
**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

CITIZENS AGAINST CASINO
GAMBLING IN ERIE COUNTY, *et al.*,

Plaintiffs,

-against-

Civil Action No. 09-CV-0291
Hon. William M. Skretny, U.S.D.J.

PHILIP N. HOGEN, in his Official Capacity
as Chairman of the NATIONAL INDIAN
GAMING COMMISSION, *et al.*,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR AN ORDER
COMPELLING PRODUCTION OF ADMINISTRATIVE RECORD
DOCUMENTS AND AUTHORIZING DISCOVERY
TO SUPPLEMENT THE ADMINISTRATIVE RECORD**

O'CONNELL AND ARONOWITZ
Attorneys for Plaintiffs
54 State Street
Albany, NY 12207-2501
(518) 462-5601

CORNELIUS D. MURRAY
JANE BELLO BURKE
Of Counsel

Dated: June 22, 2011

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
Preliminary Statement.....	1
Procedural Background.....	4
A. The Collusive Actions of the U.S. Government and the Tribe to Thwart the Effect of the Court’s July 8, 2008 Order.....	4
B. The Administrative Record.....	7
C. The Recusal and Subsequent Un-Recusal of Edith Blackwell	8
D. The NIGC Takes Action, Even Without the DOI’s Help, to Reach a Predetermined End.....	13
E. The Defendants’ Request for Supplementation	14
F. The Supplemental Production.....	14
G. The Relationship between Edith Blackwell and Michael Rossetti	15
H. Michael Rossetti and Akin Gump.....	16
I. Akin Gump and the SNI	17
LEGAL ARGUMENT	19
POINT I	19
PLAINTIFFS ARE ENTITLED TO THE PRODUCTION OF DOCUMENTS OMITTED ON DELIBERATIVE PROCESS PRIVILEGE GROUND	19
POINT II.....	24
PLAINTIFFS ARE ENTITLED TO DISCOVERY.....	24
CONCLUSION.....	25

TABLE OF AUTHORITIES

	Page
Federal Cases	
<i>Alleyne v. New York State Educ. Dep’t</i> , 248 F.R. D 383 (N.D.N.Y. 2008)	20
<i>Allocco Recycling Ltd. v. Doherty</i> , 220 F.R.D. 407 (S.D.N.Y. 2004)	19
<i>Camp v. Pitts</i> , 411 U.S. 138 (1973).....	24
<i>Children First Found., Inc. v. Martinez</i> , 2007 WL 4344915 (N.D.N.Y. Dec. 10, 2007).....	20, 24
<i>Citizens Against Casino Gambling in Erie County v. Hogen</i> , 2008 WL 2746566 (July 8, 2008)	passim
<i>Citizens Against Casino Gambling in Erie County v. Kempthorne</i> , 471 F. Supp. 2d 295 (W.D.N.Y. 2007)	2
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U. S. 402 (1971).....	24
<i>Coastal States Gas Corp. v. Dep’t of Energy</i> , 617 F.2d 854 (D.C. Cir. 1980).....	19
<i>Cobell v. Norton</i> , 226 F.Supp.2d 1(D.D.C. 2002), <i>vacated on other grounds</i> , 334 F.3d 1128 (D.C. Cir. 2003)	9
<i>Grand Cent. P’ship v. Cuomo</i> , 166 F.3d 473 (2d Cir. 1999).....	21
<i>In re Franklin Nat’l Bank Sec. Litig.</i> , 478 F.Supp. 577 (E.D.N.Y. 1979)	23
<i>In re Subpoena Duces Tecum Served on Office of Comptroller of Currency</i> , 145 F.3d 1422 (D.C. Cir. 1998)	23
<i>Nat’l Cong. For Puerto Rican Rights v. City of New York</i> , 194 F.R.D. 88 (S.D.N.Y. 2000)	22
<i>National Audubon Soc’y v. Hoffman</i> , 132 F.3d 7 (2d Cir. 1997).....	24
<i>National Council of La Raza v. DOJ</i> , 411 F.3d 350 (2d Cir. 2005).....	19
<i>Providence Journal Co. v. United States Dep’t of the Army</i> , 981 F.2d 552 (1st Cir. 1992).....	22
<i>Public Citizen, Inc. v. OMB</i> , 569 F.3d 434 (D.C. Cir. 2009).....	22
<i>Schaghticoke Tribal Nation v. Norton</i> , No. 3:06-cv-0081 (PCD), 2007 WL 867987 (D. Conn. Mar. 19, 2007).....	25

Spinner v. City of New York,
No. 01 CV 2715, 2004 U.S. Dist. LEXIS 2541 (E.D.N.Y. Feb. 19, 2004) 19
State of New York v. Salazar,
701 F.Supp.2d 224 (N.D.N.Y. 2010), *aff'd*, Case 6:08-cv-00644-LEK-DEP, Dkt 196
(Mar. 3, 2011) 19, 20, 25

Federal Statutes

25 U.S.C. § 2703(4) 16
25 U.S.C. § 2713(a)(3) 5
25 U.S.C. § 2719 passim

Federal Regulations

71 Fed. Reg. 58,769 (Oct. 5, 2006) 4
73 Fed. Reg. 29,354 (May 20, 2008) 15
74 Fed. Reg. 4,683 (Jan. 21, 2009) 20

New York Statutes

N.Y. Exec. Law § 12 18

Preliminary Statement

Plaintiffs respectfully submit this Memorandum of Law in support of their motion to supplement the administrative record and for discovery. Plaintiffs seek such relief based upon (i) the Defendants' unfounded privilege claims which resulted in the redaction of material that is highly germane to the administrative determination under review in this case, and (ii) the serious conflict of interest that infected the integrity of the administrative process and tainted the outcome, which was preordained. The conflict arises out of the intimate personal relationship between a former high-ranking attorney in the U.S. Department of the Interior ("DOI"), whose current law firm was and is a lobbyist and legal counsel for the Seneca Nation of Indians ("SNI"), and a high-ranking attorney within DOI who was the principal drafter of the legal opinion underlying the determination in this case. These individuals were former colleagues at DOI but now have a much closer relationship, one that existed at the time the determination under review in this case was made.

Section 2719 of the Indian Gaming Regulatory Act ("IGRA") prohibits gambling by Indian tribes "on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988," subject to certain statutory exceptions. On May 20, 2008, the DOI reversed its prior longstanding interpretation and stated, in a final rulemaking under 25 U.S.C. Part 292, that the Section 2719 prohibition applies only to lands "acquired by the Secretary in trust" for Indian tribes, and not to lands owned by an Indian tribe and held in restricted fee. Previously, the DOI, the National Indian Gaming Commission (the "NIGC"), and the U.S. Attorney General had consistently taken the opposite position, as did this Court, so as to avoid an interpretation that would "undermine the regulatory regime prescribed by IGRA." (*See* Murray Decl. Ex. A, B)¹ This Court in *Citizens Against Casino Gambling in Erie County v. Hogen*, 2008 WL 2746566 (July 8, 2008) ("*CACGEC IP*"), agreed and expressly rejected the alternative interpretation, which the SNI had advanced, as "at

¹ The facts supporting this motion are set forth in the accompanying the Declaration of Cornelius D. Murray, Esq., dated June 22, 2011, and the documents annexed thereto.

odds with section 20's clear purpose." *Id.* at *53.² On January 20, 2009, Inauguration Day and the dawn of a new Administration, the NIGC Chairman, concurring in the DOI's reinterpretation, reversed his own prior determination and issued a 22-page letter (Murray Decl. Ex. C) approving the SNI's resubmitted ordinance for Las-Vegas style gambling on the tribe's 9-1/2 acre parcel in downtown Buffalo, New York (the "Buffalo Parcel"). As a result, the SNI's gambling on the Buffalo Parcel, which this Court in *CACGEC II* held to be illegal and said should cease "forthwith," continues to this day.

The administrative record reflects that Edith Blackwell, a highly placed lawyer in the DOI Division of Indian Affairs, was directly involved in the reversal of the DOI's longstanding prior position on the applicability of Section 2719 to restricted fee land. Edith Blackwell also played a pivotal role in drafting a *post hoc* rationalization, Solicitor's Opinion M-37023 (Murray Decl. Ex. D), in response to the NIGC's request for an explanation of the change. At the time of these events, Edith Blackwell was living and sharing a residence with Michael Rossetti, a partner with Akin Gump Strauss Hauer & Feld, LLP, which provides legal representation to the SNI and was receiving hundreds of thousands of dollars from the SNI for that legal representation and for lobbying the federal government on issues affecting Indian sovereignty, among others. The SNI, which holds the Buffalo Parcel in restricted fee, was the sole tribe that stood to benefit from the DOI's reversal in position.³ Edith Blackwell was recused, presumably due to her relationship with Michael Rossetti,

² This is Plaintiffs' third challenge to the NIGC's approval of an ordinance authorizing Class III gambling on the Buffalo Parcel. In *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295, 396 (W.D.N.Y. 2007) ("*CACGEC I*"), this Court held that the NIGC's approval of the SNI's first ordinance, without first determining whether the land at issue was gambling-eligible Indian land, was not the result of reasoned decision-making. In *CACGEC II*, this Court ruled that the Buffalo Parcel is "Indian lands" (a conclusion with which Plaintiffs disagree), but that the Seneca Nation Settlement Act ("SNSA") did not settle a land claim, because the SNI did not have an enforceable right to relief and, therefore, the "settlement of a land claim" exception to the IGRA Section 2719 prohibition did not apply.

³ See *CACGEC II*, 2008 WL 2746566 at *39 n.49 ("there appears to be no . . . statute [other than the SNSA] then in effect or since enacted that contemplates taking land into restricted fee sta-

“from all matters involving the SNI.” (BIA-127) Yet when the SNI pressed the DOI to reverse its position on the applicability of Section 2719, Edith Blackwell un-recused herself and orchestrated the change.

In 2006, Earl E. Devaney, Inspector General for the DOI, testified before the House of Representatives in the context of oil and gas leases that there exists an “institutional culture of managerial irresponsibility and lack of accountability” beneath “significant failures” within the DOI. “Short of a crime,” Devaney stated, “anything goes at the highest levels of the Department of the Interior.” (Murray Decl. Ex. E) “Numerous OIG reports,” he pointed out, have chronicled DOI improprieties such as “complex efforts to hide the true nature of agreements with outside parties” and “intricate deviations from statutory, regulatory and policy requirements to reach a predetermined end.” The Defendants’ desperate last-minute effort to alter their interpretation of Section 2719 to benefit the SNI exemplifies the “anything goes” culture, through the use of “complex efforts” to reach a “predetermined end,” that Inspector General Devaney described.

In this action, Plaintiffs challenge the Part 292 regulations, to the extent that they reinterpret Section 2719 as inapplicable to restricted fee land, and the NIGC’s approval of the SNI’s gambling ordinance, because these actions are arbitrary and capricious, are not in accordance with statutory, regulatory or other lawful process, and were intended to alter the result in a pending lawsuit to reach a predetermined end. This challenge goes to the very core of the decision-making process. In producing the administrative record, Defendants improperly redacted or withheld numerous documents on deliberative process privilege grounds. Where, as here, the litigation challenges the decision-making process itself, and the purpose of the communication was to backfill a prior decision, the deliberative process privilege evaporates and it cannot bar disclosure. Accordingly, Plaintiffs seek an order requiring production of the entire administrative record, including the portions improperly

tus”) (citing SNI *Amicus Curiae* Brief, *CACGEC II*, Dkt No. 58 at 53 n.29), *quoted in* Amicus SNI’s Brief, *CACGEC II*, Dkt No. 70 at 17.

withheld on deliberative process privilege grounds.

Further, the emerging facts paint an unmistakable picture of egregious bad faith and improper conduct, including conflicts of interest and the clear appearance (at a minimum) of impropriety, partiality and favoritism at the highest levels. Accordingly, Plaintiffs also seek an order authorizing limited discovery, including document production and depositions, to supplement the administrative record with respect to the facts giving rise to what appears (at the very least) to be a grave impropriety, the DOI's reversal of its prior position on the applicability of Section 2719 to restricted fee land, and the NIGC's ensuing approval of the SNI's resubmitted ordinance.

Procedural Background

The procedural background preceding and leading up to this action reflects a history of collusion and complicity between Defendants and the SNI to achieve a predetermined end and to subvert this Court's power by defeating the effectiveness of its July 8, 2008 Order.

A. The Collusive Actions of the U.S. Government and the Tribe to Thwart the Effect of the Court's July 8, 2008 Order

Following the Court's July 8 Order, the SNI continued to operate its casino on the Buffalo Parcel, and Defendants failed to take any action to stop the illegal gambling. On July 14, 2008, Plaintiffs were forced to file a motion for an order enforcing the judgment. (*CACGEC II*, Dkt No. 63) Two days later, on July 16, 2008, the SNI adopted and submitted to the NIGC a third Class III ordinance (the "Third Ordinance") for gambling on the Buffalo Parcel. (Murray Decl. Ex. F) On July 22, 2008, Defendants used the new submission as the pretext for a motion to remand the case to the NIGC for reconsideration. (*CACGEC II*, Dkt No. 65)

It was in that July 22, 2008 submission that the DOI revealed for the first time that, in final Part 292 regulations issued May 20, 2008, it had reversed its prior longstanding position on the applicability of the Section 2719 prohibition to restricted fee lands. This was a 180-degree reversal in DOI's position since at least 2002, when Secretary Norton explained her "reluctant" non-approval

approval of the Tribal-State Compact between the SNI and New York (Murray Decl. Ex. A), and 2006, when the DOI published the draft Part 292 regulations for public comment, 71 Fed. Reg. 58,769 (Oct. 5, 2006), and at every step of the *CACGEC II* litigation. The SNI, acting in concert with Defendants, submitted an *amicus* brief (*CACGEC II*, Dkt No. 70) opposing Plaintiffs' motion to enforce and supporting Defendants' motion for remand. In their papers, the Government and the SNI took the extraordinary position that the NIGC's decision not to enforce IGRA was immune from judicial review and that this Court was powerless to direct the NIGC to require the gambling to stop. (*CACGEC II*, Dkt No. 65 at 6, Dkt No. 70 at 7-9)

On August 26, 2008, this Court granted in part Plaintiffs' motion to enforce, denied Defendants' motion to remand, and directed the NIGC "to comply forthwith with Congress's mandate as set forth in 25 U.S.C. § 2713(a)(3)" and with NIGC regulations. *CACGEC II*, 2008 WL 4057101 at *5. Initially, in a superficial move to appear to comply, the NIGC on September 3, 2008, served a Notice of Violation ("NOV") (Murray Decl. Ex. G) charging the SNI with violating IGRA and stating that the SNI could cure the violation by ceasing the gambling within five days. On September 3, 2008, the SNI filed a Notice of Appeal (Murray Decl. Ex. H) to contest the charges. On the same date, the SNI's long-time counsel, Akin Gump, appeared in the proceeding to contest the NOV and to request a stay until the NIGC Chairman acted on the resubmitted ordinance. (Murray Decl. Ex. I) The NIGC assigned a hearing officer (Murray Decl. Ex. J), and on October 10, 2008, NIGC Staff Attorney Michael Hoenig moved the NIGC Hearing Officer for a stay -- which if granted would effectively stay the NIGC's compliance with this Court's Order -- based on the NIGC's expressed intent to appeal to the Second Circuit. (Murray Decl. Ex. K)

On October 14, 2008, just before the end of the 90-day period for the NIGC to act, the SNI abruptly withdrew the Third Ordinance, which had been the pretext for Defendants' motion to re-

mand. (*CACGEC II*, Dkt No. 78-3)⁴ A week later, on October 21, 2008, Plaintiffs were forced to file a second motion to enforce and/or to hold the NIGC in contempt for its wanton defiance of this Court's Orders. (*Id.*, Dkt No. 78) The next day, October 22, 2008, the SNI notified the NIGC that it was resubmitting the ordinance it had just withdrawn. (Murray Decl. Ex. L) This triggered a new 90-day period for NIGC review, set to expire on January 20, 2009, Inauguration Day.

Two days later, on October 24, 2008, Defendants appealed *CACGEC II* to the Second Circuit. (*CACGEC II*, Dkt No. 80) Then, on October 28, 2008, in a stunning reversal of the established order, the NIGC Hearing Officer stayed the NIGC proceeding (Murray Decl. Ex. M), which had the perverse effect of staying this Court's Order directing the NIGC to stop the gambling "forthwith." Next, Defendants and the SNI proceeded in concert to oppose Plaintiffs' contempt motion on the specious grounds that the appeal divested the Court of jurisdiction and the NIGC has unreviewable discretion over whether to issue a closure order. (*CACGEC II*, Dkt Nos. 82-2, 83) Throughout, Defendants, in lock-step with the SNI, ignored established statutory, regulatory and judicial process (in the Inspector General's words "to reach a predetermined end").

The 90-day period to review the resubmitted ordinance was, coincidentally of course, set to expire on Inauguration Day, January 20, 2009. On Sunday, January 18, 2009,⁵ two days prior to Inauguration Day, DOI Solicitor David Bernhardt issued a memorandum, Solicitor's Opinion M-37023 (Murray Decl. Ex. C), concerning reasons for reversing the DOI's longstanding prior position. The memo acknowledged the departure and concluded that the NIGC Chairman simply had it wrong, but provided no reasoned basis for the reversal.

⁴ At the time, the reason for this bizarre move was not clear, but it now appears (*see below*) that Chairman Hogen was not yet prepared to justify the change in his prior determination that Section 2719 applies to restricted fee land. The withdrawal/resubmission reset the clock and gave the NIGC more time to figure out how to rationalize its predetermined approval of the ordinance.

⁵ The Solicitor's Office struggled to rationalize the revised interpretation (*see below*), and the opinion's release on a Sunday, prior to two federal holidays (Monday, January 19 was Martin Luther King Day and Tuesday, January 20, 2009 was Inauguration Day) reflects that struggle.

On January 20, 2009, as Barack Obama prepared to take the oath of office, NIGC Chairman Hogen issued a 22-page approval letter (Murray Decl. Ex. C) stating that he was not bound by his earlier determination and that he could alter it based on the DOI's reinterpretation of Section 2719. Hogen concluded, concurring with the DOI's revisionist reinterpretation, that the Buffalo Parcel is not subject to IGRA's general prohibition, and approved the resubmitted ordinance.

By order dated January 30, 2009, this Court reviewed Hogen's letter and determined that the Chairman had based the ordinance approval on an analysis different from the one this Court previously had rejected. Concluding that the "new analysis is presumed valid unless and until it becomes the subject of a successful legal challenge," the Court denied Plaintiffs' second motion to enforce and/or for contempt as moot. (*CACGEC II*, Dkt No. 91 at 4) This lawsuit followed.

B. The Administrative Record

On May 11, 2010 and August 27, 2010, respectively, the NIGC and the DOI filed their administrative records and privilege logs with respect to the approval of the resubmitted ordinance. Dkt No. 24, 31. These documents, which consist largely of emails, are heavily redacted (primarily on deliberative process privilege ("DPP") grounds), but nevertheless reveal a back-story that could have been part of a John Grisham novel.

Like a good novel, there is more to the story than first meets the eye. On October 27, 2008, the fragments of emails reflect, Candace Beck, an attorney in the DOI Solicitor's Office, sends to attorneys Tom Blaser, Andrew Caulum, and Jonathan Damm a draft letter to the NIGC to explain the DOI's reversal, more than five months earlier, of its prior position on the application of Section 2719 to restricted fee land. BIA-69.⁶ According to the DOI's Privilege Log (Dkt No. 32-3), Edith Blackwell, who was recused from matters involving the SNI (BIA-121-22), authored the email attachment (BIA-69-70), which is withheld on DPP grounds. On October 30, 2008, Caulum forwards

⁶ For the Court's convenience, a chart identifying key individuals (based on information in the administrative record) is annexed as Exhibit KK to the Murray Declaration.

the draft to attorney Scott Keep and, in a separate email (withheld), to Solicitor Bernhardt. BIA-76.

On November 6, 2008, DOI's George Skibine, Deputy Assistant Secretary in the Bureau of Indian Affairs, writes to NIGC General Counsel Penny Coleman and attorneys Maria Wiseman and Scott Keep to ask about the timetable for considering the ordinance. Referring to Blackwell, he asks, "with Edith recused," who in the DOI Solicitor's office "has the lead on this matter?" BIA-77. Coleman and Skibine exchange emails, BIA-78-81 (redacted on DPP and/or attorney-client privilege ("ACP") grounds, DOI Privilege Log at 1). Keep asks if someone would share the analysis under consideration. Coleman responds, "it's the draft letter that we already provided you Scott," but then reconsiders and writes back, "I just realized you were talking about the lac du Flambeau analysis. I will see if I can find the e-mail." BIA-82-101.⁷

C. The Recusal and Subsequent Un-Recusal of Edith Blackwell

On Friday, November 14, 2008, the NIGC's Penny Coleman sends a letter to Skibine and Solicitor Bernhardt asking DOI "to provide policy reasons" for the adoption, six months earlier, of "this new interpretation of section 2719." NIGC-717, BIA-34. "[I]f the Chairman is to approve the Nation's gaming ordinance on the grounds that section 2719 does not apply to restricted fee land," Coleman writes, "**he must provide a reasoned analysis for this new interpretation.**" BIA-34 (emph. added). Coleman asks DOI to assist the Chairman and provide its explanation by December 15, 2008 and she sends a "cc" copy of her letter to Blackwell. BIA-34.⁸

On November 17, 2008, Patricia Miller, BIA, forwards an email regarding "My two cents on Seneca" to Skibine, Caulum, Beck, and Damm. BIA-104-05. The email (the substance of which is

⁷ On December 19, 2008, Skibine opined that the Lac du Flambeau Band could convey a parcel of off-reservation land that it had purchased in fee simple, because federal restrictions against alienation had not attached to it.

⁸ Coleman may have sent an earlier letter to DOI about the Third Ordinance (*see* NIGC-694 (referring to NIGC draft opinion of October 2, 2008), BIA-121-22 (referring to "two letters")), prompting the October 27, 2008 draft referenced above. BIA-69. DOI's failure to provide the letter or related documents raises questions about the completeness of the administrative record.

redacted) prompts the recipients to schedule a meeting for Wednesday, November 19, 2008. BIA-102-120. On November 19, Blackwell emails Coleman:

Penny -- I have now received a cc: copy of two letters from you regarding the Seneca Nation gaming matters. As you know, I am recused from this matter. Please discontinue cc:ing me on letters regarding Seneca gaming.

BIA-121-22. Coleman writes back, "Thanks; you're right; we forgot." *Id.* That same day, Caulum acknowledges receipt of Coleman's November 14, 2008 letter, confirms that "Blackwell is recused from all matters involving the SNI" and requests that Coleman "direct any future correspondence involving the SNI" to Keep or to him.⁹ BIA-127.

On December 1, 2008, Beck asks Damm for his "copy of the portion of the AR for the regulation that dealt with the restricted fee issue."¹⁰ BIA-137. On December 2, Wiseman asks how the draft is coming, and Beck responds that it is "basically complete," but she "wanted to look once more at the NIGC comments to us on the reg" (BIA-138).¹¹ As the deadline nears, a decision is made that Blackwell's assistance is needed to explain the reversal. On Friday, December 12, at 10:58 am, Wiseman emails Blackwell:

Edith, We are drafting a response to NIGC's question of how we arrived at our interp of 2719 that excludes restricted fee. We also discuss the 2002 Norton letter and what the intent

⁹ This is not the first time an ethical issue has been raised about Blackwell's professional conduct. In *Cobell v. Norton*, plaintiffs repeatedly sought to hold Blackwell in contempt of court. See Defs' Opp. to "Bill of Particulars" for Edith Blackwell in Supp. of Motion for Order to Show Cause Why Interior Defs and Counsel should not be held in Civil Contempt (available at http://www.justice.gov/civil/cases/cobell/docs/pdf/09042002_opposition.pdf). In September 2001, DOI Solicitor William G. Myers recused Blackwell and another DOI attorney from "any further work in the areas of on-going *Cobell* litigation matters." See Mem. from William G. Myers, September 4, 2001, cited in Mem. from Sol. William G. Myers, to Seventh Report of Court Monitor, dated May 16, 2002 (http://www.justice.gov/civil/cases/cobell/docs/txt/05162002_response.txt). One year later, District Judge Lamberth issued a sharply worded opinion criticizing "Edith Blackwell's propensity for not being candid with this Court." *Cobell v. Norton*, 226 F.Supp.2d 1, 59 n. 77 (D.D.C. 2002), vac'd on other grounds, 334 F.3d 1128 (D.C. Cir. 2003).

¹⁰ The "portion of the AR for the regulation that dealt with the restricted fee issue" was before the decision-maker, but Defendants have not produced it as such in the record.

¹¹ Later that day, Beck forwards to Wiseman, Keep, Damm and Caulum a "draft letter response to the NIGC re section 2719." BIA-139. A series of emails with comments and edits ensues, all with a keen awareness of the approaching December 15, 2008 deadline. BIA-144-59.

was. **I know you're recused from Seneca, but would you be able/want to review the letter since you were involved in the regs and the Norton letter?** Maria

BIA-160 (emph. added). At 11:43 am, back comes the response:

Yes, I think the letter is not the specific matter of the Seneca litigation but the broader issue regarding the decision made in the 2719 regs. **I was involved in the discussion on the 2719 regs and I was very involved in the Norton letter.** In fact, I think I am the only one left that was significantly involved in the Norton letter."

BIA-161 (emph. added). To be sure, the logic is completely defective: the reason for this request is to provide the NIGC with a "reasoned analysis for the new interpretation" for use in considering the resubmitted ordinance. BIA-34. As the NIGC later observed, "this position on section 2719's applicability to restricted land has a very limited effect because it presently only affects one tribe, the Seneca Nation." NIGC-12.¹² The letter thus has everything to do with "the specific matter of the Seneca litigation," from which Blackwell is indisputably recused.

On December 12, 2008, Wiseman sends Blackwell "the umpteenth version of this letter" (withheld) for her thoughts. BIA-177. On December 15, Blackwell responds with a draft, "erb edits to 2719 letter.docx." *Id.* (withheld). On December 22, Damm and Beck meet with Skibine about the response to the NIGC and "also met with Edith [Blackwell] re the Norton letter only," who, notwithstanding her recusal from the SNI matter, "gave us her Norton letter file." BIA-222. Beck plans to "take another look" and "circulate another draft." *Id.*

As DOI struggles with the analysis, the NIGC becomes increasingly anxious. On January 6, 2009, Coleman emails Solicitor Bernhardt with a reminder that:

the Office of General Counsel is anxiously awaiting the response to our October 2, 2008 draft opinion^[13] on the applicability of restricted fee to Section 2719 and the subsequent November 14 follow up letter on the same subject to you and George Skibine. We would appreciate seeing a draft immediately so that we can review it. The Ordinance decision is due on January 21. Therefore, time is of the essence.

BIA-224; NIGC-694. The NIGC has good reason to be anxious. The 90-day period for the NIGC to

¹² As noted above, the SNI is the only tribe with statutorily created restricted fee land and thus the only tribe that stood to benefit from the new interpretation. *Supra* note 5.

¹³ The NIGC draft opinion of October 2, 2008 is not included in the administrative record.

take action on the Third Ordinance, had come and would have gone but for the SNI's abrupt withdrawal of the ordinance on October 14 and resubmission of it on October 22, 2008. By Coleman's count, the last date for NIGC action is January 21, 2009, and that date is fast approaching.¹⁴

On January 12, Stephen Simpson, Assistant Solicitor for Trust Responsibility, emails Edith Blackwell: "Edith, David [Bernhardt] asked me to have you call him." BIA-329. From this point forward, Blackwell becomes heavily involved in drafting the analysis to back-fill the reasons for the DOI's reversal, eight months earlier, of its position on the Part 292 regulations. On January 13, at 9:48 am, Caulum emails Blackwell a document, "2719 and 25 USC 177.docx" (withheld, DPP), on the applicability of Section 2719 to restricted fee lands. At 10:01 am, Blackwell responds. BIA-337 (redacted, DPP). Caulum then sends to Blackwell a document entitled "2719 and 25 USC 177 for erb editing 1-13-08.docx" (withheld, DPP) and says to Wiseman, Beck, and Keep, "let's have Edith add the discussion she described at our meeting and then send that document around." At 2:47 pm, Blackwell circulates a rewritten draft. BIA-349 (withheld, DPP).

At 3:28 pm, the NIGC anxiously follows up, but DOI is not prepared to respond. Beck emails Wiseman and Caulum, "NIGC called again . . . wondering if they can see a draft of our response today. . . . I do not intend to call her back unless you think I should." BIA-361. At 3:44 pm, Wiseman sends a lengthy response to Blackwell (redacted, DPP) and transmits a revised draft opinion, BIA-362 (withheld, DPP). Blackwell responds at 3:54 pm, BIA-370 (redacted and withheld, DPP). At 7:05 pm, Caulum forwards comments to Blackwell, BIA-385 (withheld, DPP), and at 7:13 pm, Blackwell responds, BIA-393 (withheld, DPP). And thus, with Blackwell at the helm, the *post hoc* rationalization takes form.

At 7:33 pm, Blackwell transmits the draft letter to Solicitor Bernhardt, BIA-396-401, and a

¹⁴ Coleman miscounted by one day, which Hoenig corrects on January 7: "The due date on the Seneca ordinance is the 20th, not the 21st. Which, because of the holiday and inauguration, means we have until a week from Friday to make a decision (or we fight the crowds and come in on Tuesday the 20th)." NIGC-689.

few minutes later, forwards it to Craig Alexander at the Department of Justice (“DOJ”). “I am authorized to work on the regs and restricted fee part of this mess,” she tells him. BIA-408. At 9:09 pm, Bernhardt responds, “Edith: I will have some comments.” BIA-422.

On January 14, 2009 at 8:41 am, with just two business days remaining before the long holiday weekend (and the start of a new Administration) Coleman writes again to Solicitor Bernhardt and Keep, “Will we get your Seneca draft today?” she asks. “We can’t finish our draft until we see yours.” BIA-423. DOI still is not ready to release it. Hours later, Caulum circulates the current version, with Bernhardt’s revisions, to the DOI team. BIA-424 (withheld, DPP). At 2:52 pm, Blackwell responds. BIA-431. The response is redacted (DPP), but it is clear that the DOI team is struggling with its effort to justify the reinterpretation. Revised drafts, comments, and additional edits circulate for the rest of the day. BIA-424-442 (redacted or withheld, DPP). At 6:27 pm, DOJ attorneys provide their suggestions and comments (on a previous draft) to Blackwell and the DOI team. BIA-449-492 (redacted or withheld, DPP and ACP).

On Thursday, January 15, at 9:28 am, Damm circulates “rare and exceptional” language (redacted or withheld). BIA-504. At 9:53 am, Blackwell, fully in charge, responds:

All -- These regulations are interpretative regulations -- [Redacted] Thus the entirety of Part 292 is premised on 2719 being ambiguous such that we need regulations. [Redacted]
BIA-504. Wiseman asks, “which statements are too broad?” BIA-510. Edits continue. BIA-508-616. “David wants to sign this today so time is of the essence,” Blackwell writes. BIA-508.

On Thursday night, January 15, 2009, with just one business day left, the NIGC still has not received a draft of the analysis. Finally, at 8:15 pm, Blackwell gives DOJ permission to send a draft to the NIGC. BIA-639-643. On Friday morning, Damm asks, “Do you know if NIGC was sent the most up-to-date draft?” BIA-654. It is not clear, BIA-657, and “it is still changing.” BIA-756. At 11:52 am, Beck sends Coleman a letter discussing the “settlement of a land claim” exception to the Section 2719 prohibition. BIA-719. At 4:44 pm, Wiseman forwards to Jensen two documents: (i)

settlement FINAL FINAL.docx, and (ii) 2719 restricted fee memo 1-16-09 FINAL FINAL FINAL.docx. BIA-836 (withheld, DPP). The “wordsmithing” continues. BIA-850.

D. The NIGC Takes Action, Even Without the DOI’s Help, to Reach a Predetermined End

On January 16, 2009, the NIGC states that it will follow the newly enacted Part 292 regulations “unless it can be demonstrated with sufficient clarity that application of a particular provision would be unlawful or create a manifest injustice.” NIGC-448. That evening NIGC’s Hoenig forwards a draft letter approving the ordinance to Jensen, Keep and Wiseman at DOI, and to DOJ attorneys. NIGC-205-06; BIA-891. “It looks as if the process of reviewing NIGC’s approval is likely to take place over the weekend,” so the team exchanges contact information. BIA-848-862.

On Saturday evening, January 17, at 4:59 pm, Jensen circulates a “substantially revised version” of the “restricted fee” memo. BIA-964. An hour later, Blackwell responds that she has a few edits, including “two substantive ones.” BIA-971 (redacted). That night, at 8:58 pm, Blackwell circulates the revised draft to the team. “Please review for typos, cites, and substance.” BIA-963. Edits continue through the night and into the morning. BIA-975-1002.

On Sunday, January 18, at 12:34 pm, NIGC’s Hoenig forwards the NIGC’s draft approval to DOI and DOJ. NIGC-215. At 2:36 pm, Damm emails Jensen that “Scott and the rest of us are comfortable with the Seneca approval letter,” and he plans to tell the NIGC that the Solicitor’s office concurs with the approval. BIA-1080. At 6:52 pm, Solicitor Bernhardt emails Coleman two documents: (i) Solicitor’s Opinion M-37023 on the applicability of 25 U.S.C. § 2719 to restricted fee lands (NIGC-187-93); and (ii) a letter from the Solicitor to Coleman addressing why the Buffalo Parcel falls within the “settlement of a land claim” exception. NIGC-194-96; BIA-1185-93. On January 18, 2009, Bernhardt tells Coleman that DOI concurs with NIGC’s approval of the SNI’s ordinance, BIA-1275, with suggested edits (redacted, DPP).

E. The Defendants' Request for Supplementation

Upon reviewing the emails in the administrative record, Plaintiffs perceived that there were significant gaps. One gap was the administrative record for the DOI's revised interpretation of IGRA Section 2719, a central issue in this litigation (*see* Compl. ¶¶ 10-11, 84-86, 93, 128-32, Prayer for Relief ¶ 3). Another omission related to materials developed after May 20, 2008 which, created after-the-fact, would not appear to fall within the deliberative process privilege. A third concerned the recusal and subsequent un-recusal of Blackwell from SNI matters. On October 7, 2010 (Murray Decl. Ex. N), Plaintiffs wrote to Defendants' counsel and requested these materials.

On October 18, 2010, Defendants' counsel responded (Murray Decl. Ex. O) that DOI would identify documents relating to the administrative record for the Part 292 regulations, but would not produce the other two requested categories. Government counsel asserted a privilege as to the post-May 20, 2008 materials on the grounds that they related to the development of the January 18, 2009 opinion letter and DOI's response to the NIGC. Defendants also asserted that documents relating to Blackwell's recusal were not part of the administrative record.

F. The Supplemental Production

On November 24, 2010, Defendants' counsel sent Plaintiffs a CD-ROM containing (unnumbered) supplemental administrative record documents relating to the Part 292 rulemaking (Dkt No. 31) and a privilege log identifying additional documents withheld, primarily on deliberative process privilege grounds (Dkt No. 32). The supplemental production answers a key question about the public comment that supposedly precipitated the DOI's reversal of its position on the applicability of Section 2719 to restricted fee land. Specifically, according to the Federal Register notice, "[o]ne comment regarded the applicability of section 2719 of IGRA to restricted fee lands and suggested a change in § 292.1," but "[t]he recommendation to modify § 292.1 was not adopted, because section 2719(a) refers only to lands acquired in trust after October 17, 1988." 73 Fed. Reg. 29,354, 29,355

(May 20, 2008).

The supplemented record reveals that it was the NIGC, the agency charged with interpreting IGRA, that had submitted the comment. By letter dated November 7, 2006, the NIGC stated:

We suggest changing the language in the applicability portion of this section [292.3] to clarify that the after-acquired lands provision of IGRA applies not only to trust acquisitions for the benefit of an Indian tribe, but also to any post-IGRA land acquisition that meets the statutory definition of “Indian lands.” See Letter from Secretary Gale Norton, DOI, to Cyrus Schindler, Seneca Nation of Indians at 7 (Nov. 12, 2002) (interpreting IGRA Section 20 to apply to restricted fee lands).

Comments on § 20 Regs Office of Indian Gaming_002.pdf at 211 (Murray Decl. Ex. P) (emph. added). Significantly, the supplemented record also reveals that DOI rejected the NIGC’s view at the behest of the SNI, and in favor of the SNI’s own competing interpretation. By letter dated October 31, 2006, SNI member Kevin Seneca had advanced this “plain language” argument:

Section 20 of IGRA, on its face, is limited to trust lands and there is no basis for extending its reach beyond its plain and clear language. That Congress clearly did not envision Section 20 to cover restricted fee lands is evidenced by the fact that Congress quite capably uses restricted fee references both in Section 20 itself and elsewhere in the IGRA.

Comments on the Section 20 Regs Office of Indian Gaming_002.pdf at 234 (Murray Decl. Ex. Q) (quoting 25 U.S.C. § 2703(4) and 25 U.S.C. § 2719(a)(2)(A)(ii)).

These competing comments presented DOI with a choice. In the end, with the “recused” Blackwell front and center (BIA-161), DOI sided with the SNI over the NIGC, abandoned its longstanding position and adopted the previously rejected “plain meaning” view that IGRA Section 2719 applies to trust lands, but not to lands held in restricted fee.

G. The Relationship between Edith Blackwell and Michael Rossetti

From publicly available information, Plaintiffs have learned that Blackwell has a close personal relationship and shares a household with Michael Rossetti, a partner at Akin Gump, the SNI’s long-time counsel and lobbyist on Indian sovereignty issues. (Murray Decl. Exs. R to Z) According to the Fairfax County tax assessor’s office, Rossetti and Blackwell own a home at Drive, Falls Church, Virginia. (Murray Decl. Ex. R) Rossetti and Blackwell purchased it together,

as joint tenants, for \$820,000 in February 2007 (*id.*), a year after Rossetti's wife filed for divorce. (Murray Decl. Ex. S) In February 2010, public records show, Rossetti and Blackwell jointly refinanced their mortgage for \$417,000. (Murray Decl. Ex. T)¹⁵ Rossetti and Blackwell also contribute together to charitable organizations.¹⁶ In short, Rossetti and Blackwell have a close personal relationship, they co-own their household, and their financial interests are intertwined.¹⁷ The imputed conflict of interest is clear, the appearance of serious impropriety obvious.

Rossetti also has strong ties to Buffalo. He began his legal career in private practice in Buffalo, where he later served as an Assistant Erie County Attorney from March 2000 to March 2001. (Murray Decl. Ex. Y) In 2001, he was tapped to fill a high-level position at DOI as Secretary Gale Norton's "Personal Counselor." There, he assisted "in formulating and implementing policies" on Indian economic development, Indian gaming, and land acquisition. (*Id.*)

H. Michael Rossetti and Akin Gump

In 2004, immediately after leaving DOI, Rossetti joined attorneys Bill Paxon and Barry Brandon at Akin Gump. (Murray Decl. Ex. Y) At Akin Gump, Rossetti is part of the American Indian Law and Policy practice area which "provides legal and strategic advice to American Indian tribal governments." (Murray Decl. Ex. Z) According to Akin Gump's website, a number of the

¹⁵ On February 23, 2009, the Fairfax County Board of Supervisors considered, and then denied, a flood damage claim from Rossetti and Blackwell for their home. (Murray Decl. Ex. U)

¹⁶ Rossetti and Blackwell contributed jointly to the Friends of the National Zoo in 2008 (Murray Decl. Ex. V), to Hospice Buffalo in 2009 (Murray Decl. Ex. W), and to the National Organization on Fetal Alcohol Syndrome in 2010 (Murray Decl. Ex. X).

¹⁷ Rossetti and Blackwell also co-authored, with two others, a 2004 "Indian Gaming Paper" addressing the DOI's ability to approve off-reservation acquisitions on "far-flung" lands for gambling purposes. *See* "Guidance on Taking Off-Reservation Land into Trust for Gaming Purposes," dated Jan. 3, 2008 (<http://www.bia.gov/idc/groups/public/documents/text/idc-001896.pdf>). The memo signaled a significant change in the DOI's position and garnered immediate congressional attention. In February 2008, Congress held oversight hearings on the development of the Guidance, whether it was lawfully enacted, its ramifications on off-reservation trust applications and whether it signified a change federal policy toward Indian tribes. *See* Oversight Hearing before Comm. on Natural Resources, U.S. House of Reps., Feb. 27, 2008 (<http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg40943/pdf/CHRG-110hhrg40943.pdf>).

firm's lawyers "previously worked in senior positions" at DOI (among other entities) and "have developed strong professional relationships with these entities, which positions Akin Gump to represent and advocate for our tribal clients in these forums." (Murray Decl. Ex. AA) This describes Rossetti. As his firm bio confirms, it was during his tenure as personal counselor to Secretary Norton that the Secretary approved the Tribal-State Compact between the SNI and New York. (Murray Decl. Ex. Q) Given the web of connections and interrelations, it is not surprising that Rossetti's conflict would be imputed to Blackwell, mandating her recusal from SNI matters.¹⁸

I. Akin Gump and the SNI

The relationship between Akin Gump and the SNI runs deep. In late December 2000, the SNI reportedly hired Akin Gump attorney Bill Paxon, along with Barry Brandon and Donald Pongrace, to lobby New York on gambling issues and to negotiate a contract for three SNI casinos in the Buffalo area. (Murray Decl. Ex. BB) Paxon had served in the New York State Assembly with George E. Pataki, Paxon from 1982-1988, and Pataki from 1985-1992. (Murray Decl. Ex. CC-EE)¹⁹ Akin Gump's website claims the firm was "pivotal" in the success of "a New York" tribe (an apparent reference to the SNI) "in establishing two off-reservation Class III gaming facilities." (Murray Decl. Ex. AA)²⁰ In 2001, Akin Gump received \$393,580 for lobbying on behalf of the SNI, in what

¹⁸ A chart illustrating the interrelations appearing from information in the administrative record and the public record is annexed as Exhibit LL to the Murray Declaration.

¹⁹ Reportedly, Paxon lobbied the New York Legislature in early 2001 to enact legislation giving Pataki the ability to negotiate a Tribal-State Compact with the SNI. (Murray Decl. Ex. BB) The effort paid off: on June 20, 2001, Pataki and the SNI entered into a Memorandum of Understanding establishing the terms for the Tribal-State Compact. In August 2001, the Legislature enacted L. 2001, c. 383, Part B, § 2, now N.Y. Exec. Law § 12, authorizing the Governor to enter into the Compact, and on August 18, 2002, the Governor and the SNI executed the Compact.

²⁰ According to Akin Gump's website, the firm's activities for the tribe included "assisting in negotiating its tribal-state compact, facilitating the expeditious federal approval of the compact and obtaining favorable determinations on applications for restricted fee status for the lands on which the gaming facilities have been placed." (Murray Decl. Ex. AA)

was the single most lucrative lobbying contract in New York for 2001. (Murray Decl. Ex. FF)²¹

On October 29, 2002, the SNI submitted an ordinance to the NIGC for Class III gambling “on Nation lands,” and less than one month later, on November 26, 2002, the NIGC approved the SNI’s ordinance.²² Between 2002 and 2004, according to federal lobbying reports, Akin Gump lobbied the DOI and Congress for the SNI and received more than \$500,000 for exercising its influence on behalf of the SNI on land-into-trust and sovereignty issues, among others. (See Murray Decl. Ex. JJ) During this period, Akin Gump also received additional revenues for lobbying activity on behalf of the Seneca Niagara Falls Corporation. (*Id.*) In February 2004, Rossetti left the DOI and joined Paxon, Brandon and Pongrace at Akin Gump, where he became a principal partner in the American Indian Law and Policy Practice Group. (Murray Decl. Ex. Y) The firm continued to lobby the U.S. Congress and the DOI for the SNI on Indian sovereignty and related issues. According to federal lobbying reports, from 2004 to 2007, the SNI paid Akin Gump more than \$600,000 for lobbying the DOI and Congress, on sovereignty, treaty rights and cigarette tax issues. (Murray Decl. Exs. JJ and MM (summary).

²¹ In 2000, Paxon “played key roles in fundraising or strategy” for George W. Bush’s presidential campaign and “in 2001, he chaired the Bush-Cheney Transition Advisory Team” (Murray Decl. Ex. DD), which positioned him to make transition hiring recommendations for the new Administration (*see* 3 U.S.C. 102 note). In April of 2001, Rossetti was elevated from the Erie County Attorney’s office to the U.S. DOI as Secretary Norton’s “Personal Counselor” (Murray Decl. Ex. Y, Z) One and one-half years later, Norton allowed the Tribal-State Compact between the SNI and New York to pass into effect without action. In her “non-decision decision” (Murray Decl. Ex. A) explaining that decision, Secretary Norton opined that lands held in “restricted fee status” are subject to IGRA’s restrictions on gambling. According to a 2002 Buffalo News article (Murray Decl. Ex. GG), Rossetti had recused himself from the SNI gambling issue, but then sought DOJ approval to un-recuse himself so that he could play “a key role” in getting the SNI’s Compact approved.

²² Besides Paxon, Akin Gump attorneys Barry Brandon (former NIGC chief of staff, former advisor to the DOI Secretary, former DOI lawyer and an adopted member of the SNI tribe) and Donald Pongrace reportedly handled most of the negotiations on the gambling compact, as well as the talks with DOI to pave the way for the casinos. (Murray Decl. Ex. BB, HH) Brandon was a founding member of Akin Gump’s American Indian Law and Policy Practice Group and “was instrumental in advising and helping to charter the Seneca Gaming Corporation” (“SGC”). (Murray Decl. Ex. HH) He left Akin Gump for SGC, where he served as Senior Vice-President and General Counsel until he was allegedly “forced out” in November 2008. (Murray Decl. Ex. II)

LEGAL ARGUMENT

POINT I

**PLAINTIFFS ARE ENTITLED TO THE PRODUCTION OF DOCUMENTS
OMITTED ON DELIBERATIVE PROCESS PRIVILEGE GROUNDS**

Defendants have asserted the deliberative process privilege to withhold or redact hundreds of pages of administrative record documents. This doctrine “shields from disclosure intra-agency or inter-agency ‘documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions are formulated.’” *Allocco Recycling Ltd. v. Doherty*, 220 F.R.D. 407, 411 (S.D.N.Y. 2004) (citations omitted). The deliberative process privilege is analogous to FOIA “Exemption 5” and, like the FOIA exemptions, is narrowly construed in light of the strong public policy favoring disclosure. *See National Council of La Raza v. DOJ*, 411 F.3d 350, 356 (2d Cir. 2005); *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980).²³ In deciding whether a document is protected, courts look to whether the document is “predecisional” -- whether it was generated before the adoption of an agency policy -- and whether the document is “deliberative,” reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. Unless the document meets both of these requirements, the privilege does not apply. The burden of establishing that a document falls within these parameters and should be excluded rests with the government. *State of New York v. Salazar*, 701 F.Supp.2d 224, 232 (N.D.N.Y. 2010) (Peebles, J.), *aff’d*, Case 6:08-cv-00644-LEK-DEP, Dkt 196 (Mar. 3, 2011) (Kahn, J.) (Murray Decl. Ex. NN);²⁴ *Spinner v. City of New York*, No. 01 CV 2715, 2004 U.S. Dist. LEXIS 2541, at *9 (E.D.N.Y. Feb. 19, 2004) (Murray Decl. Ex. OO) (citation omitted). For the following reasons, the deliberative process privilege has no application here.

²³ Consistent with this policy, the President directed that “[t]he presumption of disclosure should be applied to all decisions involving FOIA.” Mem. for Heads of Exec. Dep’ts Agencies, 74 Fed. Reg. 4,683 (Jan. 21, 2009).

²⁴ Copies of cases that are unreported or only unofficially reported are annexed as exhibits to the Murray Declaration.

A. The Deliberative Process Privilege “Evaporates” Where, as Here, the Decision-Making Process is the Subject of Litigation

When the decision-making process itself is the subject of the litigation, as it is here, “the overwhelming consensus and body of law within the Second Circuit is . . . that the privilege cannot bar discovery,” and “it evaporates.” *New York v. Salazar*, 701 F.Supp.2d at 237 (citing *Children First Found., Inc v. Martinez*, 2007 WL 4344915, at *7 (N.D.N.Y. Dec. 10, 2007) (Murray Decl. Ex. PP) (“[t]he historical and overwhelming consensus and body of law within the Second Circuit is that when the decision-making process itself is the subject of the litigation, the deliberative process privilege cannot be a bar to discovery”)) and collecting cases. Where the deliberative process privilege evaporates, the court need not engage in any balancing of interests, common in weighing assertions of qualified privilege, before requiring the government to disclose the documents. *New York v. Salazar*, 701 F.Supp.2d 224 at 237 n.9 (citing *Alleyne v. New York State Educ. Dep’t*, 248 F.R. D 383, 388 (N.D.N.Y. 2008)).

In *New York v. Salazar*, for example, the plaintiff State and Counties challenged the DOI’s determination to take over 13,000 acres of land into trust for benefit of the Oneida Indian Nation (“OIN”). Plaintiffs alleged that the government defendants had engaged in biased decision-making motivated by an improper intent to favor the OIN unfairly, and they sought an order requiring production of documents redacted or withheld from the administrative record based on the deliberative process privilege. Magistrate Judge Peebles, granting the motion in an opinion which Judge Kahn affirmed, Case 6:08-cv-00644-LEK-DEP, Dkt 196 (Mar. 3, 2011), held:

because the DOI’s decision-making process is at the heart of this action, I find that the deliberative process privilege imposes no restriction on plaintiffs’ access to pre-decisional materials, and all documents withheld from the administrative record on this basis must therefore be produced.

701 F.Supp.2d 224 at 238.

So too here, Plaintiffs challenge the decision and process by which the Defendants approved

the SNI's resubmitted ordinance to gamble on the Buffalo Parcel. The Complaint alleges that the DOI adopted the Part 292 reinterpretation "in a last-second, desperate attempt to accommodate the SNI's ability to operate a casino at the Buffalo Parcel and to head off an anticipated ruling from this Court which, in fact, materialized in July 2008." Compl. ¶ 11. It alleges that the new interpretation was contrary to existing policy and congressional intent and that DOI adopted it without an opportunity for public comment. *Id.* The thrust of the allegations is that the process was not open, but biased in favor of the SNI, and thus "procedurally and substantively illegal." *Id.*

The Complaint specifically challenges two "last-minute" actions: the DOI's issuance of the opinion letter superseding the 2002 Norton letter, and the NIGC's approval of the resubmitted ordinance. *Id.*, ¶ 12. It alleges that during the *CACGEC II* litigation, one or more individuals on behalf of the SNI "lobbied" officials within the DOI and/or the NIGC to change their position on the applicability of Section 2719 to restricted fee land, so that the Buffalo Parcel could qualify for Class III gambling, regardless of this Court's determination in the pending *CACGEC II* litigation. *Id.* ¶ 91. The Complaint squarely challenges the deliberative process itself as fatally flawed and infected by arbitrary conduct, abuse of process, and the appearance of improper influence. *Id.* ¶¶ 90-92. Under these circumstances, the deliberative process privilege evaporates and Defendants cannot rely on it to shield the disclosure of deliberative materials.

B. Even If the Deliberative Process Privilege did not Evaporate, Defendants Have Asserted It to Protect Documents to Which it does not Apply

The deliberative process privilege applies to documents that are both predecisional and deliberative. A document is predecisional if it was generated before the adoption of an agency policy, "in order to assist an agency decisionmaker in arriving at his decision." *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999); *Public Citizen, Inc. v. OMB*, 569 F.3d 434, 442 (D.C. Cir.

2009).²⁵ A document that explains a decision that was already made is subject to disclosure because it is not predecisional. In other words, the deliberative process privilege does not protect documents generated to justify -- or to back-fill -- a decision that was already made.

In this case, most of the information withheld on deliberative process privilege grounds was created not before, but after the DOI reversed its prior position on the applicability of Section 2719 to restricted fee land. The purpose of the communications was not to formulate a decision, but to backfill a decision previously made. Thus, they do not fall within the scope of the deliberative process privilege.

It is no response to assert that these documents are pre-decisional because they relate to Solicitor's Opinion M-37023 and the DOI's response to the NIGC, both dated January 18, 2009. The purpose of that analysis, and the DOI's response to the NIGC, was to explain a prior determination, not to formulate a new one. The determination was final on May 20, 2008, when DOI published it in the Federal Register. The materials at issue were post-decisional, not pre-decisional, and thus the deliberative process privilege does not apply.

C. Even If the Deliberative Process Privilege Does Not Evaporate and Defendants Asserted it Properly, the Court Should Grant Disclosure Upon a Balance of the Interests of the Parties and the Public

In the alternative, if the privilege applies to some or all of the documents identified on the privilege log (which, for the reasons discussed above, it does not), a balance of the interests of Plaintiffs and the public in exposing the DOI's decision-making to sunlight with the Government's desire to shield its decision-making from public scrutiny would nevertheless call for disclosure.

²⁵ “[C]ourts have held that a document will be considered predecisional if the agency can ‘(i) pinpoint the specific agency decision to which the document correlates, (ii) establish that its author prepared the document for the purpose of assisting the agency official charged with making the agency decision, and (iii) verify that the document precedes, in temporal sequence, the decision to which it relates.’” *Nat’l Cong. For Puerto Rican Rights v. City of New York*, 194 F.R.D. 88, 92 (S.D.N.Y. 2000) (quoting *Providence Journal Co. v. United States Dep’t of the Army*, 981 F.2d 552, 557 (1st Cir. 1992)).

Courts applying a balancing test (in cases unlike here where the decision-making process is not in issue), consider five factors in applying it: (i) the relevance of the evidence at issue; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets may be discovered. *In re Subpoena Duces Tecum*, 145 F.3d 1422, 1424 (D.C. Cir. 1998); *see also In re Franklin Nat'l Bank Sec. Litig.*, 478 F.Supp. 577, 583 (E.D.N.Y. 1979).

Here, the interests of Plaintiffs and the public in seeking disclosure outweigh the government's claimed interests in non-disclosure:

- (i) the information at issue is directly relevant to the Defendants' bias and partiality in reinterpreting IGRA Section 2719 and their unreasonable actions in approving the SNI's resubmitted ordinance;
- (ii) Defendants have withheld and redacted a substantial number of documents that are likely the best evidence of their bias, intent, motivation, and arbitrary conduct in exercising discretion in this case;
- (iii) this litigation raises serious issues that are vitally important to Plaintiffs, the citizens of Buffalo and the State because they affect sovereignty over land and will have far-reaching and potentially disruptive effects on the governance, regulation and taxation of the local community;
- (iv) the role of Defendants is central to this litigation; and
- (v) given Defendants' aggressive advocacy on behalf of the SNI, their audacity in subverting the Court's authority to bring about a predetermined result, and their ethical breaches in an "anything goes" culture, there is no reason to believe that their employees will be intimidated by an order compelling production of administrative record documents withheld or redacted based on claims of deliberative process privilege, *see Subpoena Duces Tecum*, 145 F.3d at 1424.

For all of these reasons, the production of documents withheld on deliberative process privilege grounds should be granted.²⁶

²⁶ To the extent that Defendants have withheld documents under the attorney-client privilege, they have failed to provide sufficient information to establish that the privilege applies. The

POINT II

PLAINTIFFS ARE ENTITLED TO DISCOVERY

An “extra-record investigation by the reviewing court may be appropriate when there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers or where the absence of formal administrative findings makes such investigation necessary in order to determine the reasons for the agency’s choice.” *National Audubon Soc’y v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, 410 (1971)). A court may also order discovery of evidence beyond the administrative record when the record is inadequate or incomplete. *See Overton Park*, 401 U.S. at 420. Extra-record discovery may be admitted to obtain “some explanation in order to determine if the . . . [agency head] acted within the scope of his authority and if the . . . action was justifiable under the applicable standard.” *Id.* The Supreme Court has recognized that where “further explanation is necessary to a proper assessment of the agency’s decision” because there was such a failure to explain administrative action as to frustrate effective judicial review, the court may consider the need for additional discovery. *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973).

Here, the evidence of bad faith and improper behavior is more than sufficient to support discovery. Documents in the administrative record and in the public domain reflect that Blackwell, the DOI attorney who was personally involved in the discussions on the Section 2719 reinterpretation and the *post hoc* effort to justify it, and Rossetti, a lawyer-lobbyist for the firm retained by the SNI to lobby the DOI on Indian sovereignty issues, live together, work together and have intertwined financial interests. This evidence, together with the fact of DOI’s and NIGC’s complete departure with no rational explanation from existing policies and practices, raises sufficient suspicion of bias and improper contact to require discovery.

privilege should be deemed waived and these documents, too, should be produced. *See Children First Found., Inc.*, 2007 WL 4344915 at *4) and discussion therein.

Courts have ordered discovery under such circumstances. In *New York v. Salazar*, 701 F.Supp.2d at 244, *aff'd*, Case 6:08-cv-00644-LEK-DEP, Dkt 196 (Mar. 3, 2011) (Kahn, J.), the court recently granted plaintiffs leave to conduct extra-record discovery and specifically to depose DOI Assistant Secretary James Cason about his contacts with Thomas Sansonetti, the tribe's lobbyist, who had direct access to Cason and the ability to influence his decision. This, coupled with the government's stonewalling in its response to FOIA requests, "represented a sufficient preliminary showing of bad faith to justify very limited discovery." *Id.* at 241. In *Schaghticoke Tribal Nation v. Norton*, No. 3:06-cv-0081 (PCD), 2007 WL 867987, at *5 (D. Conn. Mar. 19, 2007) (Murray Decl. Ex. QQ), the court allowed limited discovery as to whether improper political pressure influenced DOI's decision to deny a tribe's petition for federal acknowledgment. The court, finding evidence of contacts between DOI officials and a lobbyist that raised "questions" about "improper political influence," ordered document production and depositions. So too here, a high-level DOI attorney shares the same household with a lobbyist for the firm that represents the SNI. Despite her recusal from SNI matters, she un-recused herself to participate in actions that would benefit only the SNI. Under the circumstances, the evidence raises extremely serious questions, more than sufficient to warrant discovery in the form of document discovery and depositions.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully submit that their motion to supplement the administrative record and for discovery should be granted in all respects.

Dated: Albany, New York
June 22, 2011

Respectfully submitted,
O'CONNELL & ARONOWITZ, P.C.
s/ Cornelius D. Murray
Cornelius D. Murray, Esq.
cmurray@oalaw.com
Jane Bello Burke, Esq.
jburke@oalaw.com
54 State Street, Albany, NY 12207
(518) 462-5601
Attorneys for Plaintiffs