORT OF MOTION TO SUPPLEMENT ADMINISTRATIVE RECORD AND COMPEL PRODUCTION OF A PRIVILEGE INDEX

The Court should grant plaintiffs' motion to supplement the administrative record with the North Fork Band Documents and the letters from the California Secretary of State.[1] All of these documents are relevant and adverse to the challenged decisions. Moreover, all of the documents are within the Department's own files. An agency cannot refuse to look within its own file cabinet when it knows that it contains documents relevant to its decision.

[1] The federal defendants have agreed to supplement the record with the CDC master plan. [Docket 89, p. 2 fn. 1.] Plaintiffs, therefore, respectfully ask the Court to set a date by which time the federal defendants must add this document, and any other documents the Court determines should be added, to the record.

In its memorandum opinion, this Court determined that the purchase of the North Fork Rancheria for the North Fork Band of landless Indians is relevant to resolving whether the North Fork Rancheria of Mono Indians ("North Fork Tribe" or "applicant Tribe") was under federal jurisdiction in 1934. The disputed documents address whether the applicant Tribe is the same group of Indians that resided at the North Fork Rancheria and voted under the Indian Reorganization Act ("IRA") in 1935 and the same Indians on whose behalf land was purchased in 1916. The federal defendants conclude, without explanation, that the applicant Tribe descends from the Indians at the North Fork Rancheria who voted in 1935, but the federal defendants also know that a group of Indians identified as the North Fork Band of Mono Indians ("North Fork Band") claims to descend from the North Fork Rancheria. The North Fork Band Documents undermine the conclusion that the applicant Tribe qualifies for trust land.

Similarly, the federal defendants concede that the letters from the California Secretary of State are relevant to the approval of the tribal-state gaming compact. These letters demonstrate that contrary to the Indian Gaming Regulatory Act's ("IGRA") requirements, the compact was approved before the State of California had legally entered into the compact.

Both the federal defendants' and the Tribe's bulwark against supplementation is their argument that none of the documents were before the decision makers at the time the decisions were made. They make the same arguments they made in opposition to plaintiffs' first motion to supplement the record, which the Court denied without prejudice in light of granting the remand and staying this litigation. But the procedural posture of this motion is different.

When the federal defendants successfully moved this Court for remand and stayed the litigation, the trust decision became not final, and the record was reopened for further action on remand. Therefore, all of the documents plaintiffs request in this motion were presented to the agency before a new final decision was made. In fact, in May 2014, the federal defendants added four categories of documents to the administrative record, including documents created long after the November 2012 trust decision challenged. The federal defendants cannot have it both ways. If the November 2012 decision is final, it must be adjudged on the record at that time,

including the Secretary's failure to comply with the Clean Air Act ("CAA"). Or, if the November 2012 decision was rendered not final by the Secretary's request for a remand to fix her trust decision, November 2012 is not the critical date.

Although the Court granted the federal defendants' motion to remand without vacatur, it is the Secretary's action on remand that generates the new final decision. The final agency action plaintiffs challenge is the trust acquisition for the Tribe for gaming. That action is based on a number of subsumed decisions, including compliance with NEPA, IGRA, and the CAA. None of these agency decisions are final or subject to APA challenge independently of the trust acquisition. The trust decision cannot stand without complying with the CAA, and the Secretary's CAA decision is not a final agency action that can be challenged apart from the trust acquisition.

The federal defendants have used the remand, where it has suited them, to not only correct their mistakes, but also to add documents favorable to decisions that had already been made. At the same time, the federal defendants have rejected the addition of documents in their own files that plaintiffs brought to their attention a year before the post- remand decision and the certification of the revised administrative record. It cannot be that an agency is allowed a remand to correct its mistakes without disturbing the decisions and in the process add support after-the-fact to those same decisions. An agency cannot skew the administrative record to exclude adverse documents. Accordingly, plaintiffs respectfully request this Court to grant their motion to supplement the administrative record.

Plaintiffs also request that the Court require the federal defendants to produce a privilege index identifying any documents withheld from the decision file. The federal defendants misstate the issue by claiming that they need not prepare a privilege log for deliberative documents. Plaintiffs do not argue that the federal defendants must include deliberative materials or documents not in the record in the privilege log; plaintiffs instead ask whether any whole documents were withheld from the record, and if so, what the basis of withholding is. The federal defendants redacted privileged information from 113 documents they produced as part of

the administrative record, but refuse to state whether any whole document has been withheld. The Secretary cannot unilaterally avoid the privilege log requirement by refusing to state whether any privileged documents have been withheld or by claiming wholesale that everything not produced is not part of the administrative record. Unless the federal defendants categorically represent to the Court that no documents were withheld from the record, they should be compelled to produce a privilege log.

I. SUPPLEMENTATION OF THESE ADVERSE DOCUMENTS IS APPROPRIATE AND NECESSARY FOR ADEQUATE JUDICIAL REVIEW[2]

Supplementation of the administrative record is proper in this circuit in at least three different circumstances: "(1) if the agency deliberately or negligently excluded documents that may have been adverse to its decision, (2) if background information 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." *American Wild Horse Preservation Campaign v. Salazar*, 859 F. Supp. 2d 33, 42 (D.D.C. 2012) (quoting *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010)). Each of these circumstances is present here.

A. The North Fork Band Documents Are Adverse to the Agency's Determination and Were Improperly Excluded from the Administrative Record

1. The North Fork Band Documents were known to the agency at the time it made its decision

The federal defendants' argument that the North Fork Band Documents were not considered should be rejected. While the general rule states that the administrative record consists of documents considered by the agency, supplementation is appropriate where parties "'demonstrate unusual circumstances justifying departure from this general rule.'" *American Wild Horse*, 859 F. Supp. 2d at 42 (quoting *City of Dania Beach*, 628 F.3d at 590). In *American*

[2] For the Court's convenience, relevant materials from the administrative record are attached to this submission.

Wild Horse, this Court rejected the argument that the documents plaintiffs sought should not be part of the record because they were not considered by the agency in making its decision. *Id.* (finding that because the documents "were already known to the BLM, were directly related to and adverse to the decision, [they] *should have been considered as part of the AR*" (emphasis added)); *see also Fund for Animals v. Williams* (D.D.C. 2005) 391 F. Supp. 2d 191, 199 ("[T]he defendants cannot justify the exclusion of these highly relevant, adverse documents from the administrative record simply by claiming that the documents were not 'directly or indirectly considered' by the agency."). Based on all the factors in *American Wild Horse*, this Court found that "[i]t thus seems highly unlikely that the Nevada State Director of the BLM, who requested that gelding be included in gather plans in Nevada, was not aware of the Expert Declarations that offered a strong critique of the practice of gelding." *Id.* at 44.

The federal defendants' contention that they were not aware of the North Fork Band Documents at the time of the decision is equally unlikely.

a. Plaintiffs informed the agency in a timely manner of the existence of the North Fork Band Documents

Both the federal defendants and the applicant Tribe attempt to distinguish this Court's ruling in *American Wild Horse* from this litigation by arguing that plaintiffs did not refer to the North Fork Band Documents in any comment and the documents "were not brought to the agency's decision at any point in the decisionmaking process." [Docket 88, p. 6; Docket 89, p. 14 ("The Court allowed supplementation because the plaintiffs 'specifically directed the agency to [reports] in their timely filed comments . . .'" (quoting *American Wild Horse*, 859 F. Supp. 2d at 45).] This Court, however, should find that plaintiffs did refer to the North Fork Band Documents in a timely manner.

Though plaintiffs filed their original complaint on December 19, 2012 [Docket 1], it took the federal defendants until April 26, 2013, to lodge and certify the administrative record. Plaintiffs first informed the federal defendants of the North Fork Band Documents and of the fact

that these documents were in BIA files on May 16, 2013 [Docket 58-1], less than a month after plaintiffs had their first look at the administrative record and a year before the post-remand decision was certified on May 5, 2014. On July 10, 2013, plaintiffs filed a motion to compel supplementation of the record with these documents. [Docket 58.] After plaintiffs informed the federal defendants of the existence of these relevant and adverse documents, which were in the federal defendants' own files, the federal defendants successfully moved for remand and a stay of this litigation to correct errors under the Clean Air Act [Docket 77 (granted December 16, 2013).] On the same day that the Court granted the federal defendants' motion, the Court denied plaintiffs' motion to supplement the administrative record, without prejudice "in light of the Court's" granting of the federal defendants' motion for remand. Minute Order of December 16, 2013.

The federal defendants' motion for remand asked for the opportunity to complete the trust decision, effectively conceding that the 2012 decision was not the final decision to be adjudged by the Court. *See* 5 U.S.C. § 704 (stating that the court may only review a "final agency action"). The fact that the Court remanded without vacating the 2012 decision does not affirm its finality, for if it did, the Secretary's CAA compliance, which post-dates 2012, could not be considered in this APA challenge. Having granted the federal defendants' request for remand to comply with the CAA, the decision was necessarily no longer final and the record no longer closed. The Secretary had the discretion on remand to deny the trust decision if the CAA or some other issue required it, just as the record was reopened to include documents submitted during remand, including but necessarily not limited to those on which the federal defendants now rely.

The revised administrative record did not simply add documents created in connection with the CAA, but also added documents predating the remand. Among these earlier documents, for example, is the Tribe's Amended and Restated Request for a Secretarial Two-Part Determination and accompanying exhibits seeking to establish the Tribe's connection to the Rancheria [AR NEW 0000125, 0000191.] In refusing to supplement the record with the North

Fork Band Documents, the federal defendants take the position that they are free to add documents favorable to their decision, but may exclude documents adverse to it. *See Fund for Animals v. Williams*, 391 F. Supp. 2d at 197 (stating that the agency "may not skew the record in its favor by excluding pertinent but unfavorable information").

The federal defendants' narrow view of the remand as related only to issuing the missing notices under the CAA is further weakened by the documents added pursuant to the CAA decision. For instance, the federally recognized Table Mountain Tribe did not receive the required notice under the CAA and was deprived of the opportunity to comment on the draft conformity determination. [Docket 71, p. 8] After receiving notice during the remand, Table Mountain provided extensive comments on the draft conformity determination and argued that the federal defendants must issue a new conformity determination based on updated standards. [AR NEW 0001573-0001585.]

Apart from Table Mountain's comments being added to the record, a response to those comments explaining why a new conformity determination was not required was also added to the record. [AR NEW 0001945-0001955.] By adding documents created in 2014 to justify a decision made in 2012, the federal defendants have acted, when it suited them, as though the administrative record was reopened and there was no final decision during the remand. Plaintiffs, thus, reject the federal defendants' characterization of the remand as merely allowing them to correct their own error and proceed with litigating the merits as though their error never occurred. The federal defendants have added documents in support of a 2012 decision related to the fee-to-trust transfer but have excluded documents adverse to that transfer.

For all practical purposes, this case is very similar to *Butte County, California v. Hogan*, 613 F.3d 190 (D.C. Cir. 2010), where the Court found the National Indian Gaming Commission violated the APA by ignoring documents submitted by Butte County that undermined the Commission's 2003 opinion that the land at issue qualified under the restored lands exception of IGRA. *Id.* at 193. In 2006, Butte County submitted documents that challenged the opinion, and the final agency decision was not made until 2008. *Id.* The primary difference between *Butte*

County and this case is that Butte County created the documents and presented them to the agency two years before final decision (but three years after the issue was considered by the Solicitor); here, the documents were in the agency's files the entire time, some were created by the agency (not plaintiffs), and all were presented by plaintiffs to the Secretary at least one year before the new "final" decision.

Plaintiffs informed the federal defendants of the existence of the North Fork Band Documents at their earliest opportunity, and the federal defendants knew that any renewed motion to supplement the record would contain a request that this Court order the record supplemented with these documents. Therefore, if this Court finds that these documents are relevant and adverse, it should not allow the agency, which was given nearly five months to correct its own errors, to claim it was unaware of these documents.

b. Plaintiffs have put forth credible, non-speculative evidence that the North Fork Band Documents were known to the agency at the time of the decision

Even without considering the impact of the remand, the Court should find that the federal defendants knew of the North Fork Band Documents at the time the decision to take the Madera Site into trust was made.

In addition to informing the federal defendants of the North Fork Band Documents in a timely manner, plaintiffs have presented credible, non-speculative evidence that the federal defendants remained studiously ignorant. For reasons discussed at length in plaintiffs' motion, it seems highly unlikely that the BIA and the Secretary, experts in distinguishing among Indian groups [Docket 89, p. 9], were not aware of documents in their own files directly bearing on the issue of whether the applicant Tribe is in fact the North Fork Band of landless Indians for which the Rancheria was purchased and whether the applicant Tribe was in fact under federal jurisdiction in 1934.[3]

[3] The federal defendants misunderstand both Section 19 of the IRA and *Carcieri v. Salazar* in claiming that "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.'" [Docket, p. 7.] *Carcieri* makes clear that

A draft version of the IRA ROD in the administrative record states, "[T]he *historical evidence* and *contemporaneous federal records* unambiguously demonstrate that the Tribe is a recognized tribe which was under federal jurisdiction when the [IRA] was enacted in 1934." [AR 0000779.] It is unclear what contemporaneous federal records are referred to because the decision in the final IRA ROD was based solely on the Haas Report. [AR 0000779.] Nevertheless, the North Fork Band Documents contain precisely the type of "historical evidence" and "contemporaneous federal records" that the Secretary claims to have considered.

As plaintiffs have already shown, there are numerous references in the administrative record to the Mono Indians' relationship with the federal government, the Rancheria's purchase for the North Fork Band of landless Indians, and the subsequent termination of the Rancheria. [Docket 85, pp. 8-11.] The North Fork Band Documents rely on those same facts but in reference to a different group of Indians. [Docket 85, pp. 9-10] Yet the federal defendants now protest that it is enough to simply assert they did not actually consider these documents contained in their own files when they determined that the Tribe was "unambiguously" under federal jurisdiction based on documents and records relating to the North Fork Band, Mono Indians, and the North Fork Rancheria. *See Envtl. Def. Fund, Inc. v. Blum*, 458 F. Supp. 650, 661 (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" (internal quotations omitted)).

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federal recognition of an Indian tribe does not mean that the applicant Tribe was under federal jurisdiction in 1934. The Narragansett Tribe became a federally recognized Indian tribe in 1983. *Carcieri v. Salazar*, 555 U.S. 379, 384 (2009). Nevertheless, the Tribe did not make the required showing that it was under federal jurisdiction in 1934. *Id.* at 395. Recent recognition is not part of the analysis on the jurisdiction issue. The Secretary is limited "to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Id.* at 382. The North Fork Tribe claims to be members of a tribe under jurisdiction in 1934 based on the purchase of the Rancheria and the 1935 vote. For such a claim to be valid, it must be to the exclusion of any other group claiming ties to the Rancheria's purchase or the vote. Quite simply, the applicant Tribe must show that it is the same Tribe that was under jurisdiction in 1934. Absent such a showing, the Secretary cannot satisfy *Carcieri*'s mandate.

Finally, the federal defendants' assertion that the documents were not considered must be viewed with skepticism in light the agency's expertise. The federal defendants state that the agency "employs experts in the fields of history, anthropology and genealogy, to aid in determining tribal recognition." [Docket 89, p. 9 (quoting *James v. U.S. Dep't of Health and Human Services*, 824 F.2d 1132, 1138).] Consequently, "The Secretary can recognize the differences between two different groups." [*Id.* at p. 9.] This claim suggests that the decision makers knew or should have known of the North Fork Band Documents in determining the difference between the North Fork Band and the applicant Tribe,[4] or the differentiation that should have been made during the administrative process is being made by litigation counsel, after the fact, in opposition to plaintiffs' motion.

The federal defendants' position is contradictory. On the one hand, they expect the Court to defer to their expertise and uphold the presumption of regularity. On the other hand, they do not want to provide the Court with the facts to which this expertise was applied so that the Court can review their decision. *See James*, 824 F.2d at 1138 (stating that deference to the agency is appropriate to "provid[e] it with the opportunity to apply its expertise and create a "factual record . . . at the administrative level that would most assuredly aid in judicial review . . ."). The federal defendants are asking this Court to explain in litigation the justification that the Secretary failed to address in the IRA ROD. Rather, the Court should find that the federal defendants

[4] The letter of intent to seek federal acknowledgement for the North Fork Band was sent to the BIA in 1983, the same year of the *Hardwick* stipulation, which resulted in the applicant Tribe's federally recognized status. Given the emphasis in this litigation on the Tribe's recognized status, which was purportedly terminated by the Rancheria Act and restored in the *Hardwick* case, it is difficult to imagine that such experts did not consider information in the North Fork Band Documents to distinguish between groups claiming ties to the Rancheria. Disputes regarding tribal identity in connection with a piece of land and disputes among different Indian groups claiming ties to the same Rancheria have not been uncommon, especially where the development of a casino is at issue. *See, e.g., Butte County v. Hogen*, 613 F.3d at 193 (discussing County's argument that the applicant tribe was not the same tribe as the historic tribe that allegedly occupied the gaming site); *Williams v. Gover*, 490 F.3d 785, 787 (9th Cir. 2007) (dispute over whether original group of Indians residing at the Rancheria was part of the federally recognized tribe at the Rancheria following *Tillie Hardwick*); *Pitt River Home and Agr. Co-op Ass'n v. U.S.*, 30 F.3d 1088 (9th Cir. 1994) (discussing a dispute over which Indian group was the rightful beneficial owner of land taken into trust in 1940).

knew of or should have known of these documents, and consequently, the documents must be included in the administrative record.

2. The North Fork Band Documents are related to the decision

The North Fork Band documents are relevant to the tribal identity, if any, of the North Fork Band of landless Indians, for which the Rancheria was purchased, and the tribal identity, if any, of the Indians at the Rancheria that voted to reject the application of the IRA to the Rancheria in 1935. Plaintiffs do not claim that the North Fork Band is actually, or should be, a federally recognized tribe. Plaintiffs do not dispute or seek to alter the federally recognized status of the applicant North Fork Tribe. Plaintiffs do, however, reject both the federal defendants' and the Tribe's claim that the applicant Tribe was a recognized Indian tribe under federal jurisdiction in 1934.

According to the federal defendants, the North Fork Band Documents cannot be relevant because, "The *Tillie Hardwick* litigation conclusively establishes that the North Fork Rancheria was under federal jurisdiction in 1934." [Docket 89, p. 7.] The Tribe states, "It is beyond reasonable dispute that the North Fork Tribe that is participating in this litigation is the Tribe whose recognition was restored by [*Tillie Hardwick*] and which is now legally recognized by the United States." [Docket 88, p. 8.] Again, plaintiffs do not dispute that the Rancheria was under federal jurisdiction in 1934, nor do plaintiffs dispute that the Tribe is now legally recognized by the United States. Plaintiffs dispute the implication that the Tribe's restoration means that it is a recognized tribe under jurisdiction in 1934. Such an argument is neither legally nor factually accurate.

In making the decision to take the Madera Site into trust, the Secretary was required to determine that Tribe satisfied the first definition of "Indian" in Section 19 of the IRA. Under *Carcieri*, this requires determining that the applicant Tribe was a recognized tribe under federal jurisdiction in 1934. *Carcieri*, 555 U.S. at 382. Restoration of the Tribe's federal recognition, however, focuses on a different time period – the period surrounding termination under

California Rancheria Act ("CRA") and the restoration of "Indian" status following *Tillie Hardwick*. Not only are two separate time periods involved, but the Indians connected to each event might be made up of entirely different and unrelated groups.

As plaintiffs have already discussed, the CRA terminated "Indian" status rather than tribal status because the tribal make-up of Indians at Rancherias could not be determined. [Docket 85, p. 13.] The Department of the Interior ("DOI") took this same position in the Alexander Valley case and rejected the Mishewal Wappo Tribe's argument that the BIA violated its obligation to the tribe by failing to get the tribe's approval to terminate the Rancheria. "[T]ermination under the CRA did not depend upon establishing a tribal membership roll. . . . [T]ermination did not require consent of tribal members, as opposed to the approval of a majority of distributees" – the individual Indians residing at the Rancheria [RFJN, Ex. 2, p. 10.].

Under the CRA, the Indian status of the individual Indians residing at Rancherias was terminated, and the Rancheria property was distributed in fee to individuals, without regard for their tribal identity or for whatever group the Rancheria was originally purchased. *See Williams v. Gover*, 490 F.3d 785, 787 (9th Cir. 2007). The *Tillie Hardwick* litigation restored the Rancheria and the distributees "to the same status they possessed prior to the distribution of the assets of these Rancherias under the California Rancheria Act . . . ." [AR 0001065.]

The subsequent restoration of "tribal recognition" built upon the restoration of the status of the individuals residing at the Rancheria – the distributees. As pointed out by the DOI in the Alexander Valley case, restoration was really an independent recognition event that looked to the distributees under the CRA rather than back to any tribal identity that existed prior to the CRA. [RFJN, Ex. 2, p. 4 fn. 8 (stating that "such restoration [of a tribe] would need to *begin* with the descendants of those individuals whose Indian status was terminated under the CRA, not any larger group"). The DOI further pointed out, "by 1951 only one family and one non-Indian squatter lived on the Rancheria, and by the time of termination, there were only two adults who could receive Rancheria property. That evidence does not prove federal recognition of a tribal

entity apart from those individuals who resided on the Alexander Valley Rancheria." [RFJN, Ex. 2, p. 5.]

The restored tribe need not be the original group at the Rancheria that voted in 1935 or for which the Rancheria was purchased. These issues are independent of each other. This was the issue in *Williams*. In *Williams*, members of a group claiming to be the original Mooretown Rancheria tribe, for which the land was purchased and who voted in 1935, sued the BIA for its alleged role in depriving this group of membership status in the federally recognized Mooretown Rancheria tribe. The district court dismissed the case, and the Ninth Circuit affirmed. The dispositive principle in the case was the authority of an Indian tribe to define its own membership as it chose. *Williams*, 490 F.3d at 789.

Plaintiffs in *Williams* "claimed that they are descended from people who were named as members of the Mooretown Rancheria Indian tribe in either a 1915 census or a 1935 tribal voter list. *Id.* at 787. At the time of the CRA, however, two families that were not part of this original band were living on the Rancheria and voted for its termination. *Id.* at 788. In 1979, the Mooretown Rancheria became a plaintiff in the *Hardwick* case, and like the North Fork Rancheria, the Mooretown Rancheria was subsequently restored as part of the *Tillie Hardwick* stipulation. In 1987, the Mooretown Rancheria decided to form a tribal government, which "consisted of the four people to whom Mooretown Rancheria was distributed upon termination in 1959, their dependents, and lineal descendants of those distributees and their dependents." *Id.* at 788. This decision "locked out" the plaintiffs from tribal membership. *Id.* "[A]lthough plaintiffs are descended from people who have lived at Mooretown Rancheria for a very long time, they lack the rights of full members of the Mooretown Rancheria tribe." *Id.*

The nature of the "restoration" under *Tillie Hardwick* shows that there is no inevitable connection between a tribe restored and federally recognized as a result of *Tillie Hardwick* and the group of Indians that voted on the IRA in 1935 or for whom a Rancheria was originally purchased. The former and the latter need not be related at all.

Because the applicant North Fork Tribe's restoration does not speak to the time period at issue under *Carcieri*, the restoration does not make the North Fork Band Documents irrelevant as both the federal defendants and the Tribe contend. With that confusion stripped away, it is difficult to imagine how documents relating to a group separate from the applicant Tribe but claiming a connection to the Rancheria's purchase and termination are not relevant to determining whether the applicant Tribe – not some other group – is a recognized tribe under federal jurisdiction in 1934.

3. The North Fork Band Documents are adverse to the determination

The determination at issue in this case was based on a single document, the Haas Report, which simply shows that four Indians at the Rancheria voted to reject the application of the IRA at the Rancheria. But as plaintiffs discussed, the Haas Report cannot carry this weight or serve as a convenient shortcut for making the required *Carcieri* determination. The connection between a tribe restored to federal recognition and the group of Indians that voted on the IRA in 1935 is not inevitable. *See Carcieri*, 555 U.S. 379; *Williams*, 490 F.3d 785. The history of Rancherias in California – from their purchase for landless Indians to their termination and restoration – shows that a currently recognized tribe is not necessarily comprised of "members of any recognized tribe under federal jurisdiction" in 1934. 25 U.S.C. § 479. Because the North Fork Band Documents show that the reliance on the Haas Report alone was unreasonable, they are adverse to the Secretary's determination.

Both the federal defendants' and the Tribes' response is to mischaracterize the DOI's position in the Alexander Valley case. In that case, the DOI argued that the only entity recognized by the 1935 election was the Rancheria. [RFJN, Ex. 3, p. 2 n. 5] To the extent that a tribe may have been recognized at the Rancheria, it was merely a group of adult Indians residing at the Rancheria, rather than any specific tribal group. [RFJN, EX. 3, p. 2.] No larger tribal group was recognized. [RFJN, Ex. 2, p. 4.] There is, therefore, no way to conclude that, because four Indians voted at the North Fork Rancheria in 1935, the applicant North Fork Rancheria of Mono

Indians, recognized in 1983 and organized in 1996, is a recognized tribe under federal jurisdiction in 1934. *See Carcieri*, 555 U.S. at 395 (stating that federal recognition of the Narragansett Tribe in 1983 was distinct and separate from whether the Tribe was under federal jurisdiction in 1934).

According to the federal defendants, "Stand Up makes a flawed argument that conflates a Rancheria with a potentially larger group of Indians." [Docket 89, p. 10] This, however, is exactly what the federal defendants are doing. They conflate the federally recognized North Fork Rancheria of Mono Indians, recognized in 1983, with the Indians residing at the North Fork Rancheria in 1935. Just as the Mishewal Wappo Tribe was not recognized as the result of the vote of the residents of the Alexander Valley Rancheria, the applicant North Fork Tribe could not have been so recognized. Unable to establish recognition in 1934, it is impossible to conclude that the applicant Tribe was a recognized tribe under federal jurisdiction in 1934 solely on the basis of the 1935 election.

The mere presence of a group on the Haas Report is insufficient to make the required determination. The North Fork Band Documents raise a significant question that a group of Indians other than the applicant Tribe was the group voting at the Rancheria in 1935.[5] More likely, the North Fork Band Documents show that there was no specific tribe under federal jurisdiction in 1934; there was a group of Indians residing at the North Fork Rancheria and no distinct tribe existed at that time.

[5] The Tribe's claim that the administrative record contains evidence that the Rancheria's purchase was for the North Fork Tribe [Docket 88, p. 7-8] further illustrates plaintiffs' point. The Tribe, for example, provided the federal defendants with excerpts from documents to show the 1916 "purchase of the North Fork Rancheria was on behalf of 200+ *North Fork Mono*." [AR 0041113 (emphasis added).] The North Fork Band also claims to be Mono, so even if there was such evidence – a contention that plaintiffs do not accept – it does not distinguish between groups of North Fork Mono or establish that such a group was in fact a tribe.

B. The Three Letters from the California Secretary of State Should Be Added to the Administrative Record

The federal defendants concede that the requested letters are relevant to plaintiffs' new claim alleging the Secretary violated IGRA by publishing the approval of the tribal-state compact in the Federal Register. [Docket 89, p. 17]. Both the federal defendants and the Tribe, however, contend that plaintiffs' new claim is somehow an "unrelated claim that should not be used to slow down briefing on the land-into-trust dispute."[6] [Docket, 89 p. 17; Docket 88, p. 17.]

Production of documents relevant to the Secretary's decision to publish the approval will not "slow down" the briefing in this case. The record is far from voluminous, consisting of maybe a few hundred pages, most of which consist of the compact itself. Nor could the record be complex. There is no record of decision, and because there was no public comment period, very few letters, other than those plaintiffs asked to be included in the record, are likely to exist. The federal defendants cannot reasonably claim that production of these few hundred pages will delay these proceedings. Given that summary-judgment briefing has not begun, any delay would be of the federal defendants' own making. The letters plaintiffs asked to be added are properly part of the administrative record supporting the Secretary's decision to allow the compact to go into effect, and they must be produced.

The federal defendants now argue that they need not "supplement" the record with these documents because the compact claim has a separate record. That argument ignores the basic problem plaintiffs are trying to address – i.e., plaintiffs have filed an APA claim that requires the production of documents by the federal defendants, regardless of how the federal defendants want to characterize those documents. If plaintiffs considered these documents as part of the whole record needed to resolve their claims before the Court, rather than as a separate record as is now argued, it is only because federal defendants refused to clarify their position during the

[6] The federal defendants have not challenged plaintiffs' compact claim as an improper joinder of claims under Rule 18 of the Federal Rules of Civil Procedure.

"meet and confer." Indeed, the federal defendants still have not answered whether and when they intend to fulfill their legal obligation to produce documents relevant to the compact claim.

The arguments the federal defendants make ignore the practical problem plaintiffs are trying to address. For example, federal defendants cite to *Amador County v. Salazar* to argue that the Court not address plaintiffs' compact claim. [Docket 89, p. 17.] In *Amador County*, the D.C. Circuit held that that the Secretary's decision to allow a compact to be considered approved through inaction under 25 U.S.C. § 2710(d)(8)(C) constitutes a final agency action subject to judicial review under the APA. *Amador County, Cal. v. Salazar*, 640 F.3d 373, 383 ("[W]here . . . a plaintiff alleges that a compact violates IGRA, thus requiring the Secretary to disapprove the compact, nothing in the APA precludes judicial review of a subsection (d)(8)(C) no-action approval."). The case has nothing to do with the issue in dispute here. Plaintiffs' new claim is ripe for adjudication in the present action. The only thing preventing plaintiffs from briefing this claim is that federal defendants have not produced the administrative record since the notice of approval was published, and apparently, they refuse to do so while this motion is pending.

The Tribe takes a similar approach by citing a string of cases supposedly in support of the proposition that "when plaintiffs challenge multiple agency decisions in the same case, each decision has its own administrative record and is evaluated independently." [Docket, 88 p. 11 & fn. 4.] Again, this argument misses the point. The cases the Tribe cites only underscore the point that plaintiffs may litigate multiple decisions involving different records in the same proceeding, and that doing so involves efficiencies for all parties.[7] Plaintiffs' claims are properly joined; the

[7] The cases the Tribe cites do not support delaying resolution of the compact claims. *See WildEarth Guardians v. United States Office of Surface Mining Reclamation and Enforcement*, 2014 WL 503635 (D. Colo., Feb. 7, 2014, 1:13-CV-00518) ("The Complaint alleged 15 claims challenging various mining permits located in Colorado, Montana, and New Mexico"); *Western Watersheds Project v. Salazar*, 2009 WL 1299626 (D. Idaho, May 7, 2009, CIV 08-0516-E-BLW) ("WWP has challenged 18 Environmental Impact Statements (EISs) prepared by 18 separate BLM offices in six different states . . . ."). Other cases involve consolidation of separate cases that challenge agency actions on separate projects with separate administrative records. *See, e.g.*, *Safari Club Intern. v. Jewell*, 960 F.Supp.2d 17 (D.D.C. 2013) ("This is a consolidated case with two sets of plaintiffs challenging two separate, but related FWS final rules . . . ."); *Habitat Educ. Center, Inc. v. Kimbell*, 250 F.R.D. 390 (E.D. Wis. 2008) (addressing request for consolidation of two new challenges to with challenges to two separate projects with cases challenging two other projects). Finally, in *Center for Biological Diversity v. Salazar*, 2010 WL 3924069 (D. Ariz.,

administrative record should be produced; and the documents plaintiffs identified should be added.

Other than by citing inapposite cases, neither the federal defendants nor the Tribe support their contention that plaintiffs' compact claim should not be part of this lawsuit or briefed with the other claims.[8] Rather than confronting these issues, the federal defendants and the Tribe focus on the delay between the publication of the compact's approval in the Federal Register and plaintiffs' Second Amended Complaint, suggesting that the addition of the new claim is a tactic to delay resolution on the fee-to-trust transfer issue. The facts, however, show otherwise.

Immediately following the California Secretary of State's submission of the compact to the Secretary, plaintiffs put the Secretary on notice that they would challenge the Secretary's decision to approve the compact. On August 4, 2013, plaintiff Stand Up for California! sent a letter to Secretary Jewell informing her that plaintiffs were aware that the California Secretary of State had forwarded the compact for approval. [Supplemental Declaration of Cheryl Schmit ("Schmit Supp. Decl."), ¶ 5, Ex. M.] The letter further informed the Secretary of the legal challenges pending against the proposed casino project, including this litigation, and stated that plaintiffs would view approval by inaction as a violation of IGRA. [Schmit Supp. Decl., ¶ 5, Ex. M.] That plaintiffs did not amend their complaint immediately following the publication of the notice of approval was a consequence of the federal defendants' motion for remand and the resulting stay of this litigation.

Sept. 30, 2010, CV 07-0038-PHX-MHM), the district court denied plaintiffs' motion to supplement their complaint with a new claim because "judgment has been entered, and the Plaintiffs' Complaint and this action have been dismissed." *Id* at *4.

[8] The Tribe's claim that the approval of the compact has nothing to do with the trust acquisition is an oversimplification. Plaintiffs also allege in this action that the Governor's concurrence is invalid because he lacked the authority under California law. [Docket 84, ¶¶ 62, 67] If the concurrence is invalid, then there can be neither class II or class III gaming at the Madera Site. This situation would greatly affect the trust status, as all the required determinations were gaming related. The only identifiable source of the Governor's authority under California law to concur is his authority to negotiate compacts. Cal. Const. art. IV, § 19(f). Plaintiffs dispute that the Governor has any such authority, but without a valid compact under state law, the validity of the concurrence becomes even less certain. The claim regarding the compact's approval is intertwined with the concurrence issue and therefore the trust transfer.

In August 2013, the federal defendants filed their motion for stay of litigation and partial remand. [Docket 63.] In opposition, plaintiffs argued for vacatur and removal of the Madera Site from trust. [Docket 71.] The notice of approval of the compact was published in the Federal Register on October 22, 2013, while the Court was still considering plaintiffs' arguments for vacatur and removal of the site from trust. The Court granted the federal defendants' motion on December 16, 2013, and stayed the case for 90 days until March 17, 2014 [Docket 77, p. 8], at which time federal defendants requested even more time to complete the administrative record. The Court continued the stay until May 5, 2014 – an extension of nearly two additional months. Minute Order of March 18, 2014. Only after the stay was lifted on May 5, 2014, were plaintiffs granted leave to file "any amended complaint" by May 26, 2014. Minute Order of March 18, 2014. Any delay on plaintiffs' part was the result of the remand and the stay.

As discussed above, the remand required a new final decision, the administrative record of which was certified on May 5, 2014. The letters from the California Secretary of State were received long before this new decision and certification, and the federal defendants had notice as early as August 2013 that plaintiffs would challenge the compact's approval. Whether treated as part of one administrative record or as a separate administrative record, the federal defendants' obligation remains the same – to produce the documents supporting its decisions to allow the litigation to proceed.

II. THE FEDERAL DEFENDANTS MUST PRODUCE A PRIVILEGE INDEX

In opposition to plaintiffs' motion, the federal defendants have created even more ambiguity than plaintiffs have already exposed. Plaintiffs' request is simple: If documents have been withheld, the federal defendants must say so and produce a log identifying the reasons for withholding. Plaintiffs have not asked, and do not ask, this Court to compel the federal defendants to produce "a log of every document ever generated by the Department of Interior." [Docket 89, p. 20.] Such hyperbole, however, does contribute to plaintiffs' concerns that the federal defendants are shielding documents from plaintiffs and the Court. Plaintiffs' request does

not mention deliberative process documents. Yet the federal defendants' opposition is entirely devoted to citing law that protects them from producing deliberative documents – documents plaintiffs did not request.

In regard to the particular question asked, whether any documents have been withheld, the federal defendants' response is still equivocal: "the administrative record consists of the documents certified by the agency as being part of the administrative record." [Docket 89, p. 20.] It would have been much simpler, as well as consonant with plaintiffs' request, to have said: "No documents that are part of the record have been withheld on the ground of privilege." But that is not what the federal defendants' response states. Their circular statement merely identifies the contents of the administrative record they provided. But the issue is whether documents that are properly part of the decisional, not the deliberative, record were withheld on grounds of privilege. The federal defendants fail to acknowledge this point and then proceed to distract the Court by focusing on the unrelated and irrelevant deliberative process issue.

Certifying the April 26, 2013, administrative record, Nancy Pierskalla stated, "Privileged and confidential information has been *redacted or withheld* from the documents and materials comprising the administrative record in this matter." [Docket 51-1, ¶ 3 (emphasis added).] Paula Hart's certification of the revised administrative record, dated May 5, 2014, stated that "confidential statements protected under the attorney-client privilege and non-record material, including discussions of other tribes, will continue to be redacted." [Docket 83-1, ¶5.] Hart also certified "that the index filed on April 26, 2013, and the documents attached hereto reflect, to the best of my knowledge, the complete administrative record . . . ." [Docket 83-1, ¶7.] The question, therefore, is still whether documents were withheld from the April 26 administrative record as Ms. Pierskalla's certification suggests they may have been. The federal defendants have yet to provide a simple, straightforward answer to this question.

This Court should compel the federal defendants to answer this question. If the federal defendants admit to withholding documents or decline to answer the question, the Court should compel the federal defendants to produce a privilege index.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court grant this motion and order the federal defendants to supplement the administrative record with the omitted documents. Plaintiffs also request this Court to order the federal defendants to produce the required privilege index.

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