

**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

**DECLARATION OF DAVID DEBOLD IN SUPPORT OF DAKOTA
ACCESS, LLC'S REPLY ON ITS MOTION TO COMPEL COMPLETION
OF ADMINISTRATIVE RECORD**

I, David Debold, declare under penalty of perjury as follows:

1. I am a partner with the law firm of Gibson, Dunn & Crutcher LLP, counsel of record for Intervenor Defendant Dakota Access, LLC. I am a member in good standing of the Bar of this Court.
2. On the afternoon of March 15, 2017 counsel for the U.S. Army Corps of Engineers notified me that the administrative record relevant to the decision to grant an easement for the pipeline crossing at Lake Oahe was available. An index of this new portion of the record was lodged with the Court on March 24.

3. On March 27, I sent the attached email to counsel for the Corps advising that the record was missing a number of materials. My email specified the categories of missing materials, including communications between the Departments of the Army, Justice, and the Interior. My email also gave examples of items we were expecting.
4. On a phone call the following day, counsel for the Corps advised that he would discuss the issue with the Corps and then update Dakota Access on the Corps's plans with respect to the record.
5. In later communications, including on April 5 and April 7, counsel for the Corps advised that the Corps was still reviewing materials with the intention of supplementing the record. In response to the list of categories of documents that are identified in Dakota Access's now-pending motion, counsel for the Corps advised that he would discuss those categories with the Corps. He also stated, on an interim basis, that the Corps did not plan to produce attorney-client privileged, attorney work product, or deliberative documents, or documents that were not before the decision maker.
6. In a phone call on April 13, counsel for the Corps advised that while the Corps would be supplementing the record soon, it would not search for or produce the categories of documents that are listed on page 2 of Dakota Access's motion. *See* D.E. 216.

Executed on May 12, 2017

/s/ David Debold
David Debold

ATTACHMENT

From: Debold, David
To: [Schifman, Reuben \(ENRD\)](#)
Cc: [Scherman, William S.](#); [Fleischer, Jason J.](#); [Zilioli, Erica \(ENRD\) \(Erica.Zilioli@usdoj.gov\)](#); [Brar, Amarveer \(ENRD\)](#)
Subject: Administrative Record
Date: Monday, March 27, 2017 8:55:00 PM

Ben,

We appreciate the effort and hard work that go into preparing an administrative record, particularly in a case like this. We also know that you've come into the case only recently. With those understandings, we write to express our concern that the second AR supplement (as provided to us March 15 and lodged with the Court on March 24) is missing many materials we expected to see. These include emails and other communications between and among the three agencies involved here: the Departments of Justice, Army, and the Interior. We also do not see communications between each of those agencies and others, including the White House, Congress, Indian Tribes, and state governments.

We'd like to discuss how we might get the missing materials promptly or, if they are being withheld intentionally, we'd like to hear why before we trouble the Court with this issue. For example, if some of these materials are being withheld under a claim of privilege or some other protection, we ask that you provide us as soon as possible a privilege log or *Vaughn* index identifying the particulars and protections claimed for each withheld document.

A few examples of what we expected to see might be helpful, although this is not meant to be an exhaustive list. First, we do not see any documents containing discussions between the Departments of the Army, Interior, and Justice, or the White House, leading up to the joint statements that those departments made on September 9 and October 10, nor any documents relevant to the announcement and letter from Jo-Ellen Darcy on November 14 or her memorandum on December 4. *See, e.g.*, Joint Statement of Departments of Justice, Army and, the Interior Regarding *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (Sept. 9, 2016), <https://www.doi.gov/pressreleases/joint-statement-department-justice-department-army-and-department-interior-regarding> ("September 9 Statement"); Joint Statement of Departments of Justice, Army, and the Interior Regarding D.C. Circuit Court of Appeals Decision in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (Oct. 10, 2016), <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-dc>; D.E. 56-1; D.E. 65-1.

As for the September 9 statement, the Department and the Corps advised the Court at a hearing on September 16 that significant "conversations" were happening "minute by minute" leading up to the statement's release. Sept. 16 Tr. 11:16. Mr. Gette represented to the Court that "while [he] was not personally involved in those conversations, they were happening at a level higher than [he] 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 12:5-11. Such conversations led up to the Army's decision to "determine whether it [would] need to reconsider any of its previous decisions," September 9 Statement at 1, and its ultimate determinations that "its previous decisions comported with legal requirements." D.E. 56-1, at 1; *see also* D.E. 56-2, at 1 (stating that the Army "has completed the review that it launched on September 9, 2016"); D.E. 65-1, at 4 (stating that "this decision does not alter the Army's position that the Corps' prior reviews and actions have comported with legal requirements"). The communications among these three Departments or between any of them and other agencies or entities—relating to the subjects of the September 9, October 10, November 14 and December 4 statements, letters, and memoranda—are therefore properly considered part of the record in this case and should have been included in the AR supplement.

As another example, the AR Supplement includes a December 2, 2016 email from Brian Deese, senior advisor to President Obama, to the Principal Deputy Assistant Secretary of the Army, Lowry Crook. In this email, Deese states, "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." USACE_ESMT000897. Deese is referring to prior discussions on the same topic—including previous communications between the Army and the White House—yet no other records fit the description.

Finally, the former Solicitor for the Department of Interior drafted a lengthy memorandum—since withdrawn—that supported Jo-Ellen Darcy's policy decision in her December 4 memorandum to engage in further tribal consultation and possibly pursue preparation of an environmental impact statement. The former Solicitor also finalized her memorandum December 4. It is evident from the content of the former Solicitor's memorandum that there was coordination between Interior and the Army and significant input from the Standing Rock Sioux Tribe and perhaps other tribes. Yet we have received nothing of this nature.

If you would like to discuss, please let us know. We look forward to hearing when we can receive the revised AR supplement, or a log of the withheld documents along with clarification for your approach.

Thanks,
David

David Debold

GIBSON DUNN

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