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. 1:18-1462-CRC

SLAWSON'S MOTION TO TRANSFER VENUE

Slawson Exploration Company, Inc. ("Slawson") respectfully moves to transfer this case to the United States District Court for the District of North Dakota under 28 U.S.C. § 1404(a). Transfer to the District of North Dakota is appropriate because Plaintiff could have brought this case in that district. And transfer is particularly warranted here because, among other reasons, the District of North Dakota is Plaintiff's home district, Slawson's permits to drill—which are at the center of this action—concern land in North Dakota, North Dakota is where the vast majority of the administrative activities related to this action took place, and the District of North Dakota has already considered a challenge to the very permits at issue here so is familiar with the issues in this case.

Counsel for Slawson has discussed this Motion to Intervene with counsel for all parties. Plaintiff opposes the motion, but Defendants do not.

For the reasons stated above and set forth in the Points and Authorities below, Slawson respectfully requests that the Court grant its Motion to Transfer Venue.

Dated: August 30, 2018

Respectfully submitted
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STATEMENT OF POINTS AND AUTHORITIES IN SUPPORT OF SLAWSON'S MOTION TO TRANSFER VENUE

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INTRODUCTION

This case is about permits issued to Slawson by the North Dakota Field Office of the Bureau of Land Management to drill oil wells in North Dakota, and the objection of Plaintiff—an Indian tribe in North Dakota—to those permits. Prior to issuing the permits, the North Dakota Field Office published an Environmental Assessment and a Finding of No Significant Impact. The Field Office also sought and received input about Slawson's permits from North Dakota-based organizations—both private and governmental. This case belongs in North Dakota, not the District of Columbia.

28 U.S.C. § 1404(a) permits this Court to transfer this case to the District of North Dakota. First, Plaintiff could have brought this case in the District of North Dakota because Plaintiff resides in North Dakota and a "substantial part of property that is the subject of the action is situated" there. Second, the interests of convenience and justice weigh strongly in favor of transfer. The District of North Dakota has already resolved one lawsuit on the validity of these permits and is familiar with the issues. Nearly all of the relevant factors weigh in favor of transfer. And the only factor that cuts against transfer—Plaintiff's choice of forum—carries little to no weight, given this District's lack of any meaningful connection to this case.

Neither the government nor the citizens of D.C. have a significant interest in the outcome of this case. Indeed, Slawson understands that Defendants here also plan to seek transfer to North Dakota. And, North Dakota's government and its citizens have a number of concrete interests in this case; they already expressed some of them to the North Dakota Field Office. *See supra* at 2.3.3. Slawson respectfully requests that this Court exercise its discretion to transfer this case to North Dakota.

BACKGROUND

1. The Torpedo Federal Wells

This case concerns Slawson's oil wells located within the outer boundaries of the Fort Berthold Indian Reservation. DE 1 ¶ 1. These innovative wells are meant to develop a large tract of otherwise

unreachable minerals beneath the bed of Lake Sakakawea—a large reservoir (around 178 miles long) that was created by the construction of a dam completed in 1956. Ex. A, Environmental Assessment ("EA") (Mar. 2017) at 1–3, 20; Ex. B, Sundberg Decl. ¶¶ 2–3; https://en.wikipedia.org/wiki/Lake_Sakakawea. The wells are part of Slawson's Torpedo Federal Project, where Slawson has drilled multiple horizontal wells from the Torpedo Well Pad, minimizing surface disturbance. *Id.* The Torpedo Pad is on fee lands—not Tribal or Indian Allottee lands. Ex. B, Sundberg Decl. ¶ 4. The wells drilled from the Torpedo Pad will only develop federal, state, and fee oil and gas leases, not Indian tribal or allottee minerals. Ex. A, EA at 1; Ex. B, Sundberg Decl. ¶ 4.

The Torpedo Federal Project's federally owned oil and gas leases are regulated by the Bureau of Land Management ("BLM"), an agency within the Department of the Interior (the "Department"). In order to get the BLM's approval to drill the Torpedo wells, Slawson applied for permits with the BLM's North Dakota Field Office. Ex. B, Sundberg Decl. ¶¶ 2, 5-8. It began doing so in 2011. *Id.* The BLM—again, through its North Dakota Field Office—analyzed the potential impact Slawson's project could have on the area, as required by the National Environmental Policy Act, 42 U.S.C. §§ 4321–4347. *Id.* ¶¶ 5–6. As a part of that analysis, the Field Office sought comments from North Dakota state agencies, private organizations, and citizens who might have an interest in the project. Ex. A, EA at 4–10. The Office received 25 comments from members of the public in response. *Id.* at 9.

During its review, the BLM repeatedly attempted to solicit the MHA Nation's input on the Torpedo Federal Project. In early 2013, tribal representatives met with the BLM at a proposed Torpedo Pad location and voiced no objections—even though the proposed location was 345 feet closer to Lake Sakakawea than the final Torpedo Pad location. Ex. B, Sundberg Decl. ¶ 7; Ex. C, EA app. G (Mar. 2017). Throughout 2016, the BLM repeatedly communicated with the MHA Nation about the

proposed Torpedo Pad location and had four in-person meetings. *Id.* Despite these efforts, the MHA Nation did not raise any issues with the Torpedo Pad's location until August 2016. *See id.*

In March 2017, the North Dakota Field Office published its Environmental Assessment, a Finding of No Significant Impact, and a Decision Record, through which it approved Slawson's project. Ex. A, EA; Ex. D, 3/10/17 FONSI; Ex. E, 3/10/17 Decision Record. In its Environmental Assessment, the Field Office recommended an alternative location for Slawson's Torpedo Pad to the originally proposed location, due in part to some of the comments it received from local organizations. Ex. A, EA at 4–5, 10. It did so for a number of reasons, including to reduce risks of impacts to the Piping Plover, a threatened bird, and its designated critical habitat. *Id.*; Ex. B, Sundberg Decl. ¶ 6. Slawson accepted the recommendation, siting its Torpedo Pad in the alternative location identified by the Field Office. Ex. B, Sundberg Decl. ¶ 6.

Once the North Dakota Field Office issued its decision approving the permits, the MHA Nation sought administrative review of the decision with the BLM's Montana-Dakotas State Director. The MHA Nation principally objected to the location of the Torpedo Pad. *See* Ex. F, 4/24/17 State Director Decision. It argued the pad's location was sited 600 feet from the shore of Lake Sakakawea, which purportedly conflicted with a recent tribal resolution that sought to impose a 1,000-foot setback on all wells from the lake—regardless of whether the wells were on tribal land or fee land. *Id.* at 2-3. The MHA Nation also asserted the location of the Torpedo Pad conflicted with the BLM's resource management plan and management decisions of the Bureau of Indian Affairs and Army Corps of Engineers. *Id.* at 5–12. After reviewing the MHA Nation's complaints, the State Director affirmed the North Dakota Field Office's decision to issue the Torpedo permits, on April 24, 2017. *Id.* at 14.

2. The MHA Nation's Appeal And Petition For Stay

The MHA Nation next filed a Notice of Appeal and Petition for Stay with the Interior Board of Land Appeals ("IBLA"), on May 24, 2017. Ex. T, 5/23/17 Notice of Appeal. Slawson intervened in the appeal and responded to the MHA Nation's Petition for Stay. Briefing on the Petition for Stay was completed on June 5, 2017.

BLM decisions issued under 43 C.F.R. subpart 3160 (like the one at issue) remain in effect while the IBLA considers the merits of an appeal, unless either the BLM or the IBLA grants a petition for stay. 43 C.F.R. § 3165.4 (c). The IBLA's regulations state it "shall grant or deny" petitions for stay within 45 days of the expiration of the period for filing a Notice of Appeal. 43 C.F.R. § 4.21 (b)(4). Here, the IBLA took no action within its window to consider the MHA Nation's Petition. Relying on this failure to timely issue the stay within the 45-day window, Slawson began drilling the first of the Torpedo wells. Ex. G, Houston Decl. ¶¶ 5–9.

Yet on August 9, 2017—more than a month after the IBLA's 45-day window expired—an administrative judge from the IBLA issued an order staying the effectiveness of Slawson's permits pending the IBLA's review of the MHA Nation's appeal. Ex. H, 8/9/17 Stay Order. This stay required Slawson to stop drilling. *Id.*

3. Slawson's Lawsuit In The District Of North Dakota

The IBLA's failure to issue a timely stay decision put at risk the millions of dollars Slawson had expended to develop the Torpedo Federal Project and permits, and threatened to cause additional costs due to the need to halt development mid-project. Ex. G, Houston Decl. ¶ 8. Slawson therefore filed suit in the District of North Dakota, seeking an injunction and/or tempororary restraining order preventing the IBLA from enforcing its untimely and unlawful stay order. Ex. I, Slawson Complaint.

The Court entered a temporary restraining order, which had the effect of reinstating Slawson's permits. Ex. J, 8/15/17 Order Granting TRO. The MHA Nation intervened in that lawsuit several weeks later and sought to dismiss Slawson's lawsuit (and therefore vacate the temporary restraining order). After briefing, that Court denied the MHA Nation's motion to dismiss and granted Slawson's request to convert the temporary restraining order to a preliminary injunction, ensuring Slawson could continue developing the Torpedo Federal Project during the pendency of the MHA Nation's administrative appeal. Ex. K, 11/27/17 Order granting Mot. for Prelim. Inj.

4. The Director Of The Office Of Hearing And Appeals' Review Of The MHA Nation's Administrative Appeal

While Slawson's District of North Dakota lawsuit was playing out, the MHA Nation's underlying administrative appeal remained pending at the IBLA. Due in part to the IBLA's improper stay order, both the BLM and Slawson asked the Director of the Department's Office of Hearings and Appeals (the "Director") to take jurisdiction over the MHA Nation's appeal.[1] The Director agreed to take jurisdiction. Ex. L, 10/13/17 Order. The Director ruled that the IBLA should not have issued the stay order. Ex. M, 3/22/18 Order. The Director further considered the merits of the MHA Nation's appeal, and found that the BLM properly approved Slawson's Torpedo permit applications. *Id.*

5. Current Litigation

The MHA Nation claims in this suit that the Director's approval of the BLM's grant of Slawson's permits was "arbitrary and capricious" under the Administrative Procedure Act, 5 U.S.C. § 551, et seq. ("APA") and should therefore be vacated. Because this case has no connection to the District of Columbia, it should be transferred to Plaintiff's home District of North Dakota.

[1] Under 43 C.F.R. § 4.5 (b), the Director "may assume jurisdiction of any case before any board of the Office [of Hearings and Appeals] or review any decision of any board of the Office."

ARGUMENT

1. Slawson Has Standing To Bring A § 1404(A) Motion To Transfer

"[G[enerally, [w]hen a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party." *Intrepid Potash-New Mexico LLC v. U.S. Dept. of Interior*, 669 F. Supp. 2d 88, 92 (D.D.C. 2009) (citations and quotation marks omitted). As such, Slawson may move to transfer under 28 U.S.C. § 1404(a).

Two opinions from this District make clear that an intervenor can bring a § 1404(a) motion to transfer: *Intrepid Potash*, 669 F. Supp. 2d at 91–93, and *Western Watersheds Project v. Clarke*, No. 03-01985(HHK), 2004 U.S. Dist. LEXIS 32640, at *5–8 (D.D.C. July 28, 2004).[2] A number of other cases from this district have considered the merits of an intervenor's motion to transfer under 28 U.S.C. § 1404(a) without raising any concern about the intervenor's ability to do so. *See S. Utah Wilderness All. v. Lewis,* 845 F. Supp. 2d 231 (D.D.C. 2012); *Home Builders Ass'n of N. California v. U.S. Fish & Wildlife Serv.*, Civ. Act. No. 06-932 (RWR), 2006 WL 3334956 (D.D.C. Nov. 16, 2006); *Harvison v. Sunbelt Sav., FSB*, Civ. Act. No. 91-1271, 1991 WL 153108 (D.D.C. July 23, 1991); *Nat'l Wildlife Fed'n v. Alexander*, 458 F. Supp. 29 (D.D.C. 1978). And counsel has found no case from this District prohibiting intervenors to so move.

The *Intrepid Potash* and *Western Watersheds* courts recognize that some courts in other circuits have held that intervenors cannot bring a § 1404(a) motion to transfer, but observe that these other courts largely based their decisions on inapplicable precedent related to a different type of motion to transfer: a 28 U.S.C. § 1406 motion based on improper venue. *Intrepid Potash* and *Western Watersheds*,

[2] Several courts outside the D.C. Circuit have also determined that a third-party defendant can bring a motion to transfer under 24 U.S.C. § 1404(a). *See, e.g., Krupp Int'l, Inc. v. Yarn Indus., Inc.,* 615 F. Supp. 1103, 1104–07 (D. Del. 1985); *Daily Express, Inc. v. N. Neck Transfer Corp.*, 483 F. Supp. 916, 917–18 (M.D. Pa. 1979).

on the other hand, draw a distinction between motions to transfer for improper venue under 28 U.S.C. § 1406, which *require* transfer when meritorious, and motions to transfer for the convenience of the parties and in the interest of justice under § 1404(a), which give the court discretion. 669 F. Supp. 2d at 91–92; 2004 U.S. Dist. LEXIS 32640, at *7–8.

And regardless of whether MHA Nation seeks to rely on out-of-district cases to argue that Slawson cannot move to transfer, Slawson understands that Defendants also plan to move to transfer so this issue has no relevance as to whether this case may be transferred to North Dakota.

2. Transfer Of This Case To The District Of North Dakota Is Appropriate Under § 1404(a)

Under 28 U.S.C. § 1404(a), "a district court may transfer any civil action to any other district or division where it might have been brought" "for the convenience of parties and witnesses, in the interest of justice." The movant seeking transfer need only show two factors: (1) "that the plaintiff could have brought suit in the proposed transferee district," and (2) "that considerations of convenience and the interests of justice weigh in favor of a transfer." *Bergmann v. U.S. Dep't of Transp.*, 710 F. Supp. 2d 65, 71 (D.D.C. 2010). The latter requires a court to "exercise its discretion" in making an "individualized, case-by-case consideration of convenience and fairness." *Alaska Wilderness League v. Jewell*, 99 F. Supp. 3d 112, 115 (D.D.C. 2015). That discretion, however, "is not entirely unfettered." *Id.* Courts in this circuit have established a number of private and public factors to be considered in weighing the prudence of a discretionary transfer.

Here, Plaintiff unquestionably could have brought this case in the District of North Dakota. Further, all but one of the private and public factors discussed below are neutral at worst and, more often, weigh heavily in favor of transfer. And case law dictates that the one factor cutting against transfer—Plaintiff's choice of forum—be given little weight under the present circumstances. Transfer is therefore not just appropriate, but advisable.

2.1 Plaintiff Could Have Brought This Case In The District Of North Dakota

Under 28 U.S.C. § 1391(e), "[c]ivil actions like this one against a federal government agency or official may be heard in any district where, among other things, . . . 'a substantial part of property that is the subject of the action is situated, or . . . the plaintiff resides if no real property is involved in the action." *Alaska Wilderness League*, 99 F. Supp. 3d at 115 (quoting 28 U.S.C. § 1391(e)(1)). The land at issue in this case is all underneath or next to Lake Sakakawea, which is itself wholly contained within North Dakota. Plaintiff resides in North Dakota. The District of North Dakota would therefore be a proper venue for this action under § 1391(e)(1).

Even if that were not so, cases against a federal agency or its employee can also be filed anywhere that "a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(e)(1). In APA cases like this one, courts routinely find that venue lies in the transferee district where much of the work underlying an administrative decision was performed, or the district on which the challenged administrative action is focused. *See, e.g., S. Utah Wilderness All. v. Norton*, 315 F. Supp. 2d 82, 86 (D.D.C. 2004) (finding that venue lied in transferee district "because the dispute concerns land in Utah, BLM's Utah state office was involved in the leasing decisions, and the actual lease auction occurred in Utah"); *Intrepid Potash*, 669 F. Supp. 2d at 93 (finding that venue lied in transferee District of New Mexico in a case "challenging the IBLA's affirmance of the BLM New Mexico director's decision to approve applications by a defendant corporation headquartered in New Mexico for permits to drill on land that is located in New Mexico").

Here, "a substantial part of the events or omissions giving rise to" Plaintiff's alleged claim occurred in the District of North Dakota. Plaintiff's suit concerns the regulation of land in North Dakota. DE 1 ¶¶ 1, 11. The BLM's North Dakota Field Office analyzed the applications for drilling permits Plaintiff's challenge here. Ex. A, EA. That office also issued the Environmental Assessment

and Finding of No Significant Impact supporting Slawson's permits. *Id.*; Ex. D, FONSI. And the BLM's North Dakota Field Director issued the Decision Record granting Slawson the challenged drilling permits. Ex. E, Decision Record.

Because the land at issue in this case is in North Dakota, Plaintiff is a resident of North Dakota, and "a substantial part of the events or omissions giving rise to [Plaintiff's] claim occurred" in North Dakota, Plaintiff could have brought this suit in the District of North Dakota.

2.2 The § 1404(a) Private-Interest Factors Weigh In Favor Of Transfer

"The private-interest considerations the Court looks to when deciding whether to transfer a case include: (1) the plaintiff's choice of forum; (2) the defendant's choice of forum; (3) where the claim arose; (4) the convenience of the parties; (5) the convenience of witnesses, particularly if important witnesses may actually be unavailable to give live trial testimony in one of the districts; and (6) the ease of access to sources of proof." *Bergmann*, 710 F. Supp. 2d at 72 (quotation marks and citation omitted).

All of the private interest factors but one—Plaintiff's choice of forum—weigh in favor of transfer. And as discussed below, Plaintiff's choice of forum carries little weight in light of the circumstances of the case. The private-interest factors therefore counsel in favor of transfer.

2.2.1 Plaintiff's Choice Of Forum Deserves Little Deference

The District of D.C. is not Plaintiff's home forum. A Plaintiff's choice of forum is typically given substantial deference. *Bergmann*, 710 F. Supp. 2d at 72. "Substantially less deference is warranted, however, when a plaintiff choose[s] a forum other than his home forum." *Id*; *see also Gulf Restoration Network v. Jewell,* 87 F. Supp. 3d 303, 311 (D.D.C. 2015) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981)) ("When the plaintiff has chosen the home forum, it is reasonable to assume that the choice is convenient; but when the plaintiff or real parties in interest are foreign, this assumption is

much less reasonable and the plaintiff's choice deserves less deference."). 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 v. United States*, 298 F. Supp. 2d 21, 24–25 (D.D.C. 2002). Thus, any deference owed to Plaintiff's choice of this forum is diminished by the fact that the District of North Dakota, rather than this district, is the MHA Nation's home forum.

There is no meaningful connection between this case and this District. A Plaintiff's choice of forum is even less relevant when there is no meaningful connection between the case and the district in which it is brought. *Intrepid Potash*, 669 F. Supp. 2d at 95 (D.D.C. 2009) (explaining that when "most of the relevant events occurred elsewhere[,]" "deference [to Plaintiff's choice of forum] is weakened"); *S. Utah Wilderness All.*, 315 F. Supp. 2d at 86 (deference "is lessened when plaintiff's forum choice lacks meaningful ties to the controversy and [has] no particular interest in the parties or subject matter"). "In fact, the D.C. Circuit has cautioned that '[c]ourts in this circuit must examine challenges to . . . venue carefully' because plaintiffs may 'nam[e] high government officials as defendants' when a claim 'properly should be pursued elsewhere.'" *Western Watersheds Project v. Jewell*, 69 F. Supp. 3d 41, 44 (D.D.C. 2014) (quoting *Cameron v. Thornburgh*, 983 F.2d 253, 256 (D.C. Cir. 1993)).

In *Southern Utah Wilderness Alliance*, for example, the plaintiff sued the Secretary of the Department of the Interior and other agencies and officials for allegedly failing to conduct a proper environmental assessment prior to permitting the sale of oil and gas leases. *S. Utah Wilderness All.*, 315 F. Supp. 2d at 83. The Court found that Plaintiff's choice of the District of D.C. as the forum for its suit was due less deference because the "BLM's Utah state office administered the public lands at issue, BLM's Utah State Director had authority to issue oil and gas leases, and the lease sale occurred in Utah under the direction of BLM's Utah state office." *Id.* at 87. Plaintiffs argued that the District of Columbia had ties to the case because the permits implicated wilderness policy changes made by the Department,

and because federal officials had some involvement with the permitting process through, for instance, email exchanges with the Utah state office. *Id.* But those facts did not sway the Court, which observed that the "mere involvement on the part of federal agencies, or some federal officials who are located in Washington, D.C., is not determinative," and that it saw no evidence of "special oversight by Washington of Utah BLM's mineral leasing program." *Id.*

Similarly, the *Intrepid Potash* court found that this district lacked ties to a case regarding permits to drill for oil in New Mexico. The Court reasoned that "the land at issue [was] entirely within New Mexico, and the BLM field office in Carlsbad and the New Mexico state director made the original decisions to approve the drilling applications." *Intrepid Potash*, 669 F. Supp. 2d at 95*; see also Alaska Wilderness League*, 99 F. Supp. 3d at 119 (holding that suit did not have "any direct connection to the District of Columbia" because the plaintiffs "challenge[d] a regulation that will apply exclusively in Alaska (and waters off Alaska's coast), that will regulate oil and gas explorers in Alaska (and those same waters), and that will allow the incidental taking of small numbers of a marine mammal typically found basking on Alaska's shores").

This case is on all fours with *Southern Utah Wilderness Alliance* and *Intrepid Potash*, as it has no meaningful ties to the District of Columbia. The underlying challenged action—the BLM's approval of Slawson's permits to drill—solely regulates behavior and land use in North Dakota. Further, the permit approvals were made by the BLM's North Dakota Field Director, and, as in *Bregmann*, supported by the Environmental Assessment and Finding of No Significant Impact assembled by the BLM's North Dakota Field Office. Slawson understands that a D.C.-based official from the Department of the Interior may have reviewed the North Dakota Field Office's NEPA analysis, but as explained in *Southern Utah Wilderness Alliance,* such minimal contact does not establish a "meaningful tie" between D.C. and the administrative action at issue. 315 F. Supp. 2d at 87; *Alaska Wilderness League*,

99 F. Supp. 3d at 120 (finding that case arose in Alaska despite the fact that challenged regulation was "signed and promulgated" by officials in D.C., in part because "every Federal Register notice published by the Service is subject to some level of review and sign-off by Service leadership in Washington, D.C."). In other words, "[n]one of this has any direct connection to the District of Columbia, its environment, its wildlife, or its people." *Alaska Wilderness League*, 99 F. Supp. 3d at 119.

Plaintiff may try to argue that ties between this case and D.C. can be forged by the national importance of the issues in this suit. Even if that were the case, that alone would not be enough to lend Plaintiff's choice of forum relevance. *Intrepid Potash*, 669 F. Supp. 2d at 96. But in any event, this case concerns distinctly local issues, not issues of national importance, as explained *infra* in Section 2.3.3.

This is the type of "overwhelmingly local" case that has "no meaningful nexus with the District of Columbia." *Pres. Soc. of Charleston v. U.S. Army Corps of Engineers*, 893 F. Supp. 2d 49, 54 (D.D.C. 2012). This Court therefore owes little to no deference to Plaintiff's choice of this forum.

Plaintiff should be discouraged from forum shopping. A plaintiff's choice of forum is further discounted if there are indications that that choice was the result of forum shopping. *M & N Plastics, Inc. v. Sebelius*, 997 F. Supp. 2d 19, 27 (D.D.C. 2013) ("[T]he Court finds that both the private and public interest factors, particularly the law's aversion to forum shopping, heavily favor transfer of this case to the Eastern District of Michigan."). Slawson does not claim to know Plaintiff's motivations for filing this case in the District of Columbia. But it is entirely possible that Plaintiff's choice to eschew its home forum for this district was an effort to avoid the court that already ruled against Plaintiff. Ex. J, 8/15/17 Order Granting TRO; Ex. K, 11/27/17 Order granting Mot. for Prelim. Inj. The law's interest in discouraging forum shopping, therefore, also counsels in favor of giving Plaintiff's choice of forum limited deference.

2.2.2 Defendant's Choice Of Forum Supports Transfer

"A defendant's choice of forum must be accorded some weight if the defendant presents legitimate reasons for preferring to litigate the case in the transferee district." *Gulf Restoration Network v. Jewell*, 87 F. Supp. 3d 303, 313 (D.D.C. 2015) (quotation marks and citation omitted). In an APA case, a defendant has such a "legitimate reason" "where the [alleged] harm from a federal agency's decision is felt most directly in the transferee district." *Id.* Under such circumstances, a defendant's choice of forum is accorded "some weight." *Id.*

The original Defendants in this case—the Department and Secretary Zinke—told Slawson that they intend to transfer this case to the District of North Dakota. Slawson moves to transfer to that District as well. These preferences should hold "some weight," as North Dakota is the area where any harm alleged by Plaintiff would be felt "most directly," if it actually existed. *See supra* Section 2.2.1 and *infra* Section 2.3.3.

2.2.3 Plaintiff's Claim Arose In The District Of North Dakota

"In cases brought under the [Administrative Procedure Act], courts generally focus on where the decisionmaking process occurred to determine where the claims arose." *Alaska Wilderness League*, 99 F. Supp. 3d at 119. Indeed, "[w]here the decision-making process was concentrated in a particular city or state, courts have found this factor to weigh heavily in the transfer analysis." *Gulf Restoration Network*, 87 F. Supp. 3d at 313. Here, the pertinent decision-making process was in North Dakota, for the many reasons stated in Section 2.1 above and Section 2.3.3 below. In short, North Dakota is where Slawson's application for permits to drill were filed, where they were evaluated, and where they were granted.

Plaintiff may contend that the decision of the Virginia-based OHA Director approving the BLM's grant of Slawson's permits is the actual agency action being challenged, and that the case therefore did not "arise" in North Dakota. Such an approach would conflict with the one taken by the *Intrepid Potash* court. The challenged agency action in that case was a decision by the Virginia-based IBLA[3] affirming a field office's issuance of permits to drill for oil. 669 F. Supp. 2d at 90–91. The court nonetheless held that this private factor weighed in favor of transfer to the district where the permits were issued, since that is where the decisions underlying the action were made. *Id.* 97–98 (finding that "the controversy is centered solely on Interior's final decision to approve Yates' applications for permits to drill on land in New Mexico," and thus "the first three private interest factors," including the question of where the claims arose, "favor transfer" to New Mexico).

The approach taken by the *Intrepid Potash* court is equally applicable here. To focus on the location where the OHA Director issued its appellate decision would be to ignore the gravamen of Plaintiff's complaint: that the BLM's North Dakota Field Office did not properly assess The Torpedo Project's compliance with tribal and federal regulations in the Office's Decision Record, Finding of No Significant Impact, and Environmental Assessment. DE 1 ¶¶ 49, 51, 53, 65, 68. It is therefore the North Dakota Field Office's decision-making at the center of this case, meaning North Dakota is the place where Plaintiff's claims "arose."[4] This factor favors transfer.

2.2.4 The District Of North Dakota Would Be More Convenient For The Parties

The fourth factor also favors transfer, as the District of North Dakota is more convenient for the parties. Defendants have representatives in both districts—their convenience therefore does not

[3] In fact, the IBLA is an appellate board within the OHA.

[4] It is worth noting that even if the location where the OHA Director issued its decision were relevant here, it would not counsel in favor of keeping the case in this district. Again, the OHA Director issued its decision from Virginia, not D.C. Ex. M, 3/22/18 Order.

appear to cut in either direction. Slawson does not have an office in D.C., but its main oil and gas offices are in Colorado—significantly closer to North Dakota than D.C—with an operations office in North Dakota. It would be much more convenient for Slawson to litigate this case in North Dakota.

Plaintiff, on the other hand, is solely located in North Dakota, making the District of North Dakota far more convenient for it.[5] *See M & N Plastics, Inc. v. Sebelius*, 997 F. Supp. 2d 19, 27 (D.D.C. 2013) (ordering transfer from D.D.C. to E.D. Mich., and observing that "[t]he plaintiffs' choice to litigate this action here, over 550 miles away from home, is clearly not being done for 'geographical convenience'"). Further, Plaintiff illustrated its ability to conveniently try a case in the District of North Dakota in Slawson's related case in the District of North Dakota.

There is little question that the parties could litigate this case in either D.C. or North Dakota. But the District of North Dakota is equally or more convenient for all parties involved, meaning this factor weighs in favor of transfer.

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

The final two factors—the convenience of witnesses and the ease of access to evidence—typically have little if any impact in APA cases. *See Alaska Wilderness League*, 99 F. Supp. 3d at 118 n.5. That is because such cases are usually decided based on the administrative record, without witnesses or new evidence. *Id.* Some courts do, however, consider where witnesses and evidence are likely to be located if the case expands beyond the administrative record. *Preservation Soc'y*, 893 F. Supp. 2d at 56.

Here, any documents or evidence beyond the administrative record would likely be located in the BLM's North Dakota Field Office. *See* Ex. D, (FONSI) at 1 (referencing "consultation with the

[5] Plaintiff's attorney is in D.C., but his firm has an office in North Dakota, and he illustrated his ability to try a case in North Dakota in prior related proceedings. *See* D.N.D. Case No. 17-cv-166; *see also Wyandotte Nation v. Salazar,* 825 F. Supp. 2d 261, 270 (D.D.C. 2011) ("[T]he location of counsel carries little, if any, weight in an analysis under § 1404(a).").

U.S. Fish and Wildlife Service . . . *available at the North Dakota Field Office*") (emphasis added). And the government employees responsible for the investigation that led to the issuance of Slawson's permits are located in the North Dakota Field Office. *Cf. Alaska Wilderness League*, 99 F. Supp. 3d at 120 ("[I]f the plaintiffs want explanations for how and why the Service issued this walrus-specific incidental-take regulation, they can look to only one place—Alaska."). Thus, to the extent these factors have any impact, they favor transfer.

* * *

The § 1404(a) private-interest factors unmistakably point toward transfer.

2.3 The § 1404(a) Public-Interest Factors Weigh In Favor Of Transfer

The public-interest factors courts consider in assessing a § 1404(a) motion to transfer include the following: "(1) the transferee's familiarity with the governing laws; (2) the relative congestion of the calendars of the potential transferee and transferor courts; and (3) the local interest in deciding local controversies at home." *Alaska Wilderness League*, 99 F. Supp. 3d at 116. As with the private-interest factors, the public-interest factors overwhelmingly favor transfer.

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

The first public-interest factor compares the transferor and transferee courts' familiarity with the law governing the case. "'The general rule is that all federal courts are 'competent to decide federal issues correctly.'" *Id.* at 116 (quoting *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175 (D.C. Cir. 1987)). Because suits challenging federal agency actions typically concern the interpretation of only federal law, the first public-interest factor typically does not have an impact on APA cases facing transfer. *Gulf Restoration Network*, 87 F. Supp. 3d at 315 ("Because both this court and the transferee court are competent to interpret OPA, NEPA, and the APA 'there is no reason to transfer or not transfer based on this factor.'").

That said, courts do consider any judicial efficiencies to be gained from the transferee court's experience dealing with the parties, either as a general matter or with regard to the specific issues of the case. *See Wyandotte Nation v. Salazar*, 825 F. Supp. 2d 261, 267 (D.D.C. 2011) ("Although all federal courts are presumed to be equally familiar with the law governing federal statutory claims, the Tenth Circuit, and the District of Kansas, in particular, have specialized knowledge of both the parties, their history of litigation, and the statute at issue in the present litigation.") (internal citation omitted); *Pueblo v. Nat'l Indian Gaming Comm'n*, 731 F. Supp. 2d 36, 40 (D.D.C. 2010) ("[T]he courts' respective knowledge of the parties and facts is also relevant.").

Here, the District of North Dakota has already dealt not only with each of the parties in this case, but with specific issues at play in this case. *Compare, e.g.,* Ex. J, 8/15/17 Order Granting TRO at 8–9 (finding that MHA Nation does not have jurisdiction to regulate non-tribal entities such as Slawson on non-tribal land within the boundaries of the Fort Berthold Indian Reservation) *to* DE 1 ¶¶ 15, 22–27, 50, 71 (claiming authority to regulate Slawson's behavior on non-tribal land within the boundaries of the Fort Berthold Indian Reservation). Because the District of North Dakota is already familiar with issues of both law and fact in this case and this District is not, judicial efficiency strongly favors transfer.

2.3.2 The Relative Congestion Between This District And The District Of North Dakota Does Not Counsel For Or Against Transfer

The second public-interest factor looks to the relative congestion of the transferor and transferee courts. "Absent a showing that either court's docket is 'substantially more congested' than the other, this factor weighs neither for nor against transfer." *Pres. Soc. of Charleston*, 893 F. Supp. 2d 49, 57 (D.D.C. 2012).

Here, there is no indication that the District of North Dakota is "substantially more congested" than the District of D.C. While the District of North Dakota does have more cases pending

per judgeship than the District of D.C.,[6] there is no reason to believe the District of North Dakota is anything but capable of resolving this case at an appropriate speed. Indeed, the District of North Dakota illustrated its ability to handle a case of this sort in a timely manner through its handling of Slawson's suit involving the same parties. There, the Court issued a comprehensive, 14-page opinion ruling on Slawson's Motion for Temporary Restraining Order a mere three days after that Motion was filed. *See* Docket for D.N.D. Case No. 17-cv-00166. And the Court promptly ruled on the MHA Nation's motion dismiss after it intervened.

On balance, then, the relative congestion of the courts is not substantial enough to impact the transfer analysis.

2.3.3 North Dakota's Local Interest In Trying Local Controversies Weighs Heavily In Favor Of Transfer

"[P]erhaps the most important factor in the motion-to-transfer balancing test is the interest in having local controversies decided locally." *Alaska Wilderness League*, 99 F. Supp. 3d at 116 (quotation marks and citation omitted); *see also Pres. Soc. of Charleston*, 893 F. Supp. 2d at 57 (labeling this public-interest factor as the "arguably most important" factor). For that reason, this factor weighs heavily in favor of transfer, as this case "looks 'local' at every turn." *Alaska Wilderness League*, 99 F. Supp. 3d at 116.

As an initial matter, administrative actions that govern only activities in the transferee district and apply only to people operating in that district are typically considered "local." *See Alaska Wilderness League*, 99 F. Supp. 3d at 116 ("Consider the regulation: it governs *only* activities in the Chukchi Sea around (and within) Alaska's sovereign territory. Consider those regulated: the regulation applies *only* to oil and gas explorers operating in and around Alaska."). Similarly, "[l]and is a localized interest

[6] The District of North Dakota has 424 cases pending per judgeship, while the District of D.C. has 305. Ex. N, District Court Profiles at 3, 63.

because its management directly touches local citizens." *S. Utah Wilderness All. v. Norton*, 315 F. Supp. 2d 82, 88 (D.D.C. 2004). Cases "centered on property located in" the transferee district are therefore considered "local" as well. *Intrepid Potash*, 669 F. Supp. 2d at 99. Both of those principles apply here. The OHA Director's approval of Slawson's permits is "centered on" property located solely in North Dakota, and it solely governs Slawson's ability to drill in North Dakota.

Additionally, "[i]n cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only." *Gulf Restoration Network*, 87 F. Supp. 3d at 315. The fact that this case will likely be tried solely on the administrative record does not alter this principle: "The importance of respecting localized interests is equally applicable 'to the judicial review of an administrative decision which will be limited to the administrative record.'" *Id.* at 316. This Court must therefore take into account whether "the project[] at issue in this case will directly affect the lives of [local] residents." *Bergmann*, 710 F. Supp. 2d at 75.

Under Plaintiff's theory, this case has the potential to affect local residents. Plaintiff alleges that Lake Sakakawea—the area at the center of this case—"provides a critical source of tribal *and public* waters," and that the lake connects to the Missouri River, which "provides drinking water to millions of individuals." DE 1 ¶ 20 (emphasis added). Further, Plaintiff has taken the position—both in its Complaint and in prior administrative and legal proceedings—that its Constitution allows it to regulate non-Indians on non-tribal lands. DE 1 ¶¶ 15, 71; Ex. F, 4/24/17 State Director Decision at 2–3; Ex. O, MHA Nation Motion in D.N.D. Suit at 9–10. That position has obvious implications for both the state of North Dakota and its citizens. The extent to which each can be regulated by Plaintiff turns on whether the court that eventually hears this case accedes to Plaintiff's attempt to expand its power.

The North Dakota Field Office's Environmental Assessment further evidences the localized interests implicated in this case. Indeed, that assessment is entirely focused on the potential impacts—both good and bad—on the area surrounding Slawson's Torpedo Project, including any possible impacts on the area's land resources, water resources, air quality, biological resources, cultural resources, and socioeconomics. Ex. A, EA. As but one example, the Environmental Assessment concludes that "the project would provide jobs and income to residents of the Reservation as well as Dunn, McKenzie, McLean, and Mountrail Counties" in North Dakota. *Id.* at 86.

In fact, the Environmental Assessment specifically identifies a number of groups and individuals who submitted comments and questions to the North Dakota Field office regarding Slawson's project. *Id.* at 4–9. The assessment notes that roughly four North Dakota-based governmental agencies, three North Dakota-based private organizations, and a number of individuals submitted comments about the project. *Id.* at 4–9. Those comments relayed localized concerns, such as the extent to which the project would affect recreational activities on Lake Sakakawea. *Id.* at 9. Clearly, then, there is local interest in this case, and thus an interest in having it tried locally.

Plaintiff may argue that this case is less localized in nature because it concerns federal laws and regulations. But that is legally incorrect. "[T]he fact that plaintiff's cause of action arises under federal law does not mean that the subject of [the] lawsuit does not present an issue of local controversy." *Bergmann*, 710 F. Supp. 2d at 75. And in any event, the federal regulations and policies put at issue by Plaintiff are themselves local in nature. For example, Plaintiff claims that the BLM did not properly take account of its own Resource Management Plan, and that plan only applies to North Dakota. DE 1 ¶¶ 28–32, 50; Ex. P (North Dakota RMP). The Army Corps of Engineers plan that Plaintiff claims was misapplied is even more local in nature—it specifically concerns activities related to Lake Sakakawea. DE 1 ¶¶ 33–36, 50; Ex. Q (Army Corp Garrison Project-Lake Sakakawea Plan). The same

is true of a purportedly misapplied Programmatic Biological Assessment and Biological Evaluation—it relates solely to oil and gas activities on the North Dakota-based Fort Berthold Reservation. DE 1 ¶¶ 37–40, 50; Ex. R (Programmatic BA/BE). Thus, these federal policies illustrate rather than contradict the local nature of this dispute.

Plaintiff alternatively may argue that this case is not local because it concerns federal leases, and thus federal mineral rights. This too would be wrong on its face. As the *Intrepid Potash* court explained, states obtain a percentage of the royalties from federal oil leases, so North Dakota has a stake in the federal leases at issue. 669 F. Supp. 2d at 99; 30 U.S.C. § 191; Ex. S, BLM Lease Parcel Sale at 30–31. But just as important, Slawson's Torpedo Project implicates more than just federal leases. Slawson's Torpedo Project will also explore the minerals underlying state and private land underneath Lake Sakakawea, the production of which would benefit both North Dakota and its citizens. Ex. B, Sundberg Decl. ¶¶ 2, 4. Further, the location of Slawson's Torpedo Pad—the focus of Plaintiff's complaint—impacts Slawson's ability to develop the minerals from those types of lands. For example, if the pad is located too far from the minerals Slawson intends to reach, some of those minerals could be stranded. Ex. G, Houston Decl. ¶ 4. North Dakota has expressly stated its desire to avoid waste of oil and gas within its boundaries, so it has a strong interest in Slawson siting its well pad in a manner that maximizes production. *See* N.D. Cent. Code § 38-08-01 ("It is hereby declared to be in the public interest to foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste.").

As is clear, this is the type of case that courts consider "overwhelmingly local." *Pres. Soc. of Charleston*, 893 F. Supp. 2d at 54; *S. Utah Wilderness All.*, 315 F. Supp. 2d 82. This public factor, therefore, weighs heavily in favor of transfer.

* * *

As with the private-interest factors, the public-interest factors—especially the key factor of local interest—strongly favor transfer.

CONCLUSION

28 U.S.C. § 1404(a) gives this Court the discretion to transfer this case to the District of North Dakota. Because such a transfer would serve the interests of justice, and the District of North Dakota is more convenient for the parties, Slawson requests that this Court exercise that discretion.

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Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 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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