IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STAND UP FOR CALIFORNIA!, PATTY JOHNSON, JOE TEIXEIRA, and LYNN WHEAT,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF INTERIOR, RYAN ZINKE, in his official capacity as Secretary of the Interior, BUREAU OF INDIAN AFFAIRS, and TARA SWEENY, in her official capacity as Assistant Secretary-Indian Affairs,

Defendants,

and

WILTON RANCHERIA, CALIFORNIA,

Intervenor-Defendant.

Civil Action No. 1:17-cv-00058-TNM

Oral Argument Requested

FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' SECOND MOTION TO COMPEL ADEQUATE ADMINISTRATIVE RECORD AND PRIVILEGE LOG

Defendants United States Department of the Interior ("Interior" or "Department"); Ryan Zinke, in his official capacity as Secretary of the Interior ("Secretary"); the Bureau of Indian Affairs ("BIA"); and Tara Sweeny, in her official capacity as Assistant Secretary–Indian Affairs[1] (collectively, "Federal Defendants"), hereby respond to Plaintiffs' Second Motion to Compel Adequate Administrative Record and Privilege Log. *See* ECF No. 70.

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Assistant Secretary—Indian Affairs Tara Sweeny replaces John Tahsuda III, who had been delegated all nonexclusive functions, duties, and responsibilities of the Assistant Secretary—Indian Affairs.

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I. INTRODUCTION

On May 30, 2018, the Court found that four circumstances—not alone, but all together—warranted limited discovery in the form of a privilege log identifying documents withheld from the record on the basis of privilege. *See* ECF No. 62 (Memorandum Opinion) & 63 (Order). That privilege log was provided to Plaintiffs on September 5, 2018. Plaintiffs now reargue the same circumstances and evidence cited in the Court's May 30, 2018 order to request a brand new remedy: that Federal Defendants' deliberative-process privilege be either eliminated altogether or eliminated for documents dating between November 8, 2016 and January 19, 2017. Plaintiffs' only new evidence to justify further discovery is the fact that they disagree with the Federal Defendants about what they are entitled to have produced to them. None of the circumstances cited by Plaintiffs, even together, amount to bad faith or misconduct—much less the extreme misconduct that they must show for the extraordinary remedy they seek.

Plaintiffs also make two other arguments, one relating to attorney-client privilege and the other seeking to expand the record to include internal materials that were not transmitted to the agency decision-maker. First, Plaintiffs seek a broad waiver of attorney-client privilege for documents related to Plaintiffs' failed Motion for a Temporary Restraining Order ("TRO") and their abandoned Motion for a Preliminary Injunction ("PI") (ECF No. 2), as well as for documents related to the Department's title review of the land taken in trust for the Wilton Rancheria ("Tribe" or "Wilton"). Plaintiffs premise this argument on two emails in their possession since October 2017 in which attorneys in the Department's Office of the Solicitor recount communications they had with the Tribe's attorneys. But the fact that the Department was communicating with the Tribe provides no basis to infer that the Department revealed attorney-client confidences to the Tribe. The Court should reject Plaintiffs' effort to find a waiver of privilege based on such unprivileged

communications. And the Court should also refuse to find government misconduct either based on these communications themselves or the fact that Federal Defendants now refuse to produce privileged documents.

Second, Plaintiffs want the Department to treat as part of the record documents and communications internal to the Solicitor's Office (the Department's "law firm") that are related to this decision but were never transmitted to the decision-maker. Under settled Administrative Procedure Act ("APA") law, such documents are properly non-record because they were never considered by the decision-maker—and that is how they were treated here, as non-record. However, Plaintiffs brief correctly points out that these same documents were included (albeit erroneously) in counts of "record" documents in response to a Freedom of Information Act ("FOIA") request. Given this, and for the sake of moving this case towards the merits, the Department will supplement the privilege log with all privileged Solicitor's Office documents and produce anything not subject to privilege by December 14, 2018. It is the Department's prerogative to determine what is and is not record in the first instance and, contrary to Plaintiffs' assertions otherwise, these documents have been treated as non-record from the outset in accord with the Department's practice in cases like this, where the Solicitor's Office role is largely confined to formulating legal advice to be provided to decision-makers.

These record disputes are evidence of Plaintiffs' litigiousness but nothing else, and none of Plaintiffs' other allegations amount to evidence of misconduct either. The Court should decline to find any basis for either eliminating the deliberative-process privilege or invading the attorney-client privilege.

II. BACKGROUND

The Department's decision-making process on whether to acquire land into trust for Wilton began in 2013,[2] when the Tribe submitted an application to have land taken into trust for economic development and self-sufficiency. *See Stand Up for Cal.! v. U.S. Dep't of Interior*, 919 F. Supp. 2d 51, 84 (D.D.C. 2013) (taking land in trust is "in furtherance of Congress' judgment that Indian tribes must, in appropriate circumstances, be given the opportunity to pursue economic self-sufficiency and strong tribal government through gaming"). In response, the BIA issued a Notice of Intent ("NOI") to prepare an Environmental Impact Statement ("EIS"), as required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*[3] On December 19, 2013, the BIA conducted a public scoping meeting, where the public provided input, and on February 24, 2014, issued an EIS Scoping Report, which identified and analyzed seven alternatives. EIS Scoping Report at 1-2, 2-1.

The EIS Scoping Report explained that, although the Tribe's "Proposed Action" was "Alternative A" (the 282-acre Galt site), the BIA "may not determine a Preferred Alternative until completion of the environmental analysis." *Id.* at 2-10. A Preferred Alternative is distinct from a Proposed Action. As explained by the EIS Scoping Report, "a Preferred Alternative is the alternative that the agency believes would fulfill its statutory mission and responsibilities,

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[2] The Court appeared to assume in its May 30, 2018 order that the Department engaged in more than one decision-making process. *See* ECF No. 62 at 11 (finding that the Department "began procedures to take into trust the current disputed land in Elk Grove" in November 2016 and "completed the decision-making process for taking Elk Grove land into trust" within two months, after leaving the decision-making process for the Galt site "incomplete after three years"). As described below, the Department undertook only one decision-making process—the one that started in 2013 and that included consideration of the Elk Grove site, as well as the Galt site, as described below.

[3] The NOI and all other NEPA documents cited herein, as well as the Record of Decision ("ROD"), are available at www.wiltoneis.com.

considering economic, environmental, technical, and other factors." *Id.* In other words, the Preferred Alternative, not the Proposed Action, denotes the alternative that the agency is most likely to pick. Although the Court suggested that mid-November 2016 was "the first time over the years-long process that BIA identified [the Elk Grove] site," ECF No. 62 at 3,[4] the 2014 EIS Scoping Report identified the Elk Grove site as "Alternative F"—one of the alternatives that could eventually be the Preferred Alternative, EIS Scoping Report at 1-2, 2-1.

The December 29, 2015 Draft EIS ("DEIS"), like the EIS Scoping Report, also identified and analyzed a number of alternatives, including the Elk Grove site as Alternative F. ECF No. 31 at 2 ¶ 1, 10 ¶ 34. The BIA did not identify a Preferred Alternative in the DEIS and it was not required to do so. 40 C.F.R. § 1502.14(e). The public had an opportunity to comment on the DEIS, in writing or at public hearings. *Id.* § 1503.1(a)(4). Plaintiffs commented on and in one case even expressed a preference for, Alternative F, the Elk Grove site. Final EIS ("FEIS") Vol. 1, Comment Letters 08, 09, 010 (submitted by Plaintiff Stand Up for California!); Comment PH-31 (Plaintiff Lynn Wheat supporting Alternative F).

Almost a year later, in the December 14, 2016 FEIS, the BIA responded to substantive public comments received on the DEIS—including Plaintiffs' comments. *Id.* at 3-113 to 3-120 & 3-161. After considering the Proposed Action and all reasonable alternatives, the BIA selected the Elk Grove site as its Preferred Alternative in the FEIS, just as the Tribe had selected Alternative F as its new Proposed Action, based on "the alternative's ability to meet the purpose and need of the Proposed Action and the overall impact on the environment when selecting a Preferred Alternative." FEIS Vol. 2 at ES-2, 2-38, 2-39. For example, the BIA determined that the Elk

[4] Where ECF pagination diverges from a document's internal pagination, ECF pagination is used.

Grove site met the purpose and need better than the original Proposed Action at the Galt site "due to the extra infrastructure costs and related project delays for" the latter. FEIS Vol. 2 at 2-38. When the Department published the Notice of Availability of the FEIS, it started a 30-day waiting period in which Plaintiffs took advantage of yet another opportunity to comment and after which the Department could make a final decision. *See* ROD at Comment Letter 7, 8; 40 C.F.R. § 1506.10. During that time, the Department began receiving and considering public comments on the FEIS.

However, before the comment period closed, and anticipating that the Department might select its Preferred Alternative in the final decision, Plaintiffs initiated this case by filing a Complaint (ECF No. 1) and Motion for a TRO and PI (ECF No. 2). In that Motion, Plaintiffs requested emergency relief "to prevent Defendants from immediately accepting title" in trust for the Tribe. ECF No. 2-1 at 8. On January 13, 2017, the Court held a hearing on the Motion for a TRO and that same day denied it. Plaintiffs opted not to pursue further preliminary relief from the Court. Instead, Plaintiffs asked the Department to stay the trust acquisition, pursuant to 5 U.S.C. § 705, if the Tribe's application was approved. *See* ECF No. 6-1. Section 705 states that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review."

The FEIS comment period closed on January 17, 2017. On January 19, the Department issued a ROD responding to all public comments received, including Plaintiffs' comments. ROD at 59, 72-74, 79, 82-83, 87-88 (responding to Plaintiffs' comments). The ROD again selected the Elk Grove site as the Preferred Alternative after the Department reviewed all alternatives, the DEIS, the FEIS, and public comments thereto. *Id.* at 3-4. The Department explained that it chose the Elk Grove site, after three years of review and public input, because "Alternative F has the

least environmental impact of the Development Alternatives" and because "it will best meet the purpose and need for the proposed trust acquisition by promoting the long-term economic self-sufficiency, self-determination, and self-governance of the Tribe." *Id.* at 3-4, 57.

The Department continued to consider Plaintiffs' § 705 request after the final decision had been made and did not take the land in trust while it did so. However, on February 10, 2018, the Department notified Plaintiffs that justice did not require it to postpone the effective date of the final decision. *See* Ex. 1 to Decl. of Cody McBride ("McBride Decl."). Only then did the Department take the Elk Grove site into trust.

III. ARGUMENT

A. Federal Defendants have not engaged in misconduct, let alone the type of extreme government misconduct required to trigger the government-misconduct exception.

The deliberative-process privilege "prevent[s] injury to the quality of agency decisions" by allowing frank and candid discussion of legal and policy matters. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-51 (1975). Plaintiffs urge the Court to apply the government-misconduct exception—without identifying that exception by name—to preclude Federal Defendants' deliberative-process privilege. Plaintiffs rely on *In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997), but this Court, often citing *In re Sealed Case*, has made clear that the exception is not as easily triggered as Plaintiffs would suggest.

To invoke the government-misconduct exception, Plaintiffs "must meet a high bar." *Judicial Watch, Inc. v. U.S. Dep't of State*, 285 F. Supp. 3d 249, 254 (D.D.C. 2018). The exception is a narrow one because, "[i]f every hint of marginal misconduct sufficed to erase the privilege, the exception would swallow the rule." *Hall & Assoc. v. United States Envtl. Prot. Agency*, 14 F. Supp. 3d 1, 9-10 (D.D.C. 2014) (quoting *ICM Registry, LLC v. U.S. Dep't of Commerce*, 538 F. Supp. 2d 130, 133 (D.D.C. 2008)); *see Judicial Watch, Inc. v. U.S. Dep't of State*, 235 F. Supp. 3d

310, 313-14 (D.D.C. 2017) (calling it the "narrow government misconduct exception"). Plaintiffs not only "must provide an adequate factual basis for believing that the requested discovery would shed light upon government misconduct," *Am. Petroleum Tankers Parent, LLC v. United States*, 952 F. Supp. 2d 252, 268 (D.D.C. 2013); *see Hinckley v. United States*, 140 F.3d 277, (D.C. Cir. 1998) (not applying exception because claim of impropriety was not "colorable"), they must also establish that "the claimed governmental misconduct [is] severe enough to qualify as nefarious or extreme government wrongdoing," *Neighborhood Assistance Corp. of Am. v. U.S. Dep't of Hous.& Urban Dev.*, 19 F. Supp. 3d 1, 14 (D.D.C. 2013) (citing *Nat'l Whistleblower Ctr. v. U.S. Dep't of Health & Human Servs.*, 903 F.Supp.2d 59, 68–69 (D.D.C. 2012); ICM Registry, LLC, 538 F.Supp.2d 130, 133 (D.D.C. 2008)).

Moreover, "[t]he relevant consideration for 'extreme government wrongdoing' sufficient to trigger the exception is the egregiousness of the contents of the discussion, not the egregiousness of the underlying conduct that the discussion concerns." *Judicial Watch, Inc.*, 285 F. Supp. 3d at 254. This Court accordingly has applied the government-misconduct exception in only "rare cases" where "the 'policy discussions' sought to be protected with the deliberative process privilege were so out of bounds that merely discussing them was evidence of a serious breach of the responsibilities of representative government. The very discussion, in other words, was an act of government misconduct, and the deliberative process privilege disappeared." *Hall & Assoc.*, 14 F. Supp. 3d at 9-10; *see, e.g.*, *Tax Reform Research Grp. v. Internal Revenue Service*, 419 F. Supp. 415, 426 (D.D.C. 1976) (applying exception where documents concerned recommendation to use powers of IRS in discriminatory fashion against "enemies" of the Nixon Administration); *Alexander v. FBI*, 186 F.R.D. 170, 171 (D.D.C. 1999) (applying exception after allegations that "FBI improperly handed over to the White House hundreds of FBI files of former political

appointees and government employees from the Regan and Bush Administrations"); *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 134 (D.D.C. 2005) (applying exception where government allegedly engaged in malicious prosecution and abuse of process).

Federal Defendants have not engaged in misconduct, much less the type of extreme government misconduct that triggers the exception. As evidence of extreme government misconduct, Plaintiffs allege that Federal Defendants (1) "rush[ed] to issue the decision"; (2) made "misrepresentations in the TRO hearing as to when a decision would be made"; and (3) intentionally omitted record documents from the privilege log. ECF No. 70 at 18. Plaintiffs' allegations of misconduct have no substance, as thoroughly explained in Sections A.1-3. They simply cannot and have not seriously tried to meet the high bar to invoke the government-misconduct exception, which requires evidence of "extreme government wrongdoing." The Court should decline to apply this narrow exception for that reason alone.

In addition, Plaintiffs' arguments do not focus on the "egregiousness of the contents of the discussion," but on the alleged "egregiousness of the underlying conduct," which is not the "relevant consideration." *Judicial Watch, Inc.*, 285 F. Supp. 3d at 254; *see Bartko v. U.S. Dep't of Justice*, No. CV 17-781 (JEB), 2018 WL 4608239 at *6 (D.D.C. Sept. 25, 2018) ("The government-misconduct exception does not generally apply because the discussions contained in the documents are not themselves acts of misconduct."). The discussions in the documents themselves are not acts of misconduct, and that is enough to defeat the exception. *See Bartko*, 2018 WL 4608239 at *5.

Lastly, even if the exception applied to the sort of allegations Plaintiffs assert, all but the last of Plaintiffs' arguments—that Federal Defendants intentionally omitted record documents, which like the other arguments is baseless, as detailed in Section A.3—track what Plaintiffs

previously argued and what the Court found warranted only a privilege log. Not only did Plaintiffs fail to request the extraordinary remedy of entirely erasing the Department's deliberative-process privilege in the First Motion to Compel, they did not mention it in consultation on this Second Motion. *See Dist. Hosp. Partners, LP v. Sebelius*, 971 F. Supp. 2d 15, 22 (D.D.C. 2013) (expressing concern about "plaintiffs' lack of candor in providing full notice to the Secretary of exactly what they intended to compel," noting "well-established rule that motions to compel must identify the materials sought to be compelled with 'sufficient specificity,'" and denying plaintiffs' motion because "plaintiffs' counsel should have conferred with the Secretary" regarding "*all* of the issues they plan to raise"), *aff'd sub nom. Dist. Hosp. Partners LP v. Burwell*, 786 F.3d 46 (D.C. Cir. 2015); *see also Abbott GmbH & Co. KG v. Yeda Research & Dev., Co.*, 576 F. Supp. 2d 44, 48 (D.D.C. 2008); *Ellipso, Inc. v. Mann*, 460 F. Supp. 2d 99, 102 (D.D.C. 2006). Nevertheless, Plaintiffs now ask for more based on the same set of circumstances, as if the Court's prior order had already triggered the exception to the deliberative-process privilege—which is illogical, since the Court ordered Federal Defendants to log that very privilege, not abandon it. Plaintiffs should not be allowed to bootstrap an additional remedy that they failed to ask for when previously arguing the same set of circumstances. *See Am. Petroleum Tankers Parent, LLC*, 952 F. Supp. 2d at 268 (finding that purported "bad faith" "is a far cry from *misconduct*").

1. The Department's decision was not misconduct, much less extreme government misconduct.

Plaintiffs again argue, as they did in the First Motion to Compel, that the Department's decision was rushed and "significantly corrupted." ECF No. 70 at 16. Specifically, Plaintiffs continue to complain of (1) the Department's work to finalize its decision before the new presidential administration took office; (2) the Department's communication with the Tribe while evaluating the Tribe's application; and (3) the Department's developing opinion and expectation

that the Tribe's application would be granted. But contrary to Plaintiffs' arguments then and now, the Department's three-year decision-making process does not even suggest bad faith, much less extreme government misconduct.

a. The timeline of the Department's decision-making process was not misconduct, much less extreme government misconduct.

Plaintiffs first complain about the timing and speed of the Department's decision. ECF No. 70 at 17. It is true the Department performed a substantial amount of work between November 2016 and January 2017 to render its decision before the change in presidential administrations. But that process began in 2013 and took over three years to complete—as is normal for fee-to-trust decisions. Further, throughout that process, the Elk Grove site was identified as one of several alternatives to be considered and evaluated by the Department. That the Department aimed to conclude its process before the administration changed is immaterial. As the Court explained in its prior order, "expressing an intent to meet a deadline—even an accelerated one—does not exhibit bad faith *per se*." ECF No. 62 at 12. Any administration would want to wrap up its business before it leaves, especially business that dated from the start of its term. Plaintiffs do not cite any case finding misconduct based on adherence to a deadline or even government haste. Those things do not even begin to approach the type of "extreme government misconduct" found in the "rare cases" where the exception has been applied. *See Hall & Assoc.*, 14 F. Supp. 3d at 9-10.

Plaintiffs also continue to speculate that the Principal Deputy Assistant Secretary ("PDAS") did not have time to read the printed-out version of the ROD before signing it. But there is no reason to believe that the PDAS did not read the ROD in another format or make an informed decision. Regardless, the PDAS signed the ROD, and a high level decision-maker can and must delegate work underlying a final decision. *See Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 461 (D.C. Cir. 1967) ("It is well settled that even in the adjudicatory process,

an administrative officer may rely on subordinates to sift and analyze the record and prepare summaries and confidential recommendations, and the officer may base his decision on these reports without reading the full transcript."). Plaintiffs are not entitled to invade the deliberative process of the Department in an attempt to determine what the PDAS did or did not read. *See United States v. Morgan*, 313 U.S. 409, 422 (1941) (holding that it is not the function of courts to probe the integrity of the administrative process by allowing questions as to "the manner and extent of [the decision-maker's] study of the record and his consultation with subordinates"). Plaintiffs cite no authority—much less authority concerning "informal agency adjudications," which fee-to-trust decisions are, *Butte Cty. v. Chaudhuri*, 887 F.3d 501, 505 (D.C. Cir. 2018)—stating that delegation and reliance on subordinates qualifies as extreme government misconduct for purposes of erasing the deliberative-process privilege.

It is critical to note that, although Plaintiffs complain about the timing and speed of the Department's decision, they identify no specific procedural requirement that the Department failed to meet. The Court's prior order found an indicia of bad faith in the Department not acceding to Plaintiffs' last-minute requests for additional procedure and delay.[5] But the APA imposes almost no procedural requirements for informal agency adjudications other than arbitrary and capricious review. *Butte Cty*, 887 F.3d at 505-06 (citing *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990); *Dist. No. 1, Pac. Coast Dist. Marine Engineers' Beneficial Ass'n v. Mar. Admin.*, 215 F.3d 37, 42-43 (D.C. Cir. 2000)); *see also* 5 U.S.C. § 555 (setting forth minimal requirements for informal adjudications). Although "[a]gencies can voluntarily go beyond the procedural

[5] Plaintiffs' requests include a September 7, 2016 request to prepare a supplemental EIS ("SEIS"); December 29, 2016 and January, 6, 2017 requests for delay of a final decision; and January 17, 2017 request for a formal stay of proceedings under 5 U.S.C. § 705.

requirements of the Administrative Procedure Act, . . . courts generally cannot compel agencies to do more than the statute demands . . . ." *Butte Cty.*, 887 F.3d at 505. And neither the APA[6] nor NEPA[7] demanded that the Department delay a decision here. The Department should not be punished for declining to offer Plaintiffs more procedure than required by law.

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[6] As for Plaintiffs' 5 U.S.C. § 705 request, the Court found that, because the Department's denial came "after a decision was already made," it was "arguably inconsistent" with keeping an open mind. ECF No. 62 at 12-13. But a request under § 705 seeks relief that can be given *only after* a final decision has been made and is subject to an agency's discretion: Section 705 provides that, when justice so requires, an agency "*may* postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705 (emphasis added). Postponement of the effective date of any final decision is what Plaintiffs requested. *See* ECF No. 6-1. It was in the Department's discretion to deny that request. Nevertheless, the Department did postpone the effective date after a decision had been made to continue considering Plaintiffs' § 705 request. The Department took the land into trust only after concluding—in a seven-page letter dated February 10—that justice did not require a stay. *See* Ex. 1 to McBride Decl. Even if the Department's denial of Plaintiffs' § 705 request had somehow violated the APA, that would go to the merits rather than amount to evidence of bad faith or extreme government misconduct. *See Smith Prop. Holdings, 4411 Conn. LLC v. United States*, 311 F. Supp. 2d 69, 84-85 (D.D.C. 2004) (finding plaintiff's allegations of false statements did not show bad faith because they "mainly concern the issue this Court was called upon to decide—whether the agency acted arbitrarily and capriciously, or in violation of the law"); *United States v. Iron Mountain Mines, Inc.*, 987 F. Supp. 1250, 1261 (E.D. Cal. 1997) (rejecting as evidence of bad faith Plaintiffs' argument "that some of the EPA's decisions violate the [national contingency plan]" and "that EPA's decisionmaking framework was inadequate"); *see also NLRB v. Honaker Mills, Div. of Top Form Mills, Inc.*, 789 F.2d 262, 266 (4th Cir. 1986) (holding evidence of bad faith based on bias must stem "from sources outside the decisional process," not incorrect rulings).

[7] NEPA did not require the Department to prepare a SEIS. "[I]n refining the site plan and accounting for needed roadways and parking," the BIA added eight acres to the Elk Grove site in the FEIS. FEIS Vol. 2 at ES-5. "The additional acreage is addressed throughout" the FEIS, and it "consists of developed and disturbed land similar to the original 28 acres." *Id.* at ES-5, 2-26 n.1. An agency is allowed to make minor changes in the FEIS to an alternative proposed in the DEIS, or change the Proposed Action itself, without preparing a SEIS. *See* 40 C.F.R. § 1502.9; *see also* 23 C.F.R. § 771.130(b). Adding acreage to Alternative F was a minor change, as the FEIS's conclusions regarding environmental impact remained the same. In fact, that the BIA made changes to Alternative F based on public comments to the DEIS shows that the BIA did exactly what NEPA requires: identify and seriously consider feasible alternatives, not as an academic exercise, but to select the best option. *See Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 72-75 (D.C. Cir. 2011); *see also* 40 C.F.R. §§ 1502.9, 1502.14, 1502.16. In any event, whether a SEIS was required is a merits question, not evidence of bad faith or extreme government misconduct. *See, e.g.*, *Smith Prop. Holdings*, 311 F. Supp. 2d at 84.

b. Communications between the Department and the Tribe were not misconduct, much less extreme government misconduct.

Plaintiffs' second complaint is that the Department communicated with the Tribe during the decision-making process. Far from sinister, *ex parte* communications between the Department and a tribal fee-to-trust applicant are procedurally permissible and also necessary to negotiate the process. *Butte Cty.*, 887 F.3d at 506 (finding *ex parte* communications between Department and tribal fee-to-trust applicant permissible); *see also Pension Benefit Guar. Corp.*, 496 U.S. at 653-56; *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 523-26 (1978) (courts may not impose any additional procedural requirements, including subject or temporal contact limitations, beyond those specified by the APA); *Pac. Dawn, LLC v. Pritzker*, No. C13-1419 TEH, 2013 WL 6354421, at *16 (N.D. Cal. Dec. 5, 2013), *aff'd*, 831 F.3d 1166 (9th Cir. 2016) (political contacts unsurprising and permissible). Plaintiffs also neglect to mention their own *ex parte* communications to the Department opposing the decision and, at the last minute, requesting delay.

Not surprisingly, Plaintiffs cite no authority for their argument that contact between the Department and tribal fee-to-trust applicants during the review process is misconduct. After all, in addition to a practical necessity for the Department to contact an applicant to ensure the application is complete, the agency's regulations and internal procedures require such contact. *See, e.g.*, 25 C.F.R. § 151.10 ("[A] copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision."); *id.* § 151.12(a) ("The Secretary shall review each request and may request any additional information or justification deemed necessary to reach a decision."); Department of the Interior, Bureau of Indian Affairs, Office of Trust Services, Division of Real Estate Services, *Acquisition of Title to Land Held in Fee or Restricted Fee Status*, Release #16-47, Ver. IV (rev.

1), at 18 (Jun. 28, 2016) ("FTT Handbook") (directing that "a copy of all information responsive to the [Notice of Application be provided] to the applicant for their written response").[8] To the extent Plaintiffs imply that the Department's regulations and procedures themselves are biased, such an argument must fail. *See Upstate Citizens for Equal., Inc. v. Jewell*, No. 5:08- CV-0633 LEK, 2015 WL 1399366, at *10 (N.D.N.Y. Mar. 26, 2015) (finding that plaintiffs' claims of bias against the BIA in the fee-to-trust process "is effectively a claim that the policies established by Congress in the IRA create structural bias in favor of Indians" and that "Congressional policies cited by Plaintiffs . . . are insufficient to establish structural bias"), *aff'd sub nom. Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556 (2d Cir. 2016).

Butte County illustrates both the permissibility and typicality of contacts between the Department and tribal fee-to-trust applicants. That litigation involved a hotly contested fee-to-trust application for gaming that, at the time of the relevant contacts between the Department and the tribal applicant, was on remand from the D.C. Circuit. *Butte Cty.*, 887 F.3d at 503-04. At issue on remand was whether the land to be taken into trust was "restored land" eligible for gaming under the Indian Gaming Regulatory Act. *Id.* During the remand, after opting to reopen the administrative record, the Department gave the plaintiff, Butte County, 30 days to introduce new evidence and the Mechoopda Tribe 30 days to respond. *Id.* at 504. Through *ex parte* communications, the Mechoopda Tribe requested and the Department granted an extra 15 days to submit what the County described as a report from a new expert that relied on new sources, set forth a new history of the tribe, and provided a different basis for the land's eligibility for gaming. *Id.* The County alleged it was not aware of the extension request until after the new materials had

[8] The FTT Handbook is publicly available at: https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/Acquisition_of_Title_to_Land_Held_in_Fee_or_Restricted_Fee_Status_50_OIMT.pdf.

been submitted. *Id.* After the County complained, the Department gave it 20 days to reply to the tribe's voluminous materials and then approved the tribe's application. *Id.* at 504-05. The County challenged the Department's decision, arguing in part that it was procedurally improper. *Id.* at 505. The district court disagreed, and the County appealed. *Id.*

The D.C. Circuit flatly rejected the County's contention that the process was flawed, including the contention that the *ex parte* nature of the tribe's request for and Department' approval of an extension was improper. *Id.* at 505 (citing *Dist. No. 1, Pac. Coast Dist. Marine Engineers' Beneficial Ass'n*, 215 F.3d at 42-43). Noting that the APA imposes almost no procedural requirements in informal adjudications, *id.* at 505 (citing citing *Pension Benefit Guar. Corp*, 496 U.S. at 655; *Dist. No. 1, Pac. Coast Dist. Marine Engineers' Beneficial Ass'n*, 215 F.3d at 42-43), the court was also untroubled that the *ex parte* communication occurred at a very late stage of the decision-making process and that the Department did not give the County more time to respond. The Court explained that, "in an informal adjudication, there is no blanket obligation for the agency to allow submission of rebuttal evidence at all." *Id.* at 506. Just as the D.C. Circuit declined Butte County's invitation in an informal adjudication to create procedural rules not grounded in the APA or other law, this Court should refuse Plaintiffs' bid in this informal adjudication to invent procedural rules and then infer misconduct when they are not followed. The Department may freely communicate with a tribal fee-to-trust applicant, and vice versa. And as with the Mechoopda Tribe in *Butte County*, it was entirely appropriate for Wilton to be interested in the status and outcome of its fee-to-trust application, just as it was appropriate for the Department to contact the Tribe *ex parte* as questions and developments related to the application arose.

To the extent that Plaintiffs rely on the Court's prior order finding a suggestion of bad faith in the Tribe pressuring the Department to issue a decision, Plaintiffs' reliance is misplaced. The

Court's finding was based on *Sokaogon Chippewa Community v. Babbitt*, 961 F. Supp. 1276, 1278 (W.D. Wis. 1997), ECF No. 62 at 13, which did not apply the government-misconduct exception. Even with regard to bad faith, *Sokaogon* at the outset expressed concern about "throw[ing] open the court's gates to a vast array of political impropriety claims" and found bad faith only after being confronted with evidence of political pressure that went well beyond the email communications here. *Id.* at 1279-80. For example, in *Sokaogon*, Department officials met with members of Congress and opponents of the decision without notice to applicants until six weeks later. *Id.* at 1281. After opponents explained the political ramifications of the decision to a White House official, the official contacted the chairman of the Democratic National Committee (DNC), who in turn contacted Department officials. *Id.* at 1282. In response to White House inquiries on the application's status, the Department then responded contradictorily that it had decided to deny it and then, in a separate response, it was still reviewing the matter with "great care"—all before any formal decision had been issued. *Id.* at 1283. Not only did the Department's three-page final decision denying the application mark an about-face from its lengthy, detailed internal recommendations to approve it dated only 20 days earlier, the agency official originally tasked with making the decision recused herself at the last minute. *Id.* at 1283-84. Together these facts led the court in *Sokaogon* to suspect that political pressure had caused the Department's change of course. *Id.*

Here, by contrast, Plaintiffs simply allege that the email communications show "the Tribe unquestionably pressured [the Department] to issue a decision." ECF No. 70 at 16. There is no evidence that pressure from the Tribe had any effect on the outcome or timing of the Department's final decision. As explained above, after more than three years of review, the Department shared a desire to make a decision before the change in administration and worked toward that goal

independently. Moreover, unlike in *Sokaogon*, there is no evidence here of any political calculus by the Department in favor of one outcome or the other, or of last-minute reversals or recusals. The circumstances here simply do not suggest bad faith. Yet based only on email communications evidencing a mutual desire to meet a deadline, Plaintiffs ask this Court to go further than *Sokaogon*. An order finding that such evidence not only suggests bad faith but also meets the bar for extreme government misconduct would do what this Court has warned against: it would "erase the privilege, the exception would swallow the rule," in the fee-to-trust context. *See Hall & Assoc*, 14 F. Supp. 3d at 9-10. After all, it is highly unlikely that any fee-to-trust decision is made without the applicant contacting the Department about the timing of its decision, among other matters important to the application.

Lastly, albeit outside the Second Motion to Compel's section on the government-misconduct exception, Plaintiffs allege that the Department engaged in extreme government misconduct by "coordinat[ing] [its] litigation strategy with the Tribe" before a decision had been made. ECF No. 70 at 14. To do so, Plaintiffs rely on two emails that recount communications between Solicitor's Office attorneys and attorneys for the Tribe. The first email describes a communication prompted by Plaintiffs' Motion for a TRO and PI, and regarding whether the Tribe had concerns with the Department agreeing to stay taking the land in trust for 30 days, if the Department approved the Tribe's application. *Id.* at 13. The second email recounts a communication regarding the potential transfer of title of the land to the United States in the event of a decision favorable to the Tribe. *Id.* at 14.[9] The communications cited by Plaintiffs are not evidence of misconduct or extreme misconduct.

[9] Plaintiffs discuss these two emails primarily to argue that attorney-client privilege has been waived with respect to certain topics. ECF No. 70 at 12-15. This brief in Section III.B addresses that argument and describes the two emails on which Plaintiffs focus in more detail.

The Department only considered a stay and consulted with the Tribe because Plaintiffs forced the issue with their Motion for a TRO and PI. A voluntary stay would have obviated the need for a TRO hearing and provided a window to brief the Motion for a PI.[10] In the event of a favorable decision on the Tribe's application, any agreement to stay taking the land in trust would have directly affected and prejudiced the Tribe. It was appropriate to inform the Tribe that Plaintiffs had sought the stay and to seek the Tribe's position on it. Moreover, if a stay had been put in place without the Tribe's consent, then the Tribe could have potentially argued the Department had run afoul of its own regulations to acquire the land immediately, as the Department's fee-to-trust regulations provide that, once an application is approved, the Department must "[i]mmediately acquire the land in trust." 25 C.F.R. § 151.12(c)(2)(iii). Prudence therefore warranted consulting the Tribe.

The second communication from the Solicitor's Office is a good example of the routine and necessary communications that occur between the Department and a tribal applicant during the fee-to-trust decision process. As anticipated by the Department's obligation to take land into trust "immediately" after a final decision is made, title work begins before the decision with the preparation of a preliminary title opinion ("PTO"). *See* Decl. of Karen Koch, Ex. 2 to McBride Decl., at ¶¶ 7-8 ("Koch Decl."); *see also* FTT Handbook at 12-13, 17-18. In fact, DOJ counsel candidly informed the Court that "title work ha[d] begun" in this case at the TRO hearing. TRO Hr'g Tr., Jan. 13, 2017, 37:6. During that process, a tribal applicant must furnish certain title evidence to the Department, and the Department's regulations and internal procedures require it to review that evidence and notify the applicant of any "liens, encumbrances, or infirmities"; the

[10] As it turned out, the Court found no merit to Plaintiffs' Motion for a TRO and denied it on January 13, after which Plaintiffs abandoned the Motion for a PI.

Department may seek additional information from the applicant to address such issues if necessary. *See* 25 C.F.R. § 151.13(b); FTT Handbook at 17-19 (directing that the following, among other things, occur in review of a fee-to-trust application before the final decision: "Confirm that you have the required title evidence documentation from applicant and copies of all documents that create encumbrances and exceptions to title"; "Notify applicant of objections outlined in [PTO]"; and "Request applicant to provide documents to show that objections of the PTO have been cleared"). Accordingly, the Department routinely discusses title issues that may affect the title transfer with tribal applicants before making a final decision. *See* Koch Decl. at ¶ 9. Plaintiffs' cited email is an example of such discussions. *See id.* at 10-12. And if those types of discussions are deemed evidence of extreme government misconduct—a conclusion that no court has come close to—then the deliberative-process privilege will be erased in the context of fee-to-trust applications. *See Hall & Assoc.*, 14 F. Supp. 3d at 9-10.

c. The Department's developing opinion and expectation as to the application was not misconduct, much less extreme government misconduct.

Third, Plaintiffs complain about the Department's developing opinion and expectation prior to the final decision that it would ultimately grant the Tribe's application. ECF No. 70 at 12-13. The Indian Reorganization Act of 1934, 25 U.S.C. § 5108, provides the Department discretion on whether to accept land in trust for tribes. For the Department to form an opinion about how such discretion should be exercised is neither bad faith nor extreme government misconduct. As the D.C. Circuit has made clear, even in the more rigorous rulemaking context, having an opinion about a result prior to a decision does not evince a "single-minded commitment to a particular position [that makes it] incapable of giving fair consideration to the issues that are presented for decision." *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1179 (D.C. Cir. 1980); *see also Rutigliano Paper Stock, Inc. v. U.S. Gen. Servs. Admin.*, 967 F. Supp. 757, 770 (E.D.N.Y. 1997)

("The fact that [an] official may have formed an opinion as a result of the initial investigation is not a cause for bias."). Agency officials, like judges, are not required to remain agnostic about the outcome until the very end. *See Lead Indus. Ass'n, Inc.*, 647 F.2d at 1178-79; *Ass'n of Nat'l Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1174 (D.C. Cir. 1979); *Consumers Union of U.S., Inc. v. F.T.C.*, 801 F.2d 417, 427 (D.C. Cir. 1986). On the contrary, in the fee-to-trust application context, an agency is expected to have an opinion before a final decision is made: NEPA regulations authorize and encourage an agency to identify its Preferred Alternative in the DEIS and mandates it in the FEIS. 40 C.F.R. § 1502.14(e).

As Plaintiffs point out, the Department began to review public comments to the FEIS and prepare drafts of decisional documents before the close of the comment period. That is not misconduct and certainly is not extreme misconduct. *See Air Transp. Ass'n of Am., Inc.*, 663 F.3d at 487-88 (in rulemaking context, preparing a final version of proposed rule in advance "falls short of the 'strong' evidence of 'unalterably closed minds' necessary to justify discovery into the Board's decisionmaking process"). By then the Department had already identified, explained, and supported its Preferred Alternative in the FEIS—work that had to be incorporated into the final decision. The only thing of substance left to do was review and address any public comments. No rule states when it is permissible to begin reviewing comments and drafting decisional documents, and Plaintiffs do not suggest that the Department failed to consider and address all of the comments received, including Plaintiffs' submissions. ROD at 59, 72-74, 79, 82-83, 87-88 (responding to Plaintiffs' comments). At most, that the Department began drafting a decision before the close of the comment period shows only that the Department had arrived at a preliminary assessment, as required by NEPA. And that the Department's Preferred Alternative remained unchanged

following the FEIS shows that it found nothing in the submitted comments to warrant reconsideration.

Far from extreme government misconduct, that is the exact process NEPA dictates. NEPA demands only "good faith" objectivity, not "subjective impartiality." *See Carolina Envtl. Study Grp. v. United States*, 510 F.2d 796, 801 (D.C. Cir. 1975) (citing *Envl. Defense Fund v. Corps of Engineers*, 470 F.2d 289 (8th Cir. 1972)). Courts routinely reject claims that an agency has prejudged the outcome or engaged in biased NEPA assessment, much less engaged in the kind of extreme government misconduct that must be shown for the relief requested by Plaintiffs here. *See, e.g., Fayetteville Area Chamber of Commerce v. Volpe*, 515 F.2d 1021, 1026 (4th Cir. 1975) (fact that state official had stated a pre-EIS preference for highway location did not show lack of good faith objectivity); *Envtl. Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army*, 492 F.2d 1123, 1129 (5th Cir. 1974) (documents prepared by decisional agency expressing confidence that project would be approved did not show lack of good faith objectivity in later NEPA analyses); *Conservation Law Found. v. Fed. Highway Admin.*, 630 F. Supp. 2d 183, 202 (D.N.H. 2007) (an initial agency view that expansion of highway was the best alternative did not show bad faith in examination of rail alternative); *Australians for Animals v. Evans*, 301 F. Supp. 2d 1114, 1127 (N.D. Cal. 2004) (public statement of agency support for project did not show bad faith); *Nashvillians Against I-440 v. Lewis*, 524 F. Supp. 962, 986-87 (M.D. Tenn. 1981) (mere fact that a completed plan for a highway was prepared before the EIS was undertaken insufficient).

Notwithstanding NEPA and all of the case law above, Plaintiffs reason that the Department must have made its final decision at some point before it was actually allowed to. Even if NEPA did not call for a preliminary assessment, Plaintiffs' logic still does not hold. First, Plaintiffs point out that the Department considered a stay of the trust acquisition, consulted with the Tribe, and

began litigating this action before it had approved the Tribe's application. ECF No. 70 at 13. But again, it was Plaintiffs who began this litigation before there was a final decision, forcing the Department to defend its discretion to make a decision of its choosing at a time of its choosing. And to consider a stay, the Department properly consulted with the Tribe, which would be most impacted by any agreement. Second, Plaintiffs make much of the Tribe's and Department's mutual desire that a final decision be made before the change in administrations. *Id.* at 17. But that mutual desire does not mean that the Department had already made its final decision. The Department had already spent three years evaluating the Tribe's application, and it would have required even more time to bring the new administration up to speed to make any decision, whether favorable or unfavorable.

2. DOJ counsel's comments at the January 13, 2017 TRO hearing were not misconduct, much less extreme government misconduct.

In addition to the Department's decision-making process, Plaintiffs argue that DOJ counsel's January 13, 2017 representation to the Court was extreme government misconduct. ECF No. 70 at 17. DOJ counsel stated that the date of a final decision was uncertain, as it would be affected by the number and content of public comments received by the end of the public comment period on January 17, 2017. TRO Hr'g Tr., Jan. 13, 2017, 37:15-25. Counsel's comment, besides being true, is not inconsistent with a decision being issued on January 19. On January 13, the day DOJ counsel made his representations to the Court, no one knew how many comments the Department would ultimately receive or what they would say. The Court itself recognized that counsel was in no position to state when exactly a decision would occur. *Id.* at 37:9-12 ("Is there anything that you can say—and I understand the answer to this may be no, but is there anything you can currently say about the timing of the decision?"). As it turned out, the Department was able to assess and respond to all of the submitted comments by January 19, as DOJ counsel

indicated was a possibility. *Id.* at 38:19-23 ("Maybe there will be no comments or maybe—I can't say either way. The department might be able to do it. But the department doesn't know is the answer to the question, because the department doesn't know what will be in the mailbox on the 17th."). That is because the Department received only five comments between January 13 and January 17. ROD Attachment II: Comments and Responses to Comments on the FEIS. Counsel's comments were not made in bad faith, and they are certainly not extreme government misconduct.

Nevertheless, Plaintiffs appear to cite, once again, emails recounting communications between Solicitor's Office attorneys and the Tribe as evidence that the Department "was quite certain that it would be issuing a decision before the close of the Administration" and should have told the Court as much on January 13. ECF No. 70 at 12-13. Plaintiffs' argument, once again, is nonsensical. Only the first email cited by Plaintiffs, sent on January 12, is dated before the January 13 TRO hearing, and it had to do with the Department's consideration of a stay of the trust acquisition in the event the Tribe's application was approved. That the Department considered such a stay on January 12, five days before the close of the comment period, does not prove that, on January 13, the Department or DOJ counsel knew a decision would be finalized by January 19. Of course, the second email, which had to do with the title transfer and was sent on January 18, after the Court had already denied a TRO, says even less about what the Department and DOJ counsel knew on January 13.

3. Treating internal documents of the Office of the Solicitor as non-record comports with APA law and is not misconduct, much less extreme government misconduct.

Plaintiffs seek a privilege log for Solicitor's Office documents that are related to the Wilton decision but were never transmitted to the Office of the Secretary or any other programmatic component of the Department involved in the decision-making process. The Department's legal position is that such documents are non-record because they were never "before" the decision-

maker. *See* Decl. of Kallie Jacobson, Ex. 3 to McBride Decl., at ¶ 5.h ("Jacobson Decl."). Plaintiffs' contention to the contrary misstates what it means for documents to be "indirectly considered" by the decision-maker, and if accepted would seriously compromise and adversely affect the work of the Solicitor's Office and its role in the process. Not surprisingly, Plaintiffs offer no on-point precedent for their sweeping proposition.

The Department's position is based on this Court's case law. This Court has interpreted what was "before" the decision-maker "to include all documents and materials that the agency directly or indirectly considered," but it has also cautioned that "interpreting the word 'before' so broadly as to encompass any potentially relevant document existing within the agency or in the hands of a third party would render judicial review meaningless." *Pac. Shores Subdivision, California Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 4-5 (D.D.C. 2006). This Court has correctly recognized that reading "indirectly considered" as Plaintiffs do would be unworkable and profoundly counter-productive. For example, this Court has held that an agency may exclude progress and status reports generated during and related to a decision process where "it is unlikely that the [decision-maker] considered the reports, constructively or otherwise." *Am. Petroleum Tankers Parent, LLC*, 952 F. Supp. 2d at 263. Similarly, communications between a contractor and an agency that are only "tangential" to a contractor report produced in the decision process, where the decision-maker considered the report but not the agency communications with the author of the report, can be properly treated as non-record. *Id.* Even communications between a plaintiff and an agency, in which the plaintiff "provides some unsolicited advice regarding what the administration should emphasize . . . regarding the [p]laintiff's application," can be treated as non-record where there is no evidence that the decision-maker "considered these emails, or relied heavily on the content of these emails such that they should be deemed to be part of what the

Administrators 'considered' in reach[ing] [their] decision." *Id.* at 265; *see also Forest Cty. Potawatomi Cmty. v. United States*, 270 F. Supp.3d 174, 179 (D.D.C. 2017) (records of potential meetings and calls between agency and third parties not record, despite being in possession of agency, where no evidence suggests they were considered in the decision-making process); *Nat'l Min. Ass'n v. Jackson*, 856 F. Supp. 2d 150, 157 (D.D.C. 2012) (documents "either authored by EPA employees or sent to EPA employees by the" third party are not part of record where no showing "that the agency *actually considered* the documents in question") (internal quotation marks and brackets omitted; emphasis in original).

Clearly this Court recognizes that agencies have some discretion in determining how broadly they interpret what is "before" a decision-maker. The Department treats Solicitor's Office documents that were not communicated to other Department components as non-record. At the same time, Solicitor's Office documents that were transmitted to other Department components involved in the decision-making process—such as recommendation memos and edits on draft documents—are treated as record and either produced or identified on the privilege log. This distinction appreciates that the Solicitor's Office is not like other Department components. In the fee-to-trust context, the Solicitor's Office's role is not to gather factual information, analyze it, and provide recommendations to the decision-maker as to whether the Department ought to exercise its discretionary authority to approve an application. The Solicitor's Office's job is to provide legal advice, and the Office's internal deliberations over the content of the legal advice to be provided is typically *not* meant to be considered by decision-makers. The Office's internal deliberative-process is designed to weed out bad advice from good advice in order to ensure the options presented to a decision-maker are thorough and legally defensible. And the Department is guided by legal advice the Solicitor's Office actually provides, not potential advice considered

but never communicated. That is why the Department treats as record only those documents that the Solicitor's Office actually transmitted to other Department components.

Plaintiffs note that a September 29, 2017 FOIA response by the Department erroneously included internal Solicitor's Office documents—which were responsive to the FOIA request but not part of the administrative record in this case, s*ee* Jacobson Decl. at ¶ 5.c.—in its count of "record" documents. ECF No. 70 at 12. Plaintiffs speculate without more that, sometime after the FOIA response, the Department had a "sudden change of heart . . . motivated by a desire to hide" documents. *Id.* That is not true. The Department's practice for internal Solicitor's Office documents predates this case, and it began tagging such documents as non-record at the outset of compiling this record. *See* Jacobson Decl. at ¶ 5.h. Thus, such documents did not appear on the privilege log here because, as non-record materials, they were not subject to the Court's order to identify all record documents withheld on the basis of privilege. *See id.*

The Department maintains that internal Solicitor's Office documents are non-record. But because the Department's FOIA response erroneously included them in its count of "record" documents, and to help move this case towards the merits by resolving a discovery dispute, the Department agrees to: treat those documents as part of the record here; provide a log identifying the privilege basis for any withholdings; and produce anything determined to be not privileged. But in any event, the Department's legal position cannot be evidence of misconduct in the decision-making process itself—especially now that the issue is moot, since Plaintiffs will receive the internal Solicitor's Office documents they believe they are entitled to.

B. Federal Defendants did not waive attorney-client privilege.

Plaintiffs rely on two emails recounting conversations between Solicitor's Office attorneys and the Tribe to argue that the attorney-client privilege has been waived with regard to certain issues. Specifically, Plaintiffs argue waiver of the attorney-client privilege for materials related to

Federal Defendants' litigation strategy to respond to Plaintiffs' Motion for a TRO and PI, title issues, and acquisition of the trust land. However, such communications are not attorney-client privileged and cannot be the basis for finding waiver, let alone the sweeping waiver Plaintiffs urge this Court to find.

The first email, dated January 12, 2017, one day before the TRO hearing, indicates that a Solicitor's Office attorney communicated with the Tribe's then in-house counsel regarding Plaintiffs' Motion for a TRO and PI. The Solicitor's Office attorney reported to her clients that she had spoken about a stay to "the Tribe's Attorney . . . [who] agrees that the 30 days period between decision and trust transfer makes sense. But she is still talking to her client and the other Wilton attorneys." ECF No. 70-1 at 18 (Decl. of Odin Smith, Ex. D ("Smith Decl.")).[11]

The second email, dated January 18, 2017, is also authored by a Solicitor's Office attorney working on the transfer of title to the United States in the event of a favorable trust decision. In that email, the attorney recounts discussions with the Tribe's attorney about what the BIA requires before accepting a transfer of title. The attorney further discusses a development agreement affecting the land to be transferred, which Plaintiffs had put at issue in their Motion for a TRO and PI.[12] As the Solicitor's Office attorney reported, she had told the Tribe's counsel that if they could

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[11] This email is in the record at x5759 and was produced to Plaintiffs in October 2017, even though they only now raise the argument. *See* ECF No. 37-2 at 58. The index indicates that other portions of the email were redacted pursuant to attorney-client privilege.

[12] Plaintiffs alleged the development agreement encumbered the potential trust land, preventing BIA from taking it into trust. The City of Elk Grove had passed an ordinance to eliminate any encumbrance from the development agreement in 2016, but that ordinance was subject to a public referendum and, until that referendum occurred, the ordinance had no effect. ECF No. 2-1 at 15-18. Plaintiffs were not parties to the development agreement but alleged irreparable harm to their right as citizens to participate in the referendum concerning the development agreement if the land was taken into trust, which would make the development agreement inapplicable and the referendum moot. ECF No. 2-1 at 27.

find some way to "terminate the [Development] Agreement other than going through the referendum process. . . . then we would likely be able to prevail on the request for preliminary injunction." ECF No. 70-1 at 21 (Smith Decl., Ex. E).[13]

1. Consulting the Tribe on whether to accede to Plaintiffs' request to stay action on a trust decision is not a waiver of attorney-client privilege with regard to that issue or generally.

Plaintiffs reason that, because the Department consulted with the Tribe on whether to accede to Plaintiffs' request to stay action on any trust decision, those consultations must constitute a disclosure of attorney advice to the Department regarding litigation strategy. That position defies logic and misunderstands the nature and background of the contacts. Moreover, acquiescing to their view, which is unsupported by applicable case law, would lead to odd results. Revealing legal positions in other contexts does not waive the privilege with regard to the attorney-client communications that led to those positions. For example, legal positions taken in a brief publicly filed with a court do not waive attorney-client privilege for the attorney-client communications that led the party to adopt those positions. In the same way, the communications of two parties involved in negotiating a contract or a settlement, while revealing attorney-client advice in the sense of revealing their positions on issues, cannot be construed as waiving privilege over the communications and deliberations that led to the adoption of those positions. Otherwise the negotiation of anything would amount to a waiver of privilege.[14]

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[13] This email is in the record at x214 and was produced to Plaintiffs in October 2017, even though they only now raise the argument. *See* ECF No. 37-2 at 2. The index indicates that other portions of the email were redacted pursuant to attorney-client privilege.

[14] By Plaintiffs' own logic, the fact that they revealed their desire for a stay in asking for one should also waive any attorney-client privilege they might have over communications leading to the Motion for a TRO and PI, and the stay request.

As with legal briefs and negotiations, the fact that the Department sought the Tribe's position on a stay should not be construed to waive privilege over all of the Department's attorney-client communications on that issue. To be sure, just as a brief or negotiation reveals a party's legal positions, so the communications with the Tribe revealed the Department's view that the Tribe must be involved in any such agreement. But the fact that the Department acted on that view does not mean the Department waived privilege over attorney-client communications concerning whether to approach the Tribe and, more broadly, over how to address Plaintiffs' Motion for a TRO and PI. In short, like briefs and negotiations, seeking the Tribe's view on a potential stay was the implementation of the Department's legal strategy, not a waiver of the privileged deliberations that resulted in that strategy.

Neither was the Solicitor's Office attorney's communication with the Tribe about title issues a waiver of privilege concerning the advice she gave her client. As explained above in Section III.A.1.b, the fee-to-trust application process requires such conversations before a final decision is made. It would therefore be surprising if no conversation about title issues had occurred. Here the Solicitor's Office attorney observed that eliminating a development agreement might allow the Department to prevail on Plaintiffs' Motion for a PI. But the Solicitor's Office attorney neither disclosed confidential attorney-client information regarding the Motion for a PI nor coordinated litigation strategy with the Tribe. *See* Koch Decl. ¶¶ 10-12. In fact, by the date of the email communication (January 18), the Motion for a PI had been set aside because Plaintiffs elected to pursue their § 705 request instead. ECF No. 6. The January 18 email shows that the Solicitor's Office attorney obtained information from the Tribe on *the Tribe's* options with respect to the development agreement. At most, the Solicitor's Office attorney advocated for removal of the development agreement on behalf of her client—a step which, if taken, would make the

potential transfer of title easier should the Department approve the Tribe's application. That does not mean she waived privilege over the advice she gave to her client confidentially on title and other matters. To find otherwise would create a Catch-22, where any kind of exchange of information between lawyers for two parties would result in such a waiver.

Lastly, it is important to note that Plaintiffs are only able to raise this line of attack because the Department did not treat its communications with the Tribe—or internal descriptions or accounts of such communications—as either confidential or privileged. Plaintiffs' attempt to characterize these communications as a disclosure of privileged information that results in a broad waiver of attorney-client privilege should be rejected as nonsensical. And to the extent Plaintiffs argue that this is only the tip of some iceberg of in-depth coordination and strategizing with the Tribe, that assertion should be rejected for what it is: empty speculation.

2. If the Court treats communications with the Tribe as somehow waiving privilege, the scope of waiver should be limited to communications regarding whether the Tribe agrees a stay is warranted.

The Court should not find a waiver of any privilege here because doing so would make it impossible for the Department to communicate with tribes, as required by statutes and regulations, without waiving its attorney-client privilege over internal assessments of its legal options. It is enough that those communications with third parties are themselves not subject to privilege. But if the Court decides to go further, it should limit any waiver to the subject matter of whether the Department should agree to a stay.

Waiver of attorney-client privilege extends "to all other communications relating to the same subject matter." *In Re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982). Because "the 'subject matter' of the waiver could . . . be defined in a number of different ways," a court should examine "the factual context in which the privilege is asserted" to determine whether to define the subject matter waived narrowly or broadly. *In re Sealed Case*, 877 F.2d 976, 980-81 (D.C. Cir.

1989). Citing the D.C. Circuit, the Sixth Circuit explained that a court should "make prudential distinctions between what was revealed and what remains privileged" rather than just ratifying a wholesale waiver of the privilege. *In re Grand Jury Proceedings Oct. 12, 1995*, 78 F.3d 251, 255-56 (6th Cir. 1996). "Too broad an application of the rule of waiver requiring unlimited disclosure . . . might tend to destroy the salutary purpose of the privilege." *United States v. Cote*, 456 F.2d 142, 145 n.4 (8th Cir. 1972); *see also United States v. (Under Seal)*, 748 F.2d 871, 875 n.7 (4th Cir. 1984) ("If any of the non-privileged documents contain client communications not directly related to the published data, those communications, if otherwise privileged, must be removed by the reviewing court before the document may be produced.").

Plaintiffs rely on *In re Sealed Case* to suggest that upon a finding of waiver, they are entitled to underlying data, draft documents, attorney notes, and other materials related to the disclosure. But that is only where a client communicates information to the attorney not for purposes of seeking confidential advice but in order to secure assistance in preparing a document meant for public disclosure, like a prospectus for potential investors. In a case like that, where "the attorney had been employed to convey information to third parties rather than to provide legal advice for the clients' own guidance," *U.S. v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984),[15] a party could not shield the information underlying the prospectus by claiming privilege.

Cases suggesting such sweeping disclosures following waiver are off-point here. *In re Sealed Case* actually distinguishes those circumstances, explaining that in producing the data underlying a public document, a court should segregate out anything reflecting attorney advice to the client: "We . . . do not think that any portion of the six documents revealing that the adjusting

[15] This is the case from which *In re Sealed Case* drew the language Plaintiffs rely upon for their argument.

entries were made on the advice of counsel would be disclosable under the government's primary theory of waiver." 877 F.2d at 980. Here, of course, there is no public document at all and so no "data" or "drafts" to be produced. The Department's attorneys were considering how best to respond to the question of a stay, as posed by Plaintiffs in the context of adversarial litigation, and in that context determined it was appropriate to reach out to the Tribe. Where such communications are recounted in record documents, they are produced; but *In re Sealed Case* actually rejects Plaintiffs' efforts to leverage those communications to access confidential attorney-client advice related to the Motion for a TRO and PI, the stay request, negotiations concerning transfer of title, or any other matter they might come up with.

Plaintiffs' other case, *Graff v. Haverhill N. Coke Co.*, No. 1:09-cv-670, 2012 WL 5495514 (S.D. Ohio, Nov. 13, 2012), is simply inapposite. It deals with intentional waiver, the circumstance where a litigant voluntarily waives privilege over documents to make their case but then attempts to "invoke the privilege to deny its adversary access to additional materials that could provide an important context for a proper understanding of the privileged materials." *Id.* at *16 (internal quotation marks omitted). Here Defendants have not disclosed otherwise privileged materials to gain a tactical advantage; they have only produced an administrative record and left unredacted information in the emails that is not privileged. Instead, it is Plaintiffs who seek to put these emails at issue in order to support speculation about government misconduct and in hopes of invading the attorney-client privilege.

In the end, the question of whether to agree to a stay was a marginal issue, unrelated to the merits of the Motion for a TRO, which this Court summarily denied. And in the wake of this Court's ruling on Motion for a TRO, Plaintiffs abandoned their pursuit of a preliminary injunction, rendering that issue similarly marginal. In such a context, if this Court must construe these emails

as disclosing attorney-client advice to third parties, it should construe the scope of the waiver narrowly, given the marginal nature of the issues. *See Mergentime Corp. v. Washington Metro. Area Transp. Auth.*, 761 F. Supp. 1, 2-3 (D.D.C. 1991) (finding narrow waiver where "documents consist of terse entries reflecting discussions at meetings at which WMATA's counsel was present"). And with regard to the communications concerning matters to be addressed in the transfer of title, narrow waiver is similarly warranted because it is not even "clear that the subject of the information is legal advice," *id.*, rather than negotiations over steps the Tribe must take to satisfy the Department before it would accept title. To the extent that this Court finds waiver at all, disclosure should be limited to only communications expressly discussing how to approach the Tribe with regard to the potential stay, the Motion for a TRO and PI, and with regard to the development agreement's impact on those motions.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Second Motion to Compel should be denied.

DATED: November 27, 2018

Respectfully submitted,

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