UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

VILLAGE OF HOBART, WISCONSIN,

Plaintiff,

v. Case No. 23-CV-01511–WCG

UNITED STATES DEPARTMENT
OF THE INTERIOR, *et al.*

Defendants.

PLAINTIFF'S BRIEF IN SUPPORT OF ITS MOTION TO SUPPLEMENT AND COMPLETE THE ADMINISTRATIVE RECORD AND ENGAGE IN DISCOVERY

Plaintiff Village of Hobart, Wisconsin (the "Village"), by and through its attorneys, von Briesen & Roper, s.c., hereby submit the following Brief in Support of its Motion to Supplement and Complete the Administrative Record and Engage in Discovery.

INTRODUCTION

Defendants failed to submit a complete version of the Administrative Record to the Court and the Village. Put simply, the Administrative Record lodged with the Court is not identical to the one transmitted to the Interior Board of Indian Appeals ("IBIA"). Though Defendants may try to explain this omission through various inapplicable privileges, it is indisputable that this Court does not have before it all of the documents the IBIA did when it considered the administrative appeal. And even more problematic is that Defendants did not even mention the existence of the withheld documents in their index to the Administrative Record, which was refiled with the Court on July 30, 2024 as Dkt. 32-1. Accordingly, the Village moves the Court for an order requiring

Defendants to submit to the Village, and to the Court, the complete Administrative Record as it was provided to the IBIA.

Defendants' practices with respect to the Administrative Record, in addition to many other factors, also demonstrate the need for the Village to engage in discovery in this matter. Not only has Defendants' conduct with respect to the Administrative Record raised concerns that greaten a need for discovery, but the Village is also entitled to take discovery on its constitutional and bias claims, which are claims separate and distinct from its APA claim, and challenge to Defendants' course of conduct as a general matter. The need for discovery is further highlighted by the fact that four separate agencies of the United States have stonewalled the Village's attempt to gather further information through Freedom of Information Act ("FOIA") requests. Accordingly, not only is discovery in this matter appropriate and necessary, it is the Village's only available tool to hold the United States accountable for its unlawful and unconstitutional actions. Therefore, the Village moves the Court for an order permitting it to engage in discovery.

BACKGROUND

On April 12, 2006, the Business Committee of the Oneida Nation (the "Tribe") enacted several resolutions requesting the BIA accept into trust several parcels of fee land owned by the Tribe that are located within the Village. Dkt. 1 ¶ 18. The following year, the Tribe submitted 56 fee-to-trust applications to the Bureau of Indian Affairs ("BIA"), totaling 133 parcels and a combined acreage of 2,673 acres. *Id.* ¶ 19. Following the Tribe's applications, the Regional Director of the BIA issued six notices of decision to accept the parcels into trust for the Tribe. *Id.* ¶ 20.

In 2010, the Village timely appealed the six notices of decision to the IBIA, and the IBIA, for a variety of reasons, in *Village of Hobart, Wisconsin v. Midwest Regional Director*, 57 IBIA 4

(2013) ("*Hobart I*"), affirmed in part, vacated in part, and remanded the matter to the Regional Director for further consideration. *Id.* ¶ 21. The IBIA's decision in *Hobart I* concluded that the Regional Director had authority to take the land into trust for the Tribe under the Indian Reorganization Act, 25 U.S.C. § 5101, *et seq.* (the "IRA"), but declined to consider the constitutionality of the IRA. *Id.* ¶ 22. The IBIA also stated that the Regional Director failed to adequately address the Village's comments concerning tax loss, potential land use conflicts, and jurisdictional concerns, and moreover, that the Regional Director needed to address the Village's arguments on bias and the Memorandum of Understanding entered into between the Tribe and the BIA (the "MOU"), in the first instance. *Id.* ¶¶ 23–24.

Thereafter, the Regional Director issued a decision on remand adverse to the Village on January 19, 2017. *Id.* ¶ 25. The Village timely appealed the Regional Director's decision to the IBIA on February 22, 2017. *Id.* ¶ 26.

As part of the Village's appeal, the Village requested that the IBIA determine that the Regional Director's decision was the product of bias due to the decision being processed and issued under the MOU entered into between the Tribe and BIA. *Id.* ¶ 27. Under the MOU, the BIA employs individuals for the specific and sole purpose of processing the member tribes' fee-to-trust applications, and those employees' salaries are paid by the tribes. *Id.* ¶¶ 28–30. Under this "pay-to-play" structure, the staff authorized by the MOU rely on the tribes for the very existence of their jobs, and thus, are pressured to issue favorable decisions for the tribes, who provide the funds necessary to pay their salaries. *Id.* ¶ 30. Those same staff who are paid with funds from the tribes are also responsible for preparing the Notices of Decision for accepting properties into trust on behalf of those same tribes. *Id.* ¶ 31.

This arrangement has already caught the attention of certain governmental departments. In

2006 the Interior Office of the Inspector General completed an investigation and report, which stemmed from a Government Accountability Office report that identified "two separate agreements between groups of tribes and two BIA regional offices, designed to expedite the processing of certain applications" which raised serious concerns about the tribes' funding of those agreements and whether the BIA was favoring trust applications from those tribes. *Id.* ¶ 33; *United States Govt. Accountability Office, Report to Congressional Committees, Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications*, GAO-06-781, pp. 15-16 (July 2006). The Inspector General's investigation into this type of arrangement noted certain unsavory outcomes, including staff authorized by the MOU ultimately seeking different jobs due to the stress associated with relying on member tribes for their funding. *Id.* ¶ 34. The report also concluded that certain employees paid more attention to applications from tribes who were considered to be high donors. *Id.* ¶ 35. The report concluded in part that: "*the patent appearance of a conflict of interest* created by the consortiums by pointing out that the consortium's structure and use by the tribes and BIA 'reflects an insufficient separation of organizational functions, the possibility of *the appearance of unfairness* of the fee-to-trust application process, and a concentration of resources within regional BIA offices in a way that *favors consortium tribes* over other tribes served by the regional offices.'" Dkt. 1 ¶ 37a. (emphasis added).

The Inspector General further described a Solicitor's legal opinion and identified ways the MOU consortium structure gives the "*appearance of unfairness* [that] also extends to the approval process itself." Employees hired directly as a result of tribes' funding to work exclusively on those tribes' applications "*raises serious questions about the independence of judgment*." There is no evidence to suggest the BIA employees' contractible functions are "sufficiently separated from the

final review and approval of the applications…." *Id.* ¶ 37b (emphasis added). As a result, the Solicitor concluded that it "*did not believe BIA can assure that the final decisions on the consortium fee-to-trust applications are fair and unbiased, and also are perceived as such*." *Id.* (emphasis added).

On September 21, 2023, the IBIA issued its decision in *Village of Hobart, Wisconsin v. Acting Midwest Regional Director, Bureau of Indian Affairs*, 69 IBIA 84 (2023) *("Hobart II")*. *Id.* ¶ 52. In the decision, the IBIA concluded that the MOU did not create an unlawful structural bias and asserted that the Village had failed to identify any evidence that demonstrated that the Regional Director prejudged the fee-to-trust applications. *Id.* ¶ 53. The IBIA further rejected the Village's arguments that the MOU fostered improper *ex parte* communications, created an impermissible conflict of interest, and is contrary to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 *et seq.*, and the Tribal Self-Governance Act, 25 U.S.C. § 5361, *et seq.* *Id.* ¶¶ 54–55. The IBIA also rejected the Village's arguments surrounding the sufficiency of the Regional Director's order on remand, the Regional Director's failure to consider the Inspector General Report, and the Regional Director's failure to properly consider the criteria set forth in 25 C.F.R. §§ 151.10(e), (f), and (h). *Id.* ¶¶ 56–57.

Accordingly, this action was commenced by the Village on November 10, 2023. The Village alleges that (1) 25 U.S.C. § 5108 is unconstitutional; (2) 25 C.F.R. § 1.4 is unconstitutional; (3) the Village was deprived of due process by the BIA as a result of the bias created by the MOU; and (4) the IBIA's decision and the underlying decisions violate the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* (the "APA"). *See id.* ¶¶ 59–109. The Administrative Record in this matter was originally lodged with the Court on June 28, 2024, but following a conference with the Court regarding the form and quality, it was re-lodged on July 30, 2024. *See* Dkts. 27, 29, 32.

ARGUMENT

I. DEFENDANTS MUST DISCLOSE AND PRODUCE THOSE DOCUMENTS THAT ARE INDISPUTABLY PART OF THE ADMINISTRATIVE RECORD.

A. The Administrative Record and Index Submitted to the Court are Incomplete.

On July 30, 2024, Defendants re-lodged the Administrative Record with the Court. *See* Dkt. 32. Defendants state that filed alongside the Administrative Record is a "PDF Master Index of the Administrative Record constituting the certified list of the contents of the Administrative Record." *Id.*; *see also* Dkt. 32-2. However, a simple review of the "Master Index" reveals a glaring fault—the index for the Administrative Record lodged with the Court is *different* than the index and administrative record that was submitted to the IBIA. Indeed, this much is evident from the documents filed by Defendants. *Compare* Dkts. 32-2, 32-3 with Dkt. 35-13 at 1129-42 (VOH18625–38).

The index submitted to the IBIA notes the existence of numerous "Post-Remand Privileged Documents" and "Pre-Remand Privileged Documents" that are "included in the Administrative Record in compliance with 43 CFR 4.335." Dkt. 35-13 at 1138-40 (VOH18634–36). These documents were not only disclosed to the IBIA, but they were actually *produced* to the IBIA in a "separate sealed box." Dkt. 35-14 at 1(VOH18640). These documents that were included as part of the Administrative Record submitted to the IBIA are not insignificant. To the contrary, these "Post-Remand" and "Pre-Remand" privileged documents amount to 2,391 pages. *See id.* Why Defendants did not produce, let alone alert the Court to the existence of, these documents is alarming.

The concern that these documents were omitted from the Administrative Record lodged with the Court becomes even more alarming when one takes note of 43 C.F.R. § 4.335, which provides that "the record on appeal shall include, without limitation…original documents,

petitions, or applications by which the proceeding was initiated; all supplemental documents which set forth claims of interested parties; and all documents upon which all previous decisions were based." At the administrative level, then, it is clear these documents were included "in compliance with" 43 C.F.R. § 4.335; meaning that the documents are, as a matter of law, part of the Administrative Record. Dkt. 35-13 at 1138-40 (VOH18634-36).

Both the index and Administrative Record that were filed with the Court omit these documents as well as any reference to these documents as being "included in the Administrative Record." *See* Dkt. 32-2. Certainly, Defendants cannot unilaterally alter the Administrative Record the moment the dispute changes venue. Therefore, because the Administrative Record filed with the Court does not contain all the documents that were before the IBIA, it is, as a matter of law, incomplete.[1] Accordingly, the Court should order that the Administrative Record be completed through the disclosure and production of those documents listed in the "Post-Remand" and "Pre-Remand" privileged documents section of the index submitted to the IBIA.

B. There is No Justification for Defendants' Withholding of the Documents.

The Village anticipates, based on prior communications and the parties' meet-and-confer, Defendants may argue these documents are "privileged" and therefore may be withheld. This

[1] Defendants may argue that, because the IBIA stated that it did not consider these documents, there is no need for them to be included in the Administrative Record. *See* Dkt. 35-5 at 33 (VOH15250) (noting that the IBIA did not "review the contents" of the documents). But the fact the IBIA purportedly did not consider these documents is immaterial, as it is well-settled that the Administrative Record should contain "neither more nor less information than did the agency when it made its decision." *Walter O. Boswell Memorial Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984); *see also Portland Audubon Soc. v. Endangered Species Committee*, 984 F.2d 1534, 1548 (9th Cir. 1993) (noting that the "whole record" includes "everything that was before the agency pertaining to the merits of its decision."). There is no dispute that the documents were submitted to the agency and available for review, and as such, they must also be available to the Court and the parties in this litigation. In any event, the fact that Defendants claim the IBIA did not review the documents excuses nothing. The IBIA may have or should have reviewed the documents, many of which the IBIA recognized as relating to the draft notices of decision, because its review of these documents may have altered its final decision, particularly with respect to the bias claim.

position is incorrect. The documents were not withheld as part of the administrative record submitted to the IBIA, and therefore, cannot be withheld from the Administrative Record lodged with the Court. *See, e.g.*, *Walter O. Boswell Memorial Hosp.*, 749 F.2d at 792 (noting that the Court should have before it "neither more nor less than did the agency when it made its decision."). But even so, the "privileges" claimed are without merit given the Village's claims and that Defendants are unable to meet their burden for claiming such "privileges."

Defendants may contend that the "deliberative process" privilege applies to certain documents, such that those documents should not be produced to the parties or the Court. Indeed, a significant portion of the documents included in the index submitted to the IBIA list "Deliberative process" in the description of each document. *See* Dkt. 35-13 at 1138-40 (VOH18634–36). For this privilege to apply, however, the document must be "pre-decisional," meaning that it must be generated before the adoption of an agency policy. *Nat'l Immigrant Justice Ctr. v. United States Dep't of Justice*, 953 F.3d 503, 508 (7th Cir. 2020). And, the document must also be "deliberative," meaning that it reflects the "give-and-take of the consultative process." *Id.* (internal quotation marks and citations omitted). The privilege is designed to protect "communications that are part of the decision-making process of a governmental agency," given that "frank discussion of legal and policy matters is essential to the decisionmaking process of a governmental agency." *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993). "[W]hether an exception to a privilege applies must be addressed and resolved one lawsuit—indeed, one document—at a time." *Ill. Coalition for Immigrant and Refugee Rights, Inc. v. Wolf*, 19 C 6334, 2020 WL 7353408, at *2 (N.D. Ill. Dec. 15, 2020).

The initial burden of establishing the applicability of the privilege rests with the government. *See, e.g.*, *Redland Soccer Club, Inc. v. Dept. of Army of U.S.*, 55 F.3d 827, 854 (3d

Cir. 1995). And, importantly, "[m]ore than just the agency's 'say so' is required to sustain its deliberative process privilege claims." *See Nat'l Council of Negro Women v. Buttigieg*, No. 1:22-cv-314-HSO-BWR, 2024 WL 1287611, at *3 (S.D. Miss. Mar. 26, 2024). Accordingly, to the extent Defendants claim that *any* of the documents are protected by the deliberative process privilege, they must identify the document and demonstrate that it is both pre-decisional and deliberative.

But even if Defendants were able to make such a showing, "the privilege…is not absolute." *Redland Soccer Club*, 55 F.3d at 854. This is because there are instances in which "the need for accurate fact-finding override[s] the government's interest in non-disclosure." *Clinch Coalition v. U.S. Forest Serv.*, 693 F. Supp. 3d 643, 651 (W.D. Va. 2023) (quoting *FTC v. Warner Communications Inc.*, 742 F. 2d 1156, 1161 (9th Cir. 1984)); *accord Farley*, 11 F.3d at 1389 ("The deliberative process privilege may be overcome where there is a sufficient showing of a particularized need to outweigh the reasons for confidentiality."). Relevant here, the "privilege may be inapplicable where the agency's deliberations are among the central issues in the case." *Mr. and Mrs. B v. Bd. Of Educ. of Syosset Cent. School Dist.*, 35 F. Supp. 2d 224, 230 (E.D.N.Y. 1998) (internal quotation marks omitted).[2]

[2] Defendants may rely upon the rationale of *Oceana, Inc. v. Ross*, 920 F.3d 855, 865 (D.C. Cir. 2019), for the proposition that the documents were properly withheld. Not only is that decision not binding on this Court, but the D.C. Circuit also reasoned that disclosure would be appropriate in cases where there is a "showing of bad faith or improper behavior" or, among other circumstances, there is a "substantial showing" that the "record was incomplete." *Id.* As discussed herein, Plaintiffs are able to satisfy both conditions. Similarly, other courts analyzing the privilege have either disregarded *Oceana*'s broad application or applied exceptions that warrant discarding the privilege. *See, e.g.*, *North Dakota v. E.P.A.*, 127 F. Supp. 3d 1047, 1054 (D.N.D. 2015) (citing *Voyageurs Nat. Park Ass'n v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004)) (internal quotation marks omitted) (permitting disclosure if "inquir[y] into the mental process of administrative decision-makers" provides "effective judicial review"); *Nat'l Council of Negro Women v. Buttigieg*, No. 1:22-cv-314-HSO-BWR, 2024 WL 1287611, at *4-6 (S.D. Miss. Mar. 26, 2024) (gathering district court cases and disregarding *Oceana*).

The documents marked as being protected by the deliberative process privilege include emails and documents regarding the "bias allegations" and the "bias issue." Dkt. 35-13 at 1139 (VOH18635). They also include lengthy email conversations, many of which appear to be over 30 pages, regarding edits to the Notice of Decisions and the inclusion and removal of portions regarding the "Inspector General report." *See* Dkt. 35-13 at 1138-40 (VOH18634–36). Notably, despite many of these emails containing over 30 pages, the index provides only a description as to a single email within those chains. *Id.*

Given the nature of the Village's claims in this matter, and particularly, the bias claim, the need for accurate fact finding clearly outweighs Defendants' interest in non-disclosure. *Cf. Clinch Coalition*, 693 F. Supp. 3d at 651. Defendants' deliberations on the bias claims directed towards Defendants, themselves, are among the "central issues in the case," given that the Village alleges that Defendants' deliberations and actions were tainted by impermissible and unconstitutional bias. *Mr. and Mrs. B*, 35 F. Supp. 2d at 230. And, of course, there is no doubt that Defendants would seek to exclude from the Administrative Record any evidence supporting the Village's claim of bias on part of the Defendants. *Cf. Cook County, Ill. v. Wolf*, 461 F. Supp. 3d 779, 794–95 (N.D. Ill. 2020) (noting that evidence of bias and discrimination "will reside outside the administrative record" and permitting discovery because "presumptively limited discovery to the record can allow [the challenged discriminatory bias] to remain concealed."). The Village's "particularized need" for the documents, which outweighs the reasons for confidentiality, is evident—the pursuit of truth for the Village's substantiated, allegations that Defendants are impermissibly and unconstitutionally biased in favor of the Tribe (and other federally-recognized tribes) when processing fee-to-trust applications. *Farley*, 11 F.3d at 1389 ("The deliberative process privilege may be overcome where there is a sufficient showing of a particularized need to outweigh the

reasons for confidentiality."). Whatever interest Defendants may have in maintaining the confidentiality of these documents, that interest does not extend to covering up allegations of unconstitutional bias in favor of Indian tribes. Accordingly, to the extent the Court believes the deliberative process privilege applies as an initial matter, it should nonetheless determine that the qualified privilege has been overcome and order disclosure and production of the documents.

But even if the Court determines that Defendants have met their burden and that production of the documents to the parties is not warranted, the Court should nonetheless order that the documents be produced to the Court for an *in camera* review. *See, e.g.*, *Desert Survivors v. U.S. Dep't of the Interior*, 231 F. Supp. 3d 368, 382-83 (N.D. Cal. 2017) ("The Court concludes, however, that the appropriate way to address these circumstances is through in camera review and a rigorous application of the balancing test set forth in *Warner* rather than rejecting the application of the privilege altogether in cases involving APA record review."); *Nat'l Council of Negro Women*, 2024 WL 1287611, at *1 (requiring privilege log). Plaintiff has made at least a showing that the documents may shed light on one of the issues central to the case. That warrants, at a very minimum, the Court's review.

Second, Defendants may claim that the documents are protected by the attorney-client privilege. *See* Dkt. 35-13 at 1138-40 (VOH18634–36). However, those documents, even if attorney-client privileged at one point, were produced to the IBIA—an appellate review body separate and independent from the BIA—and therefore, are no longer privileged. This alone dooms any reliance on the privilege by Defendants. Moreover, the party seeking to invoke attorney-client privilege has the burden of establishing all of its essential elements. *See United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983). Because privilege "has the effect of withholding relevant information from the fact finder, it applies only where necessary to achieve

its purpose." *Fisher v. United States,* 425 U.S. 391, 403 (1976). Here, Defendants have yet to establish that these documents are attorney-client privileged.

Furthermore, the documents should not be withheld without first providing the Village a privilege log. Defendants may claim that, at most, Plaintiff is entitled to the privilege log in the form of the index that was produced as part of the administrative record provided to the IBIA. But the information contained within that index is insufficient. Federal Rule of Civil Procedure 26(b)(5), which governs privilege, requires Defendants to "*describe the nature* of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, *will enable other parties to assess the claim.*" Fed. R. Civ. P. 26(b)(5)(A)(ii) (emphasis added). Under Rule 26(b)(5), the privilege log description for *each* document required must include, among other things, the respective document's: (a) date, (b) author and all recipients "along with their capacities*,"* (c) "subject matter*,"* and (d) "a specific explanation of why the respective document is privileged." *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.,* 145 F.R.D. 84, 88 (N.D. Ill. 1992) ("descriptions such as 'letter re claim,' 'analysis of claim,' or 'report in anticipation of litigation'—with which we have grown all too familiar—will be insufficient…[T]here are no presumptions operating in the discovery opponent's favor.").

With respect to the index submitted to the IBIA, the descriptions of each document are woefully deficient. Not only are they conclusory or ambiguous, but they also plainly fail to account for all of the documents contained in the entry. For example, in the Post-Remand Privileged Documents section, Volume 2, Tab 14, there appear to be 166 pages, yet the description simply states that it is an "EMAIL…requesting latest draft NOD to review and edit." Dkt. 35-13 at 1138 (VOH18634). Similarly, another example, at Volume 3, Tab 34, there appear to be 158 pages

under an "EMAIL…forwarding draft NOD for review and comment." *Id.* at 1139 (VOH18635). One can safely assume that these are not singular emails. These are just two examples of many entries that contain this flaw. Moreover, the IBIA index does not contain a specific explanation as to why each document is privileged—instead, it simply includes the text "*Attorney-client*." This is not sufficient to meet the requirements of Rule 26(b)(5). And, in this litigation, Defendants have produced no privilege log to the Court or the Village, let alone acknowledged the existence of these documents as part of the administrative record. As such, the Court should require as a first step, Defendants to provide a privilege log that enables the Village and the Court to sufficiently determine whether the documents claimed as privileged, are in fact, privileged.

Finally, Defendants may argue that the principles of waiver or estoppel should apply to the extent that they claim the Village did not seek disclosure or object when the documents were submitted to the IBIA. But this argument is misplaced. Again, Defendants produced the documents to the IBIA, making them indisputably part of the Administrative Record, and subject to disclosure in this action.

Accordingly, the Village requests the Court issue an order that requires Defendants to submit to the Village and to the Court the complete Administrative Record as it was provided to the IBIA, including documents that Defendants (a) failed to identify in the index lodged with the Court, and (b) intentionally did not include in the Administrative Record that was relodged with the Court on July 30, 2024. In the alternative, the Village requests an order requiring Defendants to provide the Village and the Court with a privilege log of any withheld documents and to simultaneously submit those documents to the Court for an *in camera* review.

II. THE VILLAGE SEEKS, AND IS ENTITLED TO, DISCOVERY.

The Village also seeks an order from the Court permitting the Village to engage in

discovery. More particularly, the Village seeks to take discovery on its constitutional claims, including requests for admission, interrogatories, requests for production of documents, and depositions of certain agency employees, including the Regional Director, BIA employees involved in the drafting and processing of fee-to-trust applications, and certain employees and/or members of the Tribe who communicated directly with the BIA employees responsible for drafting and processing the Tribe's applications. The discovery would focus on the constitutional and bias claims against Defendants with regard to the MOU and the decisions drafted under their purview, and also used to verify the accuracy and completeness of the Administrative Record compiled by those same BIA employees who drafted the decision. As explained further below, discovery is appropriate given that Defendants have engaged in improper behavior with respect to the Administrative Record, as illustrated above, and because caselaw makes plain that the Village is entitled to discovery on its constitutional and bias claims.

A. Defendants' Bad Faith or Improper Behavior Entitles the Village to Discovery.

Both the United States Supreme Court and the Seventh Circuit have recognized that extra-record discovery "into the mental processes of administrative decisionmakers" is justified where the party seeking discovery makes a "strong showing of bad faith or improper behavior" by the government. *Dep't of Com. v. New York*, 588 U.S. 752, 781 (2019) (internal quotation marks and citations omitted); *Wolf*, 461 F. Supp. 3d at 795 (citing *Citizens for Appropriate Rural Rds. v. Foxx*, 815 F.3d 1068, 1081–82 (7th Cir. 2016) ("An exception exists [to the rule limiting discovery in APA cases to the administrative record] if a plaintiff seeking discovery can make a significant showing that it will find material in the agency's possession indicative of bad faith or an incomplete record.").

Here, the Village has already demonstrated that Defendants have engaged in bad faith or

improper behavior with respect to the Administrative Record by omitting several thousands of pages of documents. Indeed, the Village has demonstrated that Defendants failed to disclose to the Court the very existence of documents that were provided to the IBIA as part of the administrative record, and intentionally omitted them from the version of the Administrative Record that was relodged with the Court. *Compare* Dkts. 32-2, 32-3 with Dkt. 35-13 at 1129-42 (VOH18625–38). This is, at the best, improper behavior, and at the worst, bad faith. And of course, it demonstrates to the Court that the Administrative Record is incomplete.

The Village has also made a prima facia showing that extra-record discovery will show material beyond the Administrative Record, whether complete or incomplete, indicative of bad faith or improper behavior by Defendants. *See Wolf*, 461 F. Supp. 3d at 793 (reasoning "a court may allow discovery beyond the record where there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decision-makers." (internal quotations omitted)). Defendants' bad faith or improper behavior is demonstrated under the very terms of the MOU that the Village challenges in this matter. Under the MOU, those same employees that act as "liaison[s]" with the Tribe and who prepare the draft notices of decision, also prepare the record for appeal. Dkt. 1-3 at 5-6, § 8.a.ii., iii.,viii., and ix. These are the same employees whose jobs are dependent upon the Tribe's ongoing funding of their salaries. Additionally, the Village has shown a need for extra-record discovery, through the communications among MOU employees, which demonstrate bias and prejudgment of decisions to accept land into trust for the participating tribes. Dkt. 1 ¶ 38, *see also* Dkt. 1-6. These, among others, are the same concerns the Inspector General noted in its 2006 Report. Dkt. 1 ¶¶ 33-37.

Given Defendants' bad faith and improper behavior with respect to the Administrative Record and the strong showing of bad faith and improper behavior by Defendants, based on the

MOU and the communications already disclosed, extra-record discovery is warranted in this matter. If Defendants were willing to omit materials from the Administrative Record that were plainly provided to the IBIA, why should the Village or the Court believe that Defendants, who as part of their agreement with the Tribe are to prepare the record for appeal, have not withheld other relevant materials from the Administrative Record – in particular, communications within the BIA, or with the Tribe, that have a significant likelihood of demonstrating bias? Neither the Court nor the Village are required to trust or accept Defendants' "say-so." Accordingly, the Village is entitled to extra-record discovery to ensure not only the accuracy and completeness of the Administrative Record, but also that the administrative decisions were the product of an unbiased and fair process.

B. The Village is Entitled to Discovery on its Constitutional Claims.

Even setting aside bad faith or improper behavior by Defendants, caselaw also supports the independent reason for discovery on the Village's constitutional claims. The Village has asserted direct constitutional challenges in this action, including claims that: (1) 25 U.S.C. § 5108 is unconstitutional; (2) 25 C.F.R. § 1.4 is unconstitutional; and (3) the Village was deprived of due process by the BIA as a result of the bias created by the MOU. As a general matter, then, the Village is permitted to seek discovery on these claims.

Courts have noted that constitutional challenges are "reviewed independent of the APA," thus allowing the Court to "look beyond the administrative record in regard to" such claims even without consideration of any bad faith or improper behavior. *Grill v. Quinn*, No. 10 CV 0757, 2012 WL 174873, at *2 (E.D. Cal. Jan. 20, 2012); *see also Wolf*, 461 F. Supp. 3d at 792. Courts have permitted extra-record discovery on constitutional claims brought alongside APA claims for numerous reasons. *See, e.g.*, *Wolf*, 461 F. Supp. 3d at 792-795 (allowing discovery on

constitutional claim "because evidence of racial animus (if any) will reside outside the administrative record, presumptively limiting discovery to the record can allow the racial motivations underlying racially motivated policymaking to remain concealed"); *Porter v. Califano*, 592 F.2d 770, 783 (5th Cir. 1979) (noting that a lack of discovery was "damaging to the pursuit of truth" given that matters of "good faith" and "credibility" were at the center of the case); *Puerto Rico Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urban Dev.*, 59 F. Supp. 2d 310, 327-28 (D.P.R. 1999) (permitting discovery with respect to constitutional claims brought alongside APA claims because there is "no administrative record with regard to the [constitutional claims]" and "boilerplate principles of review serve poorly to address the matter pending before th[e] Court"); *Manker v. Spencer*, No. 3:18-CV-372, 2019 WL 5846828, at *19 (D. Conn. Nov. 7, 2019) (permitting discovery in an APA action where the constitutional claims asserted challenged the agency's "general course of conduct" rather than a discrete adjudication). Many of the reasons set forth in the cases above provide ample grounds to permit discovery here.

First, there is no doubt that the Village's constitutional claim with respect to bias and the MOU places Defendants' "good faith" and "credibility" at the center of this action. *Porter*, 592 F.2d at 783. That claim alleges that Defendants' involvement in the fee-to-trust application process under the MOU was "predisposed against the Village and blatantly biased in favor of the Tribe," and moreover, that the Regional Director does nothing more than "rubber stamp the notices of decision prepared by the BIA employees funded by the Tribes under the Midwest MOU." Dkt. 1 ¶¶ 97–99. The Village challenges whether Defendants have acted in good faith and, as part of that, Defendants' credibility is put at issue. As in *Porter*, a lack of discovery on this claim would be "damaging to the pursuit of truth," and allow Defendants to continue operating in the shadows with no oversight. *Porter*, 592 F.2d at 783; *see also Wolf*, 461 F. Supp. 3d at 794 ("Most people

know by now that the quiet part should not be said out loud.").

Second, and as in *Manker*, the Village's constitutional challenges allege violations with respect to Defendants' "general course of conduct" rather than a discrete adjudication. *Manker*, 2019 WL 5846828, at *19. Indeed, the Village asserts that 25 U.S.C. § 5108 and 25 C.F.R. § 1.4 are unconstitutional as a general matter, which challenges Defendants' general course of conduct in the fee-to-trust process. The Village also asserts the MOU creates impermissible structural bias as well as that the Regional Director blindly approves the notices of decision prepared by BIA employees whose salaries are funded by the Tribes under the MOU.

Third, as in *Quinn*, the pleadings and record supply a "reasonable inference to support some behind-the-scenes decision making, i.e., that not all reasons for the decision are in the record." *Quinn*, 2012 WL 174873, at *4. "This itself is grounds for discovery in an APA action." *Id.* Based on the pleadings, the MOU plainly illustrates the existence of bias and decision-making that will no doubt remain "behind-the-scenes." For example, the MOU provides that those employees funded by the Tribe are tasked with, among other activities:

- "[s]erving as liaison and maintain communication between the MWRO and the Participating Tribe for Fee-to-Trust issues[,]";
- "[r]eviewing and commenting on any deficiencies in any current application package, and reviewing and providing technical assistance in the preparation of any future applications, as requested by the Participating Tribe[,]";
- "[p]reparing the Notice of Decision on a requested parcel[,]" and,
- "[p]reparing the record for appeal under 25 C.F.R. Part 2."

Dkt. 1-3 at 5-6, § 8.a.ii., iii., viii., and ix. Moreover, they are responsible for "assuring" that each fee-to-trust application "shall" fulfill completely the requirements of 25 C.F.R. Part 151. *Id.* at 5. § 8.a. These responsibilities, which are funded by the Tribe, provide a strong inference that there are documents, influences, and expectations driving the decisions made by Defendants that will

not be found in the Administrative Record.

Moreover, and perhaps as is best explained by the investigation into similar MOUs, itself:

> [T]he funding structure of the MOU, based predominantly upon the tribes' election to redirect their TPA funds to the program, creates a situation where the tribes are literally paying the salaries of federal employees. The ability of an all-tribal body to influence the selection, performance awards, and duties and responsibilities of the federal consortium staff—coupled with the fact that the tribes control the purse strings from which the consortium staffs' salaries are dependent—results in a patent perception of a conflict of interest. This investigation has found this appearance of a conflict of interest to be, in fact real.

Dkt. 1-5 at 2. This further highlights the "behind-the-scenes" decision-making, by making it plain that these MOUs do, in fact, result in conflicts of interest and biased outcomes, evidence of which will lie outside the record. And moreover, this "behind-the-scenes" decision-making, and the influencing of it, is aptly illustrated by emails in the record, including emails in which a BIA employee indicates that they are working "OT" (overtime) on the Tribe's matters to go "above and beyond" performance targets. *See* Dkt. 33-13 at 285-86 (VOH04808-809). Certainly, BIA employees would not be logging overtime and working "above and beyond" for the Tribe if there was not a benefit to be conferred upon them by the Tribe, such as continued funding for their positions. Accordingly, there is ample evidence in the pleadings and the record to support an inference of "behind-the-scenes" decision-making, so as to warrant extra-record discovery.

And finally, as in *Wolf*, additional evidence regarding the Village's claim of unconstitutional bias will necessarily lie outside of the Administrative Record, making discovery a necessity to adequately pursue its claim. *Wolf*, 461 F. Supp. 3d at 794–95. As the Court in *Wolf* recognized, evidence of bias or discrimination "almost certainly will not be disclose[d] in the agency's contemporaneous explanation" for its action." *Id.* at 795 (internal quotation marks and citations omitted). And because evidence of bias will "reside outside the administrative record, presumptively limiting discovery to the record can allow" biased policymaking to "remain

concealed." *Id.*; *see also Quinn*, 2012 WL 174873, at *5 ("Bias, if any, is likely to be found in documents not part of the record, if any, which demonstrate the 'real' reason for the decision at issue…bias can be found in many forms, for example, outside pressure to deny a permit which might otherwise be granted. No one would argue with the proposition that the sine qua non of due process is an unbiased decision maker."). Accordingly, discovery on this claim is necessary to ensure a full and complete review of Defendants' actions. Again, preventing discovery on this claim would permit Defendants to hide behind their own "say-so" with respect to direct and substantiated allegations of unconstitutional bias. The Court should not permit Defendants to bury or hide their own biased decision-making. Accordingly, for the reasons set forth above, the Village respectfully requests that the Court enter an order permitting the Village to take discovery on its constitutional and bias claims.

C. The Federal Government's Continued Violation of the Freedom of Information Act Warrants Discovery in this Matter.

Though the caselaw and arguments above provide sufficient authority for the Court to permit discovery, the Village can point to yet another reason—the Federal Government's wholesale failure to comply with the Freedom of Information Act, 5 U.S.C. § 552 e*t seq*., and failure to respond to the Village's FOIA requests seeking information related to this matter.

On April 12, 2024, the Village sent FOIA requests to the BIA, the Assistant Secretary for Indian Affairs, the Bureau of Land Management, and the Environmental Protection Agency. *See* Declaration of Frank W. Kowalkowski, ¶ 3, Ex. A. The requests seek to obtain correspondence between the Tribe and the agencies, documents exchanged between the Tribe and the agencies, and information related to fee-to-trust applications and the Midwest MOU. *See id.* However, as of the date of this filing, 140 days have passed and the agencies have not produced any documents

in response to the Village's requests. *Id.* ¶ 7.[3] Aside from the EPA's limited response indicating it had thousands of pages of documents, the agencies have not provided meaningful responses as to when a search for documents will be complete, how many documents may exist, or when those documents will be made available to the Village, despite the Village sending numerous follow up requests for the information. *Id.* ¶ 8. The agencies have failed to provide any meaningful level of communication regarding the requests despite the Village's attempt to continuously prod them for updates. *Id.* ¶ 9, Ex. B.

The agencies' wholesale failure to meaningfully communicate with the Village, let alone produce the documents within a reasonable period of time, suggests that the agencies may be improperly attempting to assist Defendants and the Tribe in this litigation by stonewalling the Village's efforts to obtain additional information regarding this litigation. Indeed, the MOU between the BIA and the Tribe requires any FOIA requests to the BIA "be disclosed immediately to the particular Participating Tribe upon which the particular request is made, including the details of the specific information requested." Dkt.1-3 at 7 § 10. Though the Village is within its rights to file a separate action in this Court with respect to the agencies' FOIA violations, the Village recognizes that a second, contemporaneous action would be a waste of judicial economy, given that the Court may, and should, permit discovery to be taken in this matter on those same issues. In light of the agencies' FOIA violations and their likely efforts to stonewall the Village in obtaining information related to this litigation, the Court should permit discovery in this action.

[3] The EPA did produce *one* document shortly after the Village submitted its request, but after the Village raised questions regarding the sufficiency of the EPA's response, it has since informed the Village that it has thousands of pages of documents that are responsive. Kowalkowski Decl. ¶¶ 4-6. Those documents have yet to be produced. *Id.* ¶ 6.

CONCLUSION

For the reasons set forth above, the Village respectfully requests that the Court enter an order requiring Defendants to submit to the Village, and to the Court, the complete Administrative Record as it was provided to the IBIA, including documents that Defendants (a) failed to identify in the index lodged with the Court, and (b) intentionally did not include in the Administrative Record that was relodged with the Court on July 30, 2024. In the alternative, the Village respectfully requests the Court enter an order requiring Defendants to provide the Village with a privilege log of any withheld documents that the Court determines the privilege applies to, and to simultaneously submit those documents to the Court for an *in camera* review. And, finally, the Village requests that the Court enter an order permitting the Village to seek discovery in this matter with respect to the constitutional and bias claims advanced by the Village.

Dated: August 30, 2024.

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