UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Fort Sill Apache Tribe,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Civil No. 1:14-cv-958-RMC**
	)	
National Indian Gaming Commission, *et al.*,	)	
	)	
Defendants.	)	
	)	

MOTION OF PLAINTIFF FORT SILL APACHE TRIBE TO COMPLETE AND SUPPLEMENT THE ADMINISTRATIVE RECORD WITH RESPECT TO THE JANUARY 2017 DECISION OF THE NATIONAL INDIAN GAMING COMMISSION

Plaintiff Fort Sill Apache Tribe (the "Tribe"), through its undersigned counsel, hereby respectfully moves the Court to complete and supplement the administrative record relating to the January 12, 2017 determination of the National Indian Gaming Commission (the "NIGC") signed by each of the three NIGC Commissioners (the "2017 Decision"), as designated by the defendants.

The Tribe moves the Court for an Order directing the NIGC to complete the administrative record in this matter with the addition of:

(a) the December 9, 2016 Indian Lands Opinion letter issued by the Department of the Interior and delivered to the Court (Dkt. 63) (the "Indian Lands Opinion'); and

(b) any additional documents considered by the NIGC Commissioners in making the 2017 Decision, and any documents reflecting what was distributed to and considered by the Commissioners with respect to that decision.

The Tribe moves the Court to review *in camera* the email communications between NIGC counsel and the Commissioners on December 9, 2016, January 11, 2017 and January 12, 2017, to determine if such communications contain legal advice or should be added to the administrative record, and to add such communications to the record.

The Tribe moves the Court for an Order directing the NIGC to supplement the administrative record in this matter with the addition of:

(a) 39 documents that the Tribe provided to the Department of the Interior at its request relating to the process by which the Tribe was federally acknowledged in the 1970s, which are attached to the accompanying Declaration of the Tribe's Chairman Jeffrey Haozous; and

(b) all other materials considered by the Department of the Interior when preparing the Indian Lands Opinion.

In the alternative, the Tribe moves to consider as extra-record evidence the following items of evidence:

(a) 39 documents that the Tribe provided to the Department of the Interior at its request relating to the process by which the Tribe was federally acknowledged in the 1970s, which are attached to the accompanying Declaration of Chairman Haozous; and

(b) all other materials considered by the Department of the Interior when preparing the Indian Lands Opinion.

The grounds for this motion are explained in the accompanying Brief in Support of Plaintiff Fort Sill Apache Tribe's Motion to Complete and Supplement the Record With Respect

to the January 2017 Decision of the National Indian Gaming Commission and the Declaration of Jeffrey Haozous and the exhibits attached thereto.

Respectfully submitted this 27th day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2018, the foregoing Motion of Plaintiff Fort Sill Apache Tribe to Complete and Supplement the Administrative Record With Respect to the 2017 Decision of the National Indian Gaming Commission was filed with the Court's CM/ECF system, which will send notification to counsel of record in this matter who are registered with the Court's CM/ECF system.

/s/ *Kenneth J. Pfaehler*
Kenneth J. Pfaehler

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June 27, 2018

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BRIEF IN SUPPORT OF PLAINTIFF FORT SILL APACHE TRIBE'S MOTION TO COMPLETE AND SUPPLEMENT THE ADMINISTRATIVE RECORD WITH RESPECT TO THE JANUARY 2017 DECISION OF THE NATIONAL INDIAN GAMING COMMISSION

Plaintiff Fort Sill Apache Tribe (the "Tribe"), through its undersigned counsel, hereby moves the Court to complete and supplement the administrative record relating to the January 12, 2017 determination of the National Indian Gaming Commission (the "NIGC") signed by each of the three NIGC Commissioners (the "2017 Decision"), as designated by the federal defendants. In support of the motion, the Tribe states as follows:

INTRODUCTION

In response to the Court's May 25, 2018 Order requiring the defendants to "file the administrative record for the 2017 Decision no later than June 8, 2018," the defendants have filed what they claim is the administrative record for the 2017 Decision. Dkt. 100. The administrative record submitted by the NIGC is plainly deficient. The NIGC was required by the October 21, 2016 Order to "reconsider its decision and Order dated May 5, 2015, in consideration of the letter to be provided by Interior," and "issue a Decision and Order incorporating such reconsideration." Dkt. 60. Yet no document postdating May, 2015 is included in the purported administrative record for the 2017 Decision. Instead, the record for the 2017 Decision is virtually identical to the record filed for the NIGC's May 5, 2015 Decision and Order (the "2015 Decision").

The principal item missing from the administrative record is precisely the same letter this Court ordered that the NIGC consider in issuing the 2017 Decision — the Indian Lands opinion letter issued by the Solicitor's Office of the Department of the Interior ("DOI") to the NIGC on December 9, 2016 (the "Indian Lands Opinion"). The Indian Lands Opinion was supposed to be expressly considered by the Commissioners and is referenced in their 2017 Decision. The

defendants withhold the Indian Lands Opinion based the deliberative process privilege, the attorney-client privilege, the work product doctrine and as a "confidential settlement communication." None of these claims of privilege has merit.

The Indian Lands Opinion is not subject to the "Deliberative Process Privilege," because it is the final decision of the DOI on its subject and, as the privilege log makes clear, the NIGC played no role in drafting it or deliberating on it. Nor can the defendants meet their burden of showing that the Indian Lands Opinion is pre-decisional and deliberative, because it is a final opinion from the DOI on a matter that Congress has delegated to be determined by the Secretary of the Interior, and not part of NIGC's internal deliberations. The deliberative process privilege cannot be used to shield documents expressly considered in an agency's decision, or to make secret law. The deliberative process privilege is a qualified privilege, subject to a balancing of interests of the parties, and that balancing of interests tilts entirely against the privilege here.

The DOI's Indian Lands Opinion cannot be withheld as attorney work product, when by definition it was not prepared by counsel for the purpose of engaging in litigation or for trial purposes. Rather, it is the DOI's opinion on the question of federal acknowledgement for purposes of IGRA's initial reservation exception (25 U.S.C. § 2719(b)(1)(B)(ii)). That decision must be untainted by litigation or trial preparation strategy, advice, tactical advantage, biases or pressure from the Department of Justice ("DOJ"). Moreover, if some portion of the Indian Lands Opinion somehow were to reflect matters relating to positions or strategy in this litigation, that portion could be redacted prior to inclusion in the administrative record following an *in camera* review by the Court.

The NIGC's assertion that the Indian Lands Opinion is being withheld as a "Confidential attorney client communication regarding letter ordered by Court" is inaccurate. The Indian

Lands Opinion was written by the DOI Solicitor's Office and sent to the NIGC's General Counsel. The NIGC is not the client of the DOI solicitor, but has its own counsel. Moreover, there cannot have been an expectation that an Indian Lands Opinion from the DOI Solicitor in determining if one of the IGRA exceptions applies would be maintained as confidential and non-public after the NIGC made its decision. To the contrary, a Memorandum of Agreement between the DOI and the NIGC specifies that such Indian Lands opinions will be part of the administrative record after the NIGC makes its final decision (although they can be kept confidential prior to that time). Such opinions from DOI routinely are included in administrative records in Indian Gaming Regulatory Act cases. Indeed, two such DOI Indian lands opinions from 2008 and 2009 are included in the administrative record prepared by the NIGC for its 2015 Decision.[1] The reason those opinions are included, and the December 2016 Indian Lands Opinion is not, appears obvious: the NIGC agrees with the two earlier opinions, but not with the latest one.

The NIGC claims that the Indian Lands Opinion also is withheld as a "Confidential Settlement Communication." Dkt. 100-3. This is just a new twist on an old argument this Court has already rejected, when it determined that the 2017 Decision is final and appealable. Claiming a settlement privilege for the Indian Lands Opinion is part of the federal defendants' repudiated claim that they can walk away from the Indian Lands Opinion and the NIGC's 2017 Decision if the parties did not reach a settlement. The Court has previously rejected this contention, and that rejection is now law of the case.

[1] *See* Exhibit 1 attached hereto, Letter from Scott Keep, Acting Associate Solicitor, Indian Affairs, DOI to Penny Coleman, Acting General Counsel, NIGC (May 15, 2008) (AR001257); Exhibit 2 attached hereto, Letter from Arthur Gary, Acting Solicitor, DOI to Penny Coleman, Acting General Counsel, NIGC (April 23, 2009) (AR001416).

The Tribe also seeks to complete the administrative record with the addition of any documents considered by the NIGC Commissioners before making their 2017 Decision and any documents reflecting what was distributed to and considered by the Commissioners with respect to that decision. Such documents include the 39 documents provided to the DOI at the request of the Commissioner of the Bureau of Indian Affairs, and the similar records uncovered and considered by the DOI. For this reason the Tribe challenges the privilege designation of the email communications by NIGC counsel with the Commissioners on December 9, 2016, and January 11 and January 12, 2017, and requests an *in camera* review by the court to determine if they contain legal advice.

Finally, it is important to note that the NIGC was required by its own procedures to seek an opinion from DOI on the question of the Tribe's federal acknowledgment for purposes of IGRA before it issued the 2015 Decision. The Commission did not request such an opinion, thus necessitating the December 2016 Indian Lands Opinion. Had the NIGC made the request earlier, all of the 39 documents (each received from or sent to the DOI) would have been made part of the record of the NIGC administrative appeal by the Tribe, together with any other records considered by the DOI. In the alternative, the Tribe asks the Court to admit these 39 DOI documents as extra-record evidence addressing the process by which the Tribe became federally acknowledged in the 1970s. This process bears directly on the tribe's acknowledgement for purposes of 25 U.S.C. § 2719(b)(1)(B)(ii).

The Tribe therefore respectfully requests that its motion be granted, the December 9, 2016 DOI Indian Lands Opinion be produced forthwith, and the documents considered by the NIGC Commissioners between December 9, 2016 and January 12, 2017, together with the 39

documents provided by the Tribe to the DOI in October 2016 and any other records considered by the DOI, be included in the administrative record.

PROCEDURAL BACKGROUND

As the history of this litigation is recited in the Court's May 25, 2018 Memorandum Opinion, we will not reiterate it here, but merely describe for ease of reference the six pertinent orders and filings relevant to this motion.

1. The October 21, 2016 Order

The parties submitted a Joint Proposed Order in August 2016, which the Court entered. After several hearings and delays, a substantively similar Amended Order was entered on October 21, 2016. In pertinent part, the Order provided:

> [O]n or before December 1, 2016, the DOI ("Interior") shall issue a letter providing Interior's position regarding the Fort Sill Apache Tribe's gaming eligibility under the Indian Gaming Regulatory Act and certain other matters addressed in the National Indian Gaming Commission's ("NIGC") Decision and Order dated May 5, 2015 and file a copy of said letter under seal in this matter; and it is hereby
>
> FURTHER ORDERED that on or before January 13, 2017, the NIGC shall reconsider its Decision and Order dated May 5, 2015, in consideration of the letter to be provided by Interior, and shall issue a Decision and Order incorporating such reconsideration . . . .

Dkt. 60.

2. At the DOI's Request the Tribe Provided Documentation of the Federal Acknowledgement Process

In October 2016, the DOI requested that the Tribe provide it with historical records concerning the Tribal Government Development Program and other evidence of the federal acknowledgment process that resulted in the Tribe's formal acknowledgement in 1976. Declaration of Jeffrey Haozous, June 26, 2018, at ¶ 3. Between October 11 and October 28, the Tribe located (at considerable expense) and provided the DOI with 39 documents from the 1970s

that conclusively prove the Tribe was acknowledged through the federal acknowledgment process utilized by the DOI at the time. *Id*. ¶¶ 4-5 & exhibits 1-3. The DOI assured the Tribe that it would review such documents, together with historical documents it had gathered from its own files, as part of its assessment of the Tribe's acknowledgement under IGRA. *Id.* ¶ 3. In light of the DOI's assurances, the Tribe agreed to an additional extension of time for the DOI's production of the letter. *Id.* ¶ 6; Dkt. 58.

The Tribe also understood that in addition to the documents it provided to DOI, the agency also had been able to find some acknowledgment records from the 1970s on its own. The Tribe believes that the 39 documents it provided and the documents DOI had recovered were considered by DOI in preparing the 2016 Indian Lands Opinion and, in fact, that the opinion relies on some of those documents.

3. The December 9, 2016 Indian Lands Opinion Letter

On December 9, 2016, the DOI filed under seal a copy of the Indian Lands opinion letter, prepared by the DOI's Office of the Solicitor, and addressed to the General Counsel of the NIGC. Dkt. 63. The Department of Justice refused to share the letter with the Tribe. Based on the statements and assurances of DOI officials and personnel, as described in paragraphs 114, 117 and 170 of the Second Amended Complaint, the letter delivered by the DOI on December 9, 2016 addresses in detail the question of whether the Tribe was acknowledged by the Secretary under the Federal acknowledgement process for purposes of 25 U.S.C. § 2719(b)(1)(B)(ii).

4. The January 12, 2017 NIGC Decision

The DOI's December 9, 2016 Indian Lands Opinion is the basis for the NIGC's 2017 Decision. On January 12, 2017 the NIGC sent a letter advising that it had carefully considered the DOI's December 9 letter but, without explanation, would not change the positions taken in its 2015 Decision:

> After careful consideration of the December 9th letter, we have determined there are not grounds, for settlement purposes, for reconsideration of the Commissioner's May 5, 2015 Final Decision and Order. As such, the May 5, 2015 Final Decision and Order in re: Fort Sill Apache Tribe of Oklahoma Appeal of NOV-09-35 stands.

Dkt. 67, Ex. 1.

5. The Defendants' Incomplete Designation of the Administrative Record With Respect to the 2017 Decision

On May 25, 2018, the Court ordered that "Defendants shall file the administrative record for the 2017 Decision no later than June 8, 2018." On June 8, 2018, the Defendants filed what they purport to be the administrative record for the 2017 Decision. It does not include a single page that postdates May 5, 2015 Decision. Instead, it references only one document that the Commission says it considered for the 2017 Decision: the December 9, 2016 Indian Lands Opinion issued by the DOI, which the defendants have withheld as privileged.

The privilege log reflects no communications or consideration by the NIGC of the Indian Lands Opinion, between December 9, 2016, when the opinion was delivered, and January 11, 2017, the day before the three NIGC Commissioners signed the 2017 Decision. The absence of documents strongly suggests, if not confirms, that the 2017 Decision was a *fait accompli* and that the NIGC acted inconsistently with its obligation to keep an open mind about its decision.

ARGUMENT

MOTION TO COMPLETE THE RECORD

I. The Indian Lands Opinion is Needed to Complete the Administrative Record

The December 2016 Indian Lands Opinion from the DOI, which the NIGC was required to review before making the 2017 Decision (Dkt. 60), belongs in the administrative record. To prevail on a motion to complete the record, the Tribe need only "'put forth concrete evidence' and 'identity reasonable, non-speculative grounds for [its] belief that the documents were

considered by the agency and not included in the record.'" *Oceana, Inc. v. Ross*, 290 F. Supp. 3d 73, 78–79 (D.D.C. 2018) (quoting *Charleston Area Med. Ctr. v. Burwell*, 216 F.Supp.3d 18, 23 (D.D.C. 2016) (citation omitted); *see also, e.g., Univ. of Colo. Health at Memorial Hosp. v. Burwell*, 151 F.Supp.3d 1, 15 (D.D.C. 2015); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 667 F.Supp.2d 111, 114 (D.D.C. 2009). The requirements of the October 2016 Amended Order and the representations of the NIGC to this Court provide the "concrete evidence" and the reasonable, non-speculative grounds for including the Indian Lands Opinion in the administrative record.

The December 9, 2016 Indian Lands Opinion is the one document that the 2017 Decision says was considered by the Commissioners in making their decision. The NIGC cannot withhold the Indian Lands Opinion simply because the Commissioners disagreed with the position taken by the DOI. Nor can the DOJ withhold the decision because it does not want DOI's Indian Lands Opinion to see the light of day.

The Indian Lands Opinion is information the NIGC Commissioners claim they considered in making their decision. It is not part of the NIGC's internal decision-making process or a document that reflects that process. To the contrary, it is a document that provides the formal opinion of the Secretary of the Interior on a question delegated to the Secretary. This opinion was required to be considered by the NIGC in making its determination. "If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792-93 (D.C. Cir. 1984). An agency may not exclude materials from an administrative record simply because the agency claims it did not "rely" on them for its decision. *Ad Hoc Metals Coal. v. Whitman*, 227 F. Supp. 2d 134, 139 (D.D.C. 2002).

II. The Indian Lands Opinion May Not Be Withheld Based On the Deliberative Process Privilege

A. Neither of the Two Rationales for the Deliberative Process Privilege Applies to the Indian Lands Opinion

The first rationale for excluding deliberative documents is that "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.'" *Oceana, Inc. v. Ross*, 290 F. Supp. 3d 73, 83 (D.D.C. 2018) (quoting *Nat'l Ass'n of Chain Drug Stores v. U.S. Dep't of Health & Human Servs.*, 631 F.Supp.2d 23, 27 (D.D.C. 2009) (quoting *In re Subpoena Duces Tecum Served on the Office of Comptroller of Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998)). Producing the Indian Lands Opinion is not an impermissible attempt to identify a subjective motivation for the action of the NIGC Commissioners. Rather, its production is needed to understand the stated reasoning of the Commissioners, who wrote in the 2017 Decision that "[a]fter careful consideration of the December 9th letter, we have determined there are not grounds, for settlement purposes, for reconsideration of the Commissioner's May 5, 2015 Final Decision and Order." Dkt. 67, Ex. 1.

The second rationale for protecting internal deliberative materials is that doing so enhances "the quality of agency decisions by protecting open and frank discussion among those who make them within the Government." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8–9 (2001). But the decision made by the NIGC Commissioners plainly was not made as part of an "open and frank discussion" with the DOI about its decision and reasoning in the Indian Lands Opinion. Instead, the privilege log shows there was no communication between the NIGC and the DOI after the Indian Lands Opinion was issued by

the DOI, and that the NIGC had no input on the DOI's Indian Lands Opinion prior to the issuance of the opinion. Indeed, the DOI never even shared a draft with the NIGC.[2]

B. The Indian Lands Opinion Is Neither Predecisional Nor Deliberative

To invoke the deliberative process privilege, the *agency bears the burden* of showing that the materials are both pre-decisional and deliberative. *National Ass'n of Home Builders v. Norton*, 309 F.3d 26, 29 (D.C. Cir. 2002); *In re Sealed Case*, 121 F.3d 729, 737 (D.C.Cir.1997).. We address each of these elements in turn.

1. The Indian Lands Opinion is Not Predecisional

A document is predecisional "if it was generated before the adoption of an agency policy." *Public Citizen, Inc. v. Office of Mgm't & Budget*, 598 F.3d 865, 874 (D.C. Cir 2010) (quoting *Judicial Watch, Inc. v. Food & Drug Admin.,* 449 F.3d 141, 151 (D.C. Cir. 2006)); *Am. Petroleum Tankers Parent, LLC v. United States*, 952 F. Supp. 2d 252, 265 (D.D.C. 2013). The privilege "avoids confusion from premature disclosure of ideas that are not—or not yet—final policy," and misimpressions from "dissemination of documents suggesting reasons and rationales" not ultimately relied on. *Judicial Watch, Inc. v. United States Dep't of Def.*, 847 F.3d 735, 739 (D.C. Cir. 2017) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

A "document can lose its predecisional character—and the protections of the privilege — if an agency adopts the document as its own." *Judicial Watch,* 847 F.3d at 739; *see also, e.g., Nat'l Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 161 (1975); *Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 866 (D.C. Cir. 1980)); *Horowitz v. Peace Corps*,

[2] Note that DOI preparing the Indian Lands Opinion on its own, without input from NIGC, is consistent with the 2009 Memorandum of Agreement between DOI and the NIGC discussed below, which expressly states that an Indian Lands Opinion such as the December 9, 2016 letter is to be included in the final administrative record. *See* Dkt. 80-4 at 2 ¶ 8 and discussion in Section I(B)(6), *infra*.

428 F.3d 271, 276 (D.C. Cir. 2005). To adopt a deliberative document, it is not enough for an agency to make vague or equivocal statements implying that a position presented in a deliberative document has merit; instead, the agency must make an "express[]" choice to use a deliberative document as a source of agency guidance. *Sears*, 421 U.S. at 161 (emphasis in original); *see also Afshar v. Dep't of State*, 702 F.2d 1125, 1142 (D.C. Cir. 1983).

The DOI's Indian Lands Opinion is a Final Decision of the DOI. It represents the policy position of the DOI on the question of whether the Tribe was acknowledged by the Secretary under the Federal acknowledgement process for purposes of 25 U.S.C. § 2719(b)(1)(B)(ii). It is not somebody's opinion, or a list of optional choices, or a memorandum presenting alternatives. It is the final, official opinion of the DOI on a matter that Congress has delegated to the DOI. *Dep't of the Interior & Related Agencies Appropriations Act*, Pub. L. No. 107-63, § 134, 115 Stat. 414, 442-43 (2001). The Indian Lands Opinion is an "express choice" of agency guidance by DOI, not a consultative predecisional memo or other piece of interim work.

2. The Indian Lands Opinion Is Not a Deliberative Document

A document is "deliberative if it reflects the give-and-take of the consultative process." *Am. Petroleum Tankers Parent, LLC v. United States*, 952 F. Supp. 2d 252, 265 (D.D.C. 2013) (quoting *Judicial Watch, Inc. v. Food & Drug Admin.,* 449 F.3d 141, 151 (D.C. Cir. 2006)). Deliberative documents include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency," are considered deliberative. *American Petroleum*, 952 F. Supp. 2d at 265-66 (quoting *Coastal States,* 617 F.2d at 866). Recommendations from consultants also can fall within the scope of the deliberative process privilege. *American Petroleum*, 952 F. Supp. 2d at 266; *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Homeland Sec.,* 514 F.Supp.2d 36, 44 (D.D.C. 2007).

The privilege log confirms that the NIGC had no input or role in drafting the Indian Lands Opinion. In the absence of any communication on the subject between the agencies before the DOI issued its Indian Lands Opinion, the NIGC cannot claim that the opinion reflects the Commission's "deliberative materials." Moreover, the Indian Lands Opinion is not a recommendation, a draft document, a proposal, a suggestion, or any other subjective document which reflect the personal opinions of the writer rather than the policy of the agency. To the contrary, it is the policy and official position of the DOI with respect to the Tribe's acknowledgment for purposes of IGRA.

C. The DOI Indian Lands Opinion Is the Specific Subject of the NIGC's 2017 Decision

The deliberative process privilege does not apply when a document is specifically referenced in an agency's final action. *BDM Corp. v. SBA*, No. 80-1180, 1980 U.S. Dist. LEXIS 17833, at *10 (D.D.C. Dec. 4, 1980) (citing *NLRB v. Sears,* 421 U.S. at 161); *see also, e.g., Hall v. CIA*, No. 04-814 (RCL), 2017 U.S. Dist. LEXIS 122505, 2017 WL 3328149, at *13 (D.D.C Aug. 3, 2017). "When an agency . . . incorporates a [predecisional document] by reference into a final decision, the rationale for the deliberative process privilege — namely, protecting the quality of agency decision-making ex ante by facilitating the candid exchange of ideas — evaporates." *Nat'l Council of La Raza v. DOJ*, 337 F. Supp. 2d 524, 535 (D.D.C. 2004) (citing *NLRB*, 421 U.S. at 161, and *Tigue v. DOJ*, 312 F.3d 70, 81 (2nd Cir. 2002)). Indeed, "once a document has become part of an agency's decision, the public has a much greater interest in the disclosure of that document." *Id.*

The public, and the Tribe, certainly have a much greater interest in the disclosure of the Indian Lands Opinion than the NIGC has in it non-disclosure. Indeed the NIGC's 2017 Decision cannot be understood without the disclosure of the Indian Lands Opinion. Moreover, there is no

"probability that an agency employee will be inhibited from freely advising a decision maker for fear that his advice, if adopted, will become public" if the opinion is disclosed. *Cf. NLRB v. Sears*, 421 U.S. at 161. The "privilege's purpose is significantly mitigated under such circumstances." *Id.* The public policy rationale underlying the deliberative process privilege does not, on balance, support withholding the Indian Lands Opinion in these circumstances.

D. The Balancing of Interests Favors the Tribe

The deliberative process privilege is "a discretionary one," *In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979), and must be evaluated based upon the unique circumstances of each case.[3] In determining whether to honor an assertion of the privilege, a court should:

> balance the competing interests on a flexible, case by case, ad hoc basis, considering such factors as the relevance of the evidence, the availability of alternate evidence, the seriousness of the litigation or investigation, the harm that could flow from disclosure, the possibility of future timidity by government employees [should the materials be disclosed], and whether there is reason to believe that the documents would shed light on government misconduct.

Comm'n on Oversight and Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 113 (D.D.C. 2016); *see also In re Anthem*, *Inc. Data Breach Litig.*, 236 F. Supp. 3d 150, 159 (D.D.C. 2017). Balancing the competing interests in this case demonstrates that the Tribe's interest in obtaining the Indian Lands Opinion far outweighs any legitimate interest the defendants may claim to have in keeping the opinion secret.

[3] "Although there are many cases in this Circuit which discuss the deliberative process privilege, these cases 'are of limited help . . . because the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process.'" *Wilderness Soc'y v. Dep't of Interior,* 344 F. Supp. 2d 1, 11 (D.D.C. 2004) (quoting *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980)).

1. The Indian Lands Opinion is Relevant

The Indian Lands Opinion letter could not be more relevant to this dispute. The opinion assesses whether the Tribe is federally acknowledged for purposes of IGRA. The opinion is based on substantial evidence that was not considered by the NIGC (although it could have been) when the NIGC prepared the original notice of violation and its 2015 Decision. The Indian Lands Opinion is from the DOI — the very agency charged by statute with determining if tribes are federally acknowledged. The question, if answered favorably for the Tribe, is dispositive of the Tribe's case.

2. There is No Apparent Alternative

There is no apparent alternative assessment of this critical question. The December 9, 2016 DOI Indian Lands Opinion is the only assessment by DOI of whether the Tribe is federally acknowledged for purposes of IGRA. Although the MOA requires the NIGC to seek an opinion from the DOI analyzing whether the Tribe is federally acknowledged for purposes of IGRA before the NIGC determines whether the Tribe qualifies for the initial reservation exception, the Indian lands opinions issued by the DOI in 2008 and 2009 (and relied on in 2015 Decision) did not opine on the issue of federal acknowledgment, but instead affirmed the reasoning in opinions by the NIGC's counsel which turned on the fact that, at the time, Akela Flats had not yet been proclaimed the Tribe's reservation (that proclamation was made in 2011). Thus an opinion from the DOI regarding the Tribe's federal acknowledgement status was needed before the May 2015 Decision and Order and still is required now. "In cases where the information is a central issue, the need for the documents will likely outweigh any negative consequences of disclosure." *Burbar v. Inc. Vill. of Garden City*, 303 F.R.D. 9, 14 (E.D.N.Y. 2014).

3. This Litigation is Serious

As the Court knows, this litigation is serious and the work the DOI put into investigating the facts and developing the letter was serious and substantial. It took the DOI over a year to produce the letter. The Tribe spent considerable time and expense providing the DOI with documents concerning the 1970's Tribal Government Development Program. Moreover, the litigation is of enormous consequence for the Tribe, its economic development and its ability to move forward with its plans for the reservation. The uncertainty of the status of the Akela Flats gaming operation has curtailed the Tribe's ability to borrow funds and finance its operations. The Tribe's inability to operate the Apache Homelands Casino deprived the Tribe of the financial ability to implement its plans to re-establish New Mexico — including the area of and surrounding Akela Flats — as its governmental and population centers. Sec. Am. Compl. ¶ 97.

4. The Tribe Will be Harmed Without the Indian Lands Opinion in the Record

The Tribe will be harmed without the Indian Lands Opinion in the administrative record. The Tribe's ability to challenge the NIGC's new decision and order was a critical component of the agreement between the parties. *Id.* ¶ 111. The Tribe is entitled by law to have the DOI determine if the Tribe is federally acknowledged for purposes of IGRA as a matter of statute, under the MOA, and under the Court's October 20, 2016 order.

The agreed-upon and Court-ordered resolution process, as detailed at paragraphs 13-16 and 110-120 of the Second Amended Complaint, was designed to rectify that failure with a two-step process. First, the DOI would issue a letter providing DOI's position regarding Akela Flats' gaming eligibility under IGRA, analyzing, in particular, whether the Tribe was acknowledged by the Secretary under the federal acknowledgement process. Under the process the DOI was to provide that letter to the NIGC. Sec. Am. Compl. ¶ 13, 110. Second, the NIGC would formally

reconsider its Decision and Order in consideration of the letter to be provided by the DOI, and would issue a new Decision and Order incorporating such reconsideration. *Id.* In return, the litigation would be stayed. The parties proceeded on the basis of this agreement, and had numerous meetings, telephone calls and emails based on the agreement. *Id.* The agreement between the parties ultimately became the subject of a stipulated order, which was reaffirmed by a subsequent stipulated order. Dkt. 51, 60.

The structure of the agreed-upon process purposefully built in procedural protections for the Tribe should the NIGC act unfavorably. Requiring the NIGC to issue a new decision and order in explicit consideration of the DOI's letter meant that the NIGC would base its final determination on a current, fully-informed the DOI analysis of the Tribe's federal acknowledgment. *Id.* ¶ 111. If the NIGC decision nonetheless was unfavorable, the Tribe still would have a new decision and order that it could challenge on the basis of a current analysis of its acknowledgement status. *Id.* A core consideration for staying the case was that the NIGC's determination following the issuance of the DOI's letter would be public and appealable, however the NIGC might choose to rule. *Id.* Allowing the defendants to keep the Indian Lands Opinion secret would deprive the Tribe of the core consideration for which it agreed to stay the case.

The agreed-upon process also built in important procedural protections for the NGC. It provided a DOI Indian Lands Opinion which the NIGC had been required to obtain, but had not, before issuing the 2015 Decision. It also provided the NIGC with a basis to protect a decision in favor of the Tribe from attack from third parties. It would make a favorable NIGC decision "bullet-proof," at a time when the defendants, not the DOJ, thought they were making the decision on the question of acknowledgment as required by law.

5. Defendants Will Not Be Harmed from Disclosure of the Indian Lands Opinion

No harm will result from disclosure of the Indian Lands Opinion. The Indian Lands Opinion addresses only the Fort Sill Tribe. As discussed above, such opinions are required and if the agencies do not concur their respective positions are to be part of the record. The record for the 2015 Decision contains two prior concurrences drafted by the DOI Solicitor, which the NIGC utilized in evaluating IGRA compliance. Materials expressly considered in issuing a decision are part of the administrative record, whether the agency agreed with them or not. Had the proper process been followed by the NIGC before issuing the 2015 Decision, an Indian Lands Opinion from the DOI Solicitor addressing the Tribe's acknowledgement for purposes of IGRA already would be part of the administrative record for the 2015 Decision.

6. No Future Timidity By Government Employees Will Result from Disclosure

There is no reason to believe that disclosing the documents considered by the NIGC when it issued the 2017 Decision would cause future timidity by government employees. A core consideration for staying the case was that the NIGC's determination following the issuance of the DOI's letter would be public and appealable, however the NIGC might choose to rule. Sec. Am. Compl. ¶ 111. Under circumstances such as these, "the real public interest . . . is not the agency's interest in its administration but the citizen's interest in due process." *Bank of Dearborn v. Saxon*, 244 F. Supp. 394, 402 (E.D. Mich. 1965), *aff'd*, 377 F.2d 496 (6th Cir. 1967); *see also* Sec. Am. Compl. ¶¶ 176-85 (alleging due process violations).

7. The Indian Lands Opinion May Shed Light on Government Misconduct

Lastly, the Indian Lands Opinion should be disclosed because it may shed light on misconduct by the NIGC and DOJ. A discussion of this issue is in the immediately following subsection E.

E. The Process Itself Is At Issue Here

The integrity of NIGC's process is at issue here. Before issuing the 2015 decision, the NIGC was required to get an opinion from the DOI on whether the Tribe was federally acknowledged for purposes of IGRA. The NIGC did not do that. The agreed-upon and Court-ordered resolution process was meant to rectify that failure by a two-step process, with the DOI issuing an Indian Lands Opinion on the point and the NIGC then formally reconsidering its 2015 Decision and issuing a new decision.

The Tribe alleges not merely that NIGC's 2017 Decision violated the IGRA and the APA, but that NIGC's conduct in carrying out the decision-making process was an intentional breach of the agreed process and thus was arbitrary, capricious, an abuse of discretion and not in accordance with law. Sec. Am. Compl. ¶¶ 170-74. There also is the specter that the NIGC disregarded this Indian Lands Opinion under pressure from, or at the direction of, the Department of Justice.

> And once they end up in court, they're at the mercy, I say that advisedly, of the Department of Justice which may or may not agree with its client. And has been known to reach into the administrative process which is none of the department's business and put a heavy hand on the scale. Which I consider absolutely astonishing, totally uncalled for and should be actually considered grossly improper. Grossly improper.

Dkt. 89 at 3:24-4:18; *see also* K. Washburn, *Agency Conflict and Culture,* 42 Ariz. St. L.J. at 310-312, 323-324.

In other words, the administrative process that led to the 2017 Decision is a central issue in this case. Where, as here, "the *process itself* is challenged, the plaintiff's need for the documents reflecting that process . . . will often outweigh the government's interest" in keeping the documents secret under the deliberative process privilege. *Delphi Corp. v. United States*, 276 F.R.D. 81, 86 (S.D.N.Y 2011) (emphasis added). When "the decision-making process itself is the subject of the litigation, the deliberative process privilege cannot be a bar to discovery." *Greater N.Y. Taxi Ass'n v. City of N.Y.*, No. 13 Civ. 3089 (VSB) (JCF), 2017 U.S. Dist. LEXIS 146655, at *29 (S.D.N.Y. Sep. 11, 2017) (citing *Anilao v. Spota*, No. 10 CV 10-32 (JFB) (AKT), 2015 WL 5793667, at *19 (E.D.N.Y. Sept. 30, 2015) (quoting *Children First Foundation, Inc. v. Martinez*, No. 01 CV 927, 2007 WL 4344915, at *7 (N.D.N.Y. Dec. 10, 2007)); accord, *Gisbert Constr. Co. v. Engeleiter*, No. 90 Civ. 5803, 1991 WL 74652, at *1 (S.D.N.Y. May 1, 1991)).

The public policy rationale for the deliberative process privilege—that disclosure of deliberative documents might have a chilling effect on agency decision-makers—is often outweighed when "the deliberative or decision-making process is the 'central issue' in the case." *Delphi,* 276 F. R.D. at 85. "The deliberative process privilege may be inapplicable if the agency's decision-making process itself is at issue." *Jones v. Hernandez*, No. 16-CV01986-W (WVG), 2017 U.S. Dist. LEXIS 110745, at *14 (S.D. Cal. July 14, 2017) (citing *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998)). "Where the decision-making process itself is the subject of the litigation, the deliberative privilege may not be raised as a bar against disclosure of critical information." *Burka v. New York City Transit Auth*., 110 F.R.D. 660, 667 (S.D.N.Y. 1986).

F. The NIGC and DOI Cannot Promulgate "Secret Law"

The deliberative process privilege cannot be used to hide final agency action from public view when it would result in the promulgation of "secret law." *Heublein, Inc. v. FTC*, 457 F.

Supp. 52, 55 (D.D.C. 1978) (citing *NLRB v. Sears,* 421 U.S. at 138). "A 'strong theme' of this Circuit's decisions on the deliberative process-privilege . . . 'has been that an agency will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege." *Wisdom v. U.S. Tr. Program*, 232 F. Supp. 3d 97, 120 (D.D.C. 2017) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980)). Thus, an agency is required to disclose "orders and interpretations which it actually applies to cases before it." *Sterling Drug, Inc. v. Fed. Trade Comm'n*, 450 F.2d 698, 708 (D.C. Cir. 1971). As the D.C. Circuit Court of Appeals has explained:

> private transmittals of binding agency opinions and interpretations should not be encouraged. These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Thus, to prevent the development of secret law within the [agency], we must require it to disclose orders and interpretations which it actually applies in cases before it.

Sterling Drug, 450 F.2d at 708. The purpose of this limitation, therefore, is "to prevent bodies of 'secret law' from being built up and applied by government agencies." *Judicial Watch, Inc. v. U.S. Dep't of Defense,* 245 F. Supp. 3d 19, 30 (D.D.C. 2017) (internal quotations omitted). Permitting Federal Defendants to withhold the administrative record would result in the promulgation of secret law. Therefore the assertion of the deliberative process privilege should be denied.

For all of these foregoing reasons, the Tribe respectfully submits that the defendants' reliance on the deliberative process privilege should be rejected.

III. A Controlling Inter-Agency Memorandum of Agreement Reflects that the Indian Lands Opinion Should Be Included in the Record

A. The Memorandum of Agreement

A Memorandum of Agreement governing Indian Lands determinations between the DOI and the NIGC shows that there should have been no expectation by the federal defendants that the Indian Lands Opinion would not become part of the administrative record after the NIGC made its decision. As former Assistant Secretary of the DOI for Indian Affairs Kevin Washburn (formerly a defendant in this action) has explained, in order to "bring greater deliberation and more resources to bear on Indian lands determinations, Interior and the NIGC signed a Memorandum of Understanding in January 2000 that sought to achieve coordination on Indian lands questions. Further memoranda modified the general agreement." Kevin K. Washburn, *Agency Conflict and Culture: Federal Implementation of the Indian Gaming Regulatory Act by the National Indian Gaming Commission, the Bureau of Indian Affairs, and the Department of Justice*, 42 Ariz. St. L.J. 303, 334-335 (2010); *see also Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 462-63 (D.C. Cir. 2007) (discussing Memorandum of Agreement between the NIGC and the DOI dated Feb 26, 2007).

The agencies' continued reliance on the procedures in these memoranda of understanding is reflected in the in the 2009 Memorandum of Agreement (the "MOA"). The MOA requires a legal opinion addressing whether land meets one of the exceptions in 25 U.S.C. § 2719. The DOI Office of the Solicitor "must concur in any opinion that provides legal advice relating to: . . . The exceptions in 25 U.S.C. § 2719." Dkt. 80-4 at 1-2 ¶ 4. In the event of a disagreement, as we appear to have here, the MOA specifies:

> If a tribe appeals a decision of the Chairman to the full Commission pursuant to the Commission's regulations in effect at the time of the appeal and the subject of that appeal is an Indian lands opinion that has been issued pursuant to this MOA, then counsel to the full Commission

> must follow the procedures outlined in the MOA before issuing final advice to the Commission ***and the Solicitor's response to the proposed advice to the Commission shall become part of the record considered by the Commission.***

Dkt. 80-4 at 2 ¶ 8 (emphasis added).

Important policy consideration underlie the requirement that the Solicitor's Office response become part of the public record when the two agencies responsible for making Indian lands determinations are in disagreement. This precludes providing the Tribe with reliable guidance on how it is to proceed. Under such circumstances, the agencies recognized the importance of making their stated positions part of the administrative record so that have issue could be thoroughly reviewed and ultimately resolved by a reviewing court. To hide the disagreements between the NIGC and the DOI on an Indian lands opinion is a failure of due process that both agencies sought to avoid. Accordingly the MOA required that in the absence of concurrence, the respective positions of the agencies would be art of the administrative record.

The MOA continues to reflect the current practice and custom of the DOI and NIGC when addressing the applicability of the IGRA exceptions. *See* Sec. Am. Compl. at ¶¶ 16, 135 & 172. Therefore Indian lands opinions issued by the NIGC since the execution of the 2009 MOA have included specific language referencing that the DOI Solicitor's Office has concurred in the NIGC's opinion.[4] Every Indian Lands opinion since 2009 published by the NIGC on its website has included either an explicit statement that the DOI Solicitors Office concurred in the opinion or offered a detailed analysis of DOI's position. *See, e.g., Bay Mills Indian Community*, December 21, 2010; *Iowa Tribe of Oklahoma*, January 7, 2010; *Karuk Tribe of California*, April

[4] *See, e.g*., Letter to Hon. Michael Hunter, Chairman, Coyote Valley Band of Pomo Indians from Michael Hoenig, General Counsel, NIGC (October 30, 2017), available at https://www.nigc.gov/images/uploads/indianlands/2017.10.30_lltr_re_Coyote_Valley_Band_of_Pomo_Indians_ILO_Pine_Crest_Parcel_to_Tribe_Chairman_from_NIGC_GC.pdf (citing to September 22, 2017 concurrence of the DOI Solicitor's Office); *see generally* Nat'l Indian Gaming Comm'n*, Indian Lands Opinions*, https://nigc.gov/general-counsel/indian-lands-opinions (last visited December 29, 2017).

4, 2012; *United Keetoowah Band of Cherokee Indians*; July 18, 2011; *Table Mountain Rancheria*, January 10, 2014; *Seneca Nation of Indians*, January 20, 2009.[5]

Before the December 2016 Indian Lands Opinion, there was no opinion in the record of the Tribe's NIGC appeal from the Solicitor of the DOI with regard to whether the Tribe is federally acknowledged for purposes of IGRA. The NIGC had not sought the opinion, as it was required to do, before issuing the 2015 Decision. Before the December 2016 Indian Lands Opinion, the DOI Solicitor's office was not asked by the NIGC to assess the Tribe's status as "federally acknowledged" following the issuance of the Reservation Proclamation for Akela Flats. This of course was a central issue in the Tribe's appeal of the original notice of violation to the NIGC and is the central issue in the current action challenging the NIGC's 2015 and 2017 Decisions. It is a determination that is reserved for, and is required to be made by, the Secretary of the Interior. *Dep't of the Interior and Related Agencies Appropriations Act*, Pub. L. No. 107-63, § 134, 115 Stat. 414, 442-43 (2001). The NIGC was required to request this opinion from DOI before the 2015 Decision was issued. The NIGC failed to do so, and that failure in and of itself is grounds to find that the 2015 Decision was arbitrary and capricious.

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[5] *Bay Mills Indians Community*, available at https://www.nigc.gov/images/uploads/indianlands/BayMillsJurisdictionOpinionFinal.pdf

Iowa Tribe of Oklahoma, available at https://www.nigc.gov/images/uploads/indianlands/Iowa%20Tribe%20Whitecloud%20Allotment-Ioway.pdf

Karuk Tribe of California, available at https://www.nigc.gov/images/uploads/indianlands/Karuk4912.pdf;

United Keetoowah Band of Cherokee Indians, available at https://www.nigc.gov/images/uploads/indianlands/UKB%20legal%20opinion%20july%2018%202011.pdf

Table Mountain Rancheria, available at https://www.nigc.gov/images/uploads/indianlands/2014.01.10%20Letter%20to%20Tribe%20fr%20OGC%20re%20Indian%20lands%20opinion%20-%2060%20acre%20parcel.pdf

Seneca Nation of Indians, available at https://www.nigc.gov/images/uploads/indianlands/Seneca%20Ordinance%20Approval%2001-20-09.pdf

B. Defendants Concede That the Indian Lands Opinion Is Not Privileged By Including Equivalent Opinions in the 2015 Decision Record

The defendants' position that the DOI's 2016 Indian Lands Opinion should be excluded from an administrative record as "internal agency deliberations" is inconsistent with their treatment of DOI Solicitor's opinions in the administrative record for the 2015 Decision. Solicitor's office opinions of precisely the same nature are already included in the administrative record that the defendants produced with respect to the 2015 Decision. That record includes two letters from the DOI concurring in the NIGC's Indian lands opinion letters for Akela Flats from 2008 and 2009. *See* Exhibit 1, Letter from Scott Keep, Acting Associate Solicitor, Indian Affairs, DOI to Penny Coleman, Acting General Counsel, NIGC (May 15, 2008) (AR001257) (noting DOI's review of the NIGC's May 7, 2008 Indian Lands opinion and stating DOI's agreement that the Tribe is "not a restored tribe, that the lands are not restored lands and that they cannot be the initial reservation of the Tribe" within the meaning of the IGRA because at that time the DOI had not yet issued a reservation proclamation); Exhibit 2, Letter from Arthur Gary, Acting Solicitor, DOI to Penny Coleman, Acting General Counsel, NIGC (April 23, 2009) (AR001416) (noting DOI's review of the NIGC's April 20, 2009 Indian Lands Opinion addendum, and agreeing with NIGC's analysis regarding the Tribe's termination for purposes of qualifying for the IGRA's restored lands exception).

Like the first two DOI concurrence letters, the December 2016 Indian Lands Opinion should be included in the administrative record, and not shielded by claims of deliberative process, because the three letters final opinions of the Secretary of the Interior on matters that are delegated by Congress to be determined by the Secretary of the Interior. "The authority to determine whether a specific area of land is a 'reservation' for purposes of sections 2701-2721 of title 25, United States Code, was delegated to the Secretary of the Interior" in IGRA. *Dep't of*

the Interior & Related Agencies Appropriations Act, Pub. L. No. 107-63, § 134, 115 Stat. 414, 442-43 (2001) (Section 134, titled "Clarification of the Secretary of the Interior's Authority Under Sections 2701-2721 of Title 25").[6]

IV. The Indian Lands Opinion Is Not Protected By the Work Product Doctrine

The NIGC cannot claim that the Indian Lands Opinion is the work product of its attorneys or a privileged communication from its attorneys. The NIGC's work product in this case is created by its litigation attorneys, the Department of Justice. The NIGC's privileged communications are with those DOJ attorneys and its internal attorneys, identified as Michael Hoenig and Heather Carson in the privilege log. Its internal attorneys appear to have had no input on the Indian Lands Opinion for at least the seven months before the opinion was issued; therefore the Indian Lands Opinion cannot be understood to be a privileged communication with these attorneys.

The Department of Justice litigation attorneys representing the NIGC in this litigation should have had no input in the DOI's Indians Land opinion; if they did, the Court will be confronted with a substantial APA issue. The determination by the DOI as to whether the Tribe is federally acknowledged for purposes of IGRA should be made by the DOI, which is the agency "charged with interpreting the law," "not the Department of Justice; not from the wisdom of Pennsylvania Avenue." Dkt. 89 at 3:24-4:18; *see also* K. Washburn, *Agency Conflict and Culture,* 42 Ariz. St. L.J. at 310-312, 323-324.

Nor can the Indian lands Opinion be understood to be work product of the DOI Solicitor's office. The DOI knew the Indian Lands Opinion would be delivered to the NIGC for reconsideration of the 2015 Decision. Had the NIGC changed its 2015 Decision, there would be

[6] The D.C. Circuit Court of Appeals gave this appropriations rider legal effect in *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 462-63 (D.C. Cir. 2007).

no argument from the DOI that the Indian Lands Opinion is confidential. The Solicitor's office thus could not have had a reasonable expectation that its opinion would forever be confidential, as opposed to being temporarily confidential until the process was concluded.

V. The Indian Lands Opinion Is Not Protected from Disclosure By the Attorney-Client Privilege

The privilege log shows that there were no communications about the DOI Indian Lands Opinion between April 28, 2015 and the issuance of the opinion by the solicitor's office of the DOI on December 9, 2017. Dkt. 100-3. In the absence of any communication on the subject between the agencies for seven months before the DOI issued its Indian Lands Opinion, the NIGC cannot claim that the opinion reflects the *NIGC's* "deliberative materials." The Indian Lands Opinion therefore was not part of the NIGC's "deliberative process;" it was a final opinion on the subject of the acknowledgement by a separate agency, which has statutory responsibility for issuing the opinion.

The Indian Lands Opinion was written by the DOI Solicitor's office and sent to the NIGC's General Counsel. The NIGC is not the client of the DOI solicitor, but has its own counsel. Nor could there have been an expectation that an Indian Lands Opinion from the DOI Solicitor in the context of determining if one of the IGRA exceptions applies would be maintained as confidential and non-public after the NIGC made its decision. To the contrary, as we have explained a Memorandum of Agreement between the DOI and the NIGC specifies that such Indian Lands opinions will be part of the administrative record after the NIGC makes its final decision (although they can be kept confidential prior to that time). Therefore such opinions from Interior routinely are included in administrative records in Indian Gaming Regulatory Act cases.

VI. The "Settlement Privilege" Does Not Protect Any Part of the Administrative Record From Disclosure

Neither the Indian Lands Opinion nor any other documents are protected from disclosure as a "Confidential Settlement Communication." Dkt. 100-3. Logging the Indian Lands Opinion as a settlement communication is just another attempt by the Department of Justice to re-argue the motion to dismiss and motion for reconsideration of the Court's granting leave to the Tribe to pursue a claim for violation of the APA with respect to the 2017 Decision. The court has rejected this argument repeatedly, most recently in its May25, 2018 Memorandum Opinion, and the Court's rejection of this contention is now law of the case. The Tribe also notes that the Indian Lands Opinion was never delivered to the tribe as part of a settlement communication or otherwise and thus could not be withheld from the record as a "settlement communication."

MOTION TO SUPPLEMENT THE RECORD

VII. The Administrative Record Should Be Supplemented With the Materials Considered by the NIGC in Issuing the 2017 Decision

A. The Documents Reflecting Whatever the NIGC Did to Consider the DOI's Indian Lands Opinion Are Part of the Administrative Record

The defendants have made no effort to comply with the requirements for invoking the deliberative process privilege. Instead, they have proffered only a privilege log with curt, conclusory statements that the Indian Lands Opinion is "Deliberative Materials" and withheld subject to the "Deliberative Process Privilege." Dkt. 100-3. But invoking the deliberative process privilege requires "(1) ***a formal claim of privilege by the head of the department possessing control over the requested information***, (2) ***an assertion of the privilege based on actual personal consideration by that official***, and (3) a detailed specification of the information for

which the privilege is claimed, along with an explanation why it properly falls within the scope of the privilege." *Cobell v. Norton*, 213 F.R.D. 1, 7 (D.D.C. 2003) (citations omitted). "Agencies seeking to invoke the deliberative process privilege commonly do so through a combination of privilege logs that identify specific documents, and ***declarations from agency officials explaining what the documents are and how they relate to the decisions***." *Nat'l Labor Relations Bd. v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 309 (D.D.C. 2009)(emphasis added) (citing *Landry v. FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000), & *Colo. Wild Horse and Burro Coalition, Inc. v. Kempthorne*, 571 F. Supp. 2d 71, 73 n.2 (D.D.C. 2008)).

No such declaration has been provided here. There is no declaration from Chairman Choudhuri with a formal claim of privilege based on his actual personal consideration. There is no declaration from any agency official explaining what the Indian Lands Opinion is and how it relates to the 2017 Decision. All the defendants have provided is a certification from the NIGC's record officer that the documents described in the index are, to the best of his knowledge, the documents relied on by the Commission in making the 2017 Decision. Dkt. 100-1.

B. The Defendants Have Not Addressed, As They Must, Why the Indian Lands Opinion Cannot Be Produced In a Redacted Form

The Defendants must show that the Indian Lands Opinion cannot be produced in a redacted form. The Court "must be able to determine, from the privilege log, that the documents withheld are (1) predecisional; (2) deliberative; (3) do not 'memorialize or evidence' the agency's final policy; (4) were not shared with the public; and (5) cannot be produced in a redacted form." *U.S. Dep't of the Treasury v. Pension Benefit Guar. Corp.*, 222 F. Supp. 3d 38, 42–43 (D.D.C. 2016). The defendants have not taken any of these steps. In particular, they have made no effort to show that Indian Lands Opinion cannot be redacted to protect whatever deliberative processes the defendants believe may be implicated in the document.

VIII. The Administrative Record Should Be Supplemented With the Materials Considered by the DOI in Issuing the 2016 Indian Lands Opinion

The administrative record should be supplemented with the materials reviewed and considered by the DOI when preparing the December, 2016 Indian Lands Opinion. That this material belongs in the administrative record is clear from DOI's standardized guidance for compiling an administrative record, which directs that the record shall contain substantive documents:

> ● ***That were relied upon or considered by the agency, regardless of whether they support or oppose the agency's position***;
>
> ● That were available to the decision-maker at the time the decision was made (i.e., considered by staff involved in the decision process as it proceeded through the agency), regardless of whether they were specifically reviewed by the decision-maker; and
>
> ● Even if the AR Coordinator believes the relevant documents are privileged.
>
> Keep in mind that, while the APA does not specifically describe what is to be included in an AR, a court's review of a decision by an administrative agency is generally based on the reasons given by the agency and the information considered by the agency in the course of making the decision, not on the internal decision making process or on documents that reflect that process.[7]

The Department of Justice Guidelines contain similar requirements. An administrative record includes documents and materials (1) "whether or not they support the final agency decision," (2) "which were available to the decision-making office at the time the decision was made," (3) "considered by, or relied upon, by the agency," (4) "that were before the agency at

[7] Memorandum from Deputy Solicitor David L. Bernhardt to Assistant Secretaries and Directors of Bureaus and Offices, "Standardized Guidance on Compiling a Decision File and an Administrative Record," June 27, 2006, at 5 (emphasis added), located at https://www.fws.gov/policy/e1282fw5.pdf.

the time of the challenged decision, even if the final agency decision-maker did not specifically consider them," and (5) that are both "privileged and non-privileged."[8]

IGRA requires that Akela Flats be "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process." 25 U.S.C. § 2719(b)(1)(B)(ii)). The 39 documents submitted by the Tribe to counsel for the DOI and the NIGC in October, 2016, reflect that the Fort Sill Apache Tribe followed the federal acknowledgment process established for the Tribe by the DOI. The Tribe was acknowledged, at the latest, on August 18, 1976, when the Commissioner of Indian Affairs approved the Tribe's constitution. The Tribe believes that records independently uncovered by the DOI also support Tribal acknowledgment, and that both sets of records were considered by the DOI in preparing its Indian Lands Opinion.

The process reflected in the documents shows that the Secretary acknowledged the Fort Sill Apache Tribe as an Indian tribe with which the United States maintained a government-to-government relationship. The acknowledgement occurred within two years of DOI's promulgation of the first regulations governing the federal acknowledgment process (formerly Part 54, now Part 83), which were effective on October 2, 1978. The stated purpose of Part 83 was "to establish a departmental procedure and policy for acknowledging that certain American Indian tribes exist." With the promulgation of these initial regulations, the DOI required that a list be published in the federal register within 90 days, and annually thereafter, "of all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs. " 43 Fed.

[8] Joan Goldfrank, *Guidance to Client Agencies on Compiling the Administrative Record*, U.S. ATTY. BULL. 7, 8 (Feb. 2000), available at https://www.justice.gov/sites/default/files/usao/legacy/2006/06/30/usab4801.pdf.

Reg. 39361, 39362 (Sept. 5, 1978). The Tribe was included on that list, as the final attachment to the October 11 letter forwarding documents shows. Haozous Decl. ex. 1.

The 39 documents provided by the Tribe, and any other documents uncovered by the DOI, were available to the DOI and considered by it when making the Indian Lands Opinion.. They also were available to the NIGC, which would have seen them discussed in the DOI Indian Lands Opinion. The 39 documents were within the control of the NIGC when it rendered the 2017 decision, and likely in the NIGC's actual possession, because they were transmitted by the undersigned counsel to the Department of Justice lawyers who represent both the DOI and the NIGC in this case. Thus the 39 documents were before the agency at the time of the challenged 2017 Decision, even if the final agency decision-maker did not specifically consider them. Therefore the 39 documents, and any other records uncovered and considered by the DOI, should be included in the administrative record.

IN THE ALTERNATIVE, THE COURT SHOULD CONSIDER THE MATERIALS CONSIDERED BY THE DOI IN ISSUING THE 2016 INDIAN LANDS OPINION AS EXTRA-RECORD EVIDENCE

Even if the Court does not agree that the materials considered by the DOI in issuing the 2016 Indian Lands Opinion are to be part of the administrative record, the 39 documents should be considered as extra-record evidence. Where extra-record judicial consideration is proposed (as opposed to supplementation of the administrative record), a different standard is applied. In numerous situations, Courts will consider extra-record evidence which "consists of evidence outside of or in addition to the administrative record that was not necessarily considered by the agency." *National Mining Ass'n v. Jackson*, 856 F.Supp.2d 150,156 (D.D.C. 2012) (*citing Calloway v. Harvey*, 590 F.Supp.2d 29, 38 (D.D.C. 2008).

In *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989), the District of Columbia Circuit stated that extra-record evidence was reviewable if it fell within one of eight exceptions. Since

then, the Circuit appears to have narrowed these exceptions to four, three of which are applicable here: (1) when the agency failed to examine all relevant factors; (2) when the agency failed to explain adequately its grounds for its decision; (3) when the agency acted in bad faith; or (4) when the agency engaged in improper behavior. *National Mining Ass'n*, 856 F.Supp.2d at 156 (considering post agency decision documents as extra-record evidence because they shed light on an issue not addressed by the administrative record itself); *see also Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 667 F.Supp.2d 111, 115-16 (D.D.C. 2009) (noting the narrowing of the *Esch* exceptions). "Underlying all of these exceptions is the assessment that 'resort to extra-record information [is necessary] to enable judicial review to become effective.'" *Calloway*, 590 F.Supp.2d at 38 (quoting *Esch*, 876 F.2d at 991).

Resort to extra-record information is necessary to enable judicial review to become effective in this case. The Tribe has established that the NIGC behaved improperly in its review of the Indian Lands Opinion, and in the absence of the Indian Lands Opinion, still closeted by DOJ, "the record is so bare that it prevents effective judicial review." *Fund for the Animals v. Williams*, 245 F.Supp.2d 49, 57-58 (D.D.C. 2003). The applicability of the exceptions is at its zenith when, as here, the extra-record evidence is needed to facilitate examination of the procedural soundness of an agency decision. *Esch*, 876 F.2d at 991.

As explained in detail above, the NIGC improperly failed to abide by its own procedures to seek an opinion from DOI on the question of the Tribe's federal acknowledgment for purposes of IGRA before it issued the 2015 Decision. Had it done so, all of the 39 documents would have been part of the record of the NIGC administrative appeal by the Tribe. It would be contrary to APA review to allow the NIGC to evade consideration of these documents on appeal simply by failing to abide by its own internal policies and procedures, and the NIGC's process itself is at

issue here. For these reasons among others, the extra-record evidence is needed to examine the procedural soundness of the agency's decision. *See Esch*, 876 F.2d at 991.

The Tribe has presented ample evidence to invoke three of the four exceptions allowing judicial review of extra-record evidence. First, the very fact that the 39 documents are omitted from the administrative record strongly suggest that the 2017 Decision did not include all relevant factors. *See Esch*, 876 F.2d at 991; *National Mining*, 856 F.Supp.2d at 156 (documents constituted extra-record evidence because they shed light on an issue not addressed by the administrative record itself). Like the post-decisional documents in *National Mining,* the 39 documents here shed light on an issue not addressed by the administrative record itself. Specifically, the 39 documents contain information regarding the Tribe's federal acknowledgement, which is a central issue in the Tribe's appeal of the original notice of violation to the NIGC and is the central issue in the current action challenging the NIGC's 2015 and 2017 Decisions. Those issues are not properly considered in the NIGC's decision.

Second, the NIGC failed to adequately explain its grounds for its decision. Without the 39 documents it would be difficult to do so because these documents make up the basis of the 206 Indian Lands Opinion, which, in turn should have informed the NIGC's decision at issue here. The 39 documents at issue here demonstrate the Tribe was federally acknowledged under the existing DOI process. The 2017 decision is fundamentally deficient without consideration why the 39 documents do not demonstrate the Tribe's federal acknowledgement.

Finally, and as explained in more detail above, the NIGC failed to abide by its own procedures to seek an opinion from DOI on the question of the Tribe's federal acknowledgment for purposes of IGRA before it issued the 2015 Decision. *National Mining*, 856 F.Supp.2d at

156 (documents constituted extra-record evidence because they shed light on an issue not addressed by the administrative record itself).

Having demonstrated three of the four exceptions supporting consideration of extra-record evidence, the Tribe respectfully requests that this Court consider the 39 documents as extra-record evidence.

CONCLUSION

For all the foregoing reasons, plaintiff Fort Sill Apache Tribe respectfully moves the Court to order the defendants to complete and supplement the administrative record related to the 2017 Decision.

Dated: June 27, 2018

Respectfully submitted,

/s/ Kenneth J. Pfaehler

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2018, the foregoing Brief in Support of Plaintiff Fort Sill Apache Tribe's Motion to Complete and Supplement the Administrative Record With Respect to the 2017 Decision of the National Indian Gaming Commission and the exhibits thereto were filed with the Court's CM/ECF system, which will send notification to counsel of record in this matter who are registered with the Court's CM/ECF system.

/s/ Kenneth J. Pfaehler
Kenneth J. Pfaehler

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