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 Interior, Defendants, and SLAWSON EXPLORATION COMPANY, INC., Intervenor-Defendant.	Case No. 1:18-cv-01462-CRC

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO TRANSFER VENUE

I. INTRODUCTION

The United States Department of the Interior and Ryan Zinke (collectively, "Federal Defendants") hereby reply in support of their motion to transfer venue to the United States District Court for the District of North Dakota (ECF No. 23). Transfer is appropriate because this case's only connection to this district is that the Department of the Interior is headquartered in Washington, D.C. Many of the relevant factors weigh in favor of transferring to the District of North Dakota. This case is one of local interest and should be heard locally. The case is centered on Federal Defendants' approval of Slawson Exploration Company, Inc.'s ("Slawson's") permits to drill on fee land located within the boundaries of Plaintiff's Reservation in North Dakota. The environmental impacts were analyzed and the decision made by the

Bureau of Land Management's ("BLM") North Dakota Field Office. In addition, Plaintiff's choice of forum should be given less deference because it is not Plaintiff's home district. Federal Defendants, therefore, respectfully request that the case be transferred to the District of North Dakota.

II. ARGUMENT

In determining whether to transfer the case, "the Court must balance a number of 'case-specific' factors when determining whether or not transfer of the case is appropriate." *Shawnee Tribe v. United States*, 298 F. Supp. 2d 21, 23 (D.D.C. 2002) (quoting *Stewart v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)). Plaintiff does not contest that this case could have been brought in North Dakota. *See* Opp'n to Defs.' Mot. to Transfer (Dkts. 18, 23) (ECF No. 27) ("Pl.'s Opp'n"). Given that this is an Administrative Procedure Act ("APA") case dealing with federal law, many of the factors in this case do not weigh strongly on either side. The case will be decided on an administrative record without witnesses, and "ease of access to sources of proof" is not an issue. *See Nat'l Ass'n of Home Builders v. EPA*, 675 F. Supp. 2d 173, 176 n.4 (D.D.C. 2009). Likewise, because this case deals with federal law, both courts are capable of addressing the governing law. *See Pueblo v. Nat'l Indian Gaming Comm'n*, 731 F. Supp. 2d 36, 40 (D.D.C. 2010) (citing *Miller v. Insulation Contractors, Inc.*, 608 F. Supp. 2d 97, 103 (D.D.C. 2009); *Valley Cmty. Pres. Comm'n v. Mineta*, 231 F. Supp. 2d 23, 45 (D.D.C. 2002)).

Several relevant factors, however, weigh in favor of transferring the case. There is a local interest in deciding this case in North Dakota. The case deals with land and permits issued in North Dakota, and Plaintiff argues that the permits have an impact on Lake Sakakawea, a reservoir of importance to North Dakota and the local community. The claims also arose in North Dakota. In addition, the Court should consider Defendants' choice of forum. This district may be Plaintiff's preferred forum, but it is not Plaintiff's home forum, and Plaintiff's choice

therefore should be given less weight. *See Nat'l Ass'n of Home Builders*, 675 F. Supp. 2d at 179–80 ("When there is only an 'attenuated' connection between the controversy at issue and the plaintiff's chosen forum and [that] forum is not the plaintiff's home forum, the deference afforded to the plaintiff's choice is diminished."). Plaintiffs have identified no significant connections between the case or Plaintiff and the District of Columbia. Overall, the factors weigh in favor of transfer.

A. This case has local importance and should be decided in North Dakota.

"In cases in which the land in dispute is located entirely within the proposed transferee district, there is some degree of local interest in deciding the case in that district." *Nat'l Ass'n of Home Builders*, 675 F. Supp. 2d at 177 (citing *Shawnee Tribe*, 298 F. Supp. 2d at 26; *Trout Unlimited v. U.S. Dep't of Agric.*, 944 F. Supp. 13, 19 (D.D.C. 1996)). The rationale that "there is a local interest in having localized controversies decided at home" "'applies to controversies involving federal decisions that impact the local environment, and to controversies requiring judicial review of an administrative decision.'" *Wyandotte Nation v. Salazar*, 825 F. Supp. 2d 261, 266 (D.D.C. 2011) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947), quoting *Sierra Club v. Flowers*, 276 F. Supp. 2d 62, 70 (D.D.C. 2003).

This case is one of local importance. It has implications for the local environment, as Plaintiff asserts that the permits at issue threaten Lake Sakakawea, located in central North Dakota. The lake is of importance to Plaintiff, Compl. ¶¶ 20–21, and to the local community and North Dakota generally. For instance, there is a state park located on the south short of Lake Sakakawea, and there is public access to the reservoir. *See* North Dakota Parks & Recreation Department website, www.parkrec.nd.gov/parks/lssp/lssp.html (last visited October 29, 2018). Local media, including the Bismarck Tribune and the Grand Forks Herald, have covered this case. *See, e.g.*, https://bismarcktribune.com/bakken/mha-nation-continues-legal-fight-over-oil-

wells-near-lake/article_10d819bc-d48d-57c8-8e62-7d3e7260d447.html; http://www.grandforksherald.com/business/energy-and-mining/4489309-mha-nation-continues-legal-fight-over-oil-wells-near-lake; https://www.kfyrtv.com/content/news/Three-Affiliated-Tribes-files-lawsuit-over-drilling-of-oil-wells-near-Lake-Sakakawea-491593321.html. Clearly, there is a local interest in this case.

Plaintiff argues that the case is of national importance because the decision affects the Missouri River, "a *national* resource managed by *federal* officials." Pl.'s Opp'n at 7. But unlike the cases Plaintiff cites, this case does not involve federal management of the Missouri River. *See id.* (citing *Am. Rivers .v U.S. Army Corps of Eng'rs*, 271 F. Supp. 2d 230, 238 (D.D.C. 2003) (challenging Corps' operation "of the extensive dam and reservoir system on the Missouri River"); *In re Operation of the Missouri River System Litig.*, 363 F. Supp. 2d 1145, 1150 (D. Minn. 2004) ("This case arises out of the management of the Missouri River, which flows from Montana to Missouri.")). In both those cases, as well, various states and other "interested parties filed a number of lawsuits in various districts, seeking to protect their interests." *In re Operation*, 363 F. Supp. 2d at 1150–51. Such is not the case here. Plaintiff overstates the national significance of this case by trying to tie it to the Missouri River system. Instead, this is an APA case challenging a particular agency decision to issue permits to drill.

Nor do Plaintiff's allegations that the government violated its trust duties override the local interest in this case. Pl.'s Opp'n at 20–21. In *Wildearth Guardians v. U.S. Bureau of Land Management*, for example, the court noted that even though the case raised issues of national importance regarding "land management, energy, and environmental concerns," the significant local interest provided "an additional reason to transfer this case to Wyoming." 922 F. Supp. 2d 51, 55–56 (D.D.C. 2013). Similarly, in *Gulf Restoration Network v. Jewell*, the court noted that

while the oil spill "and subsequent restoration efforts are significant to individuals and communities nationwide, particularly those who reside in the other Affected States, Alabama's superior interest in this controversy is undeniable." 87 F. Supp. 3d 303, 316 (D.D.C. 2015). In addition, the District of North Dakota has experience in Native American Indian issues and is certainly capable of deciding trust issues. *See, e.g., Shawnee Tribe*, 298 F. Supp. 2d at 27 (transferring case out of D.D.C. in part because transferee court would be knowledge about and experienced in Indian treaties as well as local land use and property issues). Any national significance of this case does not override the local interest.

B. The claims arose in North Dakota.

"Transfer is . . . proper when 'the material events that constitute the factual predicate for the plaintiff's claims occurred' in the transferee district." *S. Utah Wilderness All. v. Lewis*, 845 F. Supp. 2d 231, 235 (D.D.C. 2012) (quoting *Kafack v. Primerica Life Ins. Co.*, 934 F.Supp. 3, 6–7 (D.D.C.1996). In APA cases, "courts generally focus on where the decision-making process occurred to determine where the claims arose." *Gulf Restoration Network*, 87 F. Supp. 3d at 313; *Nat'l Ass'n of Home Builders*, 675 F. Supp. 2d at 179 (citations omitted). When the decision-making process was diffuse courts have found this factor to be neutral." *Gulf Restoration Network*, 87 F. Supp. 3d at 313–14 (citing *Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 15 (D.D.C. 2000) (finding the third private-interest factor "inconclusive" where research was conducted and documents were drafted in Alaska, the Record of Decision and some policy review occurred in the District of Columbia, and "the entire rulemaking process had a national dimension as comments were received from all 50 states and public meetings were held both inside and outside of Alaska").

Here, the land at issue is located in North Dakota and many of the agency's decisions were made in North Dakota. BLM's North Dakota field office analyzed the environmental

impacts of the proposed drilling and issued the Environmental Assessment. The North Dakota Field Manager issued a Finding of No Significant Impact and issued the Decision Record authorizing Slawson's proposed drilling. The State Director for the Montana/Dakotas State Office (located in Billings, Montana, but obviously tied to North Dakota) reviewed the decision and affirmed. While some decision-making on the appeals of these decisions took place outside North Dakota — the OHA Director's office is located in Arlington, Virginia, for example — significant decision-making took place in North Dakota. Plaintiff does not allege that any decision-making actually took place in Washington, D.C. proper. As such, this factor supports transfer to North Dakota.

C. Defendants' choice of forum weighs in favor of transfer.

Defendants' choice of forum should be given some weight because Defendants have articulated legitimate reasons for preferring to litigate in North Dakota — namely, that the case does not have a connection to D.C. besides Interior's headquarters, is of local interest, and arose in North Dakota. *See Gulf Restoration Network*, 87 F. Supp. 3d at 313. "In [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." *Id.* Given the land and resources at issue are located in North Dakota and that Plaintiff's reservation is in North Dakota, there can be no real argument that the impacts of the decision are not felt most directly in North Dakota. As such, this favor weighs in favor of transfer.

D. Plaintiff's choice of forum should be given limited weight because this is not Plaintiff's home horum.

Plaintiff argues its choice of forum is entitled to particular weight because it is a federally recognized tribe with a government-to-government relationship with the United States, but the case law does not support this proposition. Pl.'s Opp'n at 4. Plaintiff fails to cite any case

holding that a tribe's choice of forum is entitled to more weight simply because it is a federally recognized tribe. *See id. California Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008), which Plaintiff cites, does not deal with a motion to transfer at all, and stands only for the uncontested proposition that federally recognized tribes enjoy a government-to-government relationship with the United States. In fact, "courts in this district have a history of providing less deference to Native American Indian tribes when they have brought suit in this, their non-home forum." *Shawnee Tribe*, 298 F. Supp. 2d at 24–25. Indeed, this district has transferred a number of cases brought by Indian tribes to other districts where the Tribe's reservation is located. *See id.* at 25 (giving diminished deference to plaintiff Shawnee Tribe's choice of forum because, "despite the Tribe's assertion that its individual members live across the United States, the Tribe's reservation is, in fact, located in Kansas"); *Ysleta del Sur Pueblo v. Nat'l Indian Gaming Comm'n*, 731 F. Supp. 2d 36, 42 (D.D.C. 2010) (citing *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, No. 04–cv–1727, slip op. at 8 (D.D.C. May 2, 2005) (granting little deference to plaintiff's choice of forum because plaintiff, a federally-recognized Indian tribe, had no connection to this district)); *Me-Wuk Indian Cmty. of the Wilton Rancheria v. Kempthorne*, 246 F.R.D. 315, 321 (D.D.C. 2007).

Plaintiff also argues that Indian tribes are not considered to be a citizen of any state for jurisdictional purposes and that it has a connection to Washington, D.C. because of its treaties and government-to-government relationship with the United States. Pl.'s Opp'n at 4–5. Courts in this district have not held that Indian tribes are stateless for purposes of transfer motions, *see supra*, and Plaintiff fails to describe any real connection to Washington, D.C. At best, Plaintiff's brief demonstrates that the United States has a connection to Washington, D.C., and invites Plaintiff's leaders to events in D.C. This is insufficient to demonstrate that Washington, D.C. is

Plaintiff's home forum or that Plaintiff has a strong connection to Washington, D.C. for the purposes of choice of venue. The Court, thus, should not give substantial weight to Plaintiff's choice to forum.

In addition, this Court should give little weight to Plaintiff's choice of forum because this district has "no meaningful ties to the controversy." *Sierra Club*, 276 F. Supp. 2d at 68 (quoting *Wilderness Soc'y*, 104 F. Supp. 2d at 13). The only meaningful tie to this District is that the Department of the Interior is headquartered there. In this case, particularly because the actual decision-making process took place outside the district, this fact carries little weight.

E. Both districts have heavy caseloads.

Plaintiff also argues that the District of North Dakota is more congested than this district because it only has one acting judge. Slawson's motion demonstrated that per judgeship, North Dakota is not "substantially" more congested than this district. Slawson's Mot. to Transfer at 17–18 (ECF No. 18). Plaintiff notes that the Federal Judicial Conference has declared a judicial emergency for the District of North Dakota, Pl.'s Opp'n at 15–16, but this appears to be based on the fact that the district is authorized to have two judges and has only one active judge since Judge Erickson was promoted to the Eighth Circuit in September 2017. *See* http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies/judicial-emergency-definition (defining judicial emergency as "any court with more than one authorized judgeship and only one active judge") (last visited Oct. 30, 2018). Federal Defendants concede that the North Dakota court is busy, but it is not known when another judge may take the bench. In any event, congestion is just one factor for this Court to consider in weighing the merits of transfer.

III. CONCLUSION

The relevant factors in this case weigh in favor of transferring the case to the District of North Dakota. The case could have been brought there, and challenges decisions made in North Dakota regarding lands and permits to drill in North Dakota. There is no denying the local interest in this case, and the lack of connection to the District of Columbia, excepting Interior's headquarters being located there. Plaintiff is not a resident of this district and its choice of forum should therefore not be given great consideration. Federal Defendants respectfully request therefore that this case be transferred to the District of North Dakota.

Respectfully submitted this 1st day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 2018, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ Devon Lehman McCune
Devon Lehman McCune
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