THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

MANDAN, HIDATSA AND ARIKARA NATION,	)	
Plaintiff,	)	Case No. 1:18-cv-01462-CRC
v.	)	
UNITED STATES DEPARTMENT OF THE INTERIOR; RYAN ZINKE in his official capacity as Secretary of the Interior,	)	
Defendants.	)	

OPPOSITION TO DEFENDANTS' MOTIONS TO TRANSFER (DKTS. 18, 23)

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INTRODUCTION

This case presents issues of national importance; whether the United States' treaty obligation to protect the MHA Nation, including its lands and waters, and the United States' trust responsibility to protect tribal jurisdiction over Reservation land, necessitates that Federal agencies include compliance with tribal law aimed at protecting the MHA Nation's water resources as a condition of a federal drilling permit issued within an Indian reservation. Interpretation of these federal statutes; the United States' treaty guarantees that it will protect tribal reservations of the MHA Nation and numerous other tribes, and the trust responsibility the United States has to all tribes, are of importance to Indian tribes and to Indians throughout the United States. The controversy in this case has national implications regarding the scope of the Secretary of the Interior's trust obligations and the standards by which permits to drill for oil and gas in Indian Country must be judged. If the plaintiffs prevail, it will result in policy changes by the Secretary of Interior here in Washington D.C. Moreover, the fact that the drilling permit at issue in this case affects waters of the United States and citizens throughout the Missouri and lower Mississippi River Valleys also counsels against transfer.

The Tribe exercised its right to bring its claims in this Court, and Defendants and Intervenor/Defendants (hereinafter collectively "Defendants") admit that this Court is a proper venue for this case. The Plaintiff's choice of forum is entitled to substantial deference, and Defendants' preference to have this case transferred to the overcrowded docket of the sole federal court judge in North Dakota does not provide a basis for transferring this case. This Court should deny Defendants' motions to transfer this case, Dkt. 18, 23.

The Tribe chose to bring its case in this Court because its primary claim is based upon the Plaintiff Tribe and all other Indian tribes' government-to-government relationship with the United States and the Federal government's trust responsibility to the Tribe, and the District of Columbia

is "the Seat of the Government of the United States." U.S. Const. art. I, § 8, cl. 17. For the Tribe, the most important claim in this case is that the United States violated the codified federal/tribal government-to-government relationship and related trust responsibilities when the United States refused to require compliance with health, welfare, and safety laws of a federally recognized Indian tribe on that Tribe's Reservation. Those laws are designed to protect the Missouri River, the cultural lifeblood of the Tribe as well as its drinking water source, by decreasing the risk of a catastrophic oil spill into the Missouri. The United States also failed to comply with its own laws which are also designed to protect that same national water from that same risk. Defendants' motions to transfer are constructed on their straw man argument that this issue of national importance is instead only an issue of local interest regarding a commonplace application for a permit to drill an oil and gas well. They are wrong, and with that error the remainder of their argument falls away.

LEGAL STANDARD

A federal court may transfer a case to an alternate proper venue "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). The moving party "bears a heavy burden of establishing that plaintiffs' choice of forum is inappropriate," and "a court may not transfer a case from a plaintiff's chosen forum simply because another forum, in the court's view, may be superior to that chosen by the plaintiff." *Tohono O'Odham Nation v. Salazar*, 2010 U.S. Dist. LEXIS 145729, *4-5 (quoting *Pain v. United Tech. Corp.*, 637 F.2d 775, 784 (D.C. Cir. 1980) and *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d. 5, 11 (D.D.C. 2007)). The "main purpose" of section 1404(a) is to allow transfer where litigation in the plaintiff's chosen forum would be "oppressively expensive, inconvenient, difficult or harassing to defend." *Oceana v. Bureau of Ocean Energy Mgmt.*, 962 F. Supp. 2d 70, 73 (D.D.C. 2013) (quoting *Starnes v. McGuire*, 512

F.2d 918, 927 (D.C. Cir. 1974)); *see also Vasser v. McDonald*, 72 F. Supp. 3d 269, 281 (D.D.C. 2014).

ARGUMENT

Nine factors–six private interest factors and three public interest factors--guide the Court's consideration of a motion to transfer pursuant to section 1404(a). *Louis v. Hagel*, 177 F. Supp. 3d 401, 406-408 (D.D.C. 2016). Several of those factors favor this Court retaining this case, and all remaining factors are inapplicable or immaterial when applied to the facts of this case. Not even one of the nine factors supports transfer of this case.

- The Plaintiff's decision to bring this case in this Court strongly supports this Court retaining this case.
- Defendant's preference does not support transfer; and because Defendant's preference is based upon calculated judge shopping, that factor is properly understood to support this Court retaining this case.
- The location of decision-making is inapposite: decision-making occurred in multiple districts.
- The convenience of the parties supports this Court retaining the case.
- Because this is an APA case, location of witnesses does not support transfer.
- Because this is an APA case, the location of sources of proof does not support transfer.
- Primarily because this case presents solely federal issues of law, the relative familiarity with the law does not support transfer.
- The fact that the federal court system has declared a judicial emergency in the District of North Dakota because one of the two judicial positions in that District has been vacant for a year strongly supports this Court retaining this case.
- The national importance of this case strongly supports this Court retaining this case.

I. THE SIX PRIVATE-INTEREST FACTORS WEIGH AGAINST TRANSFER.

A. THE TRIBE'S CHOICE OF VENUE IS ENTITLED TO SUBSTANTIAL DEFERENCE.

The first private interest factor is the "plaintiff's choice of forum." *Louis*, 177 F. Supp. 3d at 406 (citation omitted). The forum choice of any plaintiff is "'a paramount consideration that is entitled to great deference in the transfer inquiry.'" *Renchard v. Prince Wm. Marine Sales, Inc.*, 28 F. Supp. 3d 1, 11 (D.D.C. 2014) (quoting *FTC v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 26 (D.D.C. 2008)). *See also Greater Yellowstone Coal. v. Kempthorne*, 2008 WL 1862298, at *3-4 (D.D.C. 2008) (holding that a Court owes "substantial deference" to a plaintiff's choice of forum). The Tribe's decision to bring its case in the seat of the United States government should receive particular weight, because as a federally recognized Tribe it enjoys a unique a "government-to-government relationship" with the federal government. *Cali. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1263 (D.C. Cir. 2008). The Tribe is not domiciled in North Dakota or any other state. "Consequently, a tribe is analogous to a stateless person for jurisdictional purposes. *See* 13B Charles Alan Wright et al., *Federal Practice and Procedure* § 3622, at 585–86 (1984)." *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 27 (1st Cir. 2000). Instead the Tribe is a sovereign political entity which predates the United States and which has a political relationship directly with the United States of America. That relationship was first evidenced in the 1825 peace treaties with the Mandan Hidatsa and Arikara Nations, under which the United States undertook the obligation to "protect" all three tribes, 7 Stat 259, 7 Stat. 264, 7 Stat. 261, and continuing to the present day. 83 Fed. Reg. 34863, 34866 (listing the Tribe as one of the "federally recognized Indian Tribes by virtue of their government-to-government relationship with the United States."). *See generally Cohen's Handbook of Federal Indian Law* § 302[3] (2012 ed.) ("Federal acknowledgment or recognition of an Indian Group's legal status as a tribe is a formal political act confirming the tribe's existence as a distinct political society, and

institutionalizing the government-to-government relationship between the tribe and the federal government.").

After the United States was created, the United States repeatedly summoned or invited tribal leaders to come to Washington, D.C. to engage in their government-to-government relationship with the United States, including meetings to seek to redress tribal grievances. "Inviting Native American chiefs to journey to the nation's capital to meet the 'Great White Father," as they termed the President, was a ritual as old as the republic itself." Peter Nabakov, *Native American Testimony* 133 (1991). That process continues to this day. Tribal leaders are frequently invited individually and in groups to meet with the President, the heads of Federal agencies, and Congressional leaders and committees to address individual and national tribal issues. In recent years this included an annual White House Tribal Nations Conference in which all tribal leaders were invited to Washington, D.C. The Tribe has a strong relationship to Washington, D.C. The Tribe's decision to bring this action seeking redress of grievances with the Federal government in the home of the Federal government is entitled to substantial deference.

B. THE DEFENDANTS' PREFERENCE REGARDING VENUE IS ENTITLED TO NO DEFERENCE, AND DEFENDANT'S ATTEMPT TO JUDGE SHOP SHOULD WEIGH AGAINST TRANSFER.

The court should afford no deference to the Defendants' desire to litigate in North Dakota, because in the absence of "special reasons" that do not exist here, the Defendants' forum preference does not receive "such unusual deference." *Forest Cty. Potawatomi Cmty. v. United States*, 169 F. Supp. 3d 114, 118 (D.D.C. 2016) ("[A] defendant's choice of forum is 'not ordinarily entitled to deference.'")(citation omitted).

This is an APA case. As such, it will be decided on the administrative record, and will likely require approximately two courtroom appearances by counsel, none of whom are located in North Dakota. There is no basis for assuming it will require discovery or that it will require court

appearances by anyone other than the attorneys. The Defendant's cannot make a strong argument that this Court is less convenient than the federal court in North Dakota.

Based solely on their misreading of *Gulf Restoration Network v. Jewell,* 87 F. Supp. 3d 303, 313 (D.D.C. 2015), Defendants assert that their desire to litigate in North Dakota should be given "some weight." Dkt. 18 at 13. *Gulf Restoration Network* not only fails to support Defendant's argument, it is directly contrary to their interpretation.

Defendants correctly note that the discussion on page 313 of *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." *Gulf Restoration Network* at 313. But Defendants fail to keep reading beyond the one page they cite. In the reminder of that paragraph the court expressly directs readers to Part IV.C of the opinion for the court's analysis of whether there is a district in which the harm will be "felt most directly." In that later discussion of the relevant issue, the court provides a very good synthesis of the applicable case law, which then results in its conclusion distinguishing between cases like the present matter (for which transfer was denied) and cases like *Gulf Restoration Network* (for which transfer was granted). *Id.* at 315-317.

Gulf Restoration Network dealt with a specific project related to the remediation of the enormous environmental damage which occurs when there is a major oil well leaks into public water—the exact risk that Defendant United States is creating in this case by refusing to require compliance with its or the Tribe's health and safety laws as a condition of the permit to drill. After the Deepwater Horizon catastrophe, the responsible oil company pledged $1,000,000,000.00 for early cleanup work. That money was allocated to specific projects based upon a complex "framework agreement" between the United States and all of the Gulf States. The Plaintiff in *Gulf*

Restoration Network did not challenge that broad framework agreement. Plaintiff only challenged a specific project which the State of Alabama proposed and which was then approved under the process set in the framework. The project included a coastal hotel, environmental research and education center, and convention center. The project would be built in an existing State park, on public State land. Alabama would be responsible for the project, and Alabama's legislature had passed special legislation approving the project. None of these local interest factors are present here.

The Court discussed in detail why, under those facts, the "local interest" factor tipped in favor of transfer. In doing so, the Court distinguished the *Gulf Restoration Network* facts from two other cases where transfer from the District of Columbia was denied. The Court stated that transfer in those cases was denied because "plaintiffs challenged decisions that affected the use of *national* resources managed by *federal* officials." *Id.* at 317 (emphasis in original).

In this case, the Tribe is challenge a decision which affects the Missouri River, a *national* resource managed by *federal* officials. 58 Stat. 887; 58 Stat. 591; *Am. Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230, 238 (D.D.C. 2003); *In re: Operation of the Missouri River System Litigation*, 2004 WL 1402563 (D. Minn. 2004). As the State of North Dakota, writing for itself, Montana, and South Dakota succinctly stated in a prior amicus brief to this Court opposing transfer to the District of Nebraska of a suit raising environmental claims regarding the Missouri River, "Concern over federal management of the Missouri River doesn't 'belong' to Nebraska. That state has an interest in river management, but other states have at least an equal interest." Amicus Curiae Brief of North Dakota, Montana and South Dakota in opposition to Defendants' motion to transfer venue. *Am. Rivers v. Army Corps of Engineers*, D.D.C. case 1:03-00241, Dkt. 26, 2003 WL 23781196. In that same brief, North Dakota argued that no one state should be

considered the state where the claim arose. This Court agreed with North Dakota on both points, and it denied transfer. *Id.* at Dkt. 41.

Defendants' argument was wholly premised upon *Gulf Restoration Network*, but the careful synthesis of the cases into a rule of law in that supports this Court retaining this case. And, as discussed throughout this brief this case presents additional reasons why Defendants' choice of forum should be rejected. In addition to the Missouri River being a national resource managed by federal officials, the United States has the duty to protect the Tribe's federally defined jurisdiction and the Tribe's environment, and it has that same duty to other tribes nationwide.

Finally, Defendants argue that the Tribe is engaged in improper forum shopping. The Tribe is not. It brought this case in a court with venue, subject to the random draw of any of the 23 regular judges or senior judges in this Court. Federal law permits the Tribe to bring this case here. Defendants notably then have moved to transfer this case not to the Eastern District of Virginia (where the last two decisions were made) or to Montana, but to North Dakota, where they know with 100% certainty the judge to whom the case would be assigned (because he is currently the only federal judge, regular or senior, in the whole state). They are not merely forum shopping, but are judge-shopping. Their attempt to via a motion to transfer to pick the judge for their case renders the second factor neutral or in favor of Plaintiff.

C. THE CLAIMS AROSE IN MULTIPLE DISTRICTS, INCLUDING THE DISTRICT OF COLUMBIA, AND THAT DIFFUSE DECISION MAKING DOES NOT SUPPORT TRANSFER TO NORTH DAKOTA.

The third private-interest factor is the location where the claim arose. In an APA case, if the decision-making was in a specific location, this factor is accorded some weight, but where decision-making occurs in multiple locations, the factor does not weigh in favor of transfer. *Gulf Restoration Network*, 87 F. Supp. 3d at 313.

This is an appeal from a decision issued by the Director of the Department of Interior's Office of Hearings and Appeals (OHA). The Director is the highest ranking officer in the OHA and exercises authority delegated from Secretary Zinke. The Department is headquartered in the District of Columbia, and the underlying decision was issued in nearby Arlington, Virginia. Notably, Defendants did not move to transfer this case to the Eastern District of Virginia. The agency decision underlying the Director's decision was issued in the State Office in Montana. It is only the decision underlying that which was issued in the Field Office in North Dakota. The administrative record is already assembled and transferred to OHA.

The most recent of these decision, the one from which this appeal is taken, was made by the Director of the Office of Hearings and Appeals. In her decision, she states that the Secretary of the Interior provides her unfettered discretion to short circuit the standard process for IBLA appeals and decide the appeal on her own. She further claims she was permitted to do so without even providing the Tribe with a pre-decisional right to respond to Defendants' requests for her to take the very unusual step of taking a case from the assigned Administrative Judge of the Interior Board of Land Appeals (IBLA). Compl. ¶¶62-65. It is that OHA Director's decision which is on appeal, and more generally, the Tribe's complaint is aimed at the broader federal decision to no longer require compliance with tribal (or federal) health, welfare, and safety laws, and to allow drilling on the shores of a national river and the source of the Tribe's drinking water. This is not a run of the mill decision to allow an oil and gas well to be drilled. The Director of OHA almost never takes a pending matter from an IBLA Administrative Judge, and while her unexplained decision to take the case defied decades of OHA precedent, her very unusual action focused the decision-marking outside of North Dakota, and illustrates the national importance of this case.

Compl. ¶20-22. The locus of decision-making is diffuse, and does not support transfer to North Dakota

D. THERE IS NO MORE CONVENIENT FORUM FOR DEFENDANTS THAN THIS ONE.

The fourth private-interest factor, "the convenience of the parties," *Louis*, 177 F. Supp. 3d at 406 (citation omitted), weighs against transfer. The threshold issue under this factor is whether the current forum is inconvenient for Defendants. Defendants do not get past that threshold inquiry. Defendants have not shown, and could not show, that this forum is inconvenient for them.

The Defendant United States' motion to transfer is particularly unusual because they "cannot reasonably claim to be inconvenienced by litigating in this district. After all, this is [their] home forum." *Oceana, Inc. v. Pritzker*, 58 F. Supp. 3d 2, 7 (D.D.C. 2013). Slawson made some conjecture that the location of documents or other factors would make North Dakota more convenient than the District of Columbia for the United States, but Slawson does not provide any evidence supporting its conjecture, and then conspicuously the United States did not provide the missing factual support when it filed its own bare-bones motion to transfer. And, of course, the administrative record was transferred by the federal agency to the IBLA and OHA as a matter of standard agency practice when the Tribe brought this case before the IBLA.

Slawson also did not meet its burden to prove any inconvenience to itself. Slawson makes only a conclusory statement that litigating this case in North Dakota would be more convenient, but there are no facts which support that assertion. In its motion to transfer, Slawson does not state where it is headquartered, but the record in this matter shows that Slawson is based in Wichita, Kansas. It is not a North Dakota company and is not based in North Dakota. Case law suggests that the location of its attorneys is of limited or no weight, but those attorneys are based in Washington, D.C., Denver, Colorado, and Chicago, Illinois; and the Tribe's attorneys are based in Washington, D.C. and Louisville, Colorado.

Convenience of the parties does not support transfer.

E. THE LOCATION OF POSSIBLE WITNESSES AND SOURCES OF PROOF DOES NOT SUPPORT TRANSFER TO NORTH DAKOTA.

The fifth and sixth private factors relate to the location of witnesses and proof, *Louis*, 177 F. Supp. 3d at 406. Those factors are of little weight in an APA case, but any weight they have supports denial of Defendants' motion to transfer to North Dakota. Where, as here, "live testimony is unlikely, the Court need not consider the fifth and sixth [private interest] factors." *Kempthorne*, 2008 WL 1862298, at *4 (citations omitted); *see also Bosworth*, 180 F. Supp. 2d at 128 n.3.

Instead of live testimony, in an APA case the court will rely on the administrative record. This Court has held that "[t]he location of the administrative record . . . carries some weight in transfer determinations." *Sierra Club v. Flowers*, 276 F. Supp. 2d 62, 69 (D.D.C. 2003). That record has already been transferred to the Washington, D.C. area. Interior's regulations provide that:

> (d) After receiving a timely notice of appeal, the office of the officer who made the decision must promptly forward to the [IBLA]:
> …
> (3) The complete administrative record compiled during the officer's consideration of the matter leading to the decision being appealed.

43 C.F.R. 4.411

Defendants have not provided any factual evidence to dispute the location of the record being in the Washington, D.C. area and with Department of the Interior headquarters in D.C. Therefore, these factors weigh against transfer and "do nothing to help Defendants meet their burden of showing that transfer is warranted in this case." *Potawatomi Cmty.*, 169 F. Supp. 3d at 117 n.3.

II. THE THREE PUBLIC-INTEREST FACTORS WEIGH AGAINST TRANSFER

A. THE RELATIVE FAMILIARITY WITH THE RELEVANT LAW DOES NOT SUPPORT TRANSFER.

Where a case presents issues of federal law, this Court presumes that the first public interest factor does not support transfer. Defendants concede that this case presents issues of federal law, and does not present any issues of North Dakota state law. "Judges in both districts are presumed to possess equal familiarity with the federal laws governing this dispute and certainly possess equal competence in adjudicating those laws." *Akiachak Native Cmty. v. DOI*, 502 F. Supp. 2d 64, 68, (D.D.C. 2007). The first public-interest factor therefore does not support transfer. *Bosworth*, 180 F. Supp. 2d at 129; *Wilderness Soc'y*, 104 F. Supp. 2d at 16.

To attempt to overcome the presumption that the first public interest factor does not support transfer, Defendants attempt to analogize the current case to two cases where this Court has found that the first public interest factor weighed in favor of transfer based upon prior substantial litigation in the proposed transferee district. But a review of the facts of those cases show that they do not support Defendants' argument, and a review of additional cases shows that it would have required much more litigation in North Dakota in order to tip the "familiarity with the law or facts" factor in favor of Defendants.

Defendants cite *Wyandott Nation v. Salazar*, 825 F. Supp. 261 (D.D.C. 2011). In *Wyandotte Nation*, this Court, Judge Howell, provided a detailed discussion of the facts which overcame the presumption. No analogous facts are present here. *Wyandotte Nation* involved a federal law specific to the Wyandotte Nation, title 1 to P.L. 98-602 (1984). Litigation regarding that specific statute had "been ongoing in the district of Kansas since 1996." *Id.* at 267 (emphasis added). The District Court in Kansas and the Tenth Circuit had both issued multiple published opinions in that long-running and ongoing litigation, and this Court noted that plaintiffs themselves

stated that is case "can be 'summed up simply" as being on all fours with the Tenth Circuit's most recent decision. *Id.* at 267 (citing Wyandott Nation's opposition to motion to transfer)

Defendants also seek to rely upon *Ysleta del Sur Pueblo v. National Indian Gaming Association*, 731 F. Supp. 2d 36 (D.D.C. 2010)[1] but that case matches the fact pattern from *Wyandott Nation. Ysletta del Sur Pueblo* raised a legal issue based upon a law specific to the Ysletta del Sur Pueblo and one other tribe with a reservation in Texas. Litigation regarding that law had been ongoing in the Western District of Texas for 17 years.

The lengthy and ongoing litigation history which supported transfer in *Ysletta del Sur Pueblo* and *Wyandott Nation* is simply not present here. Those cases do not assist us to determine when prior litigation is sufficient to tip the scale, but other cases show that it would require substantially more than an ex parte TRO and other preliminary proceedings in a dismissed case.

For example, in *Frulla v. CR Holdings, Inc.*, 596 F. Supp.2d 275 (D. Conn. 2009), Frulla, in 2005, filed a federal ERISA suit in a federal court in the Southern District in Florida. That case went to trial in the Southern District in Florida, and Frulla lost. He appealed and he also filed a new case, with different claims but based upon the same ERISA plan. He filed his new suit in the federal court in Connecticut, and the defendant moved to transfer the case to the Southern District in Florida. The Federal District Court for Connecticut denied the motion to transfer, holding, *inter alia*, that even when the plaintiff had initiated both suits, both suits were based upon the same ERISA plan, and the first case proceeded through trial, the Plaintiff's choice to file in a different forum from his first suit prevailed.

Hayes v. Chesapeake & Ohio Railroad Co., 374 F. Supp. 1068 (S.D. Ohio 1973) is also instructive. In *Hayes*, the Court contrasted two cases, to illustrate why a plaintiff's choice of forum

[1] Defendants mis-cite the case as "Pueblo v. National Indian Gaming Association."

is entitled to deference under facts similar to those at issue in the case at bar. In *Hayes*, the plaintiff had previously filed a suit in the Alabama state court, but then voluntarily dismissed that suit after defendant filed a motion to dismiss. Plaintiff then refiled suit in a federal district court in Ohio. Defendant moved to change venue to the federal district court in Alabama, but the Court denied that motion, stating that Plaintiff's actions showed that he had chosen not to file in the federal court in Alabama, and that his decision not to file in that court controlled.

The Court in *Hayes* contrasted its decision with the appellate court decision in *Lemon v. Fruffel*, 253 F.2d 680 (6th Cir. 1958). In *Lemon*, the Plaintiff had initially filed in a federal district court in Kentucky, but then dismissed that suit and refiled the same suit in a federal district court in Ohio. Defendant moved to transfer that case to the federal court in Kentucky, and that motion was granted, and the decision to transfer was upheld on appeal. As the judge in *Hayes* discussed, the key distinction between *Lemon* and *Hayes* was the plaintiffs' choices. Lemon had initially chosen to litigate in the proposed transferee court, while Hayes had not. *See also Samsung Electronics Co., Ltd v. Rambus, Inc.*, 386 F. Supp. 2d 708 (E.D. Va. 2005) (Rambus had multiple related patent claims against multiple possible defendants. It brought a claim in the Eastern District of Virginia, but after it lost that case, it sought to have the related claims heard in a different district. Consistent with *Hayes* and *Lemon*, Rambus' motion to transfer a case out of the Eastern District of Virginia was denied because Rambus had brought the prior related claims in the Eastern District of Virginia).

In the present matter, there is currently no related case pending in the federal court in North Dakota. The only case pending in North Dakota was one that Slawson brought challenging a now mooted issue regarding an IBIA stay. The prior suit did not involve the merits of this case. Plaintiff in that case, the Intervenor/Defendant in this case, voluntarily dismissed its suit after issuance of

preliminary orders. Crucially, the Tribe never sought to litigate its claims regarding Slawson's wells in the federal court in North Dakota, and the fact that Defendant initially made a choice to file in that court and later to dismiss that suit does not tip in favor of transfer. Defendant is, in effect, seeking to dramatically expand the first-to-file rule, requiring transfer to a court in which a prior case was dismissed at a preliminary stage. The case law rejects that position, *e.g. Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 937 (Fed. Cir. 1993) (first to file rule applies only so long as the first case remains pending); *Kellogg Brown & Root Servs., Inc. v. U.S., ex rel. Carter*, 135 S. Ct. 1970, 1979 (2015) (a "first-to-file" rule does not apply when the suit that is asserted to be first has been dismissed), and instead holds that if a plaintiff has not previously sought to bring the claim in a different federal district, the plaintiff's first choice of where it wants to bring its claims is entitled to substantial deference.

Here, the Tribe's first choice of forum was this Court, and its first choice must be respected.

B. THIS CASE SHOULD NOT BE TRANSFERRED TO A FAR MORE CONGESTED COURT.

The second public-interest factor, the relative congestion of this court and the District of North Dakota, *Louis*, 177 F. Supp. 3d at 408, strongly countenances against transfer. Perhaps more remarkable than the Defendant United States' effort to transfer away from their home forum, is Defendant; claims that the relative congestion of the two courts is inapposite even though the Federal Judicial Conference has declared a "judicial emergency" in North Dakota for the past year for two separate reasons. http://www.uscourts.gov/judges-judgeships/judicial-vacancies/judicial-emergencies (last visited October 9, 2018). There are only two federal judgeships positions in the whole state of North Dakota and one of those two has been vacant for over a year, leaving Judge Hovland as the only federal judge for the whole state, including all four of the federal courthouses spread out throughout the large State. It does not appear that the judicial emergency in North Dakota will be alleviated in time to impact this case. As of October 15, 2018, a replacement for

the vacant position in the District had not yet been nominated. http://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies.

The weighted filings for the one judge covering all of North Dakota are over 800 per year. In contrast, the weighted filings in this Court are only 269, about 1/3 of Judge Hovland's current load. Judge Hovland disposes of approximately 4 times more cases, and has about 8 times as many jury trials as the average judge in this Court. Dkt. 18-15, p. 3, 63.

For example, although not even humanly possible, Judge Hovland's calendar for the week of October 22, 2018 shows 4 3-day jury trials, 5 2-day jury trials, and 1 1-day jury trial, all set in Fargo, N.D., and 11 sentencing hearings, 9 revocation hearings, and two change of plea hearings, set 200 miles away in Bismarck, N.D. The following week is similar, with ten jury trials, in both Fargo and Bismarck, and numerous other criminal hearings. Ex. 1. Criminal cases take priority over civil matters, and there is not a single entry on the calendar for a civil matter.

The most recent time the Tribe appeared in front of Judge Hovland (which was on issues unrelated to those presented here), the Judge himself noted "Unfortunately, I'm the only federal judge in the state right now, so I've got my plate full." Ex. 2 at 54, l. 8-9 (June 21, 2018 hearing). Even when both of North Dakota's federal judgeships were occupied, Judge Hovland noted that he was not sure how quickly he could issue an order on a motion for preliminary injunction because "I've got trials upon trials upon trials in front of me. With the wonderful oil boom, we have the fifth or sixth busiest criminal docket in the nation right now." Ex. 3 at 45 l. 16-19 (April 11, 2016 hearing).

In an attempt to avoid the substantial weight this Court should accord to the differences in case load, Defendants simply ignore the fact that one of the two judgeships in North Dakota has been vacant for over a year. Judge Hovland has twice as many cases as Defendants claim and

Defendants understate the discrepancy between this Court and Judge Hovland by 100%. Similarly, instead of using the preferred statistic of weighted filings, Defendants cite the statistics for pending cases instead of weighted caseload. This results in Defendants understating the discrepancy by an additional 20%.[2]

This Court has weighted filings of 269 per judgeship, while North Dakota has 402 per judgeship, but again one of those two judgeships has been vacant for over a year. Judge Hovland's weighed filings are about three times that of the average judge in this Court.

Given this wide difference in case load, transfer of this case to the one Judge in North Dakota would be contrary to 28 U.S.C. § 1404 and would also be uncollegial. In *Western Watersheds Project v. Pool*, the Court found the congestion factor "significant and germane" and "weigh[ing] in favor of keeping the case in plaintiffs' chosen forum" under much less egregious facts than those here. 942 F. Supp. 2d 93 .101 (D.D.C. 2013) (internal quotation marks omitted). In the present matter, there would have to be a compelling reason to transfer to a judge who has three times the weighted caseload of this Court, and there is no such compelling reason. This Court is capable of deciding this APA case, and it should not transfer the case to Judge Hovland's extremely overcrowded docket.

C. THE NATIONAL IMPORTANCE OF THIS CASE AND OF THE CORE LEGAL ISSUES WEIGH AGAINST TRANSFER OF THIS CASE.

Under the third public factor "[t]he question . . . is not whether the people [within a district] have an interest—even a strong one—in the outcome of this case . . . [but] whether this is a 'question[ ] of national policy or national significance.'" *Pritzker*, 58 F. Supp. 3d at 9 (quoting *Oceana*, 962 F. Supp. 2d at 77). *See also Fund for Animals v. Norton*, 352 F. Supp. 2d 1, 2

[2] The federal court systems uses "weighted filings," not pending cases, as the dispositive statistic to determine judicial emergencies.

(D.D.C. 2005) (denying transfer despite strong local interest in Wyoming); *Stand Up for Cali.!*, 919 F. Supp. 2d 51, 64 (D.D.C. 2013) (identifying the national interest in defining "the scope of the Secretary's authority" and establishing the "the standards by which" exercise of that authority "should be judged").

This case is of national importance for three reasons. First, the federal and tribal setback laws at issue are designed to protect the Missouri River, a major national waterway, from an oil spill. Second, the core issue in the case is based upon the relationship between the United States as a government and the Tribe as a government. That government-to-government relationship is, per se, a national issue. Third, the federal government's abandonment of its policy of supporting tribal law-making authority is of national, not local importance. It impacts tribes throughout the United States. The Tribe will discuss those three interests in turn, before then discussing Defendants' attempt to diminish this case to a local issue about a run-of-mill federal regulatory case.

The Missouri River is the longest river in the United States, and it flows into the Mississippi River. 28 Indian Tribes live in the Missouri River basin. *Am. Rivers*, 271 F. Supp. 2d at 238. The states of North Dakota, South Dakota, Iowa, Nebraska Missouri, Illinois, Kentucky, Tennessee, Arkansas, Mississippi, and Louisiana are all downriver from Defendant's oil works. The river provides drinking water to millions of Americans. Compl. ¶ 20

Defendant Slawson admits that for its oil and gas well on the banks of the Missouri River, it is employing methods which have never been used in the field before (Slawson uses the euphemism that its drilling at the location are "innovative"), and that it is required to comply with numerous safety and other regulations to minimize the chances of an oil spill from the wells. Even with those efforts, a spill is possible, and Defendant admits it is therefore also required to comply

with numerous nationwide federal regulations and to have plans in place to clean up a spill and to attempt to prevent the spill from reaching the Missouri.

Protecting the Missouri River from an oil spill into the Missouri River is not a "local issue."

More important to the Tribe, the issue in this case is whether the Tribe's retained sovereign rights and its relationship with the United States include the ability to protect its part of the Missouri River from environmental ruin.

Unlike most tribes in the upper plains, the Tribe was a sedentary fishing and agrarian tribe. The Tribe has lived along the Missouri River since time immemorial because the River provides the only environment within hundreds of miles that supports the Tribe's riverine and agrarian lifestyle. The Missouri River was and is its lifeblood. It is at the center of the Tribe's religious and cultural life, and it provided and still provides the Tribe's drinking water. Compl ¶¶ 20- 21.

When the United States came to take land away from the Tribe and from other tribes in the area, the United States and the Tribe agreed that the Tribe's core homelands in the Missouri River Valley and surrounding rangelands would be the Tribe's permanent homeland and that the Tribe would retain sovereign powers over that homeland. In those treaties and executive orders, the United States agreed to protect the Tribe's homeland from harm caused by non-Indians. 7 Stat 259; 7 Stat. 264; 7 Stat. 261; 26 Stat 1032; Executive Order of June 17, 1892. That was the bargain the United States struck in exchange for the Tribe surrendering other lands and rights. *Id.*

The United States subsequently affirmed these same protection as part of the Indian Reorganization Act and the tribal constitutions that it approved under that act. This includes the Tribe's Constitution, which the Secretary of the Interior approved in Washington D.C.

The United States has regularly violated that bargain, most notably by building a massive dam which flooded the land on which most of the members of the Tribe lived, had their self-

sustaining agrarian society, and buried their dead. The dam flooded about 95% of the Tribe's agricultural lands. Compl. 18-19.

To the Tribe, the core issue in this case is whether the United States is going to get away with yet another violation. That is an issue between the Tribe and the United States. It is not a "local issue," and as the Court may discern from the above, the Tribe finds it grossly offensive that the United States and Slawson, working in unison, refer to this as a "local issue."

After a period of extreme poverty and dislocation caused by the destruction of its farms, oil was discovered on the Tribe's lands. The Tribe's economy now is fueled by oil and gas production as well as the Tribe's continued use of Missouri River resources. The Tribe is therefore not a stranger or opponent of oil wells and oil production, and approximately 20% of the oil production in North Dakota occurs on the Reservation. Compl. ¶13. But building an "innovative" oil facility on the banks of the Missouri River is too dangerous to the health, welfare, and safety of the River, to the Tribe, and to others downriver.

In 2012, the Tribe adopted a law which barred oil and gas drilling within ½ mile of the river, subsequently amended in 2012 and 2017 to permit variances for oil and gas wells between ½ mile and 1000 feet of the river, but to bar wells within 1000 feet of the River. That law applies to all drilling, including that by the Tribe or tribal operators, and it was enacted based upon the Tribe's federally approved constitutional powers to protect the Reservation, its waters, Tribal members, and other non-tribal residents. Comp. 22-27.

Slawson received permission from the United States to drill on the banks of the Missouri River in 2017, years after the Tribe lawfully adopted its setback law. Compl. ¶49. Slawson's oil

and gas facility is only 600 feet from the Missouri River,[3] and therefore Slawson and the United States' sole merits argument is that the United States, as the government approving the drilling, no longer has to require compliance with tribal law designed to protect the Reservation, the River, and the tribal and non-tribal people. That is a legal assertion which the Court handling this case will necessarily have to resolve in this case. That is an issue of importance to tribes throughout the United States.

Like the Tribe, the United States has also adopted multiple rules and legally enforceable requirements to protect the Missouri River from oil spills, and those rules and regulations also predate the issuance of the drilling permit in this matter. The Tribe's position is that the United States failed to require compliance with its own laws designed to protect the federal waterways and to include applicable tribal laws in the issuance of any permit. Compl. ¶¶28-40.

Defendants' claim that the third public-interest factor weighs in their favor is based upon their failure or refusal to recognize that where a case "has both nationwide and local concerns, this factor also weighs *against* transfer." *Ctr. for Biological Diversity v. Tidwell*, 2017 WL 6334085, at *2 (D.D.C. Feb. 14, 2017); *see also Bosworth*, 180 F. Supp. 2d at 129 (denying motion to transfer where case "has some national significance"). Their argument begins (and essentially ends) with the gross understatement that the United States does not "have a significant interest in the outcome of this case." Dkt. 18 at 1. Nothing could be further from the truth.

The United States Constitution, the treaties with tribe, and federal cases show the exact opposite. U.S. Const. Art. I, §3, cl. 8 (tribal/federal relationship established in the Constitution);

[3] To put this into perspective, the oil and gas well is closer to the Missouri River than the Lincoln Memorial is to the Potomac River.

25 U.S.C. § 174; 25 U.S.C. § 5361. In Public Law 103-413, Congress made several of the same points that the Tribe is making in this brief.

> (1) the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations; (2) The United States recognizes a special government-to-government relationship with Indian tribes, including the right of the tribes to self-government, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian Tribes; (3) although progress has been made the Federal bureaucracy, with its centralized rules and regulations, has eroded tribal self-governance and dominates tribal affairs.

P.L. 103-413 §202 (1994). The "Federal bureaucracy" in this case is trying to cause further substantial erosion in tribal self-government by imposing a new rule that the United States does not require compliance with tribal health, welfare, and safety laws on tribal reservations. That is an issue of national importance.

Defendants also vastly overstate the importance of the fact that the oil and gas project is located in North Dakota. "The geographical location of specific land at issue in a case is not necessarily an indication that the effect of litigation stemming from the development of that land is restricted to the district where the land lies." *Van Sierra Club v. Antwerp*, 523 F. Supp. 2d 5,13 (D.D.C. 2007); *see also Nat'l Ass'n of Home Builders v. EPA*, 675 F. Supp. 2d 173, 178 (D.D.C. 2009) ("[The] presence of a local interest, in the form of property located within the proposed transferee district, is *not* dispositive in the transfer analysis.") (emphasis added)). Not to mention, that the project is more specifically located on a federal Indian reservation and not the state.

Defendants cannot deny the national importance of the claims that the Tribe raises. To attempt to get around the fact that the Tribe is raising issues of national importance, Defendants instead analyze whether Slawson, in its now dismissed case in the District of North Dakota, pled claims of national importance. The Tribe, not Slawson, defines what the Tribe's claims are in this case, and as one would expect, the claims the Tribe is raising are very different than the claims Slawson raised. Most egregiously, Slawson asserts as a straw man that this case is about whether

the Tribe would have regulatory/adjudicatory authority over Slawson regarding the oil wells under *Montana v. United States*, 450 U.S. 544, 565-66 (1981). That is not the issue in *this case*.

In this case, it is undisputed that the United States has regulatory/adjudicatory authority regarding the on-Reservation oil wells. The United States authority is not at all limited by *Montana—Montana* is only a limit on tribes. In fact the United States very regularly imposes regulations on non-Indians on a reservation that the Tribe would not be able to impose or to adjudicate. It does so in both civil cases and criminal cases. 28 U.S.C. § 1331; 18 U.S.C. § 1152. For example, the United States Supreme Court has held that a tribe would not have adjudicatory authority over most crimes committed by non-Indians on reservations, but the United States would. The issue 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 claims that the United States was required to impose that condition based upon, *inter alia*, the Indian Reorganization Act and other federal laws, tribal treaties, the Tribe's federally approved constitutional powers, and federal trust duties to tribes. These claims are brought in the specific context where the condition that the United States should have imposed is intended to protect the Tribe's Reservation and the Missouri River from potentially catastrophic harm caused by an oil leak on the banks of the Missouri River. Slawson does not get to avoid that issue of importance to all tribes and to others in the Missouri River Valley by defining other claims that it then asserts are not of sufficient national importance.

CONCLUSION

This is not a run of the mill appeal of a permit to drill a run of the mill oil and gas well. It is a permit to put an "innovative" oil and gas well on the banks of the Missouri River, in violation of the federal government-to-government relationship with the Tribe, contrary to the federal duty to protect tribal health, and welfare, and safety laws, and contrary to federal health, welfare, and

safety laws. Putting the well so close to the river creates a risk of a spill into the national waters of the Missouri River. In addition, the Department of the Interior Director of OHA took the unusual step of taking this important case away from the assigned IBLA Administrative Judge. The Tribe alleges that the Director's decision violates bedrock principles of the federal/tribal relationship as well as decades of departmental precedent.

These are an issue of national importance, and the Tribe has chosen to bring its claim in this Court. The Tribe never sought to adjudicate these important issues in the District of North Dakota. This Court should not transfer the claim to the overloaded docket of the one federal judge in North Dakota. The Secretary and Slawson failed to meet their "heavy burden" of establishing that considerations of convenience and the interests of justice would be served by a transfer to the District of North Dakota. *Tohono O'Odham Nation,* 2010 U.S. Dist. LEXIS 145729, *15. Rather, considerations of convenience, the location of the administrative record and the interests of justice regarding the Tribe's government-to-government relationship with the United States dictate that this Court should hear this case.

The motion to transfer should be denied.

Respectfully submitted this 15th day of October, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of October, 2018, I caused to be electronically filed the foregoing **OPPOSITION TO DEFENDANTS' MOTIONS TO TRANSFER (DKTS. 18, 23)** with the Clerk of the Court via the CM/ECF filing system, which will send notification of such filing to all parties of record.

/s/ Jeffrey S. Rasmussen
Jeffrey S. Rasmussen