IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STANDING ROCK SIOUX TRIBE; YANKTON SIOUX TRIBE; ROBERT FLYING HAWK; OGLALA SIOUX TRIBE, Plaintiffs, and CHEYENNE RIVER SIOUX TRIBE, Intervenor Plaintiff, v. U.S. ARMY CORPS OF ENGINEERS, Defendant, and DAKOTA ACCESS, LLC, Intervenor Defendant.	)	Case No. 1:16-cv-01534-JEB

RESPONSE OF PLAINTIFF OGLALA SIOUX TRIBE IN OPPOSITION TO MOTION OF DEFENDANT-INTERVENOR DAKOTA ACCESS, LLC, TO COMPEL PROMPT COMPLETION OF THE ADMINISTRATIVE RECORD

Plaintiff Oglala Sioux Tribe ("Tribe") hereby submits this Response in Opposition to the Motion of Intervenor Defendant Dakota Access, LLC ("DAPL") to Compel Prompt Completion of the Administrative Record ("DAPL Mot.").

Introduction and Background

The Tribe filed suit against the United States Army Corps of Engineers ("Corps") on February 11, 2017, three days after the Corps granted an easement to DAPL for a crude oil

pipeline to cross Lake Oahe. *Oglala Sioux Tribe v. U.S. Army Corps of Engineers*, no. 17-cv-00267-JEB (D.D.C.). The Tribe seeks to set aside the easement and the Corps' earlier approvals relating to the construction and operation by DAPL of the pipeline across Lake Oahe, based on violations of law. The Tribe's suit, along with another related suit by the Yankton Sioux Tribe, was consolidated with this suit filed by the Standing Rock Sioux Tribe on March 16, 2017.

The Corps has provided the parties, including the Tribe, with a copy of the administrative record for the February 8, 2017 easement decision. *See* ECF No. 181. Although the Tribe and its complaint is not mentioned in DAPL's motion or memorandum in support, the motion will bear on the record before the Court with respect to the Tribe's consolidated case.

DAPL's motion must fail because it has not shown that the Corps considered the documents it seeks in granting the easement, or that the documents even exist. The burden is on DAPL to overcome the presumption of regularity that applies to the record compiled by the Corps by showing with concrete evidence that the documents it seeks to add were actually considered by the Corps in making its decision. *Univ. of Colo. Health at Mem'l Hosp. v. Burwell*, 151 F. Supp. 3d 1, 13 (D.D.C. 2015). Neither speculation nor assumption is sufficient to meet that burden, *WildEarth Guardians v. Salazar*, 670 F. Supp. 2d 1, 5 (D.D.C. 2009), yet DAPL offers little more than that to support its motion.

Further, DAPL has not shown that any unusual circumstances exist that allow this Court to order that the documents be added to the record notwithstanding that they were not considered by the Corps in making its decision. DAPL has not shown and cannot show that the documents were adverse to the decision to grant the easement, or that they are needed to show that the Corps considered all relevant factors in granting the easement. Indeed, DAPL has already moved for summary judgment against the claims of Plaintiffs Standing Rock Sioux Tribe and Cheyenne

River Sioux Tribe, arguing that, based on documents now in the record, all relevant factors were considered by the Corps in granting the easement.

If the motion is granted, there is no reason to limit the additional documents to those in existence on or before January 18, 2017, as requested by DAPL. Any supplementation of the record should encompass documents up to and including February 8, 2017—the date of the easement.

Finally, to the extent DAPL requests discovery, including depositions of agency personnel and former White House staff, DAPL's request fails to make the strong showing of bad faith or improper behavior required for discovery in a case such as this one decided on an administrative record.

Argument

I. DAPL's Motion Should Be Denied Because It Does Not Meet the Standards for Completing or Supplementing the Record.

A. The Legal Standards

In an action such as this one to review an agency decision under the Administrative Procedure Act, the agency is responsible for producing the administrative record, "which must include all of the information that the agency considered 'either directly or indirectly.'" *Univ. of Colo. Health at Memorial Hosp.*, 151 F. Supp. 3d at 12 (quoting *Marcum v. Salazar,* 751 F.Supp.2d 74, 78 (D.D.C.2010)). The record that an agency produces is entitled to a strong presumption of regularity. *Charleston Area Med. Ctr.*, 2016 WL 6208365 at *3.

A party may seek to supplement the record in "one of two ways." *Univ. of Colo. Health at Memorial Hosp.*, 151 F. Supp. 3d at 13 (quoting *WildEarth Guardians,* 670 F.Supp.2d at 5 n.4). "First, a party may seek to include 'evidence that should have been properly a part of the administrative record but was excluded by the agency.'" *Id*. Where a party moves to

supplement the record in this way, "supplementation is appropriate if the agency 'did not include materials that were part of its record, whether by design or accident.'" *Univ. of Colo. Health at Memorial Hosp.*, 151 F. Supp. 3d at 13 (quoting *Marcum v. Salazar*, 751 F.Supp.2d at 78). Courts sometimes refer to this as "completion" of the record, as opposed to supplementation. *E.g.*, *Oceana, Inc. v. Pritzker*, No. CV 15-1220, 2016 WL 6581169 at *4 (D.D.C. 2016).

To complete the record through the addition of materials that were in fact considered by the agency, "the burden rests not with the [agency] to establish affirmatively the completeness of the as-filed administrative record, but rather with Plaintiffs to rebut the presumption of regularity to which that record is entitled." *Banner Health v. Sebelius*, 945 F. Supp. 2d 1, 23 (D.D.C. 2013), *decision vacated in part on reconsideration on other grounds*, No. CV 10-01638, 2013 WL 11241368 (D.D.C. July 30, 2013). Mere "speculation" by the moving party that certain documents or evidence exists or that they were actually considered by the agency is not sufficient to overcome the presumption of regularity. *WildEarth Guardians*, 670 F. Supp. 2d at 5 ("Plaintiff cannot rely on mere speculation, but must introduce concrete evidence to prove that the document[ ][was] before the actual decisionmakers involved in the determination.") (alterations in original) (internal quotations omitted). *See also Univ. of Colo. Health*, 151 F. Supp. 3d at 13 ("a plaintiff must put forth concrete evidence that the documents it seeks to add to the record were actually before the decisionmakers," and "must identify reasonable, *non-speculative grounds* for its belief that the documents were *considered* by the agency[.]") (internal quotations and citations omitted).

On this standard, "theorizing that the documents *may* exist, … fails to overcome the presumption that the record is complete." *Blue Ocean Inst. v. Gutierrez*, 503 F. Supp. 2d 366, 371 (D.D.C. 2007) (plaintiff had not defeated the presumption that the administrative record was

complete "by showing a theoretical possibility that other documents not in the record exist" because "[a]t most, it [was] merely as likely that such documents exist as it is that they do not."). *See also City of Duluth v. Jewell*, 968 F. Supp. 2d 281, 291–92 (D.D.C. 2013) (denying a motion to supplement the administrative record where the request "assumes," based on other documents in the record, that certain notes and records of meetings existed and where the moving party offered no evidence that such records, if they did exist, were considered by the decision-maker). Likewise, it is not enough for the moving party to "assert that the documents 'are relevant, were possessed by the entire agency at or before the time the agency action was taken, and were inadequately considered.'" *Am. Petroleum Tankers Parent, LLC v. U.S.*, 952 F. Supp. 2d 252, 262 (D.D.C. 2013) (quoting *Banner Health*, 945 F. Supp. 2d at 17). "Rather, the [p]laintiff must articulate 'when the documents were presented to the agency, to whom, and under what context.'" *Id*. (quoting *Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 7 (D.D.C. 2006)).

The second way a party may seek to supplement the record is through "extra-judicial evidence that was not initially before the agency but [which] the party believes should nonetheless be included in the administrative record." *Univ. of Colo. Health*, at 13 (alteration in original) (quoting *WildEarth Guardians*, 670 F. Supp. 2d at 5 n. 4). If a party seeks to supplement in this way, "a more stringent standard applies," requiring the party to demonstrate one of three "unusual circumstances," namely: (1) that "the agency deliberately or negligently excluded documents that may have been adverse to its decision," (2) that "background information [is] needed to determine whether the agency considered all the relevant factors," or (3) that "the agency failed to explain administrative action so as to frustrate judicial review." *Id*. (quoting *City of Dania Beach v. F.A.A.*, 628 F.3d 581, 590 (D.C. Cir. 2010) (internal quotations

within *City of Dania Beach* omitted)).

Although DAPL styles its motion as one to "complete" the record, it briefs the standards for both completion of the record to include documents considered by the agency, and for supplementation of the record with extra-record evidence, suggesting it relies on both. DAPL Mem. of Law in Supp. of Mot. to Compel Completion of Administrative Record ("DAPL Mem. in Supp.") at 19-20, ECF No. 216-1. This memorandum addresses the two standards separately below.

B. DAPL Does Not Meet the Burden for Completion of the Record Because It Has Not Shown that the Requested Documents Exist or Were Actually Considered by the Corps in Conjunction with the Easement Decision.

DAPL does not seek specific documents that it asserts were before the Corps and considered by it in granting the easement. Rather, it seeks to require the Corps to embark upon a broad search for documents that may not even exist. DAPL asks the Court to order "[t]he Corps shall produce within __ days of this Order all records (including emails, telephone logs, and calendars) of the Departments of the Army, the Interior, and Justice, as well as those held, received, or issued by the White House, that relate to the Dakota Access Pipeline project and that were in existence on or before January 18, 2017 …." DAPL Proposed Order, ECF No. 216-2. DAPL does not limit the records requested to those within the possession of the Corps, but extends the scope to those within the possession of other agencies:

> In short, the government should be required to search the records (including emails, telephone logs, and calendars) of the Departments of the Army, the Interior, and Justice, as well as those held, received, or issued by the White House, and produce those records in existence on or before January 18, 2017 that relate to the Dakota Access Pipeline project, including [but not limited to various categories of documents.]

DAPL Mem. in Supp. at 1, ECF No. 216-1.

To justify an order to complete the record, DAPL must meet its burden of showing with concrete evidence and non-speculative grounds that such documents were actually considered by the Corps. *Univ. of Colo. Health*, 151 F. Supp. 3d at 13. DAPL fails to meet that burden because it is pure speculation that any of the requested documents exist, or that they were actually considered by the Department in making its decision on the easement.

The speculation engaged in by DAPL as to supposed interagency communications and how they relate to the Corps' decision falls far short of the "concrete" evidence necessary to overcome the presumption of regularity afforded to the Department's compilation of the record. *Univ. of Colo. Health*, 151 F. Supp. at 13; *WildEarth Guardians*, 670 F. Supp. 2d at 5. Moreover, to the extent that the interagency communications could possibly have been relevant to the Corps' decision on the easement, DAPL fails to offer concrete evidence that such communications took place or were considered by the Corps in making its decision on the easement. DAPL speculates about what sorts of records may exist, but it provides no concrete evidence that such records exist, or that those records were considered by the relevant agency decision-makers. *Am. Petroleum Tankers*, 952 F. Supp. 2d at 265 (emails regarding scheduling and preparation for meetings in connection with application, the denial of which was challenged, would not be added to the record; such emails did not relate to the merits of the application and the moving party provided no evidence that they were "considered" by decision-maker).

DAPL fails to show "when the documents were presented to the agency, to whom, and under what context"—evidence necessary to meet its burden to show that the documents were considered by the relevant decision-makers at the Corps in connection with the challenged decision. *Am. Petroleum Tanker*, 952 F. Supp. 2d at 262 (quoting *Pac. Shores*, 448 F. Supp. 2d at 7). Like the movants in *City of Duluth* and *Blue Ocean*, here DAPL is "not indicating specific,

known additional documents that it insists should be included in the administrative record," *City of Duluth*, 968 F. Supp. 2d at 291 (citing *Blue Ocean*, 503 F. Supp. 2d at 369), but merely theorizing that such documents exist and contain relevant information. In *City of Duluth*, this Court rejected the movants' request to complete the record with "all information exchanged between agencies" regarding certain issues, noting that "[s]uch a request assumes that this information exists in written form, or even exists at all—a fact for which [the plaintiff's evidence] provides no support. … Furthermore, Plaintiff provides no evidence that these documents, if they exist, came before the relevant agency decisionmaker." *Id*. at 291–92. The Court continued, "[i]n *Blue Ocean*, the court rejected the exact same sorts of contentions [p]laintiff makes here, concluding that the plaintiff was 'reduced to theorizing that the documents *may* exist, which fails to overcome the presumption that the record is complete.'" *Id*. at 292 (quoting *Blue Ocean*, 503 F. Supp. 2d at 371).

To the extent that documents even exist that relate to the views of other agencies regarding procedural issues prior to the grant of the easement in February 2017, they are not part of the record in this case absent clear evidence that they were considered by the Corps as part of its decision on the easement. *See City of Duluth*, 968 F. Supp. 2d at 292 n.3 (refusing to supplement the record with documents obtained from the National Indian Gaming Commission ("NIGC") by the moving party through a Freedom of Information Act request; although defendant Department of Interior ("DOI") relied on an earlier decision of the NIGC in reaching its decision before the court, the moving party offered no evidence that documents before the NIGC were considered by the relevant decision-maker at DOI). DAPL offers no such evidence.

DAPL has not cited to any case that would require the defendant agency to conduct a search of its own records (let alone those of other agencies or the White House) for additional

documents based on speculation that the documents exist and were considered by the agency when it made its decision. Requiring a search will only serve to delay this action unnecessarily.

C. DAPL Does Not Meet the Standard for Supplementation of the Record.

Although DAPL seeks primarily to complete the administrative record with documents supposedly considered by the Corps, it also briefed the standard for supplementation through the addition of documents not before the agency when it made its decision. DAPL Mem. in Supp. at 19-21, ECF No. 216-1. DAPL does not meet the standard for supplementation, however.

DAPL notes that supplementation is allowed where "the agency deliberately or negligently excluded documents that may have been adverse to its decision," *id*. at 20 (quoting *City of Dania Beach v. F.A.A.*, 628 F.3d at 590 (internal quotation and citation omitted), but nowhere in its brief does DAPL assert that the documents it seeks were adverse to the decision. The Corps' decision at issue in this case—the grant of the easement—is not "contrary" to DAPL, and this basis for supplementation of the record does not apply here.

To the same effect is DAPL's invocation of other bases for supplementation. DAPL asserts that supplementation is allowed "if background information [is] needed to determine whether the agency considered all the relevant factors," DAPL Mem. in Supp. at 20, ECF No. 216-1, quoting *City of Dania Beach*, 628 F.3d at 590 (internal quotation and citation omitted), but again DAPL does not assert that the documents it seeks—many from other agencies, *regardless of whether they are in the possession of the Corps*—would have any bearing whether the Corps considered all of the relevant factors when it granted the easement on February 8, 2017. Any such assertion would be contrary to its briefing on the summary judgment motions in which it argued, based on documents in the record, that the Corps had complied with all

requirements when it granted the easement.[1]

Finally, DAPL argues that "a court may order production of extra-judicial evidence—documents beyond the administrative record—if 'needed to assist a court's review.'" DAPL Mem. in Supp. at 21, ECF No. 216-1 (quoting *Nat'l Mining Ass'n v. Jackson*, 856 F. Supp. 2d 150, 156-57 (D.D.C. 2012). The Court's holding in *National Mining*, however, was not so broad. The Court actually said that "extra-record evidence will only be considered if it is needed to assist a court's review," and only if one of the recognized exceptions for consideration of such evidence is met. *Nat'l Mining Ass'n*, 856 F. Supp. 2d at 156-57 (emphasis added). As discussed above, DAPL does not meet any of the recognized exceptions. To the extent that DAPL seeks to show "unusual circumstances" to justify the addition of extra-judicial evidence to the record, it fails to do so.

II. If the Motion is Granted, It Should Be Revised To Reflect the Date of the Easement

DAPL seeks "all records [of certain agencies] that relate to the Dakota Access Pipeline project and that were in existence on or before January 18, 2017 …." DAPL Prop. Order, ECF No. 216-2 (emphasis added). DAPL seeks documents only through January 18, 2017, because that is the date of the publication of the Notice of Intent to prepare an Environmental Impact Statement ("EIS"), and DAPL seeks the documents to support its theory as to the supposed

[1] In its opposition to the summary judgment motion filed by the Standing Rock Sioux Tribe, DAPL did assert that summary judgment should be denied on the grounds that the administrative record was not yet before the Court, ECF No. 159 at 36-37, but it failed to cite any specific document or category of documents needed to oppose the motion, and it also asserted that "the existing record provides more than satisfactory justifications for issuing the easement and withdrawing the EIS notice." *Id*. at 37. Later, after the record was filed, DAPL joined the Corps' Cross-Motion for summary judgment on Standing Rock Sioux Tribe's claims. ECF No. 184. In its opposition to the summary judgment motion filed by the Cheyenne River Sioux Tribe, and in support of its cross-motion for summary judgment, DAPL asserted that various documents showed that the easement "fully complied with the Mineral Leasing Act." ECF No. 185 at 28. It did not assert at that time that documents were needed to support its argument that all relevant factors were considered.

inappropriate "political influence" that led to the decision to prepare an EIS. DAPL Mem. in Supp. at 2, ECF No. 216-1. In this action, however, Plaintiffs are challenging the grant of the easement on February 8, 2017—almost three weeks after publication of the NOI—and the administrative record DAPL seeks to complete is the record of that decision. If the Court agrees with DAPL that additional documents that relate to the pipeline project were considered by the Corps, or should be added to the record for other reasons, and grants DAPL's motion, there is no legal basis for limiting the search for additional documents to those in existence on or before January 18, 2017. Accordingly, if the motion is granted, it should be revised to include documents that were in existence on or before February 8, 2017.

III. Discovery Should Not be Allowed.

In its memorandum in support of its motion, DAPL argues that it be allowed to conduct discovery: "[a]t a minimum, the Court should therefore allow Dakota Access to depose personnel from the three departments and former White House personnel to explore where and to what extent the records at issue here can be located." DAPL Mem. in Supp. at 28, ECF No. 216-1. DAPL's motion does not address the requested depositions, however, nor does the proposed order submitted by DAPL. Nor does DAPL address the standards for discovery in an APA case.

"Discovery typically is not available in APA cases." *Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011) (internal quotations and citations omitted). Indeed, in such cases "limited extra-record discovery is only appropriate '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.'" *Menkes v. U.S. Dep't of Homeland Sec.*, 637 F.3d 319, 339 (D.C. Cir. 2011) (quoting *Baptist Mem'l Hosp.-Golden Triangle v. Sebelius*, 566 F.3d 226, 230 (D.C. Cir. 2009). *See also Air Transp. Ass'n of Am.*, 663 F.3d at 488 (quoting *Citizens to*

Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971): "[T]here must be a strong showing of bad faith or improper behavior before [an inquiry into the administrative decisionmaking process] may be made.") (alterations in original).

This Court has repeatedly emphasized that this standard requires a "substantial showing" of bad faith or an incomplete record. *Air Transp. Ass'n of Am.*, 663 F.3d at 487 (party must make "a significant showing—variously described as a strong, substantial, or prima facie showing—that it will find material in the agency's possession indicative of bad faith or an incomplete record"). Thus, "[a] party is not entitled to conduct discovery against an agency simply because it has raised a question as to the agency's good faith." *Comm. of 100 on the Fed. City v. Foxx*, 140 F. Supp. 3d 54, 65 (D.D.C. 2015) (citing *Air Transp. Ass'n of Am.,* 663 F.3d at 487). Moreover, "[t]his is especially true when a party seeks to depose agency officials." *Id*. at 60 (citing *Capital Eng'g & Mfg. Co. v. Weinberger,* 695 F.Supp. 36, 41 (D.D.C. 1988) (observing that even when plaintiffs are entitled to discovery against an agency, they are not "necessarily entitled to ... depositions and potentially voluminous documentary materials")).

In its memorandum in support, DAPL does not address the relevant standard for discovery in an APA case, and it fails to show that it meets the standard. It has wholly failed to make the requisite showing of bad faith. Further, it does not assert that there was any bad faith or improper behavior with regard to the grant of the easement.

Conclusion

For the foregoing reasons, the Motion of Intervenor Defendant Dakota Access, LLC to Compel Prompt Completion of the Administrative Record should be DENIED.

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