IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE,

Plaintiff,

and

CHEYENNE RIVER SIOUX TRIBE,

Plaintiff-Intervenor,

v.

U.S. ARMY CORPS OF ENGINEERS,

Defendant-Cross Defendant,

and

DAKOTA ACCESS, LLC,

Defendant-Intervenor-Cross Claimant.

Case No. 1:16-cv-1534-JEB
(and Consolidated Case Nos. 16-cv-1796 and 17-cv-267)

PLAINTIFF STANDING ROCK SIOUX TRIBE'S RESPONSE TO MOTION TO COMPEL COMPLETION OF ADMINISTRATIVE RECORD

INTRODUCTION

Plaintiff Standing Rock Sioux Tribe ("Tribe") opposes Dakota Access, LLC's ("DAPL's") motion to compel supplementation of the administrative record. The motion should

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be denied because DAPL has failed to meet the standards for supplementation of the record in this Circuit, and because the motion is untimely. An extensive administrative record has been filed, and briefing on cross-motions for summary judgment on the Tribe's case is complete. The Tribe is eager for the Court to schedule a hearing and render a decision. For months, DAPL has made overblown accusations of political interference, yet the record lends no support to those claims, nor has DAPL ever produced any other evidence to support them. Now that briefing on the cross-motions for summary judgment is complete, DAPL seeks to embark on a wide-ranging fishing expedition for evidence to support its theory. In this Circuit, however, DAPL must show concrete and non-speculative evidence that the record is incomplete, which it has failed to do. The Court should deny the motion and issue a decision on the merits based on the existing record.

In the alternative, if the Court is inclined to grant DAPL's motion, it should put clear limits on what needs to be produced, and impose a strict timeline, so that resolution of the cross-motions in the Tribe's case is not unduly delayed. Reopening the record at this late date, or allowing the intrusive and unwarranted discovery that DAPL proposes, threatens to delay this case very significantly, which would prejudice the Tribe. The Tribe proposes a reasonable schedule below in the event that the Court finds that the motion has merit.

ARGUMENT

I. DAPL'S MOTION IS UNTIMELY AND FAILS TO MEET THE STANDARD FOR SUPPLEMENTING THE RECORD.

The bulk of DAPL's motion is a rehash of positions that have been exhaustively argued in its summary judgment briefs. It repeatedly complains of "political interference" in the administrative process, despite the absence of any evidence that the Corps' December 4 decision to prepare an environmental impact statement ("EIS") was anything other than what it was: a

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decision by the appropriate decision maker in light of the total facts and circumstances of this case. To the contrary, the only inappropriate "political interference" here occurred when the new President directed the Corps to abandon the EIS process and issue the easement at Lake Oahe without further review. DAPL also continues to mischaracterize the Tribe's positions, and engages in hyperbole, for example, baselessly asserting that the Corps sought to "run out the clock" to "kill the project through unwarranted delay." *Id*. at 24. These attempts to reargue the merits through overblown rhetoric are inappropriate in a procedural motion. DAPL's motion is replete with various misstatements and mischaracterizations about the merits, which the Tribe has already addressed in the summary judgment briefing. Rather than repeating those arguments here, the Tribe registers its opposition to DAPL's effort to reargue the merits in the guise of a procedural motion, and asks that DAPL's misstatements be ignored.

When DAPL finally turns to the issue at hand—i.e., the completeness of the record—its request is based on little more than its own general sense that there should be more documents from the fall of 2016 than appear in the record. This does not constitute the "non-speculative, concrete evidence" that the law requires. *Charleston Area Med. Ctr. v. Burwell*, 2016 WL 6208365, at *3 (D.D.C. Oct. 24, 2016). DAPL doesn't actually identify any particular documents that it believes should be in the record: rather, it simply suggests sweeping categories of documents that it thinks ought to exist. But a party must "identify the materials allegedly omitted from the record with sufficient specificity, as opposed to merely proffering broad categories of documents and data that are 'likely' to exist as a result of other documents that are included in the administrative record." *Univ. of Colo. Health at Mem'l Hosp. v. Burwell*, 151 F. Supp. 3d 1, 13 (D.D.C. 2015); *see also Blue Ocean Inst. v. Gutierrez*, 503 F. Supp. 2d 366, 371 (D.D.C. 2007) ("theorizing that the documents *may* exist. . . fails to overcome the presumption that

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the record is complete"). DAPL is not permitted to engage in a fishing expedition in hopes of finding additional evidence to support its position.

Contrary to DAPL's insistence that only unlawful political interference could explain the Corps' decision to withhold the easement and prepare an EIS, the existing record provides abundant support for this decision. The record documents how the Tribe and many others provided extensive technical and legal support for their view that the Corps' consideration of spill risks and impacts were deeply flawed. *See* Tribe's SJ Motion (ECF 117-1), at 10-15. The Department of the Interior prepared a lengthy and detailed memorandum justifying an EIS and greater consideration of Treaty impacts. *Id*. Other agencies had weighed in previously with critiques of the Corps' NEPA compliance and asked the Corps to prepare a full EIS. *See id.* at 9 (citing Environmental Protection Agency and Department of the Interior comments). Unsurprisingly, the Corps official who oversaw the flawed EA process continued to press his position that no more needed to be done. DAPL Motion, at 10. But the ultimate agency decision maker, Assistant Secretary of the Army Jo-Ellen Darcy, considered the varying perspectives and chose to proceed with an EIS. It was not "political interference" for the federal government to take a closer look before granting an easement for a major oil pipeline to cross the Missouri River immediately adjacent to an Indian reservation. There is no need to embark upon a speculative search for additional record documents to determine whether the Corps' subsequent reversal of Darcy's decision was lawful. *See Esch v. Yeutter,* 876 F.2d 976, 991 (D.C. Cir. 1989).

DAPL's demand for documents that have never been before the Corps, like internal communications within the Departments of Interior and Justice, as well as the White House, is particularly flawed. DAPL offers no evidence at all that such documents even exist. Regardless,

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the administrative record is supposed to include only documents before the decision maker: in this case, the Corps and its leadership in the Department of Defense. *Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Engineers*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) ("the administrative record should not include materials that were not considered by agency decisionmakers") (internal citations omitted); *see also City of Duluth v. Jewell*, 968 F. Supp. 2d 281, 290 (D.D.C. 2013) ("the Administrative Record is not 'insufficient' merely because it omits documents that were considered by a different agency that provided advice to the agency responsible for making the ultimate decision . . . [R]eliance on the decision of a sister agency does not automatically require supplementation of the administrative record with the internal documents underlying the sister agency's decision.") (internal citations omitted). Accordingly, while communications between the Corps and other agencies are properly part of the record, communications that don't involve the Corps or DOD leadership are not.

Moreover, DAPL doesn't just seek to compel supplementation of the administrative record, it seeks to conduct discovery. This includes taking depositions of agency officials, including former political appointees and officials in other agencies who are not parties to this case. DAPL Motion at 28 (asking that it be allowed "to depose personnel from the three Departments and former White House personnel"). Nothing entitles DAPL—which, after all, is not the plaintiff in this case and received the permit it wanted—to this extraordinary relief. As all parties have long acknowledged, this is a "record review" case under the Administrative Procedures Act. *See Zemeka v. Holder*, 963 F. Supp. 2d 22, 24 (D.D.C. 2013) ("Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the

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decision it did."). Discovery, particularly through depositions, is highly unusual in record review cases. *Commercial Drapery Contractors v. U.S.,* 133 F.3d 1, 7 (D.C. Cir.1998) (discovery is normally unavailable in an APA case, "except when there has been a strong showing of bad faith or improper behavior or when the record is so bare that it prevents effective judicial review"); *Friends of The Earth v. U.S. Dep't of Interior,* 236 F.R.D. 39, 42 (D.D.C. 2006) (rejecting plaintiffs attempt to take depositions in APA case).[1] DAPL has not even tried to make any showing of "bad faith," nor has it made any argument that the record is so bare as to preclude review. Even if the record needs to be supplemented, DAPL is not entitled to take depositions of agency officials and former political appointees.

The final defect in DAPL's motion is that it comes too late and threatens to gravely disrupt the timeline for resolution of the case. The Corps produced the original record on November 10, 2016, and supplemented it on January 18, 2017. After the Corps abandoned the EIS process and issued the easement, the Tribe amended its complaint, which resulted in the Corps filing another supplement, which was provided to counsel on March 16, 2017. Unlike the previous voluminous record, the March supplement contained only a few hundred documents, the scope of which could be ascertained with a cursory review.

When DAPL filed its opposition to the Tribe's summary judgment motion, it raised no concerns about the adequacy of the original record. Nearly three weeks after the Corps provided the parties with the supplemental record of the documents relevant to the easement, DAPL filed its reply brief, again without saying a word about the adequacy of the record or expressing concerns that materials may have been omitted. To the contrary, DAPL strenuously argued that the record should be limited to documents that precede the July 25, 2016 date of the NEPA

[1] *Alexander v. FBI,* 186 F.R.D. 170 (D.D.C. 1999), cited by DAPL was not an APA case, but a ruling on a discovery dispute in a suit for an alleged violation of the Privacy Act.

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documents. ECF 203 at 1 ("the Tribe repeatedly makes the error of relying on post-July 25 materials"). DAPL likewise filed its response and reply briefs opposing Cheyenne River's motion for summary judgment on March 23 and April 20 without ever mentioning concerns about the adequacy of the record.

Plainly, DAPL has reconsidered that position, and now not only believes that post-July 25 materials are appropriate, but that the Corps should produce far more post-July 25 documents than it has included to date. But this late pivot prejudices the Tribe, which has worked hard to present the issues as expeditiously as possible. The case is fully briefed, the parties have submitted an extensive appendix including thousands of pages of relevant record documents, and the motions are ripe for resolution. Oil is now flowing under Lake Oahe, exposing the Tribe to the very risks it believes should have been better examined and disclosed before any decisions on permits. DAPL's shift in position, and attempt to reopen the record and presumably the briefing as well, comes too late. For this reason too, the motion to compel should be denied.

II. IF THE MOTION IS GRANTED, IT SHOULD BE STRICTLY LIMITED TO AVOID DELAY.

If granted, DAPL's motion has the potential for significant delay in the resolution of this case, to the detriment of the Plaintiff. Accordingly, should the Court be inclined to grant the motion, it should impose limitations to minimize the impact on the expeditious resolution of the case.

At the outset, any order should reject DAPL's request to either conduct discovery or obtain documents that were not before the decision maker, as discussed above. So limited, the universe of documents that would need to be produced should be relatively modest, if they exist at all. Moreover, in a transparent attempt to find imagined "political interference" during the past administration, but sidestep the White House intervention in the process that occurred after

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the inauguration, DAPL seeks records only up to January 18, 2017 and outlines categories that omit the post-election directives from the White House to change course. If this Court grants the motion, it should extend any order to the date of the easement, February 8, 2017 and include communications between the Corps and the Trump campaign and White House.

The Tribe proposes that if the Court determines that it will grant the motion, the Court order the Corps to produce any additional documents within 21 days of the date of an order. Furthermore, the Court should order parties to submit supplemental briefs, if any are required, within 14 days of receipt of the supplemented record. This will ensure that the case continues to move towards conclusion without additional undue delay.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully asks that the motion to compel completion of the record be denied. If the Court is inclined to grant the motion, it should limit relief as proposed herein.

Dated: May 4, 2017

Respectfully submitted,

/s/ Jan E. Hasselman

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2017, I electronically filed the foregoing *Plaintiff Standing Rock Sioux Tribe's Response To Motion To Compel Completion of Administrative Record* with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Jan E. Hasselman
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