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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

v.

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

Defendants,

and

WILTON RANCHERIA, CALIFORNIA,

Intervenor-Defendant.

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

PLAINTIFF'S REPLY IN SUPPORT OF ITS SECOND MOTION TO COMPEL ADEQUATE ADMINISTRATIVE RECORD AND PRIVILEGE LOG

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INTRODUCTION

Defendants hope that the Court will forget the decision-making process involved in this case. This was not a typical fee-to-trust process, nor even one for which any analogue exists. *In less than two days*, Defendants went from the close of a comment period on a final environmental impact statement (EIS) to a record of decision (ROD)—a process that normally takes Defendants an average *15 months* to complete.[1]

Nor was this an application Defendants extensively vetted before their record-setting turnaround. For almost three years, the public understood that the Wilton Rancheria (Tribe) intended to build a casino in Galt, California—not Elk Grove. In the spring of 2016, however, the Tribe changed its plans, and for over five months, Defendants did nothing to correct the public's understanding. On November 17, however, nine days after the 2016 election, Defendants sprang into action by publishing notice of the Elk Grove application, followed by a notice of a final EIS that substituted Elk Grove for Galt as the new "proposed action." The ROD approving the Elk Grove project was signed, just 16 hours before President Trump was sworn into office. Nothing about that timeline is normal.

When Plaintiffs challenged the action, Defendants withheld one-third of the record documents under "deliberative process privilege." It was only because the Court ordered Defendants in May to produce a privilege log that they later produced *hundreds* of improperly withheld documents, none of which they have lodged with the Court. Even then, Defendants did not comply with the Court's order, but instead refused to log or produce 398 documents of the 1,098 documents they initially withheld. Now—in response to this motion—Defendants "agree" to log the documents the Court ordered them to log months ago.

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[1] *See* Attachment 1, Declaration of Sheri Pais ("Pais Decl.") at Exhibit A.

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It is too late for Defendants' excuses. There can be no serious question that Defendants tried to circumvent the Court's order to log all withheld documents and acted in bad faith in compiling the administrative record. Defendants' extended delay in producing a grand total of 34 documents under the protective order—a delay that hampered Plaintiffs' ability to understand the significance of record materials—only reinforces the conclusion that Defendants acted in bad faith. And that is particularly true because the documents Defendants produced only six days ago generally confirm the misconduct Plaintiffs alleged. Those documents show that the Tribe—which claims it repeatedly contacted BIA in November in fear of losing its refundable deposit on an option to purchase land—nonetheless purchased the land before any final decision had been made. Immediately thereafter, the Tribe conveyed the land to the United States, also before any final decision had been made. The only reasonable explanation for the Tribe to assume such a huge risk unnecessarily is if Defendants had assured the Tribe that purchasing the land before a final decision was not a risk at all.

The sham review process, Defendants' bad faith production of the administrative record, and newly produced documents all point to government misconduct. Defendants should not be permitted to shield that misconduct behind claims of privilege.

ARGUMENT

Plaintiffs previously established "a *prima facie* case that the Department acted improperly in making its decision," warranting the production of a privilege log.[2] Since then, Defendants have doubled down, evading the Court's order and delaying the production of documents. Their opposition does nothing to overcome three damning facts: (1) Defendants

[2] ECF 62, at 13 ("These actions—in tandem with the other circumstances already discussed—establish a *prima facie* case that the Department acted improperly in making its decision.").

acted in bad faith in compiling the record; (2) they ignored the Court's order in logging only some of the documents they withheld; and (3) newly produced documents provide further evidence of government misconduct. These facts warrant denying deliberative process privilege for documents that likely will confirm the allegations of misconduct in the trust decision.

To be clear, Defendants jammed through in *two months* an application that normally takes three or more years to review, and they did so over public outcry and despite myriad title problems—all of this, apparently, to deprive the incoming Administration from having a chance to review the merits of the application. And Defendants sought to mask that malfeasance by withholding documents that would shed light on their decision-making process. Disclosing deliberative process documents is necessary to "serve the public's interest in honest, effective government," as set forth below.[3]

A. Defendants' bad faith compilation of the administrative record supports Plaintiffs' allegations of government misconduct

On October 17, 2017, Defendants filed and served the administrative record, along with an index and affidavit from the Director of the Office of Indian Gaming certifying the record.[4] Defendants then produced 2,217 documents, and the Director's September 29, 2017, letter to Plaintiffs states that the "full administrative record for the January 19, 2017 Record of Decision" includes "3225 documents," of which "1098 documents have been withheld in their entirety."[5]

That initial record was far from complete such that any presumption of regularity that might have attached has evaporated.[6] Eleven months after filing the initial record, Defendants

[3] *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997) (internal quotation and citation omitted).
[4] *See* ECF 37.
[5] Letter from P. Hart, Director, Office of Indian Gaming to S. Pais, Perkins Coie LLP, at 1-2 (Sept. 29, 2017) ("FOIA Letter"). ECF 57-1 at Attachment E.
[6] "[A]n agency is entitled to a strong presumption of regularity, that it properly designated the administrative record." *Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006). That presumption disappears when there is "concrete evidence" that the

produced over 400 documents they initially withheld as privileged.[7] There was no reasonable claim of privilege for withholding many of these documents, which included emails from the Tribe to BIA officials,[8] an Army Corps of Engineers wetlands mitigation permit,[9] and agency emails that do not contain any deliberative material.[10] Many of these documents appear unimportant, but a significant number are highly substantive or otherwise shed light on the decision-making process. Had Plaintiffs not filed their first motion to compel, the Court would have decided this case on the basis of a substantially incomplete record.

Not only was the initial record incomplete, Defendants refused to log all of the documents they withheld, flouting the Court's May 30 order. When Plaintiffs raised the issue, Defendants boldly contradicted the Director's September 29, 2017, representations regarding the scope of the record and claimed that they are not required by law to log "confidential documents of the Office of the Solicitor that were not provided to the decision-maker" because those documents are not really part of the record.[11]

A complete administrative record must include "all materials that 'might have influenced the agency's decision,' and not merely those on which the agency relied in its final decision,"

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certified record does not contain documents that were before the agency. *Franks v. Salazar*, 751 F. Supp. 2d 62, 67 (D.D.C. 2010) (citation omitted). By adding hundreds of documents, including materials that Plaintiffs identified as missing, there is obviously concrete evidence that the record was incomplete.

[7] On June 20, 2018, Defendants added seven documents to the administrative record. ECF 64, 64-2. On September 5, they added 420 new documents that were previously withheld. ECF 70-1, Exhibit A. And on October 10, Defendants added yet another improperly withheld document. *Id*. at Exhibit C.

[8] *See, e.g.*, Pais Decl., ¶3 and Exhibit B at AR29864 (sharing notice with the Tribe for its comments, despite originally withholding the notice from Plaintiffs); AR30977 (preliminary title report from Tribe); AR31724 (email regarding due diligence period in option agreement).

[9] *Id*. at AR48246 (U.S. Army Corps permit affecting Elk Grove parcel).

[10] *See, e.g., id*. at AR26340 (discussing surnaming final EIS); AR28831 (requesting information about EIS); AR28859 (sending comments from Office of Indian Gaming on draft EIS); AR28895 (briefing and communications plan).

[11] ECF 70-1, Exhibit C at 1.

including those that were not provided directly to the decision-maker.[12] The fact is that Defendants represented to Plaintiffs in September, with full input of counsel, that the record consisted of 3,225 documents.[13] The Court ordered Defendants to log the withheld documents, and Defendants not only did not do it, they did not tell Plaintiffs that they were not doing it. Only now, after Plaintiffs filed this motion, have Defendants agreed [at 7] to "supplement the privilege log with all privileged Solicitor's Office documents and produce anything not subject to privilege by December 14, 2018."[14] This is not a concession "for the sake of moving this case towards the merits," as Defendants suggest [at 7]; *that*, they could have done in October. This is a concession to deflect from their failure to comply with the Court's order and the merits of Plaintiffs' assertions of misconduct.

In fact, concerns regarding what the record shows are likely why Defendants took six weeks after the Court entered a protective order on October 19, 2018, to produce 34 allegedly confidential client business information (CBI) documents in unredacted form. The only action required was to label the documents as "confidential" or "highly confidential." Despite Plaintiffs' repeated requests for the documents, Defendants only produced CBI documents on November 27 (received by Plaintiffs on November 28), three weeks after Plaintiffs' deadline for

[12] *Amfac Resorts, L.L.C. v. U.S. Dep't of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (citations omitted). The record includes "'*all documents and materials* directly or indirectly considered by the agency.'" *Novartis Pharmaceuticals v. Shalala*, No. CIV.A.99-323TFHAK, 2000 WL 1769589, *2 (D.D.C. Nov. 27, 2000) (quoting *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)) (emphasis added).

[13] Plaintiffs cited Defendants' September 29, 2017, letter in their first motion to compel, and Defendants did not at that time claim that any mistake had been made. *See, e.g.*, ECF 57, at 6 n.1.

[14] While Defendants [at 7] agreed to log documents from the Solicitor's Office "and produce anything not subject to privilege" by December 14, 2018, they only identify 329 documents from the Solicitor's Office and an additional 40 documents that seem to be both "not properly part of the AR" while also being "duplicative because already in the record." ECF 71-1, ¶ 5.g. Apart from that inherently contradictory statement, that still leaves 29 documents unaccounted for.

filing this motion and four business days before the due date of this reply.[15] The CBI documents bolster Plaintiffs' claims.

B. The documents Defendants have produced strengthen Plaintiffs' claims of government misconduct

It is not government misconduct to work to an aggressive deadline or communicate with an applicant. It is, however, government misconduct to: (1) approve the application before the review process is complete; (2) convey that decision to the applicant so that it invests

before the decision was made so that land could be transferred immediately into trust; and (3) be less than candid about these intentions when the Court inquired.[16] And it is also government misconduct to do all of these things to prevent the incoming Administration from reviewing the application.

The record leaves little doubt that Defendants pre-determined the outcome of the Tribe's application and agreed with the Tribe to acquire the land in trust before the new Administration took over. The Tribe, in fact, helps to make that clear. In their Second Motion to Compel, Plaintiffs identified a series of emails Defendants produced in September that indicated that the Tribe was pressuring Defendants to provide a preliminary title opinion to prevent the Tribe from losing money if the title encumbrances prevented the land from being acquired.[17] The Tribe explained [at 11] that the agreement's "due diligence period" gave the Tribe until November 15 to walk away from the deal, after which the Tribe would forfeit a sum of money if it chose not to

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[15] *See* Pais Decl., Exhibit C (CD labels).

[16] The general duty of candor requires attorneys to be honest and forthright with courts and to refrain from deceiving or misleading courts either through direct representations or through silence. MODEL RULES OF PROF'L CONDUCT r. 3.3 (AM. BAR ASS'N, Discussion Draft 1983).

[17] ECF 70, at 16 (discussing AR31724). Defendants withheld this email from the original record, even though emails from an applicant are, by definition, *not* deliberative. Given that Defendants withheld all associated email chains, the withholding was not inadvertent. Defendants only produced redacted versions of the documents in September. *See, e.g.*, Pais Decl., Exhibit B at AR32247, AR32255, AR32226, AR28840.

exercise the option. As the Tribe reasonably explained [at *id.*], "[t]he Chairman presumably was eager to avoid committing the Tribe's resources to an option on a parcel that could not be taken into trust."

Fair enough. Why, then, did the Tribe exercise the option to purchase the land *before* the close of the comment period on the final EIS and *before* Defendants made a decision to acquire the land in trust? Under the option agreement—which Defendants produced last week—the Tribe had until May 30, 2017 to purchase the Elk Grove parcel.[18] Yet the Tribe entered into the Purchase and Sale Agreement on January 10, 2017, nine days *before* the trust decision,[19] and executed the transfer to the United States on January 16, 2017. [20] In November, the Tribe pressured Defendants for assurances that the title encumbrances would not result in denial of its application because the Tribe did not want to risk losing its refundable deposit on the option, yet by January, it was apparently willing to risk by purchasing the parcel, even though there were five months before the option expired.[21] There is

[18] *See* Pais Decl., Exhibit B at AR14385 (initial term of option one year, running from date of execution (May 31, 2016)).

[19] *See id*. at AR32173 (identifying date of the executed Purchase and Sale Agreement as January 10, 2017); *see also* AR31731 (title insurance document dated January 11, 2017 identifying escrow account); AR32166 (accommodation instructions and indemnity dated January 11, 2017).

[20] It should be noted that the Tribe purchased the land before the January 13, 2017, TRO hearing in this Court at which Defendants represented that the timing and outcome of the trust decision was unpredictable and uncertain. In fact, the record shows communications between government attorneys and the Tribe in preparation for the TRO hearing, *see, e.g., id*. at AR5759, such that lawyers in the courtroom knew or should have known the true status of the land acquisition at the time of that hearing.

[21] *Id*. at AR31724. *See also* AR32248 ("Well, not sure but he basically is in a hurry. He asked me if sent the document that I just forwarded you. I can't be certain other than to tell you how everything needs to get done or they will lose money!"). *See* AR14385 (initial term of option one year, running from date of execution, May 31, 2016). Defendants have also withheld the "Qualified Endorsement Memo," which addressed the title issues. *See* ECF 37-2, Privilege Log AR35057 (describing withheld document as providing legal opinion and advice regarding title of the Elk Grove parcel). It is clear, however, that they discussed this issue with the Tribe over the course of several conference calls. *See* AR2824 (conference call on November 10, 2016); AR3957 ("Wilton Conference Call") (describing redactions as containing "deliberative statements discussing title issues that were flagged by the Solicitor's Office"); *see also* AR3954 (same).

no sound business reason to take such a risk before the close of the comment period and before the trust decision had been made unless the Tribe knew there was no risk at all.

Defendants try [at 25-27] to downplay the early preparation of various decision documents, but the preparation of those documents confirms that a decision had been made before the close of the review process. For example, in a gaming decision, the Regional Office prepares a recommendation memorandum based on the final EIS in which it analyzes the applicable factors and presents its recommendation to the Assistant Secretary.[22] A draft recommendation document was prepared by December 21, 2016 and finalized for signature before the close of the comment period on January 17, 2017.[23] But Defendants did not follow the normal process. Nor could they have, given that it usually takes on average 15 months to complete. Indeed, Defendants did not even publish notice of their decision, as agency regulations clearly require.[24]

Moreover, in this case, because the public did not know that the proposed action had changed from Galt to Elk Grove until November of 2016, Defendants' supposed "preliminary assessment" was not based on a meaningful review process. Elk Grove was not a cooperating agency, and there was no scoping or public hearing in Elk Grove. Defendants claim that the public had sufficient notice because a smaller version of the Elk Grove site was considered as an alternative in an EIS prepared for a different proposed action. That is plainly wrong. NEPA requires agencies to "make sure the proposal which is the subject of an environmental impact

[22] U.S. DEP'T OF THE INTERIOR BUREAU OF INDIAN AFFAIRS, ACQUISITION OF TITLE TO LAND HELD IN FEE OR RESTRICTED FEE STATUS (FEE-TO-TRUST HANDBOOK) at 48 (2016).
[23] *See* Pais Decl., Exhibit B at AR31831 (email transmitting draft recommendation document); AR31854 (forwarding the final recommendation memorandum for signature 11 hours before close of comment period).
[24] 25 C.F.R. § 151.12(c)(2)(ii).

statement is *properly defined*."[25] Defendants defined the proposal in this case as the acquisition of land in Galt—not the acquisition of land in Elk Grove. Had Defendants defined the proposed action as the acquisition of land in Galt *or* Elk Grove or as the acquisition of land somewhere within that region, their argument might have some merit. But they did not. If an agency makes "substantial changes in the proposed action that are relevant to environmental concerns," NEPA regulations require it to prepare a supplement to either the draft or final EIS.[26] Defendants obviously changed the proposed action.

If Defendants merely made an error in judgment by deciding not to prepare a supplemental EIS, that would be a straightforward APA issue. But their apparent behind-the-scenes agreement with the Tribe to rush the process and hide materials from the public is clear agency misconduct. Defendants withheld an Army Corps of Engineers wetland mitigation permit from the record until October, after Plaintiffs asked about the missing document.[27] That permit, which originated from the approval of the outlet mall from which the Elk Grove site was carved, required mitigation for wetlands in the form of credits and the establishment of a 1.4-acre preserve on the site.[28] Defendants clearly knew about this issue prior to publishing the final EIS for public review, but did not disclose the information in the final EIS.[29] And they tried to hide it from Plaintiffs and the Court. Indeed, Defendants have redacted most of the emails addressing concerns regarding the permit, many of which are dated January 18 and 19.[30] This is obviously

[25] 40 C.F.R. § 1502.4 (emphasis added).
[26] 40 C.F.R. § 1502.9(c)(i).
[27] *See* Pais Decl., Exhibit D.
[28] *See* Pais Decl., Exhibit B at AR48246 (U.S. Army Corps permit).
[29] *Id*. at AR15766 (dated October 24, 2016); AR31293 (November 10, 2016 email discussing Army Corps permit). Public notice of the FEIS was published on December 14, 2016. 81 Fed. Reg. 90379 (Dec. 14, 2016). In fact, there were extensive discussions regarding the title issues. *See, e.g.*, AR3559 (email describing call from Tribe regarding encumbrances); AR3961(title encumbrances); AR3960 (same); AR3959 (same); AR3958(same); AR5823 (conference call on November 10, 2016).
[30] *See, e.g., id*. at AR31599, AR214, AR34456.

information Defendants were required to address in the final EIS.[31] In fact, there are a number of easements and exceptions applicable to the site that Defendants failed to disclose, including a drainage easement that cuts through the property, a water line easement, and access, sewage, and other easements.[32] Disclosure, however, would have delayed approval.[33]

It is clear why Defendants agreed to approve the project prior to the change in the Administration—the Tribe pressured Defendants to do so. The Tribe suggests [at 11] that Plaintiffs can cite to only one instance of the Tribe pressuring Defendants; in fact, the Tribe contacted Defendants repeatedly to accelerate the process.[34] And the Tribe's pressure does appear to have shortchanged the process. For example, an agenda for a November 14, 2016, conference call on the Tribe's application states that the Tribe was pushing to publish their Notice of Availability, which the Office of Indian Gaming received on October 20, 2016.[35] That same day, the Office of Indian Gaming issued a memorandum directing the publication of the final EIS, stating that they had no further comments.[36] Yet that was not true; revisions were being done on the document weeks later.[37] And, it appears that Defendants did not follow the appropriate process for publication.[38]

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[31] Failing to provide essential information violates the agency's requirement of involving the public "to the extent practicable." 40 C.F.R. § 1501.4.
[32] *See generally* Pais Decl., Exhibit B at AR15766 (BLM memorandum listing easements on property).
[33] *See, e.g.*, *id*. at AR3753 (discussing the Tribe's concerns that the mitigation, which was never done, will cost money and the Tribe's "panicked" call because the Tribe's desire "to push this gaming application through before administration changes").
[34] *See, e.g.*, *id*. at AR4257 ("Chairman keeps calling"); AR5525 (stating that Chairman called for status meeting on application and "obviously wants it done before January"); AR6078 (Tribe requesting status update on EIS); AR5814 (Chairman calling for status update on surname process, because if not "Surnamed by 12/9, [it] may not be complete by 1/19/17").
[35] *Id*. at AR5556.
[36] *Id*. at AR1926; *see also* AR4288.
[37] *Id*. at AR0541 (discussing revisions to final EIS); AR6039 (discussing changes to the EIS on December 6, 2016).
[38] *See id*. at AR6065 (email chain indicating that the Solicitor's surname had not been added to the final EIS as of December 1, 2016); AR10190 (email chain indicating that the Solicitor's surname still had not been added to the final EIS as of December 8, 2018).

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These documents illustrate the government misconduct involved in this case. The Defendants argue [at 11-12] that the Plaintiffs must meet an impossibly high bar to invoke the government misconduct exception. But the standard under the exception is not as rigid as the Defendants have suggested and requires the Court to engage in fact-specific analysis.

The D.C. Circuit held in *In re Sealed Case* that "[t]he [deliberative process] privilege disappears altogether when there is *any reason* to believe government misconduct occurred."[39] Defendants attempt to chisel away at this standard by referring to cases that address the government misconduct exception as it applies to Freedom of Information Act (FOIA) requests.[40] But the courts apply the heightened standard in FOIA cases, not APA cases. Thus, Defendants' argument [at 12] that this Court requires "nefarious or extreme government wrongdoing" based on *Neighborhood Assistance Corp. of Am. v. U.S. Dep't of Hous. & Urban Dev.* ignores the Court's critical context that "to preclude application of the deliberative process privilege *in the FOIA context*, the claimed government misconduct must be severe enough to qualify as nefarious or extreme government wrongdoing."[41] As the Court observed, "our Court of Appeals has never squarely applied the [government misconduct] exception, nor has it ever defined the scope of 'misconduct' that triggers the exception's application."[42]

Where the government misconduct exception has been invoked in non-FOIA cases, the Court has relied on fact-specific analysis to determine whether the exception applies. For example, in *Chaplaincy of Full Gospel Churches v. Johnson*, the Court noted that, "[t]o invoke

[39] 121 F.3d at 746 (emphasis added).
[40] Defendants primarily rely on three FOIA cases: *Judicial Watch, Inc. v. U.S. Dep't of State*, 285 F. Supp. 3d 249, 254 (D.D.C. 2018); *Hall & Assoc. v. U.S. Envtl. Prot. Agency*, 14 F. Supp. 3d 1, 9-10 (D.D.C. 2014); and *Judicial Watch, Inc. v. U.S. Dep't of State*, 235 F. Supp. 3d 310, 313-14 (D.D.C. 2017)).
[41] *Neighborhood Assistance Corp. of Am. v. U.S. Dep't of Hous. & Urban Dev.*, 19 F. Supp. 3d 1, 14 (D.D.C. 2013).
[42] *Id.* at 13.

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the government-misconduct exception, the party seeking discovery must provide an adequate factual basis for believing that the requested discovery would shed light upon government misconduct."[43] Differentiating between FOIA and APA cases makes sense. As the court in *In re Sealed Case* observed, whereas a plaintiff's need to "shed light upon government misconduct" may overcome the deliberative process privilege in many cases, "[t]his characteristic … is not an issue in FOIA cases" because "the particular purpose for which a FOIA plaintiff seeks information is not relevant in determining whether FOIA requires disclosure."[44] The reality is quite different in an APA case, where the plaintiffs have suffered a concrete injury from agency actions and have a legitimate need to know whether the government engaged in misconduct during the process. Defendants' argument, in effect, would require Plaintiffs to demonstrate the content of the documents Defendants have redacted or withheld in order for Plaintiffs to satisfy their burden. That cannot be the law. But in any case, it is self-evident that the content of the documents Plaintiffs cite goes directly to the misconduct alleged.

In any case, Defendants' conduct was extreme. Defendants have never gone from the close of a comment period to a ROD in less than three months, let alone less than two days. The Tribe, so worried in November about losing the opportunity to obtain a refund, spent as much in January, before any decision had been made. Defendants hide relevant environmental information from the EIS and Plaintiffs.

All the evidence indicates that this was a done deal and that Defendants were merely checking the boxes in a perfunctory manner to acquire the land in trust before the Administration change. The coordination between Defendants and the Tribe on the TRO, before a final decision

[43] *Chaplaincy of Full Gospel Churches v. Johnson*, 217 F.R.D. 250, 257 (D.D.C. 2003), reversed in part and vacated in part on other grounds by *In re England*, 375 F.3d 1169 (D.C. Cir. 2004) (citing *Judicial Watch of Fla. v. Dep't of Justice*, 102 F. Supp. 2d 6, 15-16 (D.D.C. 2000)).
[44] *In re Sealed Case*, 121 F.3d at 738, 737 n.5.

was made, bolsters that conclusion. Plaintiffs do not know specifically what information was shared between the government and the Tribe, because Plaintiffs were not privy to any such conversations. But it certainly appears from the unredacted portions of the email that Defendants were discussing litigation strategy with the Tribe.[45] And if that occurred, the Defendants' argument [at 33] that there can be no waiver of attorney-client privilege here because those conversations were much the same as revealing "legal positions taken in a brief publicly filed" does not hold water. Those conversations took place in anticipation of a hearing, before Defendants made any public statements, which by their nature likely revealed confidences shared between the agency and its lawyers (*e.g.*, decisions made on how to proceed, and the basis for those decisions).

The "consultation" that Defendants admit took place regarding how to respond to Plaintiffs' stay request on the trust decision is much more akin to joint defense or common interest consultations where two parties are aligned in litigation but are permitted to share information without waiving their individual privileges. Defendants may be aligned now with the Tribe in this lawsuit, but at the time Plaintiffs sought emergency relief, the United States and the Tribe were legally adverse as regulated and regulating parties. To the extent that Defendants voluntarily shared privileged information with the Tribe, that constituted a waiver since no common interest privilege can protect communications between adversaries.[46]

Ultimately, the parties do not appear to disagree that the question of waiver turns on the substance of the communications involved. Plaintiffs recognize that one of the Government's attorneys, Karen Koch, has submitted a declaration swearing under penalty of perjury that she

[45] *See* Plaintiffs Br., ECF 70, at 9.

[46] *See, e.g.*, *In re United Mine Workers of Am. Employee Ben. Plans Litig.*, 159 F.R.D. 307, 314 (D.D.C. 1994) (noting that "the common interest rule is concerned with the relationship between the [two parties] at the time that the confidential information is disclosed").

did not share privileged information with the Tribe with respect to title issues or litigation strategy. No such declaration, however, has been submitted by Jennifer Turner, the other Government attorney identified in the cited emails as communicating with the Tribe's attorney regarding Defendants' response to Plaintiffs' motion for a TRO. The substance of her communications therefore remains in question based on the unredacted portions of the cited emails.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court conclude that there is reason to believe that government misconduct occurred and order Defendants to produce all documents withheld under deliberative process privilege.

Dated this 4th day of December 2018

Respectfully submitted,

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REDACTED -- HIGHLY CONFIDENTIAL INFORMATION OMITTED

CERTIFICATE OF SERVICE

I certify that on November 4, 2018, I filed the foregoing under seal with the Clerk of the Court using the ECF System, pursuant to the terms of the Protective Order in this case. Such ECF filing which will send notification of such filing to the registered participants as identified on the Notice of Electronic Filing. A copy of "Highly Confidential" filing has been served by electronic mail to all counsel of record.

/s/ *Jennifer A. MacLean*
Jennifer A. MacLean