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 REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TRANSFER VENUE

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 ("Motion"). In its opposition, Defendant primarily asserts that there has been no change of circumstances and that the Motion is nothing more than "an act of procedural gamesmanship" to obtain "a more favorable forum" by way of "judge shopping."[1] However, Plaintiff has moved for a change in venue primarily based upon the affidavit submitted by Defendant in support of its motion to dismiss, which makes clear that venue is most appropriate in Washington D.C., and in led the Tribe to the conclusion that venue in the District of Rhode Island may not pass the threshold requirements.

[1] Plaintiff pauses to note the seriousness of these allegations, which are made upon speculation and without any foundational support.

I. DAVID CLARKE'S AFFIDAVIT PROVIDES THE CHANGED CIRCUMSTANCES

Until FHWA submitted the affidavit of David Clarke stating that he was "responsible for facilitating the NHPA, Section 106 process," the Tribe was under the belief that the Rhode Island Division office was responsible for such actions. In fact, as discussed *infra, II*, the Tribe's belief that the Rhode Island Division office was responsible for NHPA compliance was the basis for the Tribe's understanding that Rhode Island was an appropriate venue pursuant to 28 U.S.C. 1391(e)(2). However, because "courts generally **focus on where the decisionmaking process occurred** to determine where the claims arose[,]" *Nat'l Ass'n of Home Builders v. EPA*, 675 F. Supp. 2d 173, 179 (D.D.C. 2009) (emphasis added), and the Tribe has now been informed that all decisionmaking originated from the District of Columbia office, it is evident that Rhode Island is not the forum where a "substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(e)(2).

II. RHODE ISLAND MAY NOT BE AN APPROPRIATE VENUE

The Tribe's statement that the "nexus to Rhode Island is attenuated at best" is not without merit. An analysis of Rhode Island's satisfaction as an appropriate venue pursuant to 28 U.S.C. 1391(e) demonstrates how tenuous the connection actually is. Rhode Island would be an appropriate venue if: (1) a defendant in the action resides in Rhode Island; (2) a substantial part of the events or omissions giving rise to the claim occurred in Rhode Island; (3) a substantial part of the property that is the subject of the action is situated in Rhode Island; or (4) the plaintiff resides in Rhode Island, assuming no real property is involved in the action. It is undisputed that no defendant resides in Rhode Island. Thus, the Tribe will address numbers (2), (3), and (4).

A. Events or Omissions Giving Rise to the Claim Occurred in Washington D.C.

As discussed *supra*, based on the affidavit of Preservation Officer David Clarke, it is beyond clear that the decisionmaking process was substantially done in the Washington D.C. office by either Preservation Officer Clarke or Administrator Hendrickson.

B. No Property Is the Subject of the Action

This action challenges the administrative actions of the FHWA. The "provision authorizing venue where real property is situated has rarely been invoked in administrative law actions." *See Adams v. Bell*, 711 F. 2d 161, 193 n. 108 (D.C. Cir. 1982). In fact, property is only the "subject" of an action if the action is in the nature of a property dispute. *See Environmental Defense Fund, Inc. v. Corps of Engineers*, 325 F. Supp. 728, 732 (E.D. Ark. 1970) (environmental action against Army Corps of Engineers to enjoin construction of a dam was not an action in which "real property is involved" for venue purposes because action "does not put in issue the title to, or possession of, such lands, or any interest therein."). Accordingly, there is no property involved that is the subject of this Administrative Procedures Act claim.

C. Plaintiff Does Not Reside in Rhode Island

As the First Circuit has stated, "[a]n Indian tribe . . . is not considered to be a citizen of any state." *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 27 (1st Cir. 2000).[2] While the First Circuit addressed diversity jurisdiction, without any clear guidance as to where an Indian Tribe "resides" for purposes of venue analysis, this Court should extend the First Circuit's reasoning and determine that an Indian tribe cannot reside in any state.

[2] There is a dearth of case law regarding home forum analysis for Native American Tribes. *See Navajo Nation v. Urban Outfitters, Inc.*, 918 F. Supp. 2d 1245, 1254 (D.N.M. 2013) ("Nor has this Court found a case directly on point regarding venue analysis, although there are cases regarding a tribe's citizenship for purposes of jurisdiction. For jurisdictional purposes, an Indian tribe is not considered to be a citizen of any state and is analogous to a stateless person.").

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 3rd day of September, 2019, this document was filed electronically and is available for reviewing and downloading by the ECF registered counsel of record.

/s/ Patrick J. McBurney