IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

THE STATE OF LOUISIANA, By and through its Attorney General, JEFF LANDRY, et al., PLAINTIFFS, v. JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, et al., DEFENDANTS.	CIV. NO. 2:21-CV-00778-TAD-KK

Memorandum in Support of Motion for Limited Extra-Record Discovery to Complete the Administrative Record

Pursuant to the Court's August 17, 2021, Order adopting the Rule 26(f) Report, Plaintiff States move for an order allowing limited extra-record discovery to complete the administrative record. Specifically, Plaintiff States move the court to authorize Plaintiff States to propound interrogatories and requests for production to Defendants and to depose two government officials. The shortcomings in the lodged administrative record make such discovery necessary to complete the record.[1]

I. The Court Should Authorize Limited Extra-Record Discovery.

Plaintiff States move for extra record discovery during an abbreviated discovery period to complete the administrative record. To be sure, extra-record discovery is not standard in Administrative Procedure Act cases, but it is appropriate when "'there was such failure to explain administrative action as to frustrate judicial review,' or, if administrative findings were made at the time of the challenged action, upon a 'strong showing of bad faith or improper behavior' on the part

[1] Plaintiff States and Defendants have attempted to negotiate a resolution to these issues, but were unable to come to an agreement. In response to Plaintiff States' request to complete the record, Defendants located additional documents that they did not originally include in the record, but also indicated that they would file an errata withdrawing items from the administrative record already lodged with the Court. This correspondence is attached.

of the agency." *La Union Del Pueblo Entero v. FEMA*, 2011 WL 1230099, at *9 (S.D. Tex. Mar. 30, 2011); *accord Louisiana Sportsmen All., LLC v. Vilsack*, 2013 WL 12182156, at *2 (W.D. La. Sept. 4, 2013) ("In instances where 'the agency considered evidence omitted from the administrative record', a court may consider 'extra-record' evidence."). Accordingly,

> courts have generally permitted extra-record discovery "(1) when agency action is not adequately explained in the record before the court; (2) when looking to determine whether the agency considered all relevant factors; (3) when a record is incomplete; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues; (5) when evidence arising after the agency action shows whether the decision was correct or not; (6) in certain NEPA cases; (7) in preliminary injunction cases; and (8) when an agency acts in bad faith."

La Union Del Pueblo Entero, 2011 WL 1230099, at *9. Several of those grounds for extra-record discovery are applicable here.[2]

The administrative record submitted to the Court contains no adequate explanation of Defendants' actions and is clearly (and flagrantly at parts) missing relevant documents. This case requires the Court to determine "whether the agency considered all relevant factors" under OCSLA and the MLA. *Id.* But the fragmentary record submitted by Defendants remains incomplete. For example, the record is barren of the policy rationale and evidentiary basis leading up to Section 208 of Executive Order 14008. The record also neglects to provide any insight whatsoever into the "reset" and "30 by 30" rationales contained in the various fact sheets explaining the oil and gas leasing Pause. These rationales were integral to the Pause at the time it was promulgated but seem to have been abandoned post hoc in litigation. These rationales—which provide contemporary reasons in conflict with OCSLA—are key to Plaintiff States' statutory and arbitrary and capricious claims. And there is nothing whatsoever in the record about the basis of their promulgation—the rationales just appear in

[2] This ex ante approval procedure has been utilized by courts in suits against the federal government to resolve foreseeable record supplementation issues in advance. *See, e.g.*, *Indep. Turtle Farmers of Louisiana, Inc. v. United States*, 703 F. Supp. 2d 604, 609 (W.D. La. 2010); *see also Schaghticoke Tribal Nation v. Norton*, 2006 WL 3231419, at *3 (D. Conn. Nov. 3, 2006); *Glenwood Springs Citizens' All. v. United States Dep't of the Interior*, 2021 WL 916002, at *1 (D. Colo. Mar. 10, 2021).

the record as if they descended from on high. Defendants' failure to provide evidence related to the high-level decisions and evidence informing the Pause is an obvious gap in the record that warrants extra-record discovery and supplementation. *See Williams v. Roche*, 2002 WL 31819158, at *3 (E.D. La. Dec. 12, 2002) ("Plaintiff may be permitted some limited discovery to explore whether the agency considered other evidence, either directly or indirectly, in reaching its decision and to determine whether the administrative record is actually complete.").

The face of the lodged record also reveals several gaps. For example:

- An email from Walter Cruickshank, Deputy Director of BOEM, states on January 20: "We have received instruction to withdraw any notices that are pending..." and "The withdrawals do not signify anything more than the new leadership team wanting to evaluate the pending items." Documents evincing those desires of, or instructions from, the leadership team do not appear in the record. Such statements and the identity of who made them are potentially relevant to Plaintiff Sates' claims as they may provide rationales in conflict with OCSLA. Because this was the first day of the Administration, high level involvement in this decision in this decision would be expected. ECF 172-3, BOEM 00027.
- At various points in the record, DOI officials ask the Federal Register to withdraw documents on public inspection, including the Lease Sale 257 Record of Decision. The source of these instructions and reasoning behind them are not disclosed in the record. This is potentially relevant to Plaintiff States' claims as they are evidence of the Pause and of the illegal rationale behind the Pause. *See, e.g.*, ECF 172-3, BOEM00028-29.
- Reference to the "fact sheet" first appears in a January 27, 2021, email from Jennifer Van der Heide, DOI Chief of Staff, to DOI components. No evidence whatsoever is in the record about the evidence considered in promulgating this document despite its role in justifying the oil and gas leasing Pause. The document contains reference to the "30 by 30" rationale and "reset" rationale that are potentially relevant to the factors the agency considered and Plaintiff States allege are unlawful. Because of the failure to provide an official writing implementing the Pause, this fact sheet is a relevant contemporaneous statement of reasons for the Pause. The documents and process surrounding the promulgation of this document are potentially relevant to Plaintiff States' claims regarding the arbitrary process in implementing the Pause, pretextual reasons for the Pause, the Pause's basis in factors not authorized by law, and the Pause's conflict with OSCLA. ECF 172-3, BOEM00050-55.
- In a January 29, 2021, email from Walter Cruickshank to all BOEM employees, Cruickshank highlights Executive Order 14008, indicates White House involvement in the fact sheet, highlighting the Pause, and promising to provide "additional guidance on implementing the Order ... as soon as we receive it." The extent of White House involvement is nowhere in the record, nor is the promised additional guidance or the source of such guidance. These items are potentially relevant to all of Plaintiff States' claims. ECF 172-3, BOEM00064-65.

- Various emails relate to the Lease Sale 258 cancellation but fail to indicate the source and rationale behind such authority to cancel and entire leasing process. The indications in the record of the sale cancellation notice being "fast tracked" further indicates high-level involvement that is not disclosed in the record. *See, e.g.*, ECF 172-3, BOEM00069. Such high-level involvement behind cancellation are potentially relevant to Plaintiff States' arbitrary and capricious and contrary to law claims.
- Emails between career officials at BOEM and NOAA indicate political involvement in the LS 258 cancellation and awaiting further high-level decisions, but the record does not disclose the substance of such involvement. ECF 172-3, BOEM00113-14. There are no indications of Secretarial-level involvement as would be expected for such high priority, cross-agency component actions.
- A February 10, 2021, email from Steven Mullen, a DOI official, indicates close interest in the Lease Sale 257 ROD Recission, but the record is barren of the referenced political-appointee level involvement in the Recission. ECF 172-3, BOEM00133. Such involvement and the rationales behind the LS 257 ROD decisions are potentially relevant to Plaintiff States' arbitrary and capricious, unlawful delay, and contrary to law claims.
- A March 1, 2021, email from Laura Daniel-Davis, DOI Principal Deputy Assistant Secretary, to Michael Nedd, BLM Deputy Director of Operations, declares that high-officials have decided to Pause lease sales but the rationale or documents underlying this decision are not in the record. ECF 172-8, BLMI001180. Moreover, references to BLM's "perception that all future sales would be postponed" in this same email chain further demonstrates communications between DOI and BLM that are not in the record. ECF 172-11, BLMI002424-25.
- A memorandum from Michael Nedd to Laura Daniel-Davis refers to a Pause in lease sales and requests further instruction and provides future options, indicating that directives came from high-level leadership and were related to the Executive Order ("request clarification on the Bureau of Land Management's (BLM) next steps related to recent Executive Orders and Secretarial Orders"), but there is nothing further in the record indicating any response and the requested direction from high-level leadership. Additionally, despite Nedd's questions regarding statutory authority, there is nothing further in the record regarding DOI current leadership's addressing MLA statutory concerns. These issues are relevant to Plaintiff States statutory and arbitrary and capricious claims. ECF 172-9, BLMI001313-15.
- A February 12, 2021, email from Jeff Krauss, BLM spokesman, to BLM offices advises career officials of the political reasons for the lease pauses. There are no indications in the record of where these rationales originated, their evidentiary bases, or how they interact with other rationales. It is obvious that a spokesman was not authorized to provide these rationales, but the record does not disclose their origin. These rationales are potentially relevant to Plaintiff States statutory, pretext, unlawful delay, and arbitrary and capricious claims. ECF 172-10, BLMI002414.
- Emails between BLM officials and DOI indicate that a March 1, 2021, lease sale was moving forward and had cleared environmental review processes, but there is no indication in the record for why the lease sale never occurred. The reasoning behind this delay is unclear from the record. ECF 172-11, BLMI002417-29.

Plaintiffs States' correspondence with Defendants has revealed further gaps in the administrative record based on Defendants' misreading of Plaintiff States' allegations. In an October 20, 2021, letter, Defendants stated that they believed a document from DOI political leadership regarding a lease sale delay was not part of the administrative record because "Plaintiffs' challenge is directed at postponements, not their rescindments." *See* St. John Decl. Ex. 2. However, this "rescindment" was the rescindment *of an oil and gas lease sale postponement*. And it does not appear that the rescindment overcame the general Pause because the lease sale was never held. These matters—directives from DOI political leadership regarding whether lease sales will occur or not—are highly relevant to all of Plaintiff States' onshore oil and gas lease Pause claims. Yet, Defendants have admitted to withholding such documents from the administrative record—another clear sign that the record lodged is incomplete. It is unclear how many other such highly relevant documents from DOI political leadership were withheld from the record, putting the need for further discovery to close these gaps beyond doubt. *See Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 34 (N.D. Tex. 1981) (Higginbotham, J.) (extra record discovery's "primary function is to offer assurance that the administrative record is complete in areas where completeness is suspect").

"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." *Id.* at 33. As the above gaps demonstrate, the whole administrative record is not what Defendants submitted to this Court. This incompleteness is an independently sufficient reason to authorize discovery because "Plaintiff does not have to show that the agency acted in 'bad faith,' before such discovery will be allowed, plaintiff merely has to produce reasonable evidence so that the Court may determine whether the 'whole' record has been filed." *Texas Steel Co. v. Donovan*, 93 F.R.D. 619, 621 (N.D. Tex. 1982).

Even though evidence of bad faith and improper influence is not required to obtain extra-record discovery here, it does provide another independent reason to authorize extra-record discovery. As this Court recognized in its preliminary injunction ruling, there are indications of bad faith and improper bias that need to be explored. Doc. 139 at 31 (some of Plaintiff States' allegations that the "postponements [are] based on an additional need for further environmental analysis is pretextual in order to give a reason (other than Executive Order 14008) for the Pause ... will need to be explored on the merits of this lawsuit"). At this stage it "is improper to 'require [the moving party] to come forward with conclusive evidence of political improprieties at a point when they are seeking to discover the extent of those improprieties.'" *Schaghticoke Tribal Nation v. Norton*, 2007 WL 867987, at *3 (D. Conn. Mar. 19, 2007). Because of "the difficulty the moving party will have in producing evidence of wrongdoing before they have had an opportunity to conduct discovery," Plaintiff States "need only 'supply sufficient evidence of improper political influence on agency decisionmaking as to raise suspicions that defy easy explanations." *Id.* "This is especially true given that agency officials are not likely to keep a written record of improper political contacts." *Sokaogon Chippewa Cmty. (Mole Lake Band of Lake Superior Chippewa) v. Babbitt*, 961 F. Supp. 1276, 1281 (W.D. Wis. 1997).

The above cited items demonstrate strong implications of undisclosed input and political influence from the White House and DOI political leadership. Yet, particularly with BLM lease sales, Defendants have attempted to portray them as delayed solely due to environmental reasons. Although agencies may have several reasons for an action, they may not cover up the actual basis of a decision to shield it from judicial review. And decisions cannot be based on pretextual reasons. Moreover, the record discloses improper outside influence on the agency decisionmaking process. A BOEM employee received an ethic opinion regarding outside contacts and notified an outside environmental group in advance of the Lease Sale 258 comment period cancellation before it was announced publicly. ECF 172-11, BOEM00072-73.

Additionally, the actions of the Department since this Court's preliminary injunction are string indications of bad faith in the implementation of the oil and gas leasing Pause. As recounted at Doc. 149-1 at 2-3, from the start, and even after a court order, the Department has elevated its political priorities, such as wind power development, over statutory commands. This trend of defiance of statutes and court orders, which began in January and continues to this day, is strong evidence of bad faith and attempts to evade mandatory orders.

Accordingly, the Court should authorize Plaintiff States to take extra-record discovery. *Cf. Louisiana Sportsmen All., LLC*, 2013 WL 12182156, at *2 ("[T]here is nothing before this court which proves the administrative record filed herein contains all evidence considered by the defendants in reaching its decision. Without such proof, one cannot conclude that the discovery sought by plaintiff would not lead to admissible evidence."). Plaintiff States have also attached proposed requests for production and interrogatories to concretely demonstrate the targeted nature of the discovery sought.

II. The Court Should Authorize Plaintiff States to Take Depositions.

Plaintiff States also move for authorization to depose Amanda Lefton, BOEM Director and Nada Wolff Culver, BLM Deputy Director of Policy and Programs. Plaintiff States seek prior Court approval of the subpoenas given the irreparable harm occurring and Defendants' indication that they intend to oppose depositions.

High government officials may be deposed in "exceptional circumstances" to "testify regarding their reasons for taking official actions." *In re F.D.I.C.*, 58 F.3d 1055, 1060 (5th Cir. 1995). Such circumstances exist when there is "a strong showing of bad faith or improper behavior." *Id.* Four exceptional circumstances justify depositions in this case.

First, Defendants have acted in bad faith and improperly in implementing a blanket Pause of oil and gas leasing and offering pretextual reasons for doing so. And Defendants' shifting explanations are further indicia of bad faith. Recall that when this litigation started, Defendants denied that any

such Pause existed at all. This Court found that argument to be facially implausible given the systematic halt of all onshore and offshore oil and gas leasing activities. Ensuing events have confirmed the Court's conclusion: in Secretary Haaland's recent congressional testimony, the Secretary dropped Defendants' previous position that no Pause exists and now admits that a Pause does in fact exist and results from the Executive Order. Worse yet, the Secretary told Congress several times that the Department was in compliance with the Order—but also stated that the Pause is still in place. Both things cannot be simultaneously true. Deposition is the surest way to learn which one is. *Sokaogon Chippewa Cmty. (Mole Lake Band of Lake Superior Chippewa) v. Babbitt*, 961 F. Supp. 1276, 1281 (W.D. Wis. 1997) (authorizing deposition of government officials because "[a] number of questions remain unanswered in this case, questions not raised in the average agency proceeding. By themselves, these questions may not arouse much suspicion; in combination they make the 'strong showing' necessary for extra-record discovery").

Second, a deposition is proper because proposed deponents "ha[ve] first-hand knowledge of the claims being litigated which is unobtainable from other sources." *Freedom From Religion Found., Inc. v. Abbott*, 2017 WL 4582804, at *11 (W.D. Tex. Oct. 13, 2017). Proposed deponents have personal knowledge of the reasons that a Department-wide halt of oil and gas lease sales was implemented. *Cf. Sherrod v. Breitbart*, 304 F.R.D. 73, 76 (D.D.C. 2014) ("It is clear in this case that Secretary Vilsack has personal knowledge that is directly relevant to the claims and defenses here."). Proposed deponents, as the contact point between DOI and career BLM and BOEM employees, can testify about why and how the Pause was implemented. *Id.* ("The Secretary alone has precise knowledge of what factors he considered and how they influenced his ultimate decision, so that information must come from him, not from third parties."); *see also Karnoski v. Trump*, 2020 WL 5231313, at *2 (W.D. Wash. Sept. 2, 2020) (ordering high-level officials "personally involved with the matter in a material way"); *Schaghticoke Tribal Nation v. Norton*, No2006 WL 3231419, at *6 (D. Conn. Nov. 3, 2006) (allowing deposition of

government officials because "[a]t the very least, [Plaintiff] has presented evidence sufficient to find that they may have 'unique personal knowledge' with regard to activity and pressure concerning [Plaintiff's] petition").

Third, the insufficient administrative record justifies a deposition. *Cmty. Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (D.D.C. 1983) ("[A]n inadequate administrative record, or none at all, may warrant a deposition of an agency official."). The administrative record reveals no basis for the Pause and consists substantially of publicly available documents and records of decisions over several decades. In such circumstances, courts have not hesitated to order the deposition of even cabinet-level officers to complete the record. *In re DeVos*, 2021 WL 2000277, at *5 (N.D. Cal. May 19, 2021) ("Beyond illuminating her involvement, these material gaps at the highest rungs of the Department's decisionmaking record reveal the necessity of Secretary DeVos's testimony for an independent reason."); *Karnoski*, 2020 WL 5231313, at *5 ("Secretary Mattis played a central role in each of the key events in this case and his testimony is necessary for completing the record and evaluating the Parties' arguments.").

Fourth, the agency's failure to commit the Pause to a formalized publicly available writing necessitates depositions. In the absence of "formal findings" "that were made at the same time as the decision ... the only way there can be effective judicial review is by examining the decisionmakers themselves." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Deposing proposed Deponents, officials with authority to implement a Pause on oil and gas leasing, and knowledge of the source and reasoning behind the Pause, is the only way to obtain the reasons for this unwritten decision. *In re DeVos*, 2021 WL 2000277, at *5 ("The testimony of a cabinet officer was necessary in this case because of the somewhat unique circumstances surrounding the [agency action] ... Several of the decisions required ... were made personally by the Secretary [but] [s]ince some of these decisions were not committed to writing at the

time they were made, it was only by allowing the questioning of the Secretary himself that the Court could ascertain whether the decisions were in fact made and what constituted the basis for the decisions.") (quoting *D.C. Fed'n of Civic Associations v. Volpe*, 316 F. Supp. 754, 761 (D.D.C. 1970)).

Given these extraordinary circumstances, this Court should allow Plaintiff States to depose proposed Deponents. *See Jackson Mun. Airport Auth. v. Reeves*, 2020 WL 5648329, at *9 (S.D. Miss. Sept. 22, 2020) ("[Plaintiffs] seek what most other courts have required of high-ranking government officials with essential information: a deposition. It should be conducted without further delay.").

Conclusion

For the foregoing reasons, this Court should grant Plaintiff States' motion to take limited discovery to supplement the administrative record.

Respectfully submitted,

Dated: October 22, 2021

/s/ Joseph Scott St. John

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