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.	)	
	)	

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

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Plaintiff Fort Sill Apache Tribe (the "Tribe"), through its undersigned counsel, hereby replies in support of its motion to compel the federal defendants to produce 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 "January 2017 Final Determination"). In reply in support of the motion, the Tribe states as follows:

Introduction

In response to the Court's June 29, 2017 Minute Order requiring the defendants to file a report on the "feasibility of producing an administrative record for the January 2017 Letter on or before Monday, July 31, 2017," the defendants provided a document claiming that "no administrative record exists that can be produced as a matter of law" because "the January 2017 Letter was not accompanied by or part of an attendant administrative process that resulted in a reviewable final decision." ECF No. 85 at 1-2. "To the extent the Court disagrees," the defendants asserted, they "are determining if there are any non-deliberative and/or non-privileged documents associated with the letter." *Id.* at 2.

The Tribe moved to compel production of the administrative record, as the Court already has determined that the January 2017 Final Determination is final and appealable agency action and documents exist that were considered and referred to by the NIGC Commissioners when they made the January 2017 Final Determination, including the December 2016 DOI Indian Lands Opinion letter. In opposition to the motion, the defendants continue to contend that the January 2017 determination is not final agency action despite the Court's holding to the contrary; that they complied with the Court's Minute Order and are not bound by Local Civil Rule 7(n);

that the request for the administrative record, directed by the Court to be produced in July and required by Rule 7(n) to be produced then, is "premature;" and that the record is not needed to decide their pending motions. In addition, despite not having formally invoked the deliberative process privilege or provided a log of documents, and having told the Court that they are still determining if the privilege even applies, the defendants claim the entire record related to the January 2017 Final Determination is protected by the deliberative process privilege.

None of these contentions has merit. The Court has ruled that the NIGC's January 2017 determination is final agency action.[1] A pending motion to reconsider that decision does not stay the government's obligations to produce documents, and the defendants fail to address the Tribe's authority on this point. Indeed, Local Civil Rule 7(n) required production of the certified list when the defendants moved to dismiss. The defendant's "report" violates the spirit and intent of the Court's Minute Order. As the Court has advised, the case needs to be moved forward and resolved. That means producing the administrative record and getting on with resolving this decade old dispute.

The NIGC continues to contend that it did not follow the administrative process required by its regulations before issuing the January 2017 Final Determination. But this does not mean that there is no administrative record; it simply means that the NIGC violated both its own procedures and the APA in the course of taking final agency action. The defendants now also claim that the record is protected by the deliberative process privilege. The defendants, however, have not properly invoked the privilege and have not provided information to the Court to show with specificity the information sought to be protected and the reasons for application of the privilege. They have not attempted to meet their burden of showing that particular items are pre-

[1] Transcript of Motion Hearing, June 29, 2017, at 5:7-12. A copy of the transcript is attached as Exhibit 1 to the Tribe's Motion (ECF No. 93-1).

decisional and deliberative, that is to say part of the give-and-take of the consultative process, rather than a final opinion from Interior on a matter that Congress has delegated to be determined by the Secretary of the Interior. Such opinions from Interior routinely are included in administrative records, including in the record here for the May, 2015 Decision and Order. Including the DOI Indian Lands Opinion is especially appropriate here because the DOI invited the Tribe to participate in the process of preparing its letter. The letter, therefore, cannot be considered part of an internal deliberative process.

Moreover, the administrative process itself is at issue here, and where "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. *Delphi Corp. v. United States*, 276 F.R.D. 81, 86 (S.D.N.Y 2011). The deliberative process privilege cannot be used to shield documents expressly considered in an agency's decision, or to make secret law. The balance of interests tilts heavily in favor of denying the privilege.

The Tribe therefore respectfully submits that the motion should be granted, and the certified list and administrative record, including the December 9, 2016 DOI Indian Lands Opinion, be produced forthwith.

ARGUMENT

A. There Is No Reason to Further Delay Production of the Administrative Record With Respect to the January 2017 NIGC Determination

The Defendants contend that the "Court should avoid imposing the burden of producing the administrative record" "until the threshold legal issues have been decided." Opp. at 1. But the burden apparently is minimal, as the defendants claim that they did not review anything other than the December, 2016 Indian Lands Opinion from the Department of the Interior in reaching the January 2017 determination. Moreover, "the threshold legal issue" already has been decided:

the motion to amend was granted and the Court has held that the January 2017 NIGC determination is final agency action. Indeed, the pending motion to dismiss is judged by the same standard as the defendants' futility argument in opposition to the motion to amend, and the Court already has rejected those arguments. That the defendants are trying to give themselves a mulligan is not a reason to delay production of the administrative record.

Local Rule 7(n) requires the agency to file a certified list of the contents of the administrative record with the Court "within 30 days following service of the answer to the complaint or simultaneously with the filing of a dispositive motion." Local Civ. R. 7(n). At the absolute latest, therefore, the defendants had to file their certified list with respect to the January 2017 Final Determination on July 28, 2017, when they filed their latest motion to dismiss.

The defendants now claim that they need not file an administrative record, or the required list of its contents, because a comment to Local Rule 7(n) somehow renders the rule inapplicable to motions that do not rely on the administrative record. Opp. at 7. This conclusion cannot be drawn from the comment, and the rule itself contains no such exception. Indeed, the rule requires filing the list within 30 days of an answer, followed by filing of an appendix with the record, even when no dispositive motion is filed. Local Civ. R. 7(n). If the defendants' assertion that an administrative record is inapplicable to the pending motions were sufficient to avoid application of Local Rule 7(n), this portion of the rule would be rendered meaningless.

The two cases cited by the defendants in support of this proposition predate the adoption of the relevant requirement in Local Rule 7(n),[2] and thus provide no guidance. *See* Opp. at 6

[2] Local Rule 7(n)(1) was amended in 2013 to add the underlined text:

> In cases involving the judicial review of administrative agency actions, ***unless otherwise ordered by the Court, the agency must file a certified list of the contents of the administrative record with the Court within 30 days following service of the answer to the complaint or simultaneously with the filing of a dispositive motion, whichever occurs first. Thereafter,*** counsel shall provide

(citing *Am. Bankers Ass'n v. Nat'l Credit Union Admin.,* 271 F.3d 262 (D.C. Cir. 2001); *Banner Health v. Sebelius*, 797 F. Supp. 2d 97 (D.D.C. 2011)). Even if considered, the cases do not support the defendants' position. *Banner Health,* emphasizing the importance of a "full administrative record," denied a motion to dismiss *because there was not yet an administrative record,* and required an administrative record be produced. 797 F. Supp. 2d at 113. ("Without the Administrative Record, the Court is unable to perform this function…the Court will require the Secretary to produce the administrative record before reaching the merits of these arguments"). *American Bankers Association* affirmed the district court's dismissal of claims without the administrative record because the record was not required to determine *any* of plaintiffs' claims; the court observed that an administrative record would be required where, as here, the plaintiff has "concerns about the [] application of the rule to [a] specific case[]." 271 F.3d at 266-67. These cases do no demonstrate or hold that the production of an administrative record or list of its contents, as expressly required by Local Rule 7(n), is presumptively stayed during a motion to dismiss that does not invoke the record.

The defendants also rely on minute orders in cases where a court has agreed to defer filing of a certified list at the parties' request. Opp. at 7. But each of the minute orders cited involve an *unopposed* motion for relief from the requirements of Local Rule 7(n) in light of a pending motion to dismiss.[3] *People for the Ethical Treatment of Animals, Inc. v. U.S. Fish &*

> the Court with an appendix containing copies of those portions of the administrative record that are cited or otherwise relied upon in any memorandum in support of or in opposition to any dispositive motion. Counsel shall not burden the appendix with excess material from the administrative record that does not relate to the issues raised in the motion or opposition. ***Unless so requested by the Court, the entire administrative record shall not be filed with the Court.***

[3] *See* Minute Order, *U.S. Ass'n of Reptile Keepers, Inc. v. Jewell*, No. 1:13-cv-02007-EGS (D.D.C. Jan. 28, 2014) (Sullivan, J.); Minute Order, *Friends of the Capital Crescent Trail v. Fed. Transit Admin*., No.

Wildlife Serv., 59 F. Supp. 3d 91, 93 n.2 (D.D.C. 2014), also is inapposite. This decision mentions that a motion for relief from Rule 7(n) was granted in the case, but does not describe the basis for the motion and, of course, the defendants have made no such motion here. To the extent these orders have any relevance, it is in their affirmation that it is the defendants' burden to demonstrate a justification for noncompliance with Local Rule 7(n).

No authority supports the defendants' attempt to shift the burden to the Tribe to justify its need for the administrative record and the certified list of its contents. Opp. at 6. Likewise, the defendants provide no support for their claim that compliance with Local Rule 7(n) is automatically, or even routinely, stayed pending a motion to dismiss that does not necessarily require a review of the record. At most, the cases they proffer demonstrate that a court *can* grant a request for relief from strict compliance with Local Rule 7(n), and does so where unopposed by plaintiffs. Here the defendants have made no such motion, and there would be no basis to grant such a motion if one had been made.

B. The Tribe Is Not Usurping the Defendants' Responsibility to Prepare the Administrative Record

The defendants claim that the Tribe is trying to usurp their responsibility to identify the content of the administrative record. The Tribe is trying to do no such thing, as the motion makes clear. The defendants claimed in their "report" -- and continue to claim -- that there is no administrative record with respect to the January 2017 NIGC Final Determination. But the administrative record obviously exists and includes the December, 2016 Indian Lands Opinion from the Department of the Interior which the NIGC reviewed to prepare that determination as required by Court order (ECF 60); the documents reviewed by the Department of the Interior

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1:14-cv-01471-RJL (D.D.C. Feb. 7, 2015) (Leon, J.); Minute Order, *Oregonians for Floodplain Protection v. U.S. Dep't of Commerce*, No. 1:17-cv-01179 (D.D.C. Sept. 4, 2017) (Leon, J.).

when preparing the December, 2016 Indian Lands Opinion; any documents related to the delivery of the DOI Indian Lands Opinion to the three NIGC Commissioners for their review pursuant to the Court's October 21, 2016 Order (ECF No. 60); and any other documents that were before the Commissioners as they reconsidered their May 2015 Decision and Order and elected to issue the January 2017 Final Determination.

That this material plainly belong in the administrative record is clear from the Department of the Interior's own standardized guidance on 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.[4]

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

[4] 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."[5]

The December 9, 2016 Indian Lands Opinion letter is a document that was relied upon or considered by the NIGC in taking its position in the January 2017 Final Determination. It is information considered by the agency in the course of making a decision. It is not part of the NIGC's internal decision-making process or a document that reflects that process. It is a document that provides the formal opinion of the Secretary of the Interior on a question delegated to the Secretary, which is 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). The NIGC and the DOI had these documents, and the Court and the Tribe should too. 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).

The defendants still have not explained why these documents cannot be produced "as a matter of law," as they asserted without explanation in their July 31, 2017 report. ECF No. 85 at 2. The Department of Justice offers no authority supporting this position. The defendants pretend that it is the Tribe's burden "to demonstrate NIGC [sic] can produce an Administrative Record." Opp. at 9. The Tribe has no such burden. If the NIGC wants to claim there is no administrative record when the Court has in its possession an Indian Lands Opinion from the Department of the Interior that the Commission admits to having reviewed before issuing the

[5] 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.

January 2017 Final Determination, it is the Commission's burden to explain how that position can be maintained consistent with its consideration of the Indian Lands Opinion and its obligations under the Court's October 21, 2016 order (ECF 60). That the NIGC did not follow the administrative process required by its regulations before issuing the January 2017 Final Determination does not mean that there is no administrative record; it simply means that the NIGC violated both its own procedures and the APA in the course of taking final agency action. Whether or not the agency complied with the relevant regulatory scheme, an administrative record exists that can be produced as a matter of law

The defendants assert that the Tribe is trying to dictate the contents of the administrative record and is prematurely "request[ing] specific documents." Opp. at 8. But as explained in Plaintiff's motion, the documents described are just examples of "at least four types of documents that exist with respect to the January 2017 Final Determination," and therefore reflect that an administrative record exists and can be produced. Mot. at 5. As defendants concede, once they file an administrative record or list of its contents, the Tribe will then have an opportunity to determine whether there is need for motion practice regarding the record. But first the defendants must actually produce the record. Opp. at 8. The cases the defendants rely upon stand only for the general proposition that it is the agency's responsibility to compile the administrative record, which is generally entitled to a presumption of regularity. *Id.* While that presumption may well not apply here, it is not a matter to be addressed on this motion, except to the extent the defendants are claiming that they are entitled to a presumption of regularity for the proposition that there is no administrative record. We are aware of no case authority that accords a presumption of regularity to an agency that makes a decision and then claims that there is no administrative record whatsoever supporting it.

C. Defendants Fail to Meet Their Burden of Showing that the Deliberative Process Privilege Applies

1. The Defendants Have Not Properly Invoked the Deliberative Process Privilege

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). The defendants have made no effort to comply with these requirements for invoking the deliberative process privilege. Instead, they rely on vague statements about the deliberative nature of the documents the Tribe seeks without even identifying the documents they are discussing. *See* Opp. at 13.

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). When a federal defendant fails to properly invoke the deliberative process privilege, this Court requires additional information to assess the privilege's applicability. *See, e.g., Earthworks v. DOI*, 279 F.R.D. 180, 192 (D.D.C. 2012) (finding that federal defendant failed to properly invoke the deliberative process privilege therefore requiring, among other things, a privilege log and production of all disputed documents to the court for *in camera* review).

Q privilege log is needed to invoke the privilege. Contrary to the defendants' argument, "[a]gencies 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." *NLRB v.*

Jackson Hosp. Corp., 257 F.R.D. 302, 309 (D.D.C. 2009) (citing *Landry v. FDIC*, 204 F.3d 1125, 1134 (D.C. Cir. 2000), and *Colo. Wild Horse and Burro Coalition, Inc. v. Kempthorne*, 571 F. Supp. 2d 71, 73 n.2 (D.D.C. 2008)). A privilege log is needed if the Court is to have a meaningful opportunity to assess the claim of deliberative process. *See, e.g., Sourgoutsis v. U.S. Capitol Police*, No. 16-1096 (KBJ/RMM), -- F. Supp. 3d --, 2017 WL 5633088 (D.D.C. Nov. 21, 2017) (analyzing deliberative process privilege claims based on privilege log); *Breiterman v. U.S. Capitol Police*, No. 16–0893 (TJK/RMM), --F.R.D.--, 2017 WL 5176317 (D.D.C. Nov. 2, 2017) (same); *Stein v. U.S. Sec. & Exch. Comm'n*, 266 F. Supp. 3d 326 (D.D.C. 2017) (requiring the SEC to submit more detailed descriptions of documents withheld under the deliberative process privilege so that the court could evaluate whether the privilege applied). 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.

2. <u>The Pre-2015 Administrative Record Already Includes Equivalent Materials</u>

The defendants argue that it is well-established practice for letters such as the DOI's December 2016 final Indian Lands Opinion letter to be excluded from an administrative record as "internal agency deliberations." Opp. at 12. This argument is belied by the fact that documents of precisely the same nature are already included in the administrative record that defendants have produced with respect to the May, 2015 Decision and Order. That record includes two letters from the Department of the Interior 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); and 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).

These DOI opinion letters are included in the administrative record because they were relied upon by the NIGC in issuing the May 2015 Decision and Order and necessarily in the January 2017 Final Determination as well. The only distinctions between these DOI letters, which concur in the NIGC's Indian Lands determinations of 2008 and 2009, and the December 2016 DOI Indian Lands Opinion letter, which it is believed does not, are that the December 2016 letter analyzes, for the first time, the Tribe's federal acknowledgment status under IGRA -- and that the Department of Justice does not agree with the conclusion in this letter.

Like the first two Department of the Interior concurrence letters, the December 2016 Indian Lands Opinion should be included in the administrative record, and not shielded by claims of deliberative process, because they are not part of the give and take of the consultative process, but rather 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]

Including the Interior Indian Lands Opinion letters in the record also reflects the obligations of the respective agencies under their memoranda of understanding governing Indian Lands determinations under IGRA. "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 Department of the Interior dated Feb 26, 2007).

The agencies continue to implement the procedures of these memoranda of understanding, the most current being 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." ECF 80-4 at 1-2 ¶ 4. In the event of a disagreement, as we appear to have here, the MOA specifies:

[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).

> 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.***

ECF 80-4 at 2 ¶ 8 (emphasis added). The MOA reflects the continued practice and custom of the DOI and NIGC when addressing the applicability of the IGRA exceptions. *See* Sec. Am. Compl. at ¶¶ 16, 135 & 172.

Every Indian Lands Opinion issued by the NIGC since the execution of the 2009 MOA has included specific language referencing that the DOI Solicitor's Office has concurred in the NIGC's opinion. *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 Department of the Interior 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).

Before the December 2016 Indian Lands Opinion, the administrative record contained no opinion from the Solicitor of the Department of the Interior with regard to whether the Tribe is federally acknowledged for purposes of the IGRA. At no point prior to the December 2016 DOI Indian Lands Opinion letter was the DOI Solicitor's office asked to consider the Tribe's status as "federally acknowledged" following the issuance of the Reservation Proclamation for Akela Flats. The Solicitor's position with regard to this issue is critical, because whether the Tribe's

land qualifies for the Initial Reservation Exception — one of the fundamental legal issues in this case — turns on whether the Tribe was federally acknowledged within the meaning of the IGRA.

The defendants' attempt to conceal the December 2016 DOI Indian Lands Opinion letter is not about the deliberative process; it is a thinly-veiled attempt to exclude from the administrative record critical information that had to be, and was, considered by the NIGC in making the January 2017 Final Determination. That this letter demonstrates the arbitrary and capricious nature of that determination (and the May, 2015 Decision and Order) with regard to the Tribe's federal acknowledgment is no basis for its exclusion.

3. The DOI Indian Lands Opinion Was Not the Result of an Internal Deliberative Process Because the Tribe Participated in the Process

An internal deliberative process by definition would not include the Tribe. Here, the Department of the Interior invited the Tribe to participate in the process of creating the Indian Lands Opinion. In a meeting between the Chairman of the Tribe and the Assistant Secretary for Indian Affairs Larry Roberts on October 3, 2016, Mr. Roberts requested that the Tribe assist the DOI in its analysis by providing records related to the Tribal Government Development Program and the federal acknowledgment process, which resulted in the Tribe's formal acknowledgement in 1976. Between October 11 and October 28, 2016, the Tribe (at considerable time and expense) located and provided the DOI with 39 documents from the 1970s that prove the Tribe was acknowledged through a federal acknowledgment process utilized by the DOI at the time. Copies of the Tribe's correspondence providing these documents are attached as Exhibits 3, 4 and 5 to this brief. The process reflected in the documents shows that the Secretary previously had acknowledged the Tribe as an Indian tribe with which the United States maintained a government-to-government relationship, two years before DOI promulgated the first regulations governing the federal acknowledgment process. *Id.* 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. Sec. Am. Compl. ¶ 117. The Indian Lands Opinion that resulting from this review cannot therefore be considered part of an internal deliberative process between the NIGC and the DOI.

4. The Process Itself Is At Issue Here

The performance by the DOI and the NIGC of the agreed upon and ordered resolution process, as detailed at paragraphs 13-16 and 110-120 of the Second Amended Complaint, is at the heart of this action. The agencies proposed, and the parties agreed to follow, a two-step resolution 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, and would 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 it. *Id.* The agreement between the parties ultimately became the subject of a stipulated order, which was reaffirmed by a subsequent stipulated order. (ECF 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 current, fully-informed DOI analysis of the Tribe's federal acknowledgment. *Id.* ¶ 111. If the NIGC result was nonetheless unfavorable, the Tribe still would have a new decision and order that it could challenge on the basis of a current, informed and in-depth

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.*

The Tribe alleges not merely that NIGC's January 2017 Final Determination 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. 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.
>
> So one question I have is if we just remanded this to the agency and we were no longer in court and so the Department of Justice had no role to play, do you think that the agencies within the Department of the Interior would wake up to their individual responsibilities, ignore the Department of Justice, make their own decisions, whatever they may be, and then come back to court if they're not satisfactory to the tribes, come back to court and then Justice could say oh, no, we disagree, but at least we would have a record as to what those who are charged with interpreting the law think it stands for; not the Department of Justice; not from the wisdom of Pennsylvania Avenue.

ECF 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 behind the January 2017 Final Determination 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; *Jones v. Hernandez*, No. 16-CV01986-W (WVG), 2017 U.S. Dist. LEXIS 110745, at *14 (S.D. Cal. July 14, 2017) ("The deliberative process privilege may be inapplicable if the agency's decision-making process itself is at issue.") (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).

5. <u>The Balancing of Interests Favors the Tribe</u>

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. *Wilderness Soc'y v. DOI*, 344 F. Supp. 2d 1, 11 (D.D.C. 2004) ("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'") (quoting

Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 867 (D.C. Cir. 1980)). 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).

Applying the balancing test to the administrative record associated with the January 2017 Final Determination demonstrates that the Tribe's interest in obtaining these critical documents far outweighs the defendants' interest in keeping them secret. *First,* the December 9, 2016 DOI Indian Lands Opinion letter is as relevant as it gets; the letter assesses whether the Tribe is federally acknowledged for purposes of IGRA, based on substantial evidence that was not before the NIGC when it was preparing the original notice of violation and its May, 2015 Decision and order. That question, if answered favorably for the Tribe, is dispositive of the Tribe's case.

Second, there is no apparent alternative. The December 9, 2016 DOI Indian Lands Opinion letter is the only assessment by Interior of whether the Tribe is federally acknowledged for purposes of IGRA. This is Interior's decision to make. Dep't of the Interior and Related Agencies Appropriations Act, Pub. L. No. 107-63, § 134, 115 Stat. 414, 442-43 (2001). The NIGC is required to concur in the Interior decision and the "Solicitor's response to the proposed advice to the Commission shall become part of the record considered by the Commission." ECF 80-4 at 1-2 ¶¶ 4, 8.

Moreover, 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 prior to the May 5, 2015 Decision and Order did not opine on the issue of federal acknowledgment, but instead concluded that the Tribe did not qualify for the initial reservation exception solely because Akela Flats was not (at that time) the Tribe's initial reservation. As the Decision and Order acknowledges, that reservation status changed in 2011 when the DOI issued a Reservation Proclamation establishing that Akela Flats was a reservation of the Tribe. 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. *Burbar v. Inc. Vill. of Garden City*, 303 F.R.D. 9, 14 (E.D.N.Y. 2014) ("In cases where the information is a central issue, the need for the documents will likely outweigh any negative consequences of disclosure").

Third, as the Court knows, this litigation is serious and the work DOI put into investigating the facts and developing the letter was serious and substantial. It took DOI over a year to produce the letter and the Tribe spent considerable time and expense providing the DOI with documents concerning the 1970's Tribal Government Development Program.

Fourth, the Tribe will be harmed without the administrative record. The Tribe's ability to challenge the NIGC's new decision and order was a fundamental consideration and a critical component of the agreement between the parties. *Id.*¶ 111. The Tribe has spent substantial time and effort to move this litigation forward given the serious harm that the Tribe has suffered for years and continues to suffer. As the Tribe explained back in September 2016:

> The tribe is getting incredibly harmed by this. The tribe can't make decisions on borrowing money. It can't pursue other

> business opportunities. We could have gotten to summary judgment by now if [Federal Defendants] hadn't induced the tribe to go through this process with them. And we have gone through the process. We have waited.

Sept. 30, 2016 Hearing Transcript at 6:4-9.

Fifth, no harm will result from disclosure of the materials associated with the January 2017 Final Determination, particularly the December 2016 Indian Lands Opinion. As discussed above, such opinions are required and if the agencies do not concur they are to be part of the record. The administrative record for the May 5, 2015 Decision and Order contains prior concurrences drafted by Interior, which 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.

Sixth, there is no reason to believe that disclosing the documents considered by the NIGC when it issued the January 2017 Final Determination would cause future timidity by government employees. As the defendants concede, this is not "a typical APA case." Opp. at 9. The defendants agreed to a process in which final, appealable agency action was the final result. 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). For this reason, the defendants' reliance on the deliberative process privilege should be rejected.

6. The DOI Indian Lands Opinion Is the Specific Subject of the January 2017 NIGC Determination

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. 132, 161 (1975); *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.*

In *NLRB v. Sears*, the Supreme Court rejected petitioners' argument that intra-agency memoranda were properly withheld under the deliberative process privilege when they were incorporated by reference in other documents subject to disclosure. The Court reasoned that the privilege's purpose is significantly mitigated under such circumstances because "[t]he probability that an agency employee will be inhibited from freely advising a decision maker for fear that his advice, if adopted, will become public is slight." 421 U.S. 131, 161.

Like the intra-agency memoranda in *NLRB*, Interior's December 9, 2016 Indian Lands Opinion was expressly considered by NIGC and referenced in NIGC's January 2017 Final Determination. NGIC's final opinion states:

> After careful consideration of the December 9th letter, we have determined there are no grounds, for settlement purposes, for reconsideration of the Commission'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.

ECF 67-1. NIGC's evaluation clearly referred to and considered the Indian Lands Opinion in rendering final agency action. Nor was there any inhibition of the NIGC here, knowing that the DOI letter would be made public but nonetheless rejecting its conclusions out of hand. Therefore the public policy rationale underlying the deliberative process privilege does not, on balance, support withholding the Indian Lands Opinion. The Supreme Court's decision in *NLRB* compels production of the Indian Lands Opinion.

7. 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, Roebuck & Co.*, 421 U.S. 132, 138 (1975)). "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. FTC*, 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. DOD*, 245 F. Supp. 3d 19, 30 (D.D.C. 2017) (internal quotations omitted).

The NIGC's reconsideration of its May, 2015 Decision and Order, in light of the December 9, 2016 Indian Lands Opinion—which it agreed to do and which the Court ordered it to do—necessitates the production of the Indian Lands Opinion (and any other documents) considered by the NIGC at the time it issued the January 2017 Final Determination. The Indian Lands Opinion is the Department of the Interior's conclusion about whether the Tribe is federally acknowledged for purposes of the initial reservation exception in IGRA. 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.

Conclusion

The Court has already concluded that the January 2017 Final Determination is reviewable final agency action. The federal defendants are capable of producing and should produce all documents, including the December 2016 Indian Lands Opinion and related DOI materials, that comprise the administrative record relating to the January 2017 Final Determination, without further delay. For all the foregoing reasons and the reasons stated in its motion papers, plaintiff Fort Sill Apache Tribe respectfully moves the Court to compel production of the administrative record related to the NIGC's January 2017 Final Determination.

Dated: December 29, 2017

Respectfully submitted,

/s/ Kenneth J. Pfaehler

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of December, 2017, the foregoing Reply Brief in Support of Plaintiff Fort Sill Apache Tribe's Motion to Compel Production of the Administrative Record With Respect to the January 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
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