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 SECOND MOTION TO COMPEL

ADEQUATE ADMINISTRATIVE RECORD AND PRIVILEGE LOG

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On May 30, 2018, the Court held that Plaintiffs "made a prima facie showing of bad faith to warrant limited discovery," citing evidence of the "clearly hurried review process, the documented effort to issue the decision before the change in Presidential Administrations, the disparity between the Department's representation to the District Judge at the January 13, 2017 hearing about 'uncertainty' in the timeline contrasted against issuing the decision not even a week later, and political pressure from the Senate Committee on Indian Affairs." ECF 62, at 10-11. Accordingly, the Court ordered Defendants to produce a privilege log of the documents they withheld from the administrative record "to facilitate review of the Defendants' assertion of privilege." ECF 62, at 10.

Defendants have not complied. Instead, they omitted approximately 400 record documents without acknowledging that they were doing so, apparently hoping that Plaintiffs wouldn't notice. They now claim (in an October 10, 2018 letter) that the 400 documents they designated as part of the administrative record in September 2017 aren't part of the administrative record, so Defendants don't have to log them—the Court's order notwithstanding. Defendants' refusal to log 400 record documents and their flatly contradictory explanation only reinforces Plaintiffs' allegations that Defendants acted improperly and in bad faith during the decision-making process *and* in compiling the administrative record needed for judicial review.

Second, it is clear that Defendants have waived privilege with respect to documents related to Plaintiffs' January 10, 2017 motion for a temporary restraining order (TRO), their strategy in defending against a preliminary injunction, and how to address the title encumbrances and insurance. Agency emails indicate that Defendants consulted with the Tribe on how to deal with all of these issues *prior* to approving the Tribe's application on January 19, 2017. At that time, the Tribe was an applicant seeking a decision from a supposedly objective decision-maker,

which from a privilege perspective constitutes an adversarial relationship. By coordinating their legal strategy with the Tribe, Defendants have waived any claim of attorney-client privilege with respect each of these matters.

Third, since May 30, Defendants have produced documents, including some that were improperly withheld, which indicate that Defendants' review, from at least November 8, 2016 to January 19, 2017, was a corrupted process. Record documents indicate that the government and the Tribe engaged in a coordinated strategy to issue a decision before January 20—a strategy that included misleading the Court regarding the status and likely outcome of the administrative proceedings. Defendants' efforts to avoid logging record documents (with an explanation that contradicts their prior representations) and to withhold communications about title insurance and encumbrances as confidential business information (and delay their production now) only compound the impression of malfeasance. "[W]here there is reason to believe the [deliberative information sought] may shed light on government misconduct, 'the privilege is routinely denied.'" *In re Sealed Case*, 121 F.3d 729, 738 (D.C. Cir. 1997) (quoting *Texaco Puerto Rico, Inc. v. Dept. of Consumer Affairs*, 60 F.3d 867, 885 (1st Cir. 1995). There is ample reason to believe that the deliberative information will shed light on the legitimacy of the agency proceedings in this case.

Plaintiffs respectfully request that the Court order Defendants: (1) to comply with the Court's May 30, 2018, Order, by logging *all* documents Defendants have withheld from the administrative record; (2) to produce documents related to the Department's defense to Plaintiffs' TRO, preliminary injunction, and title issues—whether currently on Defendants' privilege log or among the 400 missing documents; and (3) to produce deliberative documents, at least with respect to those from November 8, 2016 to January 19, 2017.

ARGUMENT

1. The Court should order Defendants to comply with its May 30 order to log all documents withheld from the administrative record, including the 400 documents Defendants are hiding.

On September 29, 2017, the Director of the Office of Indian Gaming sent Plaintiffs a letter stating 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."[1] The letter sets forth Defendants' long overdue response to two Freedom of Information Act (FOIA) requests filed by Plaintiffs, the first from more than a year earlier on July 22, 2016 and the second from January 24, 2017. The letter provides, "as discussed with the Solicitor's Office on August 18, 2017, we have determined to send *the full administrative record* for the January 19, 2017 Record of Decision . . . to satisfy" the outstanding FOIA requests.[2] In addressing Plaintiffs' concern that the administrative record for the January 19, 2017 Record of Decision might be narrower than the universe of documents responsive to Plaintiffs' FOIA requests, Defendants stated not only that "[t]he record does in fact include all responsive documents to the FOIA requests that are not privileged and within the Department's control," but the record "also includes documents that *were not* requested."[3] In other words, the full administrative record was broader than documents responsive to Plaintiffs' FOIA requests.

Defendants filed the certified administrative record referred to in the Director's September 29 letter with the Court approximately three weeks later. ECF 37-1. Consistent with the September 29 letter, the certified record consisted of 2127 documents—the difference

[1] Letter from P. Hart, Director, Office of Indian Gaming to S. Pais, Perkins Coie LLP, at 2 (Sept. 29, 2017) ("FOIA Letter"). ECF 57-1 at Attachment E.
[2] *Id.* at 1 (emphasis added).
[3] *Id.* (emphasis added).

between the 3225 documents the Director said comprised the "full administrative record" and the 1098 documents the Director indicated were withheld as privileged.

On April 16, 2018, Plaintiffs moved to compel Defendants to complete the administrative record and for limited discovery. ECF 57. The Court concluded that the "combination of circumstances" Plaintiffs highlighted "establishe[d] a prima facie case [of bad faith] to warrant ordering the production of a privilege log." ECF 62, at 14. Accordingly, the Court granted Plaintiffs' motion in part and ordered Defendants to produce "a privilege log to facilitate review of the Defendants' assertion of privilege." ECF 62, at 10.

Defendants have not complied with the Court's order. They did not produce a privilege log for the 1,098 documents the Director stated they were withholding from the administrative record. Instead, on September 5, 2018, Defendants produced a privilege log for only approximately 700 of the 1098 documents they have withheld, which they incorporated into a log with a number of previously produced, partially redacted documents.[4] The Director's September 5, 2018 certification does not acknowledge the disparity between the logged documents and her September 29, 2017 FOIA letter to Plaintiffs. The certification instead represents that "the attached index lists all documents withheld pursuant to privileges as well as documents now produced, including documents produced with redactions."[5]

When Plaintiffs raised this discrepancy with Defendants, Defendants responded by letter on October 10, 2018, with two claims, both of which directly contradict the Director's September 29, 2017 letter.[6] First, Defendants state that the "FOIA document count included non-

[4] Letter from DOJ to Perkins Coie LLP, dated September 5, 2018, enclosing Declaration of Paula Hart. *See* accompaning Declaration of Odin Smith ("Smith Decl.") at ¶¶ 2, 3, Exhibit A.
[5] *Id*., Exhibit B at ¶ 6.
[6] Letter from DOJ to Perkins Coie LLP, dated October 10, 2018. Smith Decl. at ¶ 5, Exhibit C.

record documents that nevertheless answer to the FOIA request."[7] But the Director made exactly the opposite claim a year earlier, when she reiterated the Solicitor's Office's statement that the record "does in fact include all documents responsive to the FOIA requests" and "also includes documents that were not requested."[8] Second, Defendants claim that the document count in the September 29, 2017, letter was a FOIA count, not a count of the number of documents in the administrative record.[9] The September 29, 2017, letter, however, is explicit: "The record includes 3225 documents. 1098 documents have been withheld in their entirety."[10] The index the Director produced with the September 29, 2017 letter is exactly the same index Defendants filed with the Court on October 17, 2017.[11] In other words, Defendants' October 10, 2018 explanation is false.

The Director's September 29, 2017 letter alone is a more than sufficient basis for rejecting Defendants' October 10 misrepresentations and ordering Defendants to log the missing 400 documents.[12] But their legal and factual justifications for suddenly treating these documents as non-record are similarly meritless. Defendants argue in the October 10 letter that they do not have to log "confidential documents of the Office of the Solicitor that were not provided to the decision-maker" because "[t]he Department's general practice in compiling administrative record is to exclude such materials as non-record."[13] That statement is factually and legally inaccurate.

The Department quite clearly had a practice of including materials from the Solicitor's Office in their administrative records as of September 29, 2017. The Department's alleged

[7] *Id*.
[8] ECF 57-1 at Attachment E.
[9] Smith Decl. at ¶ 5, Exhibit C.
[10] ECF 57-1 at Attachment E.
[11] *See* Smith Decl. at ¶ 4.
[12] Indeed, Defendants are rapidly approaching sanctionable conduct.
[13] Smith Decl. at ¶ 5, Exhibit C.

"general practice" seems to have developed after the Court ordered Defendants to justify their withholdings last May. Other administrative records include Solicitor Office materials.

Second, it ultimately does not matter what Defendants' "general practice" might be. Under the Administrative Procedure Act (APA), courts must review the "whole record," which is made up of the "full administrative record that was before the [agency decisionmakers] at the time [they] made [their] decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977); *see also* 5 U.S.C. § 706. The "whole record" includes "'all documents and materials directly or indirectly considered by the agency.'" *Conservation Force v. Ashe*, 979 F. Supp. 2d 90, 98-99 (D.D.C. 2013) (quoting *Stainback v. Sec'y of the Navy*, 520 F. Supp. 2d 181, 185 (D.D.C. 2007). Documents reflecting the work and recommendations of subordinates must be included if the agency decision was based on that work and recommendations. *See Cnty. of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 71 (D.D.C. 2008). In other words, "[a] reviewing court 'should have before it neither more nor less information than did the agency when it made its decision.'" *University of Colorado Health at Memorial Hospital v. Burwell*, 151 F. Supp. 3d 1, 12 (D.D.C. 2015), *on recons.*, 164 F. Supp. 3d 56 (D.D.C. 2016) (quoting *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997)).

Defendants seem to argue that decision-makers must physically review the actual documents for them to be included in the record. They assert that the Solicitor's Office generated some 400 internal documents—a remarkable 12 percent of the documents in the administrative record—consisting of "legal research and internal deliberations on appropriate legal advice," but they argue that those documents "were not *themselves* ever considered by the decision-

makers."[14] That claim is not credible, but in any case, the decision-maker does not have to physically review the documents "themselves."[15] It is sufficient that the decision-maker *directly or indirectly considered* the information the Solicitor's Office developed for the document to be included in the administrative record.

In fact, Defendants expressly state that "SOL is typically limited to providing legal advice to *assist decisionmakers* in carrying out their responsibilities and ensuring that decisions are legally sound and defensible."[16] Certainly, the legal memoranda that Defendants admit "were created for the purpose of giving legal advice" to the decision-maker *informed* the decision-maker. If documents were created for the purpose of giving legal advice, then they are part of the record because they are, at a minimum, information that the agency "indirectly" considered. The law is clear that the record includes "all materials that 'might have influenced the agency's decision,' and not merely those on which the agency relied in its final decision." *Amfac Resorts, LLC v. U.S. Dep't of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (quoting *Bethlehem Steel v. EPA*, 638 F.2d 994, 1000 (7th Cir. 1980)). "[I]f the agency decisionmaker based his decision on the work and recommendations of subordinates, those materials should be included as well." *Id.*[17]

[14] Smith Decl. at ¶ 5, Exhibit C (emphasis added).

[15] If it were allowed, agency lawyers could simply document all of their legal advice and reasoning in memoranda but not share the actual memoranda with the decision-maker (even though the memoranda would clearly inform the agency's decision-making). In doing so, the agency could thereby avoid *any* court review of the memoranda (*i.e.*, to determine whether the memoranda are in fact protected by the privilege).

[16] Smith Decl. at ¶ 5, Exhibit C at 2.

[17] The record in *Ad Hoc Metals Coalition v. Whitman* is instructive here. 227 F. Supp. 2d 134 (D.D.C. 2002). In that case, plaintiff was challenging an EPA rule, and argued that the record should include a transcript of an EPA conference at which science relevant to the rulemaking was presented. EPA responded that the transcript was not "relied upon" by EPA during its decisionmaking, and thus that the transcript was not part of the record. *Id.* at 138. The court rejected EPA's claim that it did not "rely" upon the transcript, and ordered the transcript to be added to the record based on the fact that the transcript reflected comments that EPA clearly took into account (since EPA personnel were presenters and attendees at the conference), and that the transcript reflected "scientific views adverse to those of EPA and was known to and—the evidence strongly suggests—was considered by EPA at the time it issued the final rule." *Id.* at 139. Importantly, the court stated that the transcript, "having been referred to, considered by, or used by EPA before it issued its final rule must be included in the administrative record." *Id.*

In any case, it is far too late for Defendants to claim that these 400 documents are not part of the administrative record. The Director and the Solicitor's Office both represented to Plaintiffs that they were part of the administrative record and they memorialized that representation in their September 29, 2017, letter. Their sudden change of heart—which they did not disclose when they produced the log—appears to be motivated by a desire to hide damaging information and undermine judicial review. As the Supreme Court observed, "asymmetry in information undermines the reliability of a court's review upon those portions of the record cited by one party or the other." *Walter O. Boswell Mem. Hosp. v. Heckler*, 749 F.2d 788, 793 (D.C. Cir. 1984). More to the point, "if agencies were permitted to withhold materials from the administrative record on the basis of privilege, but were not required to submit a privilege log, their withholding based on privilege would never surface and would wholly evade review. This would invite all manner of mischief." *Regents of the University of California v. United States Department of Homeland Security*, No. C 17-05211, 2018 WL 1210551, *6 (N.D. Cal. Mar. 8, 2018). And mischief is exactly what is happening here.

2. The Government waived attorney-client privilege when it shared communications with the Tribe prior to the January 19, 2017, decision

On January 10, 2017—two weeks before Defendants issued the record of decision challenged here—Plaintiffs filed a motion for a temporary restraining order. ECF 1. As the Court noted in its May 30 Opinion, "[t]he Department also represented, on January 13, 2017, to a judge in this District that the timing of the decision-making process was 'uncertain[]' and in part contingent on the number of public comments received. . . Yet just two days after the public comment period closed, *i.e.*, not even a week after the hearing, the Department issued its decision approving the acquisition of the land." ECF 62, at 13. It now appears that the Department was quite certain that it would be issuing a decision before the close of the

Administration because the Department was consulting with the Tribe regarding how to respond to Plaintiffs' TRO during that time.

On January 12, 2017, for example, Jennifer Turner, an attorney in the Solicitor's Office, informed the Acting Assistant Secretary about her conversation with the Tribe's attorney regarding the "Wilton TRO hearing tomorrow and need for decision."[18] The email indicates that the Tribe's attorney "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."[19] The discussion plainly assumes that the trust application would be approved, even though the comment period had not yet closed on the environmental impact statement. Turner also stated that the Tribe's attorney was talking "to her client and other Wilton attorneys" and was "supposed to call me this evening," presumably to discuss the Tribe's and the other attorneys' reaction to the Department's strategy.[20] Defendants have redacted a significant portion of that email, but it is clear that Defendants were discussing with the Tribe their litigation strategy in response to Plaintiffs' TRO. That exchange—and subsequent telephone call—occurred the day before the TRO proceedings, during which Defendants did not agree to a 30-day period between the decision and trust transfer.

Similarly, on January 18, 2017, Karen Koch, another attorney in the Solicitor's Office emailed various BIA officials regarding her discussion with the Tribe's attorney about whether "there was any way to terminate the [Development] Agreement other than going through the referendum process."[21] The Tribe's attorney suggested that they could ask the land developer and the City to revoke the Agreement, which prompted Koch's response: "I said that if they

[18] Smith Decl. at ¶ 6, Exhibit D.
[19] *Id*.
[20] *Id*.
[21] Smith Decl. at ¶ 7, Exhibit E.

could do that, they we would likely be able to prevail on the request for preliminary injunction."[22] Koch reported that the Tribe's attorney "said she would see how quickly they can proceed with that approach."[23]

Defendants clearly coordinated their litigation strategy with the Tribe and discussed strategic questions related to title problems, the development agreement that encumbered the land, and delays in trust acquisition *before* Defendants issued their decision. At that time, the interests of the Defendants and the Tribe were not and could not lawfully be aligned because no decision had been made. Thus, any communication regarding the TRO, the preliminary injunction, the title insurance, or other topics is not privileged.[24]

It is axiomatic that "[a]ny voluntary disclosure by the holder of the [attorney-client] privilege is inconsistent with the confidential relationship and thus waives the privilege." *United States v. AT&T,* 642 F.2d 1285, 1299 (D.C. Cir. 1980). Waiver can be accomplished through oral communications, and if it is, the waiver should extend to communications relating to or underlying the information that was disclosed. *See In re Sealed Case*, 877 F.2d 976, 979 (D.C. Cir. 1989) (citing *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1985) (holding that data in a document communicated to an attorney with the intent that the data would be revealed to others meant that the data as well as the details underlying the data—including the document itself, preliminary drafts of the document, and attorney's notes containing material necessary to the preparation of the document—would not enjoy the privilege); *Graff v. Haverhill N. Coke Co.*, No. 1:09-cv-670, 2012 WL 5495514, at *17 (S.D. Ohio, Nov. 13, 2012) (under Fed. R. Evid.

[22] *Id*.
[23] *Id*.
[24] With respect to emails regarding title issues, Defendants designated such communications as confidential business information (CBI), although it remains unclear to Plaintiffs why such communications qualify as CBI. Defendants and Intervenor-Defendants have agreed to produce those documents subject to protective order. The Court entered the protective order on October 19, 2018, ECF 69, but Defendants have not produced any CBI documents in the three weeks since.

502, finding that after voluntary disclosure of the final version of an environmental audit in litigation, it would be unfair to allow defendants to withhold the documents underlying the audit, since defendants put their compliance with statutes and regulations at issue in the litigation).

Defendants acknowledge that the attorney-client privilege does not apply to their communications with the Tribe.[25] But Defendants also orally disclosed to the Tribe information that Defendants claim is privileged, including information regarding responding to Plaintiffs' TRO, how to deal with a preliminary injunction, whether to delay the acquisition of land, and how to deal with title issues. Accordingly, Defendants have waived privilege not only for the information disclosed orally but also for any related underlying documents. As a result, many of the documents Defendants withheld and listed on the privilege log, as well as allegedly privileged documents that have not been included in the record, but should be, must be produced to Plaintiffs.

3. Deliberative Process Privilege should not apply to documents from November 8, 2016 to January 19, 2017

In this Circuit, deliberate process privilege "disappears altogether when there is *any* reason to believe government misconduct occurred." *See In re Sealed Case*, 121 F.3d at 746 (emphasis added). "[W]here there is reason to believe the [deliberative information sought] may shed light on government misconduct, 'the privilege is routinely denied.'" *Id.* at 738 (quoting *Texaco Puerto Rico*, 60 F.3d at 885); *see also In re Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992) ("the privilege may be overridden where necessary ... to 'shed light on alleged government malfeasance'") (quoting *In re Franklin Nat'l Bank Securities Litig.*, 478 F. Supp. 577, 582 (E.D.N.Y. 1979)).

[25] Smith Decl. at ¶ 5, Exhibit C at 2.

Plaintiffs have already established a prima facie case of bad faith. *See* ECF 62. The decision-making process itself appears to have been significantly corrupted. The Tribe unquestionably pressured Defendants to issue a decision, calling multiple times a day.[26] It insisted that "everything needs to get done [fast] or they will lose money!"[27] On November 3, 2016, the Tribe explained to Defendants that it had an option agreement on the proposed trust land pursuant to which it committed some sum of money—which the agency has redacted—that it would lose if the title problems would cause the application to be denied.[28] Whether the Tribe stands to lose money in a private transaction is not a valid consideration in the trust acquisition process. Yet Defendants appear to have provided the Tribe assurances that the title problems would be favorably resolved long before any decision was made.[29]

The Tribe's timing drove the final months of the review process, not the merits of the application.[30] The goal was "to get this under wire before the new administration comes in."[31] The draft recommendation memorandum for the Regional Office—which the Assistant Secretary uses to prepare the record of decision—and the legal description to be included in the Federal Register were prepared well ahead of the end of the comment period.[32] The environmental contractor prepared multiple drafts of the Record of Decision in December, long before it received comments on the environmental impact statement.[33]

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[26] Smith Decl. at ¶ 8, Exhibit F (WR_AR0031284).
[27] Smith Decl. at ¶ 8, Exhibit F (WR_AR0031283).
[28] Smith Decl. at ¶ 9, Exhibit G (WR_AR0031724).
[29] *See e.g.*, Smith Decl. at ¶ 10, Exhibit H (WR_AR0031732) ("They want new easements!"); ¶ 11, Exhibit I (WR_AR0031725) (review of new title documents); ¶ 7, Exhibit E (WR_AR0000214) (negotiating to avoid preliminary injunction). Because documents related to the title insurance disclosures and draft deeds—which Defendants have withheld as confidential business information—have not been produced under the protective order the Court approved three weeks ago, Plaintiffs reserve the right to raise questions related to those documents. Smith Decl. at ¶ 12, Exhibit J (WR_AR0032283).
[30] Smith Decl. at ¶ 13, Exhibit K (WR_AR0005627) (calculating the deadlines for various actions).
[31] *Id.*
[32] Smith Decl. at ¶ 14, Exhibit L (WR_AR0033405).
[33] Smith Decl. at ¶ 15, Exhibit M (WR_AR0034939 34760, 34097).

While Defendants were doing everything possible behind the scenes to approve the application before January 20, they told the Court a different story. At the January 13 TRO hearing, they said that no decision had been made and that they did not know when a decision might be made, in substantial part because of the public comments. *See e.g.*, ECF 25, at 37:21-25; 38:1-23. When the Court tried to clarify whether "as a practical matter" the trust acquisition would happen "next week," Defendants responded only that it was "uncertain." *Id.* 40:13 – 41:8. Defendants did not acknowledge that they had been circulating drafts of the decision documents for weeks, *see supra*, or that they had internal calls "to discuss timing near the end of the review period."[34]

In fact, the Department ultimately had a least 11 different people simultaneously editing the decision documents in Google Docs during an approximately 36-hour period between January 17 and January 19 to complete the decision.[35] Defendants coordinated with the Tribe to get their response to comments before the comment period even closed.[36] Everything, including resolving problems, was being done as quickly as possible, with Defendants apparently working around the clock.[37] It is not even clear that the Acting Assistant Secretary had time to review the decision documents. At 2:47:33 PM, the Office of Indian Gaming emailed the Solicitor's Office to remind them that "Steven Lowery," who worked in the Office of the Assistant Secretary "has the final pen."[38] Lowery finished reviewing at 4:25 PM, at which point he arranged to have the documents printed to be signed by the Deputy Assistant Secretary.[39] Those were signed

[34] Smith Decl. at ¶ 16, Exhibit N (WR_AR0033426).
[35] Smith Decl. at ¶ 17, Exhibit O (WR_AR0034497; 34499; 34494).
[36] *Id.* (WR_AR0034498).
[37] Smith Decl. at ¶ 18, Exhibit P (WR_AR0034456 (email from 4:18:47 AM), 34496, 34480).
[38] Smith Decl. at ¶ 19, Exhibit Q (WR_AR0034343).
[39] Smith Decl. at ¶ 20, Exhibit R (WR_0033014).

sometime after 5:50 PM, when the final decision documents were left in an unlocked room on a round table.[40]

The Court should conclude that Defendants' actions both before the Record of Decision and since this lawsuit has been filed were "severe enough to qualify as nefarious or extreme government wrongdoing," thus precluding the application of the deliberative process privilege. *Neighborhood Assistance Corp. of Am. v. U.S. Dep't of Hous. & Urban Dev.*, 19 F. Supp. 3d 1, 14 (D.D.C. 2013). Specifically, the government intended to approve the trust application no matter what occurred: as demonstrated by Defendants' misrepresentations in the TRO hearing as to when the decision would be made; the rush to issue the decision in the waning hours of the Obama Administration; and more recently, the intentional omission of documents from the very privilege log that the Court ordered Defendants to produce. Accordingly, the Court should conclude that there is good reason to believe that government misconduct occurred, and order that the deliberative process privilege cannot protect any documents from at least November 8, 2016 to January 19, 2017.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court order Defendants: (1) to comply with the Court's May 30, 2018, Order, by logging *all* documents Defendants have withheld from the administrative record; (2) to produce documents related to the Department's defense to Plaintiffs' TRO, preliminary injunction, and title issues—whether currently on Defendants' privilege log or among the 400 missing documents; and (3) based on the evidence pointing towards the Government's misconduct, to produce deliberative documents, at least with respect to those from November 8, 2016 to January 19, 2017.

[40] Smith Decl. at ¶ 21, Exhibit S (WR_AR0004487).

Dated this 9th day of November 2018

Respectfully submitted,

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