IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MANDAN, HIDATSA AND ARIKARA NATION,

Plaintiff,

v.

THE UNITED STATES DEPARTMENT OF THE INTERIOR; **RYAN ZINKE,** in his official capacity as Secretary of the United States Department of the Interior

Defendants,

and

SLAWSON EXPLORATION COMPANY, INC.,

Intervenor-Defendant.

Civil Action No. 18-1462 (CRC)

REPLY IN SUPPORT OF SLAWSON'S MOTION TO TRANSFER VENUE

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

1. § 1404(a) Permits This Court To Transfer This Case To The District Of North Dakota 1

2. The Private-Interest Factors Weigh In Favor Of Transfer 2

2.1 The Tribe's Choice Of Forum Does Not Deserve "Substantial Deference" 2

2.2 The Defendants' Venue Preference Weighs In Favor Of Transfer 3

2.3 The Tribe's Claim Arose In North Dakota 5

2.4 The District of North Dakota Is A More Convenient Forum 6

2.5 To The Extent They Have An Impact, The Convenience Of Witnesses And Ease Of Access To Evidence Support Transfer 7

3. The Public-Interest Factors Weigh In Favor Of Transfer 8

3.1 The District of North Dakota Would Be More Familiar With This Case's Issues Of Law And Fact 8

3.2 The Congestion Of The Respective Courts Does Not Warrant This Court's Retention Of This Case 11

3.3 The District Of North Dakota Has a Local Interest In Trying This Case Locally 12

3.3.1 The Involvement Of "National Issues" Does Not Defeat Transfer 12

3.3.2 This Case Does Not Involve "National Issues" 14

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Air Line Pilots Ass'n v. E. Air Lines,
672 F. Supp. 525 (D.D.C. 1987) 8

Alaska Wilderness League v. Jewell,
99 F. Supp. 3d 112 (D.D.C. 2015) 6, 7, 12, 15

American Rivers v. Army Corps of Engineers, Case
No. 1:3-cv-00241,
2003 WL 23781196 (D.D.C. March 14, 2003) 15, 16

Cal. Valley Miwok Tribe v. U.S.,
515 F.3d 1262 (D.C. Cir. 2008) 2

City of West Palm Beach v. U.S. Army Corps of Engineers,
317 F. Supp. 3d 150 (D.D.C. 2018) 3, 14

Fed. Housing Fin. Agency v. First Tenn. Bank Nat'l Ass'n,
856 F. Supp. 2d 186 (D.D.C. 2012) 8

Frulla v. CRA Holdings, Inc.,
596 F. Supp. 2d 275 (D. Conn. 2009) 9, 10

Greater Yellowstone Coalition v. Bosworth,
180 F. Supp. 2d 124 (D.D.C. 2001) 13

Gulf Restoration Network v. Jewell,
87 F. Supp. 3d 303 (D.D.C. 2015) ..... passim

Hayes v. Chesapeake & Ohio Ry. Co.,
374 F. Supp. 1069 (S.D. Ohio 1973) 9, 10

Intrepid Potash-New Mexico, LLC v. US Dept. of Int.,
669 F. Supp. 2d 88 (D.D.C. 2009) ..... passim

Lemon v. Druffel,
253 F.2d 680 (6th Cir. 1958) 9, 10

M & N Plastics, Inc. v. Sebelius,
997 F. Supp. 2d 19 (D.D.C. 2013) 6

Montana v. U.S.,
450 U.S. 544 (1981) ..... passim

Niagara Pres., Coal., Inc. v. FERC,
956 F. Supp. 2d 99 (D.D.C. 2013) 2

Oceana v. Pritzker,
58 F. Supp. 3d 2 (D.D.C. 2013) 13

Plains Commerce Bank v. Long Family Land and Cattle Co.,
554 U.S. 316 (2008) 18, 19

Pres. Soc. of Charleston v. U.S. Army Corps of Engineers,
893 F. Supp. 2d 49 (D.D.C. 2012) 8, 16

Pueblo v. Nat'l Indian Gaming Comm'n,
731 F. Supp. 2d 36 (D.D.C. 2010) 3, 9, 16

Renchard v. Prince Wm. Marine Sales, Inc.,
28 F. Supp. 3d 1 (D.D.C. 2014) 2

S. Utah Wilderness Alliance v. Norton,
315 F. Supp. 2d 82 (D.D.C.) 1, 3, 12

Samsung Electronics Co. v. Rambus Inc.,
386 F. Supp. 2d 708 (E.D. Va. 2005) 10

Shawnee Tribe v. U.S.,
298 F. Supp. 2d 21 (D.D.C. 2002) 3, 16

Sierra Club v. Flowers,
276 F. Supp. 2d 62 (D.D.C. 2003) 13

Starnes v. McGuire,
512 F.2d 918 (D.C. Cir. 1974) 14

W. Watersheds Project v. Jewell,
69 F. Supp. 3d 41 (D.D.C. 2014) 12

Wyandotte Nation v. Salazar,
825 F. Supp. 2d 261 (D.D.C. 2011) 3, 9, 16

Statutes

28 U.S.C. § 1404 ..... passim

INTRODUCTION

It is undisputed that this Court has the discretion to transfer this case to the District of North Dakota. Slawson explained in its Motion to Transfer that such discretion arises from the fact that venue would have been proper had the MHA Nation (the "Tribe") chosen to bring this case in North Dakota—the site of the land in dispute. In its opposition to Slawson's Motion, the Tribe does not disagree.

The Tribe does argue, however, that this Court ought not exercise that discretion. It argues that each of the § 1404(a) private- and public-interest factors weighs against transfer. But for each such argument, the Tribe either does not cite applicable authority or cites case law that does not support its position. The Tribe also regularly fails to identify evidence to support the factual claims on which its arguments rest, such as its unsupported contention that the agency decision it is challenging has had or will have a "national impact." The Tribe further does not distinguish—or even discuss—the most analogous cases from this District (*Intrepid Potash* and *S. Utah Wilderness Alliance*), in which motions to transfer were granted.

For the reasons stated in Slawson's Motion, the private- and public-interest factors overwhelmingly favor transfer. And as explained below, the Tribe's arguments do not counsel otherwise.

ARGUMENT

1. § 1404(a) Permits This Court To Transfer This Case To The District Of North Dakota

Under 28 U.S.C. § 1404 (a), this Court has the discretion to grant Slawson's and the Federal Defendants' motions for transfer if the case "might have been brought" in the District of North Dakota. DE 18 at 7-9. As Slawson has explained, the Tribe indeed could have filed this case in that

District. *Id.* at 8-9. The Tribe does not claim otherwise in its response to the Defendants' Motions. This Court's discretionary power to transfer this case to the District of North Dakota is undisputed.[1]

2. The Private-Interest Factors Weigh In Favor Of Transfer

2.1 The Tribe's Choice Of Forum Does Not Deserve "Substantial Deference"

The Tribe contends that its "decision to bring this case in this Court strongly supports this Court retaining this case." DE 27 at 3 (emphasis in original). That claim is contradicted by the cases the Tribe itself cites. For instance, *Renchard v. Prince Wm. Marine Sales, Inc.*, cited by the Tribe, DE 27 at 4, explains that any deference owed to a plaintiff's choice of forum is "substantially lessened" when, as here, "the plaintiff is a 'foreigner' to the forum," and when "there is a lack of 'meaningful ties' between the controversy, the parties, and the forum." 28 F. Supp. 3d 1, 11 (D.D.C. 2014).

The Tribe does not contest this principle. Instead, it suggests that D.C. *does* have meaningful ties to this case.[2] DE 27 at 4-5. The Tribe argues that its decision to bring suit "in the seat of the United States government should receive particular weight" because of Native Americans' "unique" "government-to-government" relationship with the U.S. DE 27 at 4. The case the Tribe cites in support—*Cal. Valley Miwok Tribe v. U.S.*, 515 F.3d 1262, 1263 (D.C. Cir. 2008)—says no such thing. It is not even about a motion to transfer, or a plaintiff's choice of forum. And in fact, "courts in this district have a history of providing *less* deference to Native American Indian tribes when they have brought

[1] Because the Tribe does not dispute that this action could have been brought in the District of North Dakota, it "has thus waived argument on whether this claim could have been brought in the transferee district." *Niagara Pres., Coal., Inc. v. FERC*, 956 F. Supp. 2d 99, 103 (D.D.C. 2013).

[2] The Tribe tacitly admits, as it must, that D.C. is not its home forum. Thus, even if there were a meaningful connection between D.C. and this case (there is not), any deference owed to the Tribe's choice of forum would still be diminished. *Gulf Restoration Network v. Jewell*, 87 F. Supp. 3d 303, 312 (D.D.C. 2015) (according diminished deference to plaintiff's choice to file suit in the District of Columbia, which had meaningful ties to the controversy but was not plaintiff's home forum).

suit in this, their non-home forum." *Shawnee Tribe v. U.S.*, 298 F. Supp. 2d 21, 25 (D.D.C. 2002) (emphasis added); *see also Pueblo v. Nat'l Indian Gaming Comm'n*, 731 F. Supp. 2d 36, 42 (D.D.C. 2010) (affording tribe's choice of the District of Columbia diminished deference because it was not the tribe's home forum, and it had "no meaningful ties to the controversy and no particular interest in the parties or subject matter"); *Wyandotte Nation v. Salazar*, 825 F. Supp. 2d 261, 268-69 (D.D.C. 2011) (same).

What is more, the Tribe does not even mention, much less distinguish, the two most analogous cases cited in either parties' brief: *Intrepid Potash* and *S. Utah Wilderness All.* DE 18 at 10-12. Those cases explain what the Tribe refuses to accept: BLM decisions regarding oil and gas leases and drilling permits have no meaningful connection to D.C. *Id;* s*ee also City of West Palm Beach v. U.S. Army Corps of Engineers*, 317 F. Supp. 3d 150, 154 (D.D.C. 2018) (finding no nexus between the case and D.C. because "a substantial part of the events giving rise to Plaintiff's claims occurred outside of the District of Columbia," "[a]ll of the lands and natural resources at issue in this case" were located in the transferee district, and "most of the challenged decisions were made outside of the District of Columbia").

Because D.C. is not the Tribe's home forum and has no connection to this case, the Tribe's choice of forum is not owed the "substantial deference" that the Tribe claims.

2.2 The Defendants' Venue Preference Weighs In Favor Of Transfer

The Tribe next contends that this Court should afford no deference to Slawson's and the Federal Defendants' preference for this case to be tried in North Dakota, in part because "[t]his is an APA case," meaning "it will be decided on the administrative record" and, according to the Tribe, it will require a small number of court appearances. DE 27 at 5. But as *Gulf Restoration Network* explains, "[i]n Administrative Procedure Act ("APA") cases, a defendant's choice of forum deserves 'some weight' where the harm from a federal agency's decision is felt most directly in the transferee district." 87 F. Supp. 3d 303, 313 (D.D.C. 2015).

The Tribe argues that Slawson "misreads" *Gulf Restoration Network*. DE 27 at 6. But Slawson reads *Gulf Restoration Network* the same way the Tribe reads it. Indeed, the Tribe admits that "*Gulf Restoration Network* provides that if the harm from a federal action is felt most directly in the proposed transferee district, then a Defendant's preference to transfer to that district is 'afforded some weight.'" *Id.* at 6 (emphasis in original). The Tribe simply contests the fact that the impact of the BLM's decision to approve Slawson's drilling permits will be "felt most directly" in North Dakota. *Id.* at 6-8. As explained in Slawson's Motion (DE 18 at 18-22) and in Section 3.3 below,[3] however, the Tribe is wrong. This case provides a prototypical example of federal agency action with a localized effect, so Slawson's and the Federal Defendants' preference to try this case in North Dakota weighs in favor of transfer.

The Tribe additionally argues that Slawson and the Federal Defendants are inappropriately forum-shopping. DE 27 at 8. Putting aside the Tribe's lack of evidence regarding the Defendants' motives, the Tribe's argument proves too much. It assumes that the Defendants' have an incentive to litigate in North Dakota, which necessarily means the Tribe has an incentive to *avoid* its home district, and suggests the Tribe took that into consideration when choosing to file in this District. If the goal of disincentivizing forum-shopping cuts in any direction, it is against the District of Columbia (which has no meaningful connection to this case) and in favor of the District of North Dakota (where the Tribe resides, the oil wells at issue are located, the impact of the pertinent agency decision will be felt, and a related case has already been litigated).

[3] The Tribe argues about the localized impacts of this case in both its section regarding this second private-interest factor (the Defendants' venue preference) and its section regarding the third public-interest factor (whether this case is largely a "local controversy"). Similar to the court in *Gulf Restoration Network*, Slawson solely discusses the localized nature of this case in relation to the third public interest factor. *Infra* Section 3.3.

2.3 The Tribe's Claim Arose In North Dakota

The parties agree that the third private-interest factor—where Plaintiff's claim arose—weighs in favor of transfer in APA cases when the agency decision-making at issue took place in the transferee district. DE 27 at 8. But the Tribe claims that the agency decision-making at issue here was "diffuse," meaning the claim purportedly arose in "multiple districts."

It is true that this factor does not weigh in favor of transfer when the challenged agency decision-making is "diffuse." For example, in *Gulf Restoration Network*—which concerned a restoration project in Alabama related to the Deepwater Horizon oil spill—the challenged agency decisions were made by a council that included 12 state trustees from five different states and 14 federal trustees, many of whom resided in D.C. 87 F. Supp. 3d at 306-10. Further, the council's process for drafting the Environmental Impact Statement involved public meetings in D.C., Florida, Alabama, Mississippi, Louisiana, and Texas. *Id* at 309. The Court ruled that this agency decision-making was "diffuse," and thus this factor did not "support transfer or weigh against it" (thought transfer was ultimately granted) *Id.* at 313.

Here, by contrast, the Tribe does not deny that the decisions underlying the BLM's issuance of Slawson's permits—including those reflected in the BLM's Environmental Assessment, its Finding of No Significant Impact, and its Decision Record—were all made in North Dakota. *See* DE 18 at 3. The Tribe instead focuses solely on the location of the appellate bodies that considered the Tribe's appeals, like the Virginia-based OHA director and the state director for the Montana-Dakotas BLM offices. DE 27 at 9. But the Tribe cites no case law to support its contention; and as explained in

Slawson's Motion, the locations of such appellate bodies have no bearing on where the Tribe's claim "arose."[4] *See* DE 18 at 14.

Because the decision-making underlying the BLM's consideration and approval of Slawson's applications for permits to drill took place in North Dakota, the Tribe's claim "arose" in North Dakota. This factor weighs in favor of transfer.

2.4 The District of North Dakota Is A More Convenient Forum

The Tribe next argues that the fourth private-interest factor—the convenience of the parties—weighs against transfer. It bases its argument on the premise that "[t]he threshold issue under this factor is whether the current forum is inconvenient for Defendants," and contends that neither Slawson nor the Federal Defendants "met its burden." DE 27 at 10. The Tribe cites no case law establishing that this supposed "threshold inquiry" exists, and in fact, it does not. *Cf. Alaska Wilderness League v. Jewell*, 99 F. Supp. 3d 112, 120 (D.D.C. 2015) (weighing convenience of districts without reference to whether original forum is inconvenient for defendant). The Tribe nevertheless uses the "threshold inquiry" it invented to draw attention away from the convenience of North Dakota and toward the supposed convenience of D.C. DE 27 at 10.

The Tribe first argues that the Federal Defendants "cannot reasonably claim to be inconvenienced by litigating in" D.C., because it is their home forum. *Id.* This ignores the fact that, as a federal agency and that agency's secretary, the Federal Defendants "operate across the United States," meaning North Dakota is also convenient for them. *M & N Plastics, Inc. v. Sebelius*, 997 F. Supp. 2d 19, 24-

[4] The Tribe suggests that this case is different because the OHA Director took the "very unusual action" of taking jurisdiction of the Tribe's appeal from the IBLA. DE 27 at 9. But there is no reason to believe—and the Tribe certainly does not provide one—that it matters whether the Virginia-based IBLA or the Virginia-based OHA Director heard the Tribe's appeal.

25 (D.D.C. 2013). And in any event, "any inconvenience to [the federal government] is offset by the fact that [it is] the party requesting the transfer." *Alaska Wilderness League*, 99 F. Supp. 3d at 120.

The Tribe takes the same tack with Slawson, contending that Slawson has failed to "meet its burden" by showing that D.C. is inconvenient for it. DE 27 at 10. Again, Slawson has no such burden, nor does it claim that it could not try a case in D.C. To the contrary of the Tribe's assertion, however, Slawson did put forth facts in its Motion supporting its claim that the District of North Dakota would be more convenient than the District of Columbia. DE 18 at 14-15. Slawson's main oil and gas offices are in Colorado, and the operations office in charge of the Torpedo Project is in North Dakota. Ex. U, Petersen Aff. Both are closer to the District of North Dakota than the District of Columbia.

Finally, the Tribe has no answer for the fact most relevant to this particular inquiry: the Tribe itself is located in North Dakota. The Tribe therefore cannot claim that the District of North Dakota is inconvenient for it, or that the District of Columbia is *more* convenient for it.[5]

Because the parties could try this case in either proposed district, this factor should not weigh heavily in this Court's § 1404(a) analysis. But on the whole, North Dakota is more convenient for the parties, so any weight this factor does carry favors transfer.

2.5 To The Extent They Have An Impact, The Convenience Of Witnesses And Ease Of Access To Evidence Support Transfer

The parties agree that the fifth and sixth factors should have little if any impact on this Court's analysis. The Tribe nevertheless claims that this factor weighs against transfer because a copy of the administrative record is in the "Washington, D.C. area." DE 27 at 11. But the Tribe does not suggest, much less offer proof, that the administrative record is so voluminous that sending it to North Dakota

[5] The Tribe notes that one of its attorneys is located in D.C. But "[t]he convenience to counsel is of minor, if any, importance under § 1404(a)." *Intrepid Potash-New Mexico*, 669 F. Supp. 2d 88, 98 (D.D.C. 2009).

would present a significant burden. *Cf. Pres. Soc. of Charleston v. U.S. Army Corps of Engineers*, 893 F. Supp. 2d 49, 56 (D.D.C. 2012) ("[T]his factor does not weigh heavily in the Court's analysis, as the administrative record is not 'voluminous.'"). Nor does it show that the burden of sending the record to North Dakota would be materially different from the burden of sending it from the Virginia-based Office of Hearings and Appeals to this Court, or to the lawyers working on this case. *Cf. Air Line Pilots Ass'n v. E. Air Lines*, 672 F. Supp. 525, 527 (D.D.C. 1987) ("Once the material is photocopied, boxed and sent to the District, it would not be a significantly greater hardship to send an additional copy of these documents to the courthouse.").

Should this case require evidence beyond the administrative record, however, any witnesses would be burdened by the case remaining in this District, as they would likely be members of the Tribe or employees of the BLM's North Dakota Field Office and therefore located in North Dakota. DE 18 at 16. Thus, while these factors have little if any impact, the location of potential additional witnesses counsels in favor of transfer.

3. The Public-Interest Factors Weigh In Favor Of Transfer

3.1 The District of North Dakota Would Be More Familiar With This Case's Issues Of Law And Fact

The first public-interest factor considers the Courts' respective levels of familiarity with the law governing the case. The Tribe contends that "this Court presumes that the first public interest factor does not support transfer" when federal law controls, and that the Defendants must "overcome the presumption." DE 27 at 12. This, again, is an overstatement. The applicability of federal law does not give rise to a "presumption" against transfer; rather, it typically renders this factor neutral. *Fed. Housing Fin. Agency v. First Tenn. Bank Nat'l Ass'n*, 856 F. Supp. 2d 186, 194 (D.D.C. 2012) (finding "court's familiarity with the governing law" to be "neutral" because "all federal courts are presumed

to be equally familiar with the law governing federal statutory claims"). Thus, the federal law at issue does not cut for or against transfer.

Regarding the merits of Slawson's arguments, the Tribe does not deny that a transferee court's familiarity with the law, facts, and parties involved in a case can weigh in favor of transfer. Yet the Tribe argues that cases cited by Slawson on this point—*Wyandotte Nation* and *Pueblo*—are irrelevant because they involved a "lengthy and ongoing litigation history" in the transferee court, implying that the present parties' litigation history in North Dakota is not "lengthy" enough to merit consideration. DE 27 at 12-13. The length of the parties' litigation history in North Dakota, however, is beside the point. That there were more efficiencies to be gained by way of transfer in *Wyandotte Nation* and *Pueblo* does not mean that there are *no* efficiencies to be gained here through a transfer to North Dakota.

The Tribe additionally cites a series of inapt, out-of-circuit cases that have no bearing on whether this factor weighs in favor of transfer in this case. The Tribe first cites *Frulla v. CRA Holdings, Inc.*, wherein the parties were quarrelling over an ERISA plan about which they had already litigated in a different district. 596 F. Supp. 2d 275, 279-80 (D. Conn. 2009). The *Frulla* court only included a single sentence in its opinion even arguably related to this factor, and it simply did not discuss the relative impact of the transferee court's history with the parties. *Id.* at 290-91 ("While the district court in Florida may have familiarity with the Plan, the instant case involves different issues, causes of action, and principles of law."). The *Hayes* and *Lemon* cases are even more irrelevant to this factor. They are focused on whether and when a plaintiff's choice of forum carries weight in a § 1404(a) analysis. *Hayes v. Chesapeake & Ohio Ry. Co.*, 374 F. Supp. 1069 (S.D. Ohio 1973) ("Defendant has overlooked an essential point of the *Lemon* opinion: Judge Druffel transferred the case back to a forum for which plaintiff had initially exhibited a preference. On the other hand, defendant asks us to transfer this case to a forum which plaintiff has shown a marked determination to avoid."). And neither case even

mentions the issues of whether and how a transferee court's litigation history with the parties can serve the interests of judicial economy. *See generally id.*; *Lemon v. Druffel*, 253 F.2d 680 (6th Cir. 1958).

Unlike *Frulla*, *Hayes*, and *Lemon*, the Tribe's final case is not irrelevant; it actually supports the Defendants' Motions to Transfer. *Samsung Electronics Co. v. Rambus Inc.*, a case from the Eastern District of Virginia, concerned a motion to transfer a case related to a group of patents that were also the subject of cases pending in the Northern District of California. 386 F. Supp. 2d 708, 710 (E.D. Va. 2005). The Virginia court denied the motion to transfer to California, but explained that *Samsung* was a "rare" case with "unique" circumstances because both the Virginia court and the California court had already engaged with the merits of their respective cases. *Id.* at 723-24. In fact, the Virginia court had already held a *trial* on some of the issues involved in its case. *Id.* at 722-23. The Virginia court reasoned that had it not already been extensively involved in litigation concerning the relevant patents, "judicial economy and the interest of justice would [have] weigh[ed] in favor of transferring venue to the Northern District of California." *Id.* at 722. Such is the case here. This Court has not engaged on the merits of the Tribe's claim, while the District of North Dakota has. DE 18 at 10.

The Tribe disagrees, arguing that the North Dakota suit "did not involve the merits of this case." DE 27 at 14. That is incorrect. DE 18 at 16-17. Slawson's North Dakota suit arose from the same administrative proceedings challenged in this case. *Compare* DE 18-11 *to* DE 1. The Tribe correctly notes that the two cases concern different orders: this case challenges the final denial of the Tribe's administrative appeal while Slawson's North Dakota action challenged an interim administrative stay order secured by the Tribe that prevented Slawson from drilling. But to obtain that interim stay order the Tribe was obligated to show that it was likely to succeed on the merits of its appeal. DE 18-9 at 1. Thus, the North Dakota Court's review of the stay order necessarily required it to consider the Tribe's substantive arguments in the appeal. *See* DE 18-11 at 8-10. Those arguments, of course,

are the same arguments the Tribe will make in this case, as the Tribe is contesting the denial of that same appeal. *Compare, e.g*, DE 1 ¶ 71 (asserting that Tribe's "federally approved Constitution" and *Montana v. U.S.* allow it to regulate "activities on fee land within the Reservation") *to* DE 18-21, 5/23/17 Notice of Appeal at 10-11 (same). Thus, the District of North Dakota has considered the very arguments the Tribe will assert in this case. Transferring the case to that District will therefore serve the interest of judicial economy.[6]

3.2 The Congestion Of The Respective Courts Does Not Warrant This Court's Retention Of This Case

The Tribe argues that a judicial vacancy in the District of North Dakota has rendered North Dakota more congested than the District of Columbia. It further argues that that congestion counsels against transfer. DE 27 at 15-17.

Slawson concedes that the vacancy identified by the Tribe renders the District of North Dakota more congested than this District, but that congestion is not as dire as the Tribe makes it sound. The vacancy has indeed been identified as a "judicial emergency," but that designation is not exactly rare. There are currently 63 judicial emergencies in the federal courts. http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies (last visited October 24, 2018). Further, Judge Hovland has the help of two magistrate judges, and according to North Dakota's clerk of court, the District has been able to "lean[] on judges from other states to help handle the North Dakota caseload while the seat remains open." Ex. V, 8/8/18 Bismarck Tribune Article. Finally, the Tribe's speculation that the vacancy will not be filled any time soon is contradicted by North Dakota Senator Heidi Heitkamp, who said in August that she "expect[s] we're going to see that

[6] The Tribe argues that Slawson is trying to upend case law regarding the first-to-file rule. But this factor has nothing to do with that rule, as illustrated by the fact that the cases the Tribe cites have nothing to do with this factor, or even § 1404(a) motions to transfer generally. *See* DE 27 at 15.

nomination fairly soon," and that once the nomination takes place she will "be proud to push it through as fast as [she] can." *Id.*

Regardless of the comparative congestion of the Districts at issue, however, "this one factor, on its own, does not outweigh all of the others"—particularly the "most important factor," discussed next. *W. Watersheds Project v. Jewell*, 69 F. Supp. 3d 41, 44 (D.D.C. 2014).

3.3 The District Of North Dakota Has a Local Interest In Trying This Case Locally

The third public-interest factor—the interest in having local controversies decided locally—is "perhaps the most important factor." *Alaska Wilderness League*, 99 F. Supp. 3d at 116. The Tribe does not dispute the local impact of this case, described in Slawson's Motion and the 142-page Environmental Assessment issued by the BLM's North Dakota Field Office. DE 18 at 18-21; DE 18-2. Nor does the Tribe even mention, much less distinguish, the analogous cases of *S. Utah Wilderness* and *Intrepid Potash*, which explain the localized nature of BLM decision-making regarding oil and gas leases and drilling permits. DE 18 at 10-11, 19; *Intrepid Potash*, 669 F. Supp. 2d at 98-99; *S. Utah Wilderness All.*, 315 F. Supp. 2d at 88-89. The Tribe instead claims that this case concerns "national issue[s]," and that those issues trump the local interest in trying this case locally. DE 27 at 17-18.

The Tribe is wrong. As explained below, the mere involvement of "national issues" in a case is not enough to weigh against transfer. And in any event, this case does not involve "national issues." It is instead "local at every turn." *Alaska Wilderness League*, 99 F. Supp. 3d at 116. This factor therefore weighs strongly in favor of transfer.

3.3.1 The Involvement Of "National Issues" Does Not Defeat Transfer

The Tribe argues that despite the obvious local impacts of the BLM's approval of Slawson's drilling permits, the case's "national importance" trumps North Dakota's local interest in hearing this case. DE 27 at 17-18. The Tribe's case law, however, does not bear its point out.

The Tribe cites *Oceana v. Pritzker,* for the proposition that the presence of "national policy or national significance" in a case, on its own, overrides any local interest in trying a case with local impacts. DE 27 at 17. But *Pritzker* said no such thing. *Pritzker* found that the claim at issue "arose" in D.C. not just because it involved "national policy," but also because the challenged regulation was "drafted, signed, and published in [the District of Columbia]" by "officials at agency headquarters." 58 F. Supp. 3d 2, 6 (D.D.C. 2013). Thus, the driving force of *Pritzker*'s denial of the transfer motion was not the presence of a "national issue," but "the national interest in having national controversies *decided where they arise*." *Id.* at 8 (emphasis added). Indeed, the court explicitly distinguished *Pritzker* from cases like *Sierra Club v. Flowers*, in which transfer was granted despite the presence of issues of national importance "because of the 'lack of evidence' that federal officials in [the transferor] district had played an 'active or significant role'" in the challenged agency decisions. *Id.* at 10 (quoting *Sierra Club v. Flowers*, 276 F. Supp. 2d 62, 67 (D.D.C. 2003)); s*ee also Intrepid Potash*, 669 F. Supp. 2d at 96 ("Courts have deferred to a plaintiff's choice of this forum in cases involving a national issue *when federal officials in the District of Columbia had significant involvement in the agency action*." (emphasis added)).

Other cases cited by the Tribe also illustrate this point. For instance, the Tribe cites *Greater Yellowstone Coalition v. Bosworth,* as an example of a case with "some national significance" in which transfer was denied. DE 27 at 21. But the Tribe's selective quotation leaves out the fact that the case's "national significance" stemmed in part from the fact that "federal government officials in the District of Columbia were involved in the decision" challenged. 180 F. Supp. 2d 124, 128–29 (D.D.C. 2001).

Thus, as the Tribe's own cases show, the presence of issues of "national significance" alone do not warrant denial of a motion seeking transfer from this District. D.C.-based officials must also have been involved in the challenged agency action in order for any local interest to be outweighed by the national significance of a case. This principle is in line with other cases finding that federal courts

in the states are equally as competent as D.C. to handle "issues with national implications." *City of West Palm Beach*, 317 F. Supp. 3d at 157. Put differently, and "[a]s the D.C. Circuit has articulated, there is no 'blanket rule that "national policy" cases should be brought [in the District of Columbia].'" *Id.* (quoting *Starnes v. McGuire*, 512 F.2d 918, 928 (D.C. Cir. 1974).

Here, there was no significant involvement of D.C.-based officials in the agency decision-making being challenged. DE 18 at 11-12. Even if the issues raised by the Tribe's suit were "national" in character, therefore, this factor does not weigh against transfer.

3.3.2 This Case Does Not Involve "National Issues"

Even if the presence of "national issues" did weigh against transfer, this case does not involve any such issues. The Tribe says otherwise, putting forth a number of intertwining arguments in an attempt to paint this case as something larger than it is. The Tribe argues that (1) the involvement of the Missouri River in this case renders the case "national" in character; (2) the case is "per se" nationally relevant because of the Tribe's "government-to-government" relationship with the United States; and (3) the issues raised by the Tribe's suit affect all Native American tribes, and thus are of "national importance." DE 27 at 18. For the reasons stated below, these arguments fail to show that this case is anything more than a "local controversy" under § 1404(a) case law.

The Missouri River does not render this case "nationally important." The Tribe contends that this case has more than just a "local impact" because it involves the Missouri River, which spans multiple states and is "a national resource." DE 27 at 18-19. The Tribe implies that an oil spill from Slawson's approved project could impact the Missouri River's waters in states other than North Dakota. *Id.* at 19. Yet the Tribe offers no evidence whatsoever that a project the size of the Torpedo Project could possibly impact the Missouri River's waters as far south as South Dakota (much less in states further away). And such a claim is belied by the actual facts.

As an initial matter, it is highly unlikely that any spill from the Torpedo project would even reach the shores of Lake Sakakawea, much less flow to another state. As briefly explained in a letter from Slawson to the North Dakota Industrial Commission, the Torpedo Project has incorporated Best Management Practices, including, among many other safety measures, the use of automatic shut-off devices and the installment of berms, including 2-foot clay berms and additional tertiary containment trenches. Ex. W, 9/6/16 Ltr to North Dakota Industrial Commission. This is in addition to the development and implementation of a Spill Prevention Control and Countermeasure plan and an Oil Spill Contingency plan. *Id.* But even if a spill did reach water, the Project is located roughly 220 miles from the South Dakota border. Ex. X, Map. Further, the project is at the northern edge of Lake Sakakawea, a relatively motionless portion of the Missouri River created by the Garrison Dam (which itself is roughly 66 miles from the Project). *Id.* And the 142-page Environmental Assessment issued by the BLM does not discuss any impact outside of North Dakota. DE 18-2. In short, there simply is no evidence that the challenged agency action will *or even can* have an out-of-state impact.[7]

The lack of any out-of-state impact distinguishes this case from *American Rivers v. Army Corps of Engineers*, Case No. 1:3-cv-00241, 2003 WL 23781196 (D.D.C. March 14, 2003), the case cited by the Tribe in which the State of North Dakota filed an amicus brief opposing a motion to transfer. *See* DE 27 at 7. That case also involved the Missouri River. Ex. Y, 5/21/03 Order in 03-cv-241 (D.D.C.),

[7] To the extent the Tribe is claiming that the Missouri River's purported status as a "national resource" necessarily makes this case non-local, DE 27 at 7-8, that is incorrect. This case unquestionably involves state and private resources. DE 18 at 21. Thus, even if the man-made portion of the Missouri River system involved here—Lake Sakakawea—could somehow be construed as a "national resource," that fact would not make this case non-local. *Alaska Wilderness League*, 99 F. Supp. 3d at 118. (in granting transfer, distinguishing a "case [that] involved government regulations concerning *exclusively* federal lands (the National Petroleum Reserve) that happened to be in Alaska, not—as here—federal waters *as well as* 'lands [and waters] controlled by the State of Alaska'").

Dkt. 41 at 2. But unlike this case, *American Rivers* involved a challenge to an agency decision that had an obvious impact on multiple states. More specifically, it involved a challenge to the Army Corp of Engineers' operation of a series of dams on the Missouri River that were located in Montana, North Dakota, South Dakota, and Nebraska. *Id.* at 3-5. Thus, the State of North Dakota's opposition to a transfer motion in the inapposite *American Rivers* has nothing to do with this case.

Put simply, the fact that the Missouri River spans several states is irrelevant. The Tribe provides no reason to believe that an oil spill from the Torpedo Project would even reach Lake Sakakawea, much less evidence supporting the remarkable claim that the Project poses any risk to waters that lie 220 miles away.

The Tribe's relationship with the U.S. does not weigh against transfer. The Tribe next claims that this case is "per se" national in nature because of the Tribe's "government-to-government relationship" with the United States. DE 27 at 18. The Tribe again cites no case law to support its position, and the case law again contradicts the Tribe's assertion. The involvement of a Native American tribe does not automatically render the case nationally important, as illustrated by the numerous cases involving tribes that have been found to be local in nature. *See, e.g., Wyandotte Nation*, 825 F. Supp. 2d at 266-67; *Pueblo v. Nat'l Indian Gaming Comm'n*, 731 F. Supp. 2d at 41; *Shawnee Tribe*, 298 F. Supp. 2d at 26-27. The interest of the federal government[8] in this case also does not render it nationally important. *Cf. Pres. Soc. of Charleston*, 893 F. Supp. 2d at 55 ("Consistently, district courts in this circuit have held that the mere fact that a case concerns the application of a federal statute by a federal agency does not provide a sufficient nexus to the District of Columbia to weigh against transfer."). The question whether a case is local in nature does not turn on whether a federal official or agency is involved,

[8] The Tribe claims that Slawson does not believe the federal government has a significant interest in this case. DE 27 at 21. Slawson said no such thing. It instead said that the government and citizens of *the District of Columbia* have no interest in this case. *See e.g.,* DE 18 at 1.

but rather whether "the [alleged] harm from a federal agency's decision *is felt most directly in the transferee district*." *Gulf Restoration Network*, 87 F. Supp. 3d at 313 (emphasis added).

As the case law shows, the fact that the Tribe has a "government-to-government relationship" with the United States has no bearing on whether this case is a local controversy.[9]

The challenged agency decision has no impact on other tribes. The Tribe finally argues that this case is of "national importance" because it centers around "the federal government's abandonment of its policy of supporting tribal law-making authority," which will "impact[] tribes throughout the United States." DE 27 at 18. In other words, the Tribe claims that the BLM's conclusion that it need not enforce the Tribe's law requiring a 1,000-foot setback from Lake Sakakawea represents a sea change in how the United States interacts with Native Americans. Throughout its brief, the Tribe references this supposed "new rule" to "no longer require compliance with tribal (or federal) health, welfare, and safety laws." *See* DE 27 at 9, 21-22.

In truth, there is no such "new rule." The Tribe does not (and cannot) point to any evidence of a policy shift regarding the federal government's recognition of tribal laws, such as rule-making procedures, a pronouncement from the Secretary of the Interior, or even administrative or judicial orders in conflict with the decision below. That is because there has been no such policy shift. Instead, this case merely involves, at most, the routine administrative application of a decades-old standard—originally announced in *Montana v. U.S.*—establishing the circumstances under which a tribe can regulate non-Indians on fee lands within the boundaries of a reservation. *See Montana v. U.S.*, 450 U.S. 544 (1981).

[9] The Tribe says that it is "grossly offensive" to call a dispute "between the Tribe and the United States" a "local issue." DE 27 at 20. But the fact that a case is local does not mean that it cannot be very important to those who will feel its impact. That the Tribe—who is solely located in North Dakota—views this case as so important actually illustrates its local nature, as others outside North Dakota do not share its particularized interest in the case's outcome.

A brief review of *Montana v. U.S.* brings to light the routine nature of this dispute. *Montana v. U.S.* concerned, in part, "the question of the power of [a] Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe." *Id.* at 557. The Supreme Court held that a tribe can regulate non-Indians on non-tribal land under two circumstances: (1) when "nonmembers" have "enter[ed] consensual relationships with the tribe or its members," and (2) when the regulated conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 565. Slawson does not have a consensual relationship with the Tribe, making the first circumstance inapplicable. As for the second circumstance, subsequent case law has made clear that it only applies when the regulated conduct "imperil[s] the subsistence or welfare of the Tribe," *id.*, meaning "tribal power must be necessary to avert catastrophic consequences." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 341 (2008).

As the administrative rulings below illustrate, the Tribe's claim that the BLM should have enforced the Tribe's law turns on whether *Montana v. U.S.*'s second category of regulatory authority allows the Tribe to dictate where Slawson can and cannot drill on fee lands within the reservation. DE 18-7 at 3-5; DE 18-14 at 3-4. Thus, contrary to the Tribe's contention, this is not a case about some new "federal decision" not to honor a tribe's right to pass and enforce laws. It is about whether the specific law passed by the Tribe meets the well-worn *Montana v. U.S.* standard for regulating non-Indian's on non-tribal lands, given the particular circumstances at play.

The Tribe tries to avoid this conclusion by claiming that *Montana v. U.S.* is unrelated to this case because it describes when a tribe can regulate a private party, and this case is about whether the Tribe can force the *government* to enforce the Tribe's law against Slawson.[10] DE 27 at 22-23 ("The issue

[10] Slawson actually made a version of this argument itself in the administrative proceedings below. Slawson explained that *Montana v. U.S.* is technically irrelevant because the Tribe is attempting to control the behavior of the federal government, and Native American tribes do not have any such

the Tribe defined in this case is whether the *United States* had to condition a permit to drill on Slawson complying with the Tribe's substantive laws."). The Tribe recites a list of sources (such as statutes and treaties) that purportedly obligate the United States to enforce tribal laws. *Id.* at 23. But whatever the Tribe's theory is for its purported ability to force the BLM to impose the Tribe's law upon Slawson, the Tribe would need the authority to pass that law in the first instance to trigger such an obligation. In other words, the government could not be obligated to enforce a tribal law regulating Slawson's conduct on fee lands if the Tribe did not have the authority to regulate such conduct itself. And whether the Tribe has such authority is controlled by *Montana v. U.S.*

That is why the Tribe itself argued throughout the administrative proceedings that *Montana v. U.S.* allows it to dictate where Slawson can drill. DE 18-7 at 3; Ex. Z, 7/10/17 MHA Nation Statement of Reasons at 8-9. Indeed, the Tribe claims *in its complaint* that *Montana v. U.S.* permits it to regulate Slawson. DE 1 ¶ 71. And in the very paragraph in which the Tribe now claims *Montana v. U.S.* is irrelevant, the Tribe pulls language directly from the progeny of *Montana v. U.S. Compare Plains Commerce Bank*, 554 U.S. at 341 (observing that "tribal power must be necessary to avert c*atastrophic consequences*" in order to justify regulation of non-Indians on non-tribal land (emphasis added)) *to* DE 27 at 23 (claiming the Tribe's law should have been enforced because it was "intended to protect" against "potentially *catastrophic harm*." (emphasis added)).

It is worth noting that the Tribe has argued that, separate and apart from *Montana v. U.S.*, its federally approved constitution gives it the right to regulate non-Indians on fee lands. That is not so. But in any event, that argument does not render this case "non-local" either, as it relies on the specifics

authority, under *Montana v. U.S.* or otherwise. But Slawson explained, as it does above, that even if the Tribe could require the government to enforce the Tribe's laws, the Tribe would need the authority to pass those laws in the first instance under *Montana v. U.S.*, which it does not have.

of the Tribe's constitution, and therefore would not be relevant for all tribes across the nation, who have different constitutions.

In sum, this case does not concern a "federal decision" or "new rule" regarding when to enforce tribal laws. As the administrative record makes clear, the challenged agency decision involved a particularized, local application of the well-established *Montana v. U.S.* standard. It therefore did not and will not have any impact on other tribes in other states. Thus, this is a prototypically local case, and it should therefore be transferred to the District of North Dakota.

CONCLUSION

This Court has the discretion to transfer this case to North Dakota. Slawson's Motion to Transfer explains why this Court ought to exercise that discretion. And as explained above, the Tribe's arguments to the contrary are unavailing. Slawson therefore requests that this case be transferred to the District of North Dakota.

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Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2018, a copy of the foregoing was filed via the Court's ECF docketing system and was served via electronic mail to all parties of record, as follows:

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