UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

NARRAGANSETT INDIAN TRIBE,
ACTING BY AND THROUGH THE
NARRAGANSETT INDIAN TRIBAL
HISTORIC PRESERVATION OFFICE
Plaintiff,

v. C.A. No. 1:19-cv-00158

BRANDYE L. HENDRICKSON in her
official capacity as Deputy Administrator of the
FEDERAL HIGHWAY ADMINISTRATION
Defendant.

PLAINTIFF'S MOTION TO TRANSFER VENUE AND MEMORANDUM IN SUPPORT OF MOTION

Pursuant to 28 U.S.C. § 1404(a), Plaintiff, Narragansett Indian Tribe, by and through the Narragansett Indian Tribal Historic Preservation Office (the "Tribe" or "NIT"), moves for an order transferring this action to the United States District Court for the District of Columbia for the convenience of the parties and witnesses, and in the interest of justice.

I. PARTIES AND PROCEDURAL BACKGROUND

NIT is the only federally recognized Indian tribe located in the State of Rhode Island. The Federal Highway Administration ("FHWA") and Brandye L. Hendrickson, in her official capacity as Deputy Administrator ("Administrator Hendrickson"), reside in the District of Columbia for purposes of determining appropriate venue pursuant to 28 U.S.C. § 1391(e).

The Tribe filed this suit pursuant to the Administrative Procedures Act challenging a final agency decision issued by Administrator Hendrickson on June 28, 2018 ("Final Decision"). The Final Decision affirmed FHWA's termination of a programmatic agreement and decision to re-initiate Section 106 consultation. In addition to Administrator Hendrickson's Final Decision, she

authored several letters to the Tribe regarding the Viaduct Project, including correspondence dated October, 15, 2018 and December 6, 2018. Involvement of the FHWA's District of Columbia office was not limited to Administrator Hendrickson; in fact, the very person "responsible for facilitating the NHPA, Section 106 process" was David S. Clarke, Federal Preservation Officer, also located in the D.C. office. *See Declaration of David S. Clarke*, ¶ 4 (ECF #12-1).

The Tribe filed this action on March 29, 2019. The summons and complaint were served on the required parties. To date, no responsive answer been filed, rather, presently pending is a motion to dismiss. The Tribe's objection to the motion to dismiss is not due until August 23, 2019.

II. DISCUSSION

Section 1404(a) of Title 28 of the United States Code provides that, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Notably, transfer "is not dependent on the initial forum being 'wrong,' and allows for transfer 'to any district where venue is also proper.'" *Kula v. Every Watt Matters, LLC*, No. 17-297-JJM-PAS, 2018 U.S. Dist. LEXIS 55072, at *2 (D.R.I. Mar. 29, 2018) (quoting *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 134 S. Ct. 568, 579, 187 L. Ed. 2d 487 (2013)).

A. Threshold Determination Regarding Where the Action Might Have Been Brought

As an initial matter, a suit may only be transferred to a venue "where it might have been brought." *See* 28 U.S.C. 1404(a). Indisputably, pursuant to 28 U.S.C. 1391(e), this action could have been brought in the District of Columbia. *See* 28 U.S.C. 1391(e) ("[a] civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his [or her] official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant

in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action."). Administrator Hendrickson is deemed to have resided in the District of Columbia for purposes of venue determination. Accordingly, the Tribe satisfies this threshold determination.

B. Balancing of Convenience and Justice

The Court is to apply the same factors to a motion to transfer venue as it would under a *forum non conveniens* analysis. *See Paradis v. Dooley*, 774 F. Supp. 79, 82 (D.R.I. 1991). As the Supreme Court stated:

> The factors pertaining to the private interests of the litigants include[] the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. The public factors bearing on the question include[] the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981) (internal citations and quotations omitted).[1]

[1] Analysis of many of the referenced factors results in a neutral determination as to whether transfer is warranted. For instance, due to the fact that this is an APA case, "neither the convenience of the parties and witnesses nor the ease of access to sources of proof weighs heavily in the analysis." *Pueblo v. Nat'l Indian Gaming Comm'n*, 731 F. Supp. 2d 36, 42 (D.D.C. 2010). Additionally, both courts are similarly congested; the District of Columbia has 316 pending cases per judge and civil cases average 6.3 months from filing to disposition, while the District of Rhode Island has 311 pending cases per judge and civil cases average 8.1 months from filing to disposition. *See* Admin. Office of the U.S. Courts, United States District Courts – National Judicial Caseload Profile (December 31, 2018), https://www.uscourts.gov/sites/default/files/fcms_distprofile1231.2018.pdf. These differences are inconsequential to weigh heavily on the analysis.

While the actual undertaking, i.e. the Viaduct Project, is located within Rhode Island, it is clear that the majority of the actions that took place and led to the Final Decision were made from FHWA's headquarters in Washington D.C. *See Nat'l Ass'n of Home Builders v. EPA*, 675 F. Supp. 2d 173, 179 (D.D.C. 2009) ("In cases brought under the APA, courts generally focus on where the decisionmaking process occurred to determine where the claims arose.").[2] The decisionmaking was completed by Administrator Hendrickson and Preservation Officer Clarke, both located in the Washington, D.C. offices of FHWA. This is not a case where the regional offices were responsible for the decisionmaking process. *See Mashpee Wampanoag Tribe v. Zinke*, C.A. No. 18-2242 (RMC), 2019 U.S. Dist. LEXIS 104109 *19 (D.D.C. June 21, 2019) ("Thus, this case is distinguishable from those cited by Intervenors in which decisions were focused outside D.C.").

Moreover, this is not a local issue involving local interests; rather this case represents a challenge to FHWA's compliance with the National Historic Preservation Act, and in particular, FHWA's actions in affirming the termination of a programmatic agreement for an undertaking that has already been partially completed. A determination as to whether the Final Decision was arbitrary and capricious will have implications far beyond the bounds of the State of Rhode Island. The Final Decision was made by officials in Washington, D.C. and it will impact all undertakings[3] whose adverse effects on historic properties are resolved by way of a programmatic agreement and which agreement is later terminated without cause or justification. *See Mashpee,* 2019 U.S. Dist. LEXIS 104109, at *25-26 ("This Court concludes that this case does not concern 'the type of

[2] Furthermore, the federal trust responsibilities owed to the Tribe originate from Washington D.C. The nexus to Rhode Island is attenuated at best.

[3] The impact to undertakings is not limited to undertakings by the FHWA. Rather, it is any and all undertakings by federal agencies. The vast majority of agencies are headquartered in Washington, D.C. The effects of this decision are much greater on the federal agencies located within Washington D.C. than effects to be felt within the bounds of Rhode Island.

purely localized controversy that would warrant transfer to the local district court' but is focused on decisions made by DOI in Washington, D.C. that have the potential to impact Indian Tribes across the country.") (quoting *Forest Cty. Potawatomi Cmty. v. United States*, 169 F. Supp. 3d 114, 118 (D.D.C. 2016)); *Otay Mesa Prop., L.P. v. United States DOI*, 584 F. Supp. 2d 122, 126 (D.D.C. 2008) (determining not to transfer case out of District of Columbia because "the controversy involves an issue of federal environmental law under the Endangered Species Act that is subject to judicial review under the APA[.]").

Additionally, "[i]t is well established that in considering a motion to transfer under 28 U.S.C. § 1404(a), the plaintiff's choice of forum is entitled to great weight." *Blinzler v. Marriott Int'l*, 857 F. Supp. 1, 3 (D.R.I. 1994) (quoting *Residex Corp. v. Farrow*, 374 F. Supp. 715, 717 (E.D. Pa. 1974)). Nothing prevents the Tribe, as plaintiff, from moving to transfer venue. *See Am. Standard, Inc. v. Bendix Corp.*, 487 F. Supp. 254, 260 (W.D. Mo. 1980) ("Any party to the action, including the plaintiff, may move for transfer under § 1404(a)."). While the Tribe initially filed in the District of Rhode Island, the Tribe's preference for venue is the District of Columbia. This action arose a result of a decisionmaking process that originated in Washington, D.C. This matter, dealing with the APA and administrative law, is the type of issue that the "D.C. Circuit is as familiar, if not more so, than the First Circuit, and which do not materially involve familiarity with the parties." *Mashpee*, 2019 U.S. Dist. LEXIS 104109, at *23. *See also Stewart v. Azar*, 308 F. Supp. 3d 239, 248 (D.D.C. 2018) ("if anything, this Court has more experiences with APA cases, which would weigh against transfer [out of District of Columbia]."). It is appropriate for the District of Columbia to be the forum to decide this important national issue.

III. CONCLUSION

For the foregoing reasons, the Tribe requests that this Court enter an order transferring venue to the United States District Court for the District of Columbia.

Respectfully submitted,

NARRAGANSETT INDIAN TRIBE BY AND THROUGH THE NARRAGANSETT INDIAN TRIBAL HISTORIC PRESERVATION OFFICE

By its Attorneys,

/s/ Patrick J. McBurney

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CERTIFICATION

I hereby certify that on this 14th day of August, 2019, this document was filed electronically and is available for reviewing and downloading by the ECF registered counsel of record.

/s/ Patrick J. McBurney