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

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

Defendants oppose extra-record discovery on an argument the Court has already rejected—that no oil-and-gas leasing pause exists. Putting to the side that such a Pause clearly does exist, Doc. 139 at 32-33, Defendants cannot now evade their obligation to provide a complete administrative record by simply declaring that the Pause—the basis of Plaintiff States' suit—does not exist. In fact, Defendants' persistence in this position is precisely why that extra-record discovery is necessary.[1]

I. Defendants' Arguments Are Based On The False Premise That There Is No Oil-And-Gas Leasing Pause.

Defendants assert (at 3-6) that Plaintiff States' proposed discovery goes beyond the scope of their Complaint. But the face of Plaintiff States' Complaint clearly challenges a Department-wide oil-and-gas lease-sale moratorium. Doc. 1 at 44 ("The OCSLA Leasing Moratorium is a substantive rule

[1] Counsel conferred via telephone during the week of October 11 regarding discovery, then engaged in extensive correspondence trying to resolve these discovery issues. Indeed, following that conversation and as recounted in Plaintiff States' opening motion, both sides traded detailed letters and emails regarding discovery issues, what is reflected in the administrative record, and authorities. *E.g.*, Docs. 174-5, 174-6, and 174-7. When it was clear that an impasse had been reached, Plaintiff States filed their motion in accordance with the Court's scheduling order. Attached to this brief is a Local Rule 37.1 Certificate.

that was issued without the notice-and-comment period required by 5 U.S.C. §553."); *see* Doc. 139 at 22 ("The Plaintiff States maintain that the Pause itself is a final agency action, as is each cancellation and postponement."). Individual agency actions taken to implement this Department-wide Pause are relevant to the existence of a continued blanket Pause on oil-and-gas lease sales and self-evidently relevant to the rationale behind such a Pause.

Defendants try to dodge the fundamental relevance of the individual lease-sale cancellations by misstating Plaintiff States' contentions. As noted, Plaintiff States explicitly challenge an oil-and-gas leasing Pause directed by Executive Order 14008. Doc. 1 at 5-6. Actions taken "in reliance on Section 208 of [the] Executive Order" and on the Pause are thus highly relevant—not because Plaintiff States challenge these post-filing actions as independent final agency actions, but because these actions are evidence of the Department-wide Pause, indicate that the Pause is still in effect, and potentially provide further evidence of the arbitrary and unlawful reasons underlying the Pause.

For this same reason, evidence regarding the progress of the next Five-Year Program is highly relevant because its lack of progress is further evidence of the final agency action that Plaintiff States actually challenge—the oil-and-gas leasing Pause. As with the post-filing lease sales, Plaintiff States have not pleaded a separate claim challenging the lack of progress on the Five-Year Plan. Rather, the lack of progress is highly relevant to Plaintiff States' central assertion that Defendants unlawfully implemented a blanket oil-and-gas leasing Pause.

Far from asking the Court to authorize "free-flowing discovery," Doc. 178 at 6, Plaintiff States seek limited, directed discovery focused on a final agency action integral to their Complaint. *See* Doc. 139 at 24 ("This Court has determined that the Pause in new oil and gas leases on federal lands and in federal waters ... [is] final agency actions that [is] reviewable under the APA."). And because Defendants continue to assert that no across-the-board oil-and-gas lease Pause exists, evidence, pre- or post-filing, of such a Pause is integral to Plaintiff States' allegations that an ongoing Pause does in

fact exist. Because Plaintiff States' discovery seeks evidence relevant to a final agency action unambiguously challenged in their Complaint, their discovery request is appropriately limited to their specific claims.

II. Extra-Record Discovery Is Appropriate At This Point.

Defendants argue (at 6-8) that the Supreme Court's holding in *Department of Commerce v. New York* fundamentally displaces all of Plaintiff States' cited opinions. In doing so, Defendants rely almost exclusively on *Kona v. Renaud*, 2021 WL 3674114 (N.D. Tex. June 4, 2021). But the court there held that "extra-record discovery should only be ordered *after* the government produces the administrative record." *Id.* at *2 (quoting *Ramos v. Wolf*, 975 F.3d 872, 901 (9th Cir. 2020) (R. Nelson, J., concurring)). That's exactly what Plaintiff States are seeking here—extra-record discovery to complete an administrative record that has been lodged and Defendants assert is complete. Unlike the situation in *Department of Commerce*, where Defendants had already stipulated to complete the administrative record, *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2564, 2574 (2019), Defendants here have persisted in arguing the record as lodged is complete.

Because the administrative record has been filed and Defendants assert it is final, now is the time for the Court to order extra-record discovery to complete the record. *See Kona*, 2021 WL 3674114, at *2-3 ("Defendant must file the administrative record in each case before the Court is able to evaluate whether an exception to the APA record-review requirement applies."); *Chayapathy v. Renaud*, 2021 WL 1561407, at *1 (N.D. Tex. Apr. 21, 2021) ("[T]he Supreme Court recently reiterated in *Department of Commerce*, any such extra-record discovery should only be ordered *after the government produces the administrative record*.") (emphasis added); *Damuluri v. Renaud*, 3:21-cv-634 (N.D. Tex. Mar. 30, 2021) ("[C]oncrete determination of whether discovery beyond the administrative [record] provides the only possibility for effective judicial review can only be made *once the administrative record is compiled, filed and reviewed*.") (emphasis added). This rule makes perfect sense—Plaintiff States must know what

documents are not included before moving to include such documents in the administrative record. *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."); *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"). Accordingly, Plaintiff States' request for extra-record discovery is not premature.

III. Plaintiff States Have Demonstrated That The Administrative Record Is Incomplete.

Defendants cannot avoid this straightforward fact: The face of the record they submitted confirms that they did not produce the "'whole' administrative record," which "consists of all documents and materials directly *or indirectly* considered by agency decision-makers and includes evidence contrary to the agency's position." *Exxon Corp.*, 91 F.R.D. at 33 (emphasis added). Although extra-record discovery is not granted as a matter of course, it should be granted if the moving party makes "a probabilistic showing that discovery is sufficiently likely to unearth evidence relevant to deciding whether the record should be supplemented or added to." *La Union del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 141 F. Supp. 3d 681, 695 (S.D. Tex. 2015); *see Exxon Corp.*, 91 F.R.D. at 46 (granting extra-record discovery "relevant to the agency's promulgation" of a regulation). For the reasons discussed in their brief, Plaintiff States have made such a showing of incompleteness. Doc. 174-1 at 2-7. Defendants' responses only highlight the need for discovery.

As an initial matter, Defendants' efforts to highlight specific documents in the record cannot hide the fact that the record still contains *no* rationale for the across-the-board oil-and-gas leasing Pause, and still fails to disclose the impetus behind this Pause other than Executive Order 14008. The

record contains no rationale or record that was before the Department when it implemented the Pause. *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.").

Beyond that, consider the specific concerns that Defendants raise. *First*, the January 28 Memorandum reflects that BLM was unsure how to proceed regarding the Executive Order and was awaiting higher-level direction. BLMI001315-15. But then the record goes silent. Defendants' contention (at 11-12) that a meeting was cancelled does not explain the gap in the record about a response to BLM that provided direction about the Executive Order. And Defendants' assertion (at 12) that the record addresses the statutory concerns is belied by Defendants' record citations, which refer to a document created in 1989 (BLMI000008-9), a document created in 1996 (BLMI000017), a decision document that cites the Mineral Leasing Act in passing (BLMI001170), and a manual produced in 2013 (BLMI002689). In short: Defendants cite nothing in the administrative record evincing the *contemporaneous* legal rationale behind the blanket Pause on oil-and-gas leasing, or how the Defendants came to their "eligible land" conclusion about individual lease sales.

Second, Defendants ask the Court (at 13) to ignore the fact that the record evinces other rationales for the Pause, the basis for which are nowhere disclosed in the record. Throughout the record and in litigation, Defendants insist that environmental concerns underly the Pause and created a record heavy on NEPA concerns but light on any other factors. *See, e.g.*, Doc. 128-1 at 9 ("In light of this growing NEPA workload and evolving NEPA case law, BLM postponed first-quarter sales 'to confirm the adequacy of underlying environmental analysis.'"). Yet in publicly available documents and in references throughout the record, other rationales—such as the need to preserve public lands and remedy "[i]rresponsible leasing of public lands and waters"—make occasional and unexplained

appearances. BOEM00056. Defendants have provided no indication about where these non-NEPA concerns originated or the extent to which they informed agency decisionmaking. At a minimum, those materials were "indirectly considered by agency decision-makers" and should be fully included in the record. *Exxon Corp.*, 91 F.R.D. at 33.

Third, Defendants attempt (at 13-15) to dismiss Plaintiff States' concerns about the New Mexico lease sale by falling back on their argument that any action after Plaintiff States filed their complaint cannot be included in the administrative record. But, as discussed above, the unexplained cancellation of the New Mexico lease sale is further evidence of an ongoing oil-and-gas lease sale Pause, which is the final agency action under review (and the final agency action that Defendants continue to insist does not exist). The record does not explain the sudden halt of the New Mexico lease sale, which was heading toward completion on what even BLM leadership seemingly understood to be a requirement that it occur no later "than the end of the Quarter." BLMI002424-28. This is yet another gap in the record informed by Defendants' erroneous interpretation of Plaintiff States' claims.

Fourth, Defendants try (at 16-17) to play down the withdrawal of the Lease Sale 257 materials from the Federal Register as routine Executive Branch practice on Inauguration Day. The record gap, however, does not result from the routine practice of pulling back Federal Register notices. Instead, the record indicates that the incoming Departmental leadership team intended to review and evaluate the notices after their withdrawal. And those reviews and evaluations by the leadership team are not in the record, indicating another gap.

Fifth, Defendants argue (at 17-18) that the process and rationales underlying the fact sheets issued with the Executive Order—the *only* currently known contemporaneous justification for the Pause—are not relevant to this case. More than any other document, the fact sheets issued nearly simultaneously by the Department and the White House provide the only contemporaneous justification for the oil-and-gas leasing Pause. BOEM00051-55; BOEM00056-57. The record that

went into preparing the fact sheets are thus self-evidently relevant to Plaintiff States' claims that the Department-wide Pause is arbitrary and capricious, contrary to law, and unreasonably delayed action.

Defendants' contention that the documents underlying White House fact sheet cannot be included in the administrative record because the President is not an "agency" again misunderstands Plaintiff States' allegations. The rationales are relevant to the Pause, which is a final agency action. It does not matter that the President is not an "agency" because Plaintiff States challenge the Executive Order as *ultra vires* rather than solely under the APA. And contrary to Defendants' characterization (at 17-18), Plaintiff States do not allege that the Interior fact sheet itself is a final agency action. Rather, the fact sheet and materials underlying it were part of the decisional record considered by the agency in formulating the blanket Pause and later individual lease sale cancellations. Even if these materials were only "*indirectly* considered by agency decision-makers," they must be included in the record. *Exxon Corp.*, 91 F.R.D. at 33 (emphasis added); *accord Williams*, 2002 WL 31819158, at *3.

Perhaps Defendants are correct that a directive to withdraw massive amounts of public lands and water from development ("30 by 30")—and to "Hit[] Pause On New Oil and Gas Leasing" "to restore balance on America's public lands and waters" and remedy "[i]rresponsible leasing of public lands and waters"—did not inform the oil-and-gas leasing Pause. BOEM00056. Perhaps not. But Plaintiff States need not take Defendants' word for it because documents exist that would confirm the truth. In any case, Defendants' assertion (at 18) that these rationales were not relied upon merely assumes away precisely what Plaintiffs seek in discovery. Without the materials underlying the creation of these contemporaneous rationales, the administrative record is facially incomplete.

Sixth, Defendants' assertion (at 18-19) that the record contains the full documentation of high-level direction over the Pause only bolsters Plaintiff States' arguments. According to Defendants, the whole of high-level official involvement in the Pause falls to four documents in the BOEM record. Yet those documents unmistakably indicate that there are further instances of high-level involvement

that are not included in the record. For instance, Laura Daniel-Davis, exercising Delegated Authority of the Assistant Secretary—Land and Mineral Management, indicated in an email to Walter Cruickshank, Deputy Director of BOEM, that based on her "conferr[al] with the Solicitor's Office, we've determined that BOEM should prepare and publish" the Recission of Lease Sale 257 and "postpone further consideration of the sale." BOEM00057. Yet the record is entirely devoid of this conferral or the rationale underlying it—the rationale that informed the Recission of Lease Sale 257, which is central to Plaintiff States' claims. The very lack of evidence of those rationales and high-level direction for a major action confirms that the record is incomplete.[2] There is simply a dearth of evidence of the rationales employed by those who actually had decisionmaking authority.[3]

It is clear that the agency made its decision to implement an across-the-board oil-and-gas leasing Pause based on materials and considerations not fully disclosed in this NEPA-centric record. The presumption of regularity does not require courts "to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com.*, 139 S. Ct. at 2575. All public indications from high-level Executive officials provide one set of rationales, which are not in the record, while the administrative record reveals only a separate set of rationales. Extra-record discovery is needed to ensure disclosure of all relevant considerations behind the oil-and-gas lease Pause.

IV. Plaintiff States Are Entitled to Propound Interrogatories and Requests For Production.

Plaintiff States' interrogatories and requests for production are appropriately tailored to complete the administrative record. Defendants argue (at 20-21) that agencies may act for political reasons. That's correct but irrelevant. What's at issue in this discovery motion is whether the agency

[2] Defendants also fail (at 19) to rebut Plaintiff States' concerns regarding the fast tracking of the Lease Sale 257 Rescission. Their explanation consists of a description of DOI's document-tracking system, not why the Recission was fast tracked.

[3] Any contention that the Secretary has nothing to do with a key DOI initiative is simply not plausible, particularly given the Secretary's extensive testimony before Congress about the Pause.

disclosed *all* its reasons in the administrative record—including political ones. Indeed, *Department of Commerce* confirms that political reasons are not exempted from the requirement that the agency disclose the rationales underlying its actions:

> The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

139 S. Ct. at 2575-76. If political reasons underlay the decision, they must be disclosed in the administrative record to allow for effective judicial review. As discussed in Plaintiff States' opening motion and throughout this reply, there is a "significant mismatch," *id.* at 2575, between the NEPA-centric record and the political and policy reasons reflected intermittently but incompletely in the record lodged by Defendants, and that actually drove the decisionmaking process.

V. Plaintiff States Are Entitled To Take Their Requested Depositions.

Defendants strain (at 23-24) to avoid the appearance that they have offered shifting positions. Only by redefining the word "Pause" to mean the absence of lease sales—rather than its natural meaning (and the meaning it has borne throughout this case) of an affirmative action—can Defendants even argue that they have offered a consistent front throughout this case. *See, e.g.*, BOEM00056 (noting that the Department was "Hitting Pause on New Oil and Gas Leasing"). As Plaintiff States detail in their opening motion, Defendants have offered shifting and inconsistent positions for the Pause, making depositions necessary to get the full picture. *See, e.g.*, *Sokaogon Chippewa Cmty. (Mole Lake Band of Lake Superior Chippewa) v. Babbitt*, 961 F. Supp. 1276, 1281 (W.D. Wis. 1997).[4]

[4] Defendants argue (at 24-25) that the short period of time between Inauguration Day (January 20) and proposed deponents' appointments (February 5 and February 22) makes these depositions inappropriate. That argument falls flat because both officials are uniquely placed to have first-hand knowledge of the promulgation and implementation of the Pause.

Finally, Defendants' assertion (at 25) that depositions are not necessary to determine if a blanket Pause exists *because no blanket Pause exists* again conflicts with this Court's ruling. And it is Defendants, not Plaintiff States, who "persist in [an] unfounded belief" about the Pause. Doc. 139 at 31-32 ("[T]his Court believes the Plaintiff States have a substantial likelihood of success on the merits on proving the Agency Defendants have implemented the Executive Order Pause to both on land sales under MLA and to offshore sales under OCSLA."). In any event, evidence of the Pause is precisely what Plaintiff States seek to explore in their discovery. *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."). Unless and until Defendants concede that a blanket Pause exists, Plaintiff States are entitled to depose agency officials about this issue. Doc. 139 at 31 ("The Plaintiff States allege the postponements 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. Some of these will need to be explored on the merits of this lawsuit.").

Conclusion

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

Respectfully submitted,

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