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

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL COMPLETION OF ADMINISTRATIVE RECORD

Kimberley Caine
William J. Leone
Robert D. Comer
NORTON ROSE FULBRIGHT US LLP
799 9th St. NW, Suite 1000
Washington, D.C. 20001-4501
(202) 662-0200

William S. Scherman
David Debold
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
wscherman@gibsondunn.com

Counsel for Dakota Access, LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Regulations

INTRODUCTION

Dakota Access, LLC seeks an order requiring the government to do what it said it would do at a hearing more than two months ago: produce a complete administrative record for this case. The existing record for post-July 25, 2016 events is woefully deficient. With briefing recently completed on Plaintiffs' partial summary judgment motions and Defendants' cross-motions—and despite good-faith efforts to work with the government on correcting the problem—Dakota Access still lacks documents critical to a full defense against Plaintiffs' claims. This Court should order the government to correct that serious shortcoming.

The documents at issue here are described in the Motion itself. 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 the following:

- All documents that relate to the preparation and substance of a September 9, 2016 Joint Statement issued by the three Executive Branch Departments, as well as all documents considered by the three Departments in developing and issuing that Joint Statement.

- All documents pertaining to an October 10 Joint Statement by the same Departments, including the determination whether to reconsider any previous decisions, and all documents considered as part of that determination.

- All documents considered in reaching the determination that the Army announced on November 14, and then reiterated on December 4, that the permits at issue here "comported with legal requirements."

- All documents that discuss the granting of the July 25, 2016 permissions and all that were considered in deciding to announce delay of the easement.

The government should be required to produce these documents even if they typically would qualify for pre-decisional deliberative process protection given that the documents are relevant to

showing improper political interference with agency action—conduct not protected by that privilege. Alternatively, the government should be required to file a "Vaughn index" describing any documents it is withholding and the grounds for doing so.

Plaintiffs are challenging the legality of agency action in both July 2016 and February 2017. As for the latter, they contend that three Executive Branch Departments—the Departments of the Interior, the Army, and Justice—properly determined beginning in September 2016 that the U.S. Army Corps of Engineers (the "Corps") should delay issuance of a right-of-way (or easement) to Dakota Access. They further contend that these Departments properly concluded in December 2016 that the Corps should decline to grant the easement based on the then-existing record. The materials that were before those three Departments when they made these determinations—and communications about those determinations—are therefore properly part of the administrative record for Plaintiffs' claims.

Materials showing communications within and among these Departments, as well as communications between those Departments and the White House, must be added to the record for a second related reason. Plaintiffs' claims challenging the February 2017 agency action rest heavily on the faulty assumption that the earlier actions taken by the Department of the Army, including its January 18, 2017 decision to initiate a process for preparing an Environmental Impact Statement for the proposed Lake Oahe right-of-way, were legally permissible and could not lawfully be reversed. Dakota Access has consistently maintained that this unprecedented process had no lawful basis. In a blatant display of high-level political interference, the three Departments and the White House embarked on an unlawful mission to delay the Dakota Access Pipeline for as long as it might take to nullify a valid decision by the Corps that would have allowed the pipeline to be completed much sooner but for that political interference.

The validity (or not) of the new process that began no later than September 2016 and continued through January 18, 2017 is of great importance to this case. If it was invalid, Plaintiffs may not rely on *any* post-July 25, 2016 materials, and their challenges to post-July 25 actions will necessarily fail. The missing materials will almost certainly show that invalidity. The Corps had already completed its exhaustive process in July 2016 for review and approval of the pipeline's crossing at Lake Oahe in North Dakota. Even though all environmental issues were addressed and resolved at that time, three different Executive Branch Departments—the Army, the Interior, and Justice—jointly announced on September 9 that they would initiate a new process for reviewing the Corps's earlier actions before any decision would be made about the Lake Oahe easement. What followed was extensive and prolonged involvement by multiple personnel from the three Departments and the White House.

When Dakota Access previously sought documents relevant to the September 9 announcement and ensuing events—so that the company could prove those events were improper in support of its Declaratory Judgment Act cross-claim—the government protested that the only agency action then at issue pre-dated those events. This Court agreed—provisionally. The Court explained that things would be different if later events came into play.

That time has come. In February, when Plaintiffs moved to amend their complaints and filed their partial summary judgment motions, they put the post-July events front and center. The government agreed to provide the additional record for those actions, with a target date of March 10. Most of the additional record has now been lodged. It is seriously deficient. Given all of the activity by the three Departments and the White House, there should be many hundreds, if not thousands, of emails and other records documenting that process, including the information the government considered. Persons at or near the highest levels of these various Executive Branch

components were in regular communication with one another, yet the government has provided a mere 27 email chains for a period spanning more than four months. There is a dearth of emails from one Department to another; no emails at all discussing the public statements issued jointly by the Departments; and just one email that includes any member of the White House. And even that one email, which Brian Deese, Senior Advisor to the President, sent to a senior Army official, confirms that the record should contain many more emails that include White House personnel.

These failings are highly prejudicial to Dakota Access. Without the missing records, Dakota Access will be forced to defend the lawful construction and operation of its pipeline—already months delayed at substantial expense to the company—by indulging the fiction that the process between September 9 and January 18 was permissible and even entitled to deference. Dakota Access needs these records to help show instead that this substantial delay was unlawful and that the Court need not subject abandonment of that process and subsequent issuance of the easement to the heightened scrutiny that Plaintiffs urge. The government presumably has its own reasons for keeping these communications hidden despite the high likelihood that they alone would defeat Plaintiffs' claims. Dakota Access—which suffered the serious consequences of that invalid process—should not be doubly penalized by being forced to join in the charade.

BACKGROUND

This lawsuit began on July 27, 2016, when the Standing Rock Sioux Tribe sued the Corps to challenge the lawfulness of decisions the agency finalized and announced two days earlier. But the case has since expanded as a result of highly unusual government actions that first came to light on September 9, 2016, minutes after this Court denied a motion by Standing Rock to enjoin the imminent completion of the Dakota Access Pipeline. This Background section is divided into three parts: First, it chronicles these governmental actions, which proceeded as a joint endeavor by three Executive Branch agencies and the White House. Second, it reviews the claims at issue

in this litigation and how they relate to this motion. Third, it sets forth the procedural history relevant to the administrative record.

1. The Unusual and Unlawful Agency Actions That Began September 9, 2016, and the Absence of Documents in the Administrative Record Relevant to Those Actions

On September 9, 2016, this Court denied Standing Rock's preliminary injunction motion, thus clearing the way for the completion of the Dakota Access Pipeline. D.E. 38. But unbeknownst to the Court and Dakota Access, three Executive Branch Departments had spent that week working on other plans. In what they titled a "Joint Statement From the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers," those three Executive Branch agencies announced their collective judgment that, despite this Court's denial of preliminary injunctive relief, "important issues raised by the Standing Rock Sioux Tribe and other tribal nations and their members regarding the Dakota Access pipeline specifically, and pipeline-related decision-making generally, remain." D.E. 42-1 (Ex. 1). This joint statement by Interior, Justice, and the Army set forth "steps" that all three Departments "will take," including that the Army would not "authorize constructing the Dakota Access pipeline on Corps land bordering or under Lake Oahe until it can determine whether it will need to reconsider any of its previous decisions regarding the Lake Oahe site under the National Environmental Policy Act (NEPA) or other federal laws." *Id.* "In the interim," all three Departments "request[ed] that the pipeline company voluntarily pause all construction activity within 20 miles east or west of Lake Oahe." *Id.*

Over the next few months, Interior, Justice, and the Army remained heavily involved in this new and highly unusual process. The Court got a glimpse into the nature and extent of that involvement at its September 16, 2016 status conference. The Court began that conference by telling the government it was "quite troubled by what happened here." Sept. 16, 2016 Hr'g Tr.

(Ex. 2) at 4:25–5:1. It reminded the government that its opposition to a preliminary injunction had included a plea not to "encourage parties in the future to decline to consult and comment and then bring last minute challenges as construction is underway, utilizing judicial resources in the process." *Id.* at 5:12–15. The government's opposition had also stated that delay, "after both the Corps and Dakota Access have invested significant time and resources and accommodated timely raised tribal concerns[,] would only reward plaintiffs' unwillingness to engage meaningfully in the consultation process." *Id.* at 5:8–11. The Court stated that while it continued "to expend reasonably significant effort to issue in an expedited fashion a lengthy opinion," the government never advised that it was "reconsidering" its "position" on whether to "authorize construction under Lake Oahe." *Id.* at 5:25–6:6. The Court properly questioned how this could happen and how it complied with the "duty of candor to the tribunal." *Id.* at 6:8–9. The Court pointed out that even though the government knew the easement was not going to issue any time soon, it never told the Court that there was no need for an urgent decision on an injunction for that part of the project. *Id.* at 9:18–21 (Court: "Did you ever say that in any of your papers, that we're not granting the easement or there is no irreparable harm because we haven't authorized this? Of course not.").

Counsel from the Justice Department tried to explain that there had been "no agency action or any change whatsoever" in the government's position, *id.* at 7:1–2, which—as the Court aptly observed—begs the question of "what is the point of the press release" if "nothing has changed," *id.* at 10:5–6. *See also id.* at 10:9–10 (also questioning, "Why did you wait until minutes after my order?").[1] While the government's characterization may have been "literally" true, *id.* at 6:20–21

[1] The Court pressed counsel to explain why the government never spoke up about the new timing for consideration of the easement: "In fact, the easement issue was raised in oral argument, and Mr. Leone, as I recall, was rather surprised about where that even stood, to learn that it hadn't yet been approved. It was certainly never raised in the papers as this is an issue, of course Dakota Access has to get an easement, and who knows when that is going to happen." Sept. 16, 2016

(government counsel's words), the Court now knows there *was*, in fact, a significant and previously undisclosed change in the government's *process* for approving the pipeline. Government counsel acknowledged that while this Court was working on its opinion denying a preliminary injunction, those agencies were having "conversations" in which they "grappl[ed] with some very heady and important issues," including "issues that addressed important sovereign-to-sovereign relationships," and it was all "going on minute by minute in the context of us responding to the Court and appropriately litigating on behalf of our agency clients." *Id.* at 11:13–18. During this period leading up to September 9, "the agencies were looking at the statement that they ultimately issued." *Id.* at 11:19–20. "[T]heir conversations and consideration regarding that statement" and "the status of that statement continued up until moments before it was issued." *Id.* at 11:20–23. The conversations were extensive, and they reached high levels of the government. As the Principal Deputy Section Chief of the Justice Department's Natural Resources Section put it to this Court: The conversations "were happening at a level higher than I was involved, those conversations were literally on an ongoing basis, including the content, what would be said, conversations from agency to agency about what we could and could not do appropriately given the situation and the ongoing litigation." *Id.* at 12:6–11.

Despite this flurry of activity at all three Departments in the days leading up to the September 9 Joint Statement, including considerations by each of which actions they should take (or delay taking) on Dakota Access's easement application, the administrative record that the Corps recently produced for events post-dating July 25, 2016, contains *not a single document* memorializing or even referencing any of those discussions. There is not even one email or other record of

---

Hr'g Tr. (Ex. 2) at 14:3–9. The Court added that "there have been omissions, material omissions, that would have, had I been informed of them, caused different timetables or this to proceed on a different track." *Id.* at 15:13–16.

a communication from one Department to another (*e.g.*, from anyone at Interior to anyone at the Army) about what the government lawyer described to this Court as "important sovereign-to-sovereign relationships" or other "important issues raised by" tribal nations "regarding the Dakota Access pipeline." Nor is there one record of a single "conversation[] from agency to agency about what" they "could and could not do appropriately given the situation." Instead, the record that has been produced contains a total of *four* documents of *any* type dated between September 2 and September 12, and not one of those four remotely discusses preparing the September 9 Joint Statement or considering the issues that the statement addressed.

The small portions of the record that the Corps *has* produced show that significant activity at these three Departments, as well as interactions involving the White House, continued over the next four months on issues central to the pipeline's approval. Tribes communicated with all three Departments to complain about the pipeline. AR ESMT 1475 (Ex. 3) (Sept. 19, 2016 letter from Cheyenne River to the three Departments); AR ESMT 1370 (Ex. 4) (Sept. 22, 2016 letter from Standing Rock to Jo-Ellen Darcy, Assistant Army Secretary for Civil Works ("ASA Darcy")); AR ESMT 1300 (Ex. 5) (letter referencing Tribe's September 23, 2016 meeting with "the entire federal team," sent from Standing Rock to ASA Darcy, and copied to Justice Department's Principal Deputy Attorney General and Acting Chief of Staff, as well as Interior's Solicitor and Assistant Secretary for Indian Affairs). Tribes also communicated with the Departments and the White House. AR ESMT 960 (Ex. 6); AR ESMT 963 (Ex. 7); AR ESMT 974 (Ex. 8); AR ESMT 1033 (Ex. 9). In addition, on October 10, 2016, after the D.C. Circuit rejected Standing Rock's bid for a stay pending appeal of this Court's order denying a preliminary injunction, the same three Departments publicly confirmed the continuation of work on issues related to the pipeline approval. They jointly announced that the Army's review of "issues raised by the Standing Rock Sioux Tribe and

other Tribal nations and their members" was continuing and that it "hopes to conclude its ongoing review soon." Oct. 10, 2016 Joint Statement (Ex. 10).

Ten days later, on October 20, David Cooper, General Counsel for the Corps, submitted a lengthy memorandum for the express purpose of "provid[ing] information" to the Army "to enable it to determine whether it will need to reconsider any of its previous decisions regarding the location of the Dakota Access Pipeline (DAPL)" under NEPA or other federal laws as mentioned in the September 9 Joint Statement. AR ESMT 1213 (Ex. 11).

A few weeks later, on November 14, ASA Darcy reported in a letter to Standing Rock, Dakota Access, and Dakota Access's parent company, that the review announced on September 9 had been "completed." D.E. 56-1 (Ex. 12). She acknowledged that, after "accounting for information" that the Army had "received from the Tribes and the pipeline company since September," the Army "concluded that its previous decisions comported with legal requirements." *Id.* at 2. Yet despite that conclusion, ASA Darcy opined that "additional discussion with the Standing Rock Sioux Tribe and analysis are warranted." *Id.* at 3. She thus "invite[d] the Standing Rock Sioux Tribe to engage in discussion" concerning topics related to the pipeline. *Id.*

Despite all of this activity between September 9 and November 14, the administrative record provided by the government contains almost no communications (i) *among* the agencies, (ii) *within* each agency, or (iii) *between* any agency and the White House. In fact, the sum total of *all email chains* produced by the Corps for that two-month-plus date range is five—one of which is a duplicate. *See* AR ESMT 999–1485.

Over the remainder of November and into December the agencies engaged in even more activity relevant to Plaintiffs' claims. The first weekend of December was particularly busy. On Sunday, December 4, the Department of Interior's Solicitor completed a lengthy memorandum

(called an M-Opinion) that the Interior Secretary had requested. AR ESMT 565 (Ex. 13). The Solicitor had already shared a draft of her M-Opinion with ASA Darcy, who herself was preparing a memorandum, also dated December 4. D.E. 65-1 (Ex. 14). The Interior Solicitor's M-Opinion (which Interior has since withdrawn) recommended that the Corps prepare an Environmental Impact Statement for the pipeline.

But ASA Darcy had a problem. The Interior Solicitor's recommendation directly conflicted with the recommendation she received from *within* the Army just one day earlier. That December 3 memorandum was signed by Colonel John Henderson, Commander for the Corps's Omaha District, whose office had vastly greater experience with all information relevant to approval of the pipeline crossing at Lake Oahe. Based in part on the substantial work the Corps had already put into preparing and finalizing an Environmental Assessment ("EA"), along with Colonel Henderson's July 25 Finding of No Significant Impact on the environment, the Colonel's December 3 memorandum set forth his detailed and well-documented recommendation to grant Dakota Access the easement without further delay. His transmittal emphasized the Corps's "extensive review and additional coordination with" Standing Rock and Dakota Access. AR ESMT 368 (Ex. 15). Brigadier General Scott Spellmon, Commanding General for the Corps's Northwestern Division, "fully endorse[d] and concur[red]" with Colonel Henderson's recommendation, explaining that it "follows over 25 months of study, analysis and consultation with numerous partners." *Id.* Counsel at Army headquarters also reviewed and approved the recommendation. *Id.*

ASA Darcy chose to take her advice from the other agency—the Department of Interior—thus rejecting the recommendation from several of her agency's own expert personnel who had detailed knowledge of the project. That put her in the position of trying to explain why, in her "judgment," after her own experts had completed two years of painstaking analysis, there should

be yet "additional analysis," or why this new analysis would be "best accomplished" by "preparing an Environmental Impact Statement (EIS)," which her own experts had conclusively determined was *not* required. D.E. 65-1 ¶ 12 (Ex. 14). She couldn't base her decision on any legal *requirement* for additional analysis, because she conceded—indeed, she went out of her way "to be clear"—that her decision did not "alter the Army's position that the Corps' prior reviews and actions have comported with legal requirements." *Id.* ¶ 15. Included within those reviews and actions was the Finding of No Significant Impact on the environment. She ultimately was forced to fall back on calling her action a "policy decision" that she "based on the totality of circumstances in this case." *Id.*

Despite all of this cross-agency activity and intrigue, the record so far contains only a handful of emails from early December. And those mainly concern scheduling and then recapping a five-hour meeting in North Dakota on December 2—attended by Standing Rock, the Corps, and Dakota Access—to which the company brought 20 subject matter experts to answer any and all questions the Tribe had about the pipeline. *E.g.*, AR ESMT 848 (Ex. 16). (Some of the scheduling emails included unsuccessful efforts to secure attendance by representatives of the Pipeline and Hazardous Materials Safety Administration. AR ESMT 895 (Ex. 17).)

What little the Corps has produced for this time period leaves no doubt that much more is missing. There are no communications between Interior and the Army about the preparation or content of the Interior Solicitor's memorandum; in fact, there aren't even any communications *internal* to either the Army or Interior on that topic. There also is just one email in the *entire record* between anyone at the White House and any of the agencies: On December 2, Brian Deese, Senior Advisor to the President, wrote to Lowry Crook, Principal Deputy Assistant Secretary of

the Army (Civil Works), about the "reaction this week to the Corp's recent announcement on review of the Dakota Access pipeline process." That reaction "reminded" Deese that he "wanted to touch base." Deese wrote:

> I know there have been a number of calls for the President to be directly involved and I know that the White House is receiving periodic updates about the security situation on the ground as events have unfolded. But I don't want there to be any confusion about the White House's engagement here. As you already know-- and I just want to make absolutely clear -- we expect the Army will make its own independent assessment of decisions related to the project, including when it comes to timing. Thanks, as always, for your continued effort.

AR ESMT 897 (Ex. 18).

This self-serving, papering-of-the-record email makes clear that the White House and the President himself had already been significantly involved in the process. Deese refers, for example, to things that Crook already knew from earlier discussions, and Deese's reference to wanting the Army's independent assessment is supposedly a reiteration of what was said in one of those other discussions. Yet this is the only email in the entire record to or from anyone at the White House.

As this Court knows, ASA Darcy decided to postpone acting on her December 4 policy judgment to conduct an EIS. In fact, she waited more than six weeks—until January 18, 2017—to publish notice in the Federal Register. Dakota Access argued to this Court at the time that by waiting until two days before the change in administrations, ASA Darcy sought to maximize delay. The record now available—incomplete though it is—confirms as much. The same regulations that ASA Darcy cited in her memorandum required her to "publish a notice of intent" to prepare an EIS "[a]s soon as practicable after [her] decision to prepare" one. 40 C.F.R. § 1501.7. Yet more than a month passed before she published a notice that is so perfunctory her delay cannot possibly be excused by the need for further work or analysis. In fact, her notice merely repeats what she wrote on December 4. *Compare* D.E. 65-1 (Ex. 14) *with* 82 Fed. Reg. 5543 (Jan. 18, 2017).

Even Standing Rock understood at the time that ASA Darcy had no legitimate reason to delay publication; its Chairman thus "anxiously" inquired on January 4 about the timing for the notice, stating that the Tribe was "becoming increasingly nervous that the EIS Notice and initial scoping meetings have not been issued before January 20th." AR ESMT 532 (Ex. 19). Whether ASA Darcy responded to Chairman Archambault's email with a call (as he requested) or with an email that the government has yet to produce, the absence of further inquiries by Chairman Archambault about timing shows that she found a way to put his anxiety to rest.

During this same period—between early December and January 18—agency consultation about the pipeline continued apace. For example, the Oglala Sioux Tribe asked to meet with several components of Interior, as well as representatives from Justice, the Army, the Corps, and the Environmental Protection Agency; and the Tribe scheduled that meeting for January 17. AR ESMT 474 (Ex. 20). (A January 13 email within the Corps also listed real estate topics to discuss with that Tribe. AR ESMT 471 (Ex. 21).) Standing Rock met with ASA Darcy again on January 13. AR ESMT 466 (Ex. 22). The Army held a December 15 conference call with approximately a dozen tribal leaders, and notes of the call reveal an earlier meeting with those tribal leaders (on December 9) that also included Justice, the Army, and Interior. AR ESMT 537 (Ex. 23).

Even with this substantial level of activity leading up to the change of administrations, the portion of the record that the government has made available for this time period is also exceptionally lean. It includes little more than: (i) a December 6 letter from Cheyenne River to ASA Darcy and Colonel Henderson (AR ESMT 563 (Ex. 24)); (ii) an email chain internal to the Corps on efforts to answer questions by Standing Rock (AR ESMT 544 (Ex. 25)); (iii) a December 9 letter from ASA Darcy to Cheyenne River that supports this Court's jurisdiction over Dakota Ac-

cess's Declaratory Judgment Act cross-claim in that ASA Darcy vowed that the Army would "pursue any and all rights and remedies available under the law" if "any unauthorized drilling were to occur" (AR ESMT 543 (Ex. 26)); and (iv) a January 19 letter from ASA Darcy to Chairman Archambault confirming her January 18 Federal Register notice and expressing gratitude and appreciation to him in her "last official act" (AR ESMT 466 (Ex. 22)). That last document also makes clear that ASA Darcy was well aware of the effect that her delayed Federal Register notice had on this litigation. *Id.* (letting Chairman Archambault know her awareness that the Army published the Notice of Intent (or NOI) on January 18 "and immediately defended the NOI in Federal Court").

For the entire period relevant to this motion to compel—*i.e.*, September 2, 2016 through January 20, 2017—the Corps has produced a grand total of 109 documents. Many, if not most, are already in the public record. Just one quarter are email strings—a total of 27 for the entire four-and-a-half month period. As noted earlier, only one of those 27 includes as sender or recipient anyone from the White House. No emails have been produced that went between any of the three Departments that issued the joint statements (*e.g.*, no emails from Interior to the Army or from Justice to Interior). In fact, nearly every email of any note from this important time period has already been described above.

2. The Issues Raised by Plaintiffs' Claims

When this case started, the record was properly limited to pre-July 25. Plaintiffs challenged only agency action occurring on or before that date. On November 15, Dakota Access filed a cross-claim based on the unusual post-September 9 turn of events. In the cross-claim Dakota Access contends that the Corps had made the decisions and determinations for granting a right-of-way in July, and the company therefore sought a declaratory judgment that Dakota Access had the legal authority to complete the pipeline beneath Lake Oahe. D.E. 57. On December 5, Dakota

Access filed a motion for summary judgment on its cross-claim, D.E. 66, and the Court set an expedited briefing schedule. As explained below, Dakota Access also sought to compel the production of documents that were missing from the administrative record.

After the Corps issued the signed easement in February, this Court denied, without prejudice, Dakota Access's motion for summary judgment on its cross-claim, given that a declaratory judgment may no longer be needed. After Dakota Access filed its motion for summary judgment on its cross-claim, Plaintiffs subsequently moved to amend their complaints. D.E. 97 & 106. Neither the Corps nor Dakota Access has opposed amendments based on events that occurred after Plaintiffs filed or last amended their complaints, meaning events after September 8. (The Corps does not oppose any of the other amendments, either. D.E. 188.)

The upshot is that agency actions post-dating July 25, 2016 are now squarely at issue in this lawsuit. For example, and as detailed below, the Tribes argue that the process of further review starting in September binds the Corps to a particular course of action—in particular, preparation of an EIS. They also argue that the Army's decision to rescind notice of the EIS process and issue the easement was an unlawful "reversal" of a previous agency decision.

Dakota Access, for its part, has consistently argued that the post-September 9 process on which the Tribes stake their arguments was itself unlawful. In particular, the Department of the Army, the Department of the Interior, the Justice Department, and the White House had no lawful basis to revisit the Corps's final determination, set forth in its Finding of No Significant Impact (a final agency action), that the crossing of land in the Corps's jurisdiction "is not injurious to the public interest and will not impair the usefulness of the federal projects" and that the "preparation of an Environmental Impact Statement is not required." AR 71179 (Ex. 27). As explained below, the unlawfulness of this added process is one reason the Corps and the Army were entitled to issue

the easement without any need to revisit, let alone supplement, the rationale that the Corps articulated on July 25.

3. The Procedural History of Disputes Over the Record

This is not the first dispute over the record in this case. On November 15, 2016, the same day Dakota Access filed its Declaratory Judgment Act cross-claim, it moved to supplement the administrative record with documents relevant to the September 9 Joint Statement and the events that followed. D.E. 58.

Dakota Access sought additional records for two purposes. First, it argued that the missing documents "directly bear on Plaintiffs' claims that the Corps did not comply with the law when it decided to allow Dakota Access to build an oil pipeline beneath Lake Oahe in North Dakota." D.E. 58-1 at 1; *id.* at 4-5. Among other things, the records were "important to understanding the scope of the decisions at issue in Plaintiffs' claims." D.E. 62 at 2.

Second, Dakota Access explained that the missing records would support its cross-claim—a claim alleging that the Corps had already made all of the necessary determinations for a right-of-way—by helping to expose "the political interference that has plagued" the pipeline approval process "and run afoul of the rule of law since at least September 9." *Id.* at 2-3. It pointed out that the government was taking "irreconcilable positions," *id.* at 2, and it attributed that posture to "the government's unprecedented conduct and political interference," *id.* at 4. It contended that the joint announcements by the three Departments raised grave doubts as to how further review could be squared with the government's representations (including representations made to this Court on September 16) that the Corps was *not* reconsidering its July 25 decisions. *E.g.*, Sept. 16, 2016 Hr'g Tr. (Ex. 2) at 12:19–22 ("Your Honor, . . . you keep using the term 'reconsideration' As we stand here now, we still do not believe this is in a situation of reconsideration.")

Dakota Access thus challenged the entire process as resting on an "artificial distinction" and sought records that would "likely demonstrate arbitrary and capricious political interference with the implementation of a decision that was made, and has now been subsequently validated." D.E. 58-1 at 5. Documents showing the nature and extent of political interference would support the claim that all relevant authorizations had been completed. *See id*. This other purpose for seeking these records also negated assertion of a pre-decisional deliberative process privilege. *See* D.E. 62 at 11 (citing *Alexander v. FBI*, 186 F.R.D. 170, 179 (D.D.C. 1999), to argue that the deliberative process privilege does not apply where "political motivation" for the government action is alleged).

Dakota Access's request in mid-November for materials that would support its challenge to the unlawful interference by the other Departments and the White House included:

- "all documents pertaining to the substance of the September 9 Joint Statement," and "all documents considered in developing and issuing" that statement;
- "all documents pertaining to the October 10 Joint Statement, including the determination whether to reconsider any previous decisions, and all documents considered as part of that determination";
- "documents considered in the determinations announced" on November 14 that "the permits at issue here 'comported with legal requirements'"; and
- "all documents that discuss the granting of the July 25, 2016 permissions and all that were considered in deciding to announce delay of the easement."

D.E. 58-1 at 6–9.

The Corps opposed supplementing the record. It claimed it had yet to make a final decision on the right-of-way (or easement). In the government's view, the only decisions at issue had been made on or before July 25, meaning that the record need not include later documents. D.E. 61 at 1–2 & 5–11. It also objected that the proposed deadline would not give it sufficient time to locate and produce more documents. *Id.* at 2 & 12–15.

The Court denied the motion to supplement without prejudice. It "largely agree[d] with the government's position that, right now, if [Dakota Access is] arguing that the July 25th decision was determinative, then the documents that predate and include that July 25th date should be sufficient." Dec. 9, 2016 Hr'g Tr. (Ex. 28) at 10:16–20. The Court left open the possibility of access to post-July 25 documents if later pleadings made them relevant. *Id.* at 10:21–11:3 (stating that if the government "opens the door by relying on documents postdating" July 25, "I'll let you renew that motion and I'll address that on [an] expedite[d] basis"). In the meantime, the Court acted to prevent delay should it later require production of these records by requiring the government to "make reasonable efforts to compile the documents sought" in Dakota Access's motion. *Id.* at 13:14. (The government advised that it was already compiling relevant documents in anticipation of what it characterized as a final decision on the easement. D.E. 61 at 12.)

After the Corps issued the easement, the Court addressed the administrative record again with the parties. The government confirmed that it had "been compiling documents related to the [easement] decision-making process as we were going along." Feb. 6, 2017 Hr'g Tr. (Ex. 29) at 19:4–6. The Court asked the government to continue that course: *i.e.*, "to attempt to compile" it "on an ongoing basis so that we could do it in some expedited fashion." *Id.* at 19:20–22. One week later, after the Corps signed and issued the easement, the government advised that its "best estimate" for the administrative record for the February 8 easement decision was March 10. Feb. 13, 2017 Hr'g Tr. (Ex. 30) at 39:20–24. The Court asked the government to continue to expedite compilation of that record as well as to expedite certification of the record already lodged. *Id.* at 40:15–19. Dakota Access stated its understanding that the government would be producing "everything that post-dates July 25th up to the February 8th decision that relates to the claims that have been brought." *Id.* at 43:1–5 (specifying the relevant statutes). The government never sought to

narrow the scope of the record relevant to Plaintiffs' claims—*i.e.*, the scope of documents at issue in the earlier Motion to Supplement the Administrative Record.

ARGUMENT

The Current Record Is Seriously Deficient and Must Be Corrected

Several missing documents must be added to the administrative record for this case. Since December, when this Court first addressed the adequacy of the administrative record, Plaintiffs have expanded their claims to challenge agency action that occurred between July 25, 2016 and February 8, 2017. The three Departments participated heavily in that decision-making process, including the decision whether to delay the easement in favor of further consultation and various other steps. In addition, Plaintiffs' legal challenges rest, to a significant degree, on two related assumptions: (i) that the additional agency process the three Departments announced on September 9 was lawful; and (ii) that the government needed to make a special showing before it could bring that process to an end. The missing documents are needed to help Dakota Access establish why both assumptions are wrong. In particular, the missing documents will show that the previous administration's process for revisiting the issues that the Final EA and the FONSI had already resolved was infected with improper political interference lacking a basis in law. The government should be ordered to add the missing documents to the record promptly.

A. When adjudicating a claim brought under the APA, a court must review "the whole record." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case."). "The 'whole' administrative record . . . consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 20 (D.D.C. 2013),

aff'd sub nom. Dist. Hosp. Partners, L.P. v. Burwell, 786 F.3d 46 (D.C. Cir. 2015) (quoting *Stainback v. Sec'y of Navy*, 520 F. Supp. 2d 181, 185 (D.D.C. 2007)) (quotations and ellipsis in original); *see also Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 196 (D.D.C. 2005) ("[T]he record must include all documents that the agency 'directly or indirectly considered.'") (citation omitted). "[A]n agency may not skew the record by excluding unfavorable information . . . [n]or may an agency exclude information simply because it did not rely on it for its final decision." *Dist. Hosp. Partners*, 971 F. Supp. 2d at 20 (internal citations omitted).

"[A]bsent clear evidence to the contrary, an agency is entitled to a strong presumption of regularity, that it properly designated the administrative record." *Pac. Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006). Courts in this circuit have held that a party can nonetheless rebut this presumption of regularity in at least three "unusual circumstances:" "(1) if the agency 'deliberately or negligently excluded documents that may have been adverse to its decision,' (2) if background information was needed 'to determine whether the agency considered all the relevant factors,' or (3) if the 'agency failed to explain administrative action so as to frustrate judicial review.'" *City of Dania Beach v. F.A.A.*, 628 F.3d 581, 590 (D.C. Cir. 2010) (quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)). Under such circumstances, the presumption of regularity is rebutted if a party "introduce[s] non-speculative, concrete evidence to support [its] belief that the specific documents allegedly missing from the administrative record were directly or indirectly considered by the actual decision makers involved in the challenged agency action." *Dist. Hosp. Partners*, 971 F. Supp. 2d at 20.

In addition, a court may order production of extra-record evidence—documents beyond the administrative record—if "needed to assist a court's review." *Nat'l Mining Ass'n v. Jackson*, 856 F. Supp. 2d 150, 156-57 (D.D.C. 2012).

B. Plaintiffs challenge decisions resulting from an administrative process, first announced in September 2016, in which three Executive Branch Departments determined that issuance of an easement should be postponed in favor of further process. All three Departments and the White House participated heavily in that determination, as well as in the process that resulted. In addition, each Plaintiff rests its case heavily on the argument that the Corps had a legal duty to consider information presented *after* that agency made its July 25, 2016 Finding of No Significant Impact. And each Plaintiff asks this Court to consider extensive materials that neither they nor anyone else bothered to present to the Corps or any of the other agencies until after the government announced its new and unusual process on September 9. As explained below, the missing records are fatal to Plaintiffs' claims on both points and therefore should be included in the record.

Standing Rock argues, for example, that the Corps violated the National Environmental Policy Act by failing to prepare an EIS on the Lake Oahe crossing. That argument relies extensively on what it describes as a two-phase process that the three Departments did not even start until September 2016 and that—according to the Tribe—focused on issues related to the EA (phase one) and treaty rights and oil spill risks (phase two). D.E. 117-1 (Standing Rock Brief) at 10-14. Standing Rock cites to expert reports that it and two other tribes commissioned, but none of those reports is dated any earlier than October 28, 2016. *Id.* at 10-12 (Accufacts Report; EarthFax Report; and Envy Report); *id.* at 20-22 (challenging July 25 § 408 decision because, "most critically," "serious questions" are raised by "expert reports critiquing the Final EA after the Corps reopened the dialogue on the Oahe crossing"). Standing Rock also relies heavily on the former Interior

Solicitor's opinion, which the Solicitor did not complete until December 4, 2016, and which itself relied on post-July 25 documents. *See, e.g.*, D.E. 117-1 at 13-14; *id.* at 24-26 (quoting from Solicitor's December 4 Opinion to criticize the Final EA); D.E. 195 at 9-11, 17-18, 23-24. The Tribe calls this Interior Department document, written specifically to address the approvals at issue in this case, an "authoritative Opinion" that "changed the playing field dramatically" on approval of the pipeline crossing D.E. 195 at 33; *id.* at 9 n.9 (invoking "the weight given by" ASA Darcy "to the Solicitor's analysis in the Dec. 4 determination to conduct further review of Treaty rights").

Cheyenne River does the same, citing tardy expert reports in both its motion and its Statement of Material Facts. D.E. 131 at 1 (Brief); D.E. 131-1 (Statement of Material Facts) ¶ 43. Cheyenne River even calls these untimely reports "preliminary," under the theory that a whole new governmental process was just getting started in January. D.E. 131 at 10 (arguing that the Corps, in withdrawing notice of the EIS process, "ignored the preliminary expert reports offered by SRST, CRST, and the Oglala Sioux Tribe during the truncated easement 'comment' period before rendering its conclusory decision").

Plaintiffs then go a step further, arguing that the Corps was *required* to follow this new process that the three Departments initiated, and they assert error in deviating from that process by invoking "heightened scrutiny" that supposedly applies "where an agency reverses its own prior decision." D.E. 117-1 at 16, 35-39. An entire section of Standing Rock's summary judgment motion is devoted to the argument that notice to terminate the EIS process, a process that ASA Darcy first suggested publicly in December 2016, was a "reversal" of agency action that "runs afoul of the reasoned decision-making required by the APA under" *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29 (1983). D.E. 117-1 at 35-36 (arguing that the Corps "failed to address, let alone

provide a reasoned explanation for, abandoning the determinations undergirding its December 4 decision to require an EIS"). A key premise for this argument is that the EIS process was somehow required—even though the Corps had already decided on July 25 that one was *not* required—and that ASA Darcy's December 4 memorandum provided its legal underpinning. *Id.* at 36 (asserting that ASA Darcy directed an EIS to "rectify . . . shortcomings" in the process); D.E. 195 (Standing Rock Reply Brief) at 33 (alleging that the Corps "failed to provide an explanation that satisfies APA review for departing from the December 4 decision" and that it "ignored the findings" in that decision).

Plaintiffs exploit their version of this extra-legal administrative process to seek judgment on their claims, arguing that *they*—not Dakota Access—were prejudiced by the actions that improperly delayed the easement. D.E. 199 at 2 (Cheyenne River challenges Dakota Access's point that the Tribes engineered "continuation of the administrative process" as "unsupported and false"). Under Plaintiffs' distorted view, "the Corps, Dakota Access's co-defendant, was solely responsible for the continuation of the administrative process," *id.*, when even the limited record so far shows that the Corps was the one agency trying to end the unlawful effort by the other Executive Branch components to delay the easement. Cheyenne River even goes so far as to call itself "the victim of this process," insisting it did not "create or drive" the so-called "tortuous process" that held up the easement, and arguing that the contrary view is an "implausible fabrication." *Id.* at 3.

Finally, the Tribes accuse the *current* administration of politically interfering in the process that was itself the product of political interference. D.E. 117-1 at 35 (Standing Rock accusing the Corps of an "abrupt about-face" "[i]mmediately after the election and at the direction of the new

President"); D.E. 195 at 2 ("The Corps started down the path of righting . . . wrongs when it committed to prepare an EIS," but "[w]ithin days, the new administration jettisoned that process and granted the easement without further NEPA review."); *see also* D.E. 131 at 19 n.5 (Cheyenne River calling withdrawal of the Solicitor's Opinion a "political decision to erase [her] analysis from the books" that "underscores the results-oriented mindset that has permeated the government's decision-making related to this project").

C. Given how Plaintiffs have alleged their claims, Dakota Access is entitled to the missing records. It is plain that the three Executive Branch Departments all participated in the determinations to delay issuance of the easement in favor of further process. Plaintiffs argue that the delay was appropriate—in fact, they insist it was required. To the extent the Court entertains such arguments, the records those Departments considered and their communications about those determinations are properly subject to the Court's review.

Additionally, Dakota Access needs these records to show that the three Departments and the White House worked outside of the lawful process—a process that the Omaha District of the Corps had been properly following up until that interference—all in an effort to run out the clock so that they might kill the project through unwarranted delay alone. There can be no doubt that the record is incomplete on this important issue and that the missing records would assist Dakota Access's defense.

This Court has noted that "political decisions" are part of "what government does." Sept. 16, 2016 Hr'g Tr. (Ex. 2) at 15 (referring to "decisions where they have to weigh the interests of competing groups"). The records at issue in this motion are needed to prove something else: improper political interference in the agency processes. The existing record already confirms that records of improper interference have been withheld.

The Court has already alluded to one example. In August 2016 the Corps persuasively urged this Court not to grant a preliminary injunction to Standing Rock after the Tribe had refused to participate in the two-year agency process leading up to July 25, 2016. Delaying completion of the pipeline "after both the Corps and Dakota Access have invested significant time and resources and accommodated timely raised tribal concerns," the Corps pointed out, "would only reward Plaintiff's unwillingness to engage meaningfully in the consultation process" and give the wrong incentive by "encourag[ing]" others to do the same. D.E. 21 at 43. But before this Court could even accept that valid reasoning—and the Court eventually *did* endorse it—personnel at higher levels of the government were charting an opposite path in which the Tribe *would* be rewarded for unwillingness to participate. Surely someone at one of the three Departments or at the White House alerted others to the serious problem created by this glaring inconsistency, but all proof of it is missing from the record. Similarly, it is inconceivable that nobody questioned an agency's authority to go back *sua sponte* and purportedly reconsider whether it made the right decisions while refusing even to call it a "reconsideration." *Cf*. Sept. 16, 2016 Hr'g Tr. (Ex. 2) at 12 (government counsel resists characterizing the new process as a "reconsideration").

And that is just the beginning. What—other than a politically fueled "results-oriented" mindset to delay a project by any and all means—would prompt a decision-maker to stop an agency from going forward while it determines whether all previous decisions comport with the law, and then stop the agency a second time even *after* it determines that all previous decisions *did* comport with the law? Why ask a *different* Department to write a memorandum supporting further delay unless it is clear that the persons with the relevant expertise who have worked on the issue for two years—persons within one's *own* agency—will not support that delay? That is precisely what

happened here, yet the government has produced none of the records that would expose the circumstances surrounding these impermissible actions.

Back in November, when the scope of the record was first in dispute, the Corps alluded (ever so briefly in a footnote) to the privilege for pre-decisional deliberative process. D.E. 61 at 13 n.5. Dakota Access explained why that is no excuse for refusing to produce records here. D.E. 62 at 11-12. Among other things, the documents that are missing from this record are needed to show that the government engaged in an unlawful process. The privilege does not extend to such materials. *See Alexander v. F.B.I.*, 186 F.R.D. 170, 179 (D.D.C. 1999) (no privilege for inquiry into political motivation for government action). At a minimum, the government should be required to log any documents it withholds in a Vaughn index so that the Court and the parties know what is being withheld and why.

There is no valid explanation—none at all—for how the administrative record could contain zero communications between the three Departments. Government counsel assured this Court that all three had been feverishly grappling with a host of "heady and important issues" in the days leading up to their first Joint Statement. Even the communications *within* these agencies on the decisions made between September and January are all but non-existent. The same is true for communications between these Departments and the White House. It is clear from just the December 2 Deese email that the White House was following the process closely and actively taking part. Yet that email is the only one to or from anyone at the White House that the government includes in the record.

It is no excuse for the government to limit its record collection efforts to the Corps or even the Army. Three different Departments jointly participated in the determinations and announcements that the pipeline approval process would be delayed. Moreover, the records are needed for

more than just proving what the Corps decided or documenting the record upon which its decisions were based. They are also needed to show that others outside the Corps decided to prevent that agency from finalizing its decision about the Lake Oahe crossing. This type of material, even if it could be characterized as solely extra-record, is directly relevant to this Court's review because it would assist in resolving a valid defense to Plaintiffs' claims. *See Nat'l Mining Ass'n*, 856 F. Supp. 2d at 156-57. As noted above, Plaintiffs' claims rest on the assumption that the process announced September 9 was valid. Records from other agencies and the White House are important precisely *because* persons outside the Corps should not have been exerting influence on that agency's decision-making, especially after the Corps had already made its key final decisions and the parties were already litigating those final actions in this Court.

Plaintiffs ask this Court to view their claims as having arisen in a world in which the agency process between September 9 and January 20 was entirely lawful. (The government does too, perhaps to avoid potential embarrassment from exposure of that process or to avoid a precedent for future cases.) But the Court should not impose that alternative reality on itself. And Dakota Access should not be put through the litigation risks that come with having to defend agency actions here and in the D.C. Circuit while stuck laboring under such a false premise. That is especially true given that Dakota Access has already suffered substantial prejudice from the inordinate delay that this unlawful process created. That multi-month delay imposed substantial costs on the company, its investors, workers, and the states and localities that have lost tax revenue and other economic benefits. It would add insult to injury for Dakota Access to be denied the opportunity to pursue a valid defense: that the process that unfolded starting no later than early September was legally impermissible and cannot be used to support any of Plaintiffs' claims.

D. As noted earlier, the records that should be produced from the custody of the three Departments and the White House fall into at least these four categories:

- All documents that relate to the preparation and substance of a September 9, 2016 Joint Statement issued by the three Executive Branch Departments, as well as all documents considered by the three Departments in developing and issuing that Joint Statement.

- All documents pertaining to an October 10 Joint Statement by the same Departments, including the determination whether to reconsider any previous decisions, and all documents considered as part of that determination.

- All documents considered in reaching the determination that the Army announced on November 14, and then reiterated on December 4, that the permits at issue here "comported with legal requirements.

- All documents that discuss the granting of the July 25, 2016 permissions and all that were considered in deciding to announce delay of the easement.

The government also should not be allowed to invoke the privilege for pre-decisional deliberative process given that the documents are relevant to showing improper political interference with agency action.

For the reasons explained above, it is not plausible that the government has already produced everything responsive. (The government has, in fact, advised that it will not search for these categories of documents.) Surely there are emails and other records of discussions that surrounded and led up to the various public statements, memoranda, and announcements spanning the four-month-plus period. And it cannot be the case that nobody at Interior communicated with anybody at the Army (including the Corps) about this matter. At 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. A handful of depositions would help determine the number of persons from the three Departments and the White House who played an active role in the post-September 9 process, including those who were most heavily involved, and the steps the government took to locate their records. Only then could

the Court ensure that Dakota Access has the materials needed to defend fully the approvals for its pipeline.

CONCLUSION

For the reasons stated above, the Court should order the Corps to complete the administrative record with all documents that pertain to the public statements and decisions regarding the Dakota Access Pipeline beginning with the lead-up to the September 9 Joint Statement.

Dated: April 21st, 2017

Respectfully submitted,

/s/ William S. Scherman

William S. Scherman
David Debold
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
wscherman@gibsondunn.com

Kimberley Caine
William J. Leone
Robert D. Comer
NORTON ROSE FULBRIGHT US LLP
799 9th St. NW, Suite 1000
Washington, D.C. 20001-4501
(202) 662-0200

Counsel for Dakota Access, LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April, 2017, I electronically filed the foregoing document using the CM/ECF system. Service was accomplished by the CM/ECF system.

/s/ William S. Scherman
William S. Scherman
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
wscherman@gibsondunn.com

Counsel for Dakota Access, LLC