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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NEIGHBORS AGAINST BISON SLAUGHTER, et al., Plaintiffs, v. THE NATIONAL PARK SERVICE, et al., Defendants.	Case No. 1:19-cv-3144-BAH Chief Judge Beryl A. Howell PLAINTIFFS' RESPONSE TO FEDERAL DEFENDANTS' MOTION TO TRANSFER VENUE

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INTRODUCTION

Federal Defendants failed to demonstrate that litigating this case in this District "imposes a heavy burden on the defendant or the court," or that Neighbors filed the case here "solely in order to harass the defendant or take advantage of favorable law." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249, 249 n.15 (1981). Because they have not made a strong case, by clear and convincing evidence, that this District is inappropriate, they have no right to transfer this case.

A bison hunt or "harvest" at Beattie Gulch, Montana, on the edge of Yellowstone National Park, endangers the lives of Plaintiffs Neighbors Against Bison Slaughter members, Bonnie Lynn (collectively, Neighbors), hunters, other property owners, residents, and visitors. Neighbors seeks to stop the unsafe hunt of bison—the National Mammal—until the agencies analyze the effects of the hunt and make decisions based a correct understanding of their jurisdiction and authorities.[1] Neighbors' Motion for a Temporary Restraining Order and a Preliminary Injunction (Neighbors' TRO/PI Mot.), ECF No. 4, which seeks to stop irreparable harm, deserves the Court's attention far more than Federal Defendants' error-laden, nine-factor motion to transfer venue. *See* 28 U.S.C. § 1657; *cf.* Fed. R. Civ. P. 65(b)(3).

Neighbors chose "to petition the Government for a redress of grievances" in this District because their pro bono lawyers live and work here, and because Federal Defendants made the policy decisions in this District that personnel in Montana and Wyoming merely implemented.[2] The convenience of the Parties and witnesses supports Neighbors' decision. No one expects to call witnesses in this Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, case, so litigating here will not burden witnesses or the government. Indeed, the assigned U.S.

[1] *See* National Bison Legacy Act, Pub. L. No. 114-152, 130 Stat. 373 (May 9, 2016).
[2] [2019] Operating Procedures for the IBMP (Dec. 31, 2018) (2019 Winter Decision), ECF No. 4-12; U.S. Const. amend. I.

Department of Justice lawyers also work in the District. Forcing Neighbors to litigate in Montana would only increase pro bono counsel's litigation costs to travel for hearings.

Federal Defendants have failed to demonstrate sufficient inconveniences or an absence of entanglement with this District to grant their motion to transfer. Twice before, this Court has denied motions on cases regarding Yellowstone and Yellowstone bison because Yellowstone "is truly a national icon." *See Greater Yellowstone Coal. v. Kempthorne*, Nos. Civ-A 07-2111 (EGS), 07-2112 (EGS), 2008 WL 1862298, *17 (D.D.C. Apr. 24, 2008); *Greater Yellowstone Coal. v. Bosworth*, 180 F. Supp. 2d 124, 128 (D.D.C. 2001) (Urbina, J.).

Like those cases, this case involves Yellowstone National Park, which covers parts of three states (Idaho, Wyoming, and Montana). This case also includes amicus tribes with members from several different western states (Oregon, Montana, Washington, and Idaho) and Presidential-Cabinet-level defendants.

The Complaint describes activities that cross jurisdictional boundaries. Some bison, shot when crossing the Yellowstone boundary into Beattie Gulch, run back into Yellowstone and die in the judicial District of Wyoming. Although the bison slaughter causes extreme impacts on a small neighborhood in Beattie Gulch, the flawed decisions and negligent management of the United States' last remaining wild bison herd reach the highest levels of the United States government in this District. The current bison hunt threatens the lives of locals and visitors from all over the world who come to this gateway to Yellowstone. Retaining venue would therefore most effectively advance Congress's directions to make transfer decisions for the "convenience of parties and witnesses" and in the "interest of justice." 28 U.S.C. § 1404(a).[3]

[3] In full, Section 1404(a) states: "For 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 or to any district or division to which all parties have consented."

MOTION PRIORITIES

Federal Defendants are asking this Court to transfer this case to the District of Montana before considering Neighbors TRO/PI Motion. Fed. Defs.' Mem. in Supp. of Mot. to Transfer Venue 17 (Fed. Defs.' Br.), ECF No. 13. Federal Defendants, however, have the power to temporarily stop that hunt and to give this Court sufficient time to consider both motions. They have declined to use that power without explanation. Instead of addressing their motion, Neighbors TRO/PI Motion deserves the Court's full attention.

Congress leaves courts to "determine the order in which civil actions are heard and determined," and it identifies only "a narrow set of cases that must skip to the front of the line." *Comm. on Ways & Means of House of Representatives v. U.S. Dep't of Treasury*, No. 1:19-cv-01974 (TNM), at *2 (D.D.C. Aug. 29, 2019) (denying a motion to expedite). Among them, Congress directs courts to prioritize cases seeking preliminary injunctive relief. 28 U.S.C. § 1657. Discretionary venue transfers do not take priority over averting irreparable harm through motions seeking preliminary injunctive relief. *See id.*; *cf.* Fed. R. Civ. P. 65(b)(3).

To the knowledge of Neighbors' counsel, no bison are currently leaving Yellowstone. Therefore, any closure of Beattie Gulch would currently impact no one. Last winter, for example, bison did not exit Yellowstone north to Beattie Gulch until months into 2019.[4] Nonetheless, Neighbors has no control over the hunt. The weather could turn any time, and the bison could migrate out of Yellowstone. Federal Defendants have not, and almost certainly cannot, identify any harm in delaying the bison hunt by a few weeks while the Court hears Neighbors' claims. In contrast, if the bison hunting begins, the irreparable harms Neighbors' describe could happen at

[4] *See* Bison Mgmt. Operations Winter 2018-19, at 2 (Apr. 4, 2019), ibmp.info/Library/StatusReports/20190404_YELLbison_fieldOpsMgmtSummary.pdf.

any time—possibly on an even larger scale than prior years. Last month, the National Park Service described its intensive bison slaughter plans for this winter. They focus on the northern herd that migrates through Beattie Gulch: "The removal of 600 to 900 bison this winter should decrease the number of bison to fewer than 4,100 by the end of winter. Removals should focus on the northern herd."[5]

The Forest Service could issue an emergency closure of Beattie Gulch for public safety while the Parties briefed these issues and while the Court considered them. *See* 36 C.F.R. § 261.53(e) (authorizing the Forest Service to close areas for "Public health or safety."). It has closed Beattie Gulch before.[6] Separately, the Department of the Interior could stop bison from leaving Yellowstone, as it also has done before. *See* Interagency Bison Mgmt. Plan (IBMP) Envtl. Impact Statement (EIS) xvi (Reese Creek), ECF No. 4-5. Again, likely, no bison would leave Yellowstone during the additional time this Court needs to review Federal Defendants' motion to transfer. Delaying the hunt would likely impact no one. But the Federal Defendants remain indifferent to such a common-sense plan.

Instead, they blame Neighbors for filing suit and threatening the status quo. Federal Defendants accuse Neighbors of manufacturing a "long delay in filing suit until the challenged activity [was] imminent;" they argue that the delay "undercuts any justification that the more appropriate venue should be ignored due to exigency." Fed. Defs.' Br. 15-17. Neighbors moved

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[5] Chris Geremia, *Status Report on the Yellowstone Bison Population*, Park Service (Oct. 2019), ibmp.info/Library/OpsPlans/2019_StatusYellowstoneBisonPopulation_Oct2019.pdf. That could easily lead to 400, 500, or 600 bison kills on the tiny, quarter-square-mile area of Forest Service land at Beattie Gulch. Federal Defendants prefer hunters slaughtering bison in Beattie Gulch, because that presents fewer bison management challenges for them. *See* 2019 Winter Decision 6.

[6] Emergency Area Closure for Beattie Gulch Area North of Gardiner, Forest Service (undated), fs.usda.gov/detail/custergallatin/news-events/?cid=STELPRDB5337783; ECF No. 25-6; ECF No. 25-8.

as quickly as they could. Before filing this case, Neighbors' counsel spent months interviewing over a dozen witnesses, reviewing IBMP documents, piecing together a complex record, reviewing numerous earlier Yellowstone bison cases and materials, and researching the law. Neighbors needed every moment to prepare adequately to challenge the Federal Defendants' negligent treatment of Beattie Gulch residents. With lives and livelihoods at stake, they took the time they needed for the sake of prudence—not for gamesmanship.

Federal Defendants' arguments also surprise Neighbors because Neighbors notified them of their claims and proposed lawsuit months ago. On August 16, 2019, they sent a letter to Custer Gallatin Forest Supervisor Mary Erickson and to Yellowstone Superintendent Cam Sholly. Ex. A. They "demand[ed] that the Federal Agencies immediately suspend the upcoming hunting season (2019-2020) in Beattie Gulch until the Federal Agencies can ensure that any future wild bison hunting is conducted under organized, safe, and humane conditions." *Id.* The Park Service never responded, and the Forest Service casually dismissed the letter. *See* Letter from Mary Erickson to Matthew Thurlow and Jared Pettinato (Sept. 13, 2019), Ex. B. Neither agency contacted Neighbors to forestall litigation; and neither agency appears to have consulted with the Department of Justice. *See* Ex. A at 1. Neighbors had no choice but to file this lawsuit.

Even upon filing, Neighbors had hoped to negotiate with Federal Defendants to identify a mutually agreeable schedule for briefing their TRO/PI Motion. But just as the IBMP "ignored [Plaintiff Bonnie Lynn] and pretended like [she] did not exist," Lynn Decl. ¶ 64, and as Federal Defendants neglected Neighbors' August letter, Federal Defendants once again dismissed out-of-hand Neighbors' proposals to compromise. Federal Defendants may not act until someone dies at Beattie Gulch, and even then, they may continue to adhere to the status quo because they consider themselves powerless bystanders (despite all of the federal law to the contrary).

Courts created preliminary injunctions to give them sufficient time to consider complicated inquiries, like motions to transfer, before irreparable injury occurs. *See*, *e.g.*, *Tinnus Enters., LLC v. Telebrands Corp.*, No. 6:17-CV-170-RWS, at *2 (E.D. Tex. Jul. 16, 2018) ("Delaying entry of this [preliminary injunction, and allowing the harms to continue] while the Court analyzes each of these motions [including a transfer motion] would undermine the purpose of the preliminary injunction against Defendants—to maintain the status quo until the resolution of the litigation."). No valid reason compels this Court to consider Federal Defendants' motion to transfer ahead of Neighbors' motion to avert irreparable harm. *See Concerned Rosebud Area Citizens v. Babbitt*, 34 F. Supp. 2d 775, 776 (D.D.C. 1999) (denying a motion to transfer and expediting summary judgment briefing).

FACTUAL AND PROCEDURAL BACKGROUND

Sooner or later, the chaotic, overcrowded, and unsafe bison hunting at Beattie Gulch will kill or seriously injure someone. Lynn Decl. ¶ 27, ECF No. 4-27. The bison hunt, on a quarter-mile-square area north of Yellowstone, puts the neighbors in extreme physical danger from dozens of excited and poorly managed hunters shooting haphazardly at groups of bison. Sue Oliver Decl. ¶ 5 ("I have seen hunters make wild shots."), ECF No. 4-36. The bison hunt causes extreme noise. *See* Lynn Decl. ¶ 28 ("it sounds like a war zone."). And perhaps worst of all, the hunt leaves tens of thousands of pounds of rotting, potentially disease-laden bison carcasses littered across this small geographic area. Oliver Decl. ¶ 7 (calculating that "hunters left almost 30,000 pounds—15 tons—of guts and bison parts [in Beattie Gulch]"). Local residents can only flee their homes and scale back their businesses during the winter.

For years, the Park Service and the Forest Service have ignored the local residents' plight and the extreme dangers of the hunt because they seem to think they have no alternatives to this

gruesome, unsanitary, and dangerous hunt. Much of their frustration derives from the policy positions that Washington, D.C., policymakers have thrust upon them. Back in the 1990s, undersecretaries for the U.S. Departments of Agriculture and the Interior negotiated over the IBMP with Montana Governor Marc Racicot.[7] And just last year, then-Secretary of the Interior Ryan Zinke took bison management decisions away from Superintendent Dan Wenk and brought them into the Secretary's office. Secretary Zinke fired Superintendent Wenk for failing to manage bison the way Secretary Zinke wanted.[8]

Neighbors have brought four claims, and all of them relate to issues of national concern:

1. The APA requires the Park Service to decide how to implement the Yellowstone Management Act Amendments, Act of January 24, Pub. L. No. 67-395, 43 Stat. 1174, 1214 (codified at 16 U.S.C. § 36), under its jurisdiction over Yellowstone bison that extends beyond Yellowstone's boundaries. Compl. ¶¶ 55-59, ECF No. 1.

2. The APA required the Forest Service to explain why it is implementing its Organic Act, 16 U.S.C. § 551, by allowing the bison hunt at Beattie Gulch, although the hunt endangers property owners, residents, and visitors. Compl. ¶¶ 61-63; 36 C.F.R. § 261.53(e).

3. National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370m-12, required the Park Service and the Forest Service to analyze and develop alternatives for bison management in the 2019 Winter Decision with correct interpretations of their jurisdiction. Compl., ¶¶ 65-68.

[7] Letter from James R. Lyons, Undersecretary for Natural Resources and Env't, USDA, et al. to Marc Racicot, Montana Governor 2 (Dec. 13, 1999), IBMP EIS 714, ECF No. 4-19.

[8] *See*, *e.g.*, Edward O'Brien, *Yellowstone Park Chief Blames Bison Politics For His Departure*, Yellowstone Public Radio (Aug. 9, 2018), mtpr.org/post/yellowstone-park-chief-blames-bison-politics-his-departure; Matthew Brown, *Yellowstone boss says Trump administration forcing him out*, Associated Press (June 7, 2018), apnews.com/24808bac6ff445998da7254d5b299ced.

4. NEPA required the Park Service and the Forest Service to issue a supplemental environmental impact statement to analyze the impacts of the escalating, intensifying, and concentrating hunt in Beattie Gulch. Compl., ¶¶ 70-71.

STANDARD OF REVIEW

Federal Defendants misstate the standard of review for a motion to transfer venue. They contend that Section 1404(a) "facilitates transfer to a more appropriate federal forum." Fed. Defs.' Br. 6. Although district courts have discretion to decide motions to transfer "according to an individualized, case-by-case consideration of convenience and fairness," *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quotations omitted), courts abuse that discretion when they 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." *Pain v. United Techs. Corp.*, 637 F.2d 775, 783 (D.C. Cir. 1980).

Congress designed Section 1404(a) primarily to address "problems arising where, despite the propriety of the plaintiff's venue selection, the chosen forum was an inconvenient one." *Van Dusen v. Barrack*, 376 U.S. 612, 634 (1964). Congress remedied those inconveniences by passing Section 1404(a) as a "federal judicial housekeeping measure," to "prevent the waste of time, energy, and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Id.* at 616, 636 (quotations omitted).

With Section 1404(a), Congress did not "narrow the plaintiff's venue privilege," but sought "simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court." *Id.* at 634; *Ferens v. John Deere Co.*, 494 U.S. 516, 525 (1990). Even some inconvenience to the moving party does not justify a court overcoming a plaintiffs' venue decision. *Ferens*, 494 U.S. at 528.

When a plaintiff properly lays venue here, courts require a movant, who seeks to transfer the case elsewhere, to "justif[y]" the transfer "by particular circumstances that render the [the District of Columbia] inappropriate by reference to the considerations specified in" Section 1404(a). *Starnes v. McGuire*, 512 F.2d 918, 925 (D.C. Cir. 1974) (*en banc*). After the moving party demonstrates that the plaintiff could have brought the case in the transferee forum, the moving party bears the burden of demonstrating by "clear and convincing evidence" a "strong case" that the District of Columbia is "inappropriate." *See N.Y. Marine & Gen. Ins. Co. v. Lafarge N. Am.*, 599 F.3d 102, 113-14 (2d Cir. 2010) (quotations omitted); *Starnes*, 512 F.2d 925 (rejecting the argument that "absent extraordinary circumstances [all] such actions should ordinarily be transferred as a matter of course"). Courts weigh nine factors that include plaintiffs' chosen forum, the convenience of parties and witnesses, and the "interest of justice." *See* Section 1404(a); *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 571 U.S. 49, 63 n.6 (2013). Even neutral factors weigh against transfer because they increase the movant's burden of demonstrating inconvenience.

ARGUMENT

Federal Defendants have failed to carry their burden of demonstrating, by clear and convincing evidence, that this District causes such inconvenience that it overcomes (a) Neighbors' choice of forum, (b) Congress's direction to decrease costs for pro-bono counsel representing small businesses and citizens who cannot afford lawyers, and (c) the bison management decision-making that happened in Washington, D.C. Neighbors does not dispute that they could also have filed this case in the District of Montana or in the District of Wyoming, but that does not mean that anything required them to file there. The United States Code gives

this Court venue, too. *See* 28 U.S.C. § 1391(e)(1) (recognizing venue wherever any federal defendant resides).

I. Neighbors' Decision to File in This District Deserves Weight.

Courts "ordinarily" weigh "a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." *Piper Aircraft*, 454 U.S. at 255. In other words, "the plaintiff's choice of forum is more than just one factor that the trial judge must consider when balancing equities between two alternative forums." *Pain*, 637 F.2d at 783. "[A] plaintiff's choice of forum should rarely be disturbed." *Piper Aircraft*, 454 U.S. at 241. Movants bear a "heavy burden . . . to establish that the plaintiff's choice of forum is *not* appropriate." *Pain*, 637 F.2d at 786.

Federal Defendants argue that "little deference is afforded where the plaintiff has substantial ties to the proposed transferee district" and that "all Plaintiffs are residents of Montana." Fed. Defs.' Br. 10. They also argue that Section 1404(a) requires "meaningful ties" to this District, and that those do not exist. *Id.* at 9, 10. These arguments misconceive the nature of the convenience inquiry.

The venue statute requires no "meaningful ties." *See* 28 U.S.C. § 1391(e). And the phrase "meaningful ties" arise nowhere in Section 1404(a)'s text. These considerations arise only in determining whether plaintiff chose a venue so inconvenient to justify transferring the case. Choosing the home forum implies convenience, whereas choosing a foreign forum simply does not imply the same convenience and "deserves less deference." *Piper Aircraft*, 454 U.S. at 256.[9]

[9] For its argument that residence matters, Federal Defendants rely on district court cases that ultimately misinterpret the United States Court of Appeals for the District of Columbia's decision in *Pain*. Fed. Defs.' Br. 10 (citing *Airport Working Grp. of Orange Cty, Inc. v. U.S. Dept. of Def.*, 226 F. Supp. 2d 227, 230 (D.D.C. 2002) (quoting *Miccosukee Tribe of Indians v. United States*, No. 99CV2464, slip op. at 5 (D.D.C. December 27, 2000) (citing *Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 561 F. Supp. 1238, 1239 (D.D.C. 1983)

Therefore, Neighbors' residence matters only inasmuch as it tends toward the convenience of litigation here. Even if Neighbors have no ties or residence here, "[t]he Court must . . . give some weight to the plaintiffs' choice of forum." *Atl. Marine*, 571 U.S. at 63 n.6. Federal Defendants still bear the burden of demonstrating inconvenience. They have failed to do so.

II. This District Does Not Present an Inconvenient Forum for Parties or Witnesses.

The Supreme Court has directed Courts, in deciding whether to transfer cases, to "evaluate both the convenience of the parties and various public interest considerations." *Atl. Marine*, 571 U.S. at 62. Federal Defendants have failed to prove by "clear and convincing evidence" a "strong case" in favor of transferring this case to the District of Montana.

Instead, the convenience to Neighbors' counsel and Federal Defendants' counsel weighs heavily in favor of this Court retaining venue. "Section 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal with transfer." *Atl. Marine*, 571 U.S. at 60. And "the central focus of the *forum non*

(citing *Pain*))). The Supreme Court has recognized that *Pain* stands for the proposition that "citizenship and residence are proxies for convenience," and the Supreme Court directs courts to focus on whether "the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court . . . ." *Piper Aircraft*, 454 U.S. 256 n. 23, n.24.

In *Pain*, the D.C. Circuit upheld a dismissal of an airline-crash case under *forum non conveniens* for filing in this District. 637 F.2d at 799. There, a helicopter had crashed on its way from Norway to an oil platform. *Id.* 779. A Norwegian company wholly owned a Delaware company that had built the helicopter. *Id.* The crash had killed several foreign citizens and one U.S. citizen—none of whom lived in the United States. *Id.* at 780. The U.S. citizen's mother lived in New Hampshire, and among the plaintiffs, only she held U.S. citizenship. *Id.* The D.C. Circuit upheld the dismissal for *forum non conveniens* because "the chosen forum was so attenuated that plaintiffs' choice of forum deserved little deference from the trial court." *Id.* at 786. The *Pain* court explained further that the attenuation from the District simply made the forum more inconvenient. *Id.* at 798-99. The district court cases on which Federal Defendants rely make categorical conclusions that have drifted far from *Pain* and ignored its rationale.

conveniens inquiry is convenience." *Piper Aircraft*, 454 U.S. at 249. The Parties' attorneys work every day in this District, and this Court will resolve this APA case on cross-motions for summary judgment. This District presents by far the most convenient forum for any oral arguments, and nothing else makes this District inconvenient.

A. The Private Convenience Factors Demonstrate That This District Does Not Present an Inconvenient Forum.

The Supreme Court has identified four factors that relate to the parties' private interests:

1. "[R]elative ease of access to sources of proof;"

2. "[A]vailability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses;"

3. "[P]ossibility of view of premises, if view would be appropriate to the action;" and

4. "[A]ll other practical problems that make trial of a case easy, expeditious and inexpensive."

Atl. Marine, 571 U.S. 49, 63 n.6 (quotations omitted). These private factors weigh against transferring this case to the District of Montana.

1. *Transferring This Case to Montana Does Not Enable More Easy Access to Sources off Proof for this APA Case.*

The considerations for an APA case make this case equally convenient here as in Montana. Neighbors has brought this case under the APA. Compl. ¶¶ 8, 10, 24, 25, 59, 63, ECF No. q. Under the APA, "[t]he factfinding capacity of the district court is . . . typically unnecessary to judicial review of agency decisionmaking." court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). No trial or witness inconvenience will arise by this Court retaining venue because, under the APA, plaintiffs are generally not "entitled to[] a trial." *Cronin v. USDA*, 919 F.2d 439, 443 (7th Cir. 1990); *Am. Bioscience Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001).

Instead of a trial, a court will resolve this case on cross-motions for summary judgment based on the electronic administrative records that the Park Service and the Forest Service will compile and deliver, likely through the mail. *See* 5 U.S.C. § 706; *Fla. Power & Light*, 470 U.S. at 743-44; *Am. Bioscience*, 243 F.3d at 582. APA procedures make this case convenient in this District.

2. *Witnesses Could Only Testify for Requests for Injunctive Relief, But Neighbors Has Not Requested a Hearing on Their TRO/PI Motion.*

The Parties will not likely call any witnesses for this APA case. *See Greater Yellowstone Coal. v. Kempthorne*, *10 ("this is an action for review of an administrative record and live testimony is unlikely"). Under the APA, "[t]he task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light*, 470 U.S. at 743-44. "There is a strong presumption against discovery into administrative proceedings born out of the objective of preserving the integrity and independence of the administrative process." *NVE, Inc. v. Dep't of Health & Human Servs.*, 436 F.3d 182, 195 (3rd Cir. 2006).

Federal Defendants speculate that witness testimony for Neighbors' TRO/PI Motion "may be necessary." Fed. Defs.' Br. 13-14. In an APA case, no witnesses can appear, except perhaps for requests for injunctive relief. *See Ctr. For Biological Diversity v. Wagner*, CIV. 08-302-CL, 2009 WL 2176049 (D. Or. June 29, 2009) ("Extra-record evidence may also be considered in relation to a request for injunctive relief."), *report and recommendation adopted*, CIV. 08-302-CL, 2009 WL 2208023 (D. Or. July 22, 2009). Here, however, no party requested a hearing on Neighbors' motion, so no witnesses will appear for it.

Federal Defendants return to their refrain that convenience favors transferring this case to Montana because Neighbors reside in Gardiner, Montana. Fed. Defs.' Br. 11. Residence, however, does not inconvenience anyone because Neighbors will not likely testify.

Federal Defendants argue that "[t]he only named individual Defendant with direct involvement in the challenged agency action is headquartered in [Yellowstone], Wyoming—closer to the District of Montana than the District of Columbia." Fed. Defs.' Br. 11-12. That named-party's residence has no weight because it does not affect the convenience of the litigation. Under the APA, the Supreme Court has rejected the possibility that a party could call a decision-maker as a witness without "a strong showing of bad faith or improper behavior." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) ("inquiry into the mental processes of administrative decisionmakers is usually to be avoided."), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 104, 107 (1977).

Federal Defendants stop short of asserting that Yellowstone Superintendent Sholly would attend any hearing. Likely, he would not attend, and likely, no Court would compel him to do so. *Cf. United States v. U.S. Dist. Court*, 694 F.3d 1051, 1062 (9th Cir. 2012) ("[T]he district court abused its discretion in ordering a government representative with full settlement authority to appear in person for an initial settlement conference."). Therefore, the named Parties' residences do not inconvenience anyone, and litigating in this District will inconvenience no witnesses.

3. *This Court Will Not Likely Visit the Site.*

Because the reviewing court will decide this case based on the administrative records the agencies present, *Fla. Power & Light*, 470 U.S. at 743-44, it will have no opportunity to visit the site. The APA allows courts to conduct *de novo* reviews of agency action only if "there are inadequate factfinding procedures in an adjudicatory proceeding, or [if] judicial proceedings are brought to enforce certain administrative actions." *Camp v. Pitts*, 411 U.S. 138, 141 (1973). This convenience factor weighs in favor of this Court retaining venue.

4. *The Remaining Practicalities Weigh in Favor of This Court Retaining This Case.*

Litigating in this District will make this case easier, quicker, and less expensive. The strongest possibility for inconvenience in either district lies in oral arguments that courts may hold on Neighbors' TRO/PI Motion, on cross-motions for summary judgment, or on other motions. Undoubtedly, arguing here in the District where all the litigation counsel can easily come to court—some via public transportation—would cost less and take less time than flying all Parties' counsel out to Montana.

Litigating in Montana also presents its own, additional inconveniences. The courthouses are at least two-and-a-half hours' drive from Beattie Gulch. Beattie Gulch fits entirely within Park County.[10] The United States District Court for the District of Montana Local Rule 1.2(c)(1) designates Park County as part of the Billings Division. According to the Montana Department of Transportation's distance calculator, 169 miles separate Gardiner and Billings.[11] But not just time makes that drive inconvenient. In the winter, snow and blizzards can make Montana's roads treacherous and can block passes and highways. These local considerations make transferring this case to Montana more inconvenient.

One court in this District denied a motion to transfer a case from Yellowstone when the federal defendants "fail[ed] to appreciate the magnitude of the Western landscape." *Greater Yellowstone Coal. v. Kempthorne*, at *12. The Court rejected the possibility that the "field offices an average of 500 miles from the Court [are] more convenient than a main office approximately 2.5 miles away . . . ." *Id.* For that reason, the court concluded "that the convenience of the parties clearly weighs in favor of denying transfer." *Id.*

[10] *See* 2019 Montana Highway Map I-6, mdt.mt.gov/travinfo/docs/2019-mt-highway-map.pdf.
[11] At mdt.mt.gov/travinfo/scripts/citydist.pl (enter Gardiner and Billings).

Finally, transferring this case to Montana would contravene Section 1404(a)'s direction to consider the "interest of justice." As one interest of justice, Congress has sought to expand equal access to justice for people and small businesses who cannot "seek[] review of . . . unreasonable governmental action because of the expense involved in securing the vindication of their rights . . ." *See* Equal Access to Justice Act, Pub. L. No. 96-481 § 202, 94 Stat. 2321, 2325 (Oct. 21, 1980), *quoted approvingly by Comm'r v. Jean*, 496 U.S. 154, 163, 165 n.11 (1990). With that act, Congress intended to help plaintiffs just like community organization Neighbors and Bonnie Lynn, whose small business is suffering as a result of unreasonable agency action. *See generally* Bonnie Lynn Decl., ECF No. 4-27.

Transferring this case to Montana could require Neighbors' counsel to spend thousands of dollars for flights and hotel rooms and dozens of hours flying back and forth to Montana. Increasing litigation costs would decrease the number of lawyers with specialized skills willing to take pro bono cases in rural areas, like Montana. In the long run, that policy would undermine those residents' and small businesses' abilities to obtain justice. The interest of justice therefore lies in this Court retaining venue.

B. The Public Interest Factors Weigh in Favor of This Court Retaining This Case.

This Court would advance the public interests of justice by retaining venue to address thorny jurisdictional issues that cross judicial district lines and state boundaries, where several tribes and one state assert jurisdiction. This confluence of jurisdictions is occurring here because of the unique and special character of Yellowstone in the United States.

The Supreme Court has identified three public interest factors to weigh in deciding whether to transfer a case under Section 1404(a):

1. "[T]he administrative difficulties flowing from court congestion;
2. "[T]he local interest in having localized controversies decided at home; [and]

3. "[T]he interest in having the trial of a diversity case in a forum that is at home with the law."

Atl. Marine, 571 U.S. 49, 63 n.6 (quotations omitted).

The first and third factors resolve easily in favor of retaining venue. For the first factor, Federal Defendants have failed to demonstrate that the District of Montana could, more easily than this District, accommodate this case on its docket. Fed. Defs.' Br. 14. That factor weighs in favor of this Court retaining venue. The third factor weighs in favor of this Court retaining venue because the District of Montana does not have any specialized knowledge in federal law, like the Supremacy Clause, the Commerce Clause, or the Public Lands Clause.

Because Federal Defendants have no other arguments, they contend that this case presents a "localized controversy" for "home" courts to decide. Fed. Defs.' Br. 14-15. They argue that Montana residents "and other relevant entities in the region have a compelling interest in having this localized controversy decided at home." *Id.* (quoting *Trout Unlimited v. USDA*, 944 F. Supp. 13, 19 (D.D.C. 1996)). They argue that this Court's decision will most affect Montana, its citizens, "its bison hunt permitting system, its citizens' private lands, and its unique ecosystems . . . inextricably linked in this case . . . ." *Id.*[12]

Because they filed this motion in haste, Federal Defendants misapprehend the practicalities of "home;" ignore the tribes from Washington, Oregon, and Idaho who hunt bison in Beattie Gulch; deny Yellowstone's importance to all citizens of the United States; and fail to account for the Secretary of the Interior's personal involvement in bison management. The fallacies of the

[12] Federal Defendants audaciously contend that Montana owns the Yellowstone bison, but that forms a central question for this litigation. *Compare* Fed. Defs.' Br. 15 ("[Montana's] wildlife") *with* Pls.' TRO/PI Br. 22-29. Neighbors rejects Federal Defendants' legal conclusion. Federal Defendants are putting the cart before the horse by raising that issue in their motion to transfer.

agencies' arguments fatally undermine its attempts to demonstrate inconvenience sufficient to compel this District to transfer this case to Montana.

1. *Complicated Jurisdictional Boundaries Preclude any Conclusion That Montana Qualifies as a "Home" Jurisdiction with a Localized Controversy.*

Federal Defendants refer to Montana as the "home" district, and the district "where the challenged decision-making occurred, where the federal and state natural resources at issue are located, and where the resolution of this litigation will be most keenly felt." Fed. Defs.' Br. 14, 17-18. They have failed to account for the judicial districts that Congress drew, their proximity to Ms. Lynn's properties, and where the relevant decisions actually happened.

Federal Defendants fail to recognize that Congress included Yellowstone within the District of Wyoming—even the areas within Montana: "Wyoming and those portions of Yellowstone National Park situated in Montana and Idaho constitute one judicial district." 28 U.S.C. § 131. Separately, "Montana, *exclusive of Yellowstone National Park*, constitutes one judicial district." *Id.* § 106 (emphasis added). Those statutes put Ms. Lynn's property just 300 yards from the District of Wyoming. Lynn Decl. ¶ 13; *see* Pls.' TRO/PI Br. v (map). Indeed, some bison, that hunters shoot on Forest Service land in Beattie Gulch, run back into Yellowstone and die on Park Service land in the District of Wyoming. *See* Sue Oliver Decl. ¶ 8, ECF No. 4-36; Sue Oliver, *Bison Meeting Notes April 6, 2016*, ECF No. 4-41.

When Ms. Lynn drives to the grocery store in Gardiner, Montana, from her RV down Old Yellowstone Trail South, Ms. Lynn drives through the District of Wyoming and back into the District of Montana. *See* IBMP EIS 33. She keeps that RV there, in part, so that she can go into Yellowstone—in the District of Wyoming. Lynn Decl. ¶¶ 16-17. Beattie Gulch, on Forest Service land, borders the District of Wyoming. *See* IBMP EIS 33.

Federal Defendants argue that the decisions all happened in Montana and that "the challenged actions are located" in Montana, Fed. Defs.' Br. 15, 17, but they do not even account for Yellowstone Park Superintendent Sholly making decisions from the District of Wyoming. In this area, wild, Yellowstone bison cross state boundaries, judicial district boundaries, and other boundaries blissfully ignorant until the shooting starts; then they retreat back across those jurisdictional boundaries into Yellowstone. *See* Oliver Decl. ¶ 8. The Park Service once kept Yellowstone bison in the Stephens Creek Facility: in Montana, but in the Wyoming Judicial District, although now the Park Service releases many for hunting. *See* IBMP EIS 181; 2019 Winter Decision. Those actions happen in the District of Wyoming. Federal Defendants' ignore these jurisdictional lines.

Not only judicial districts intersect here. Montana exercises overlapping jurisdiction over the land within its boundaries and within the judicial District of Wyoming. *See Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) ("Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause."). And the Tribes assert jurisdiction there, too. [Tribes'] Mot. to File a Joint *Amicus Curiae* Br. in Supp. of the Fed. Defs. 3 (Tribes' Mot.), ECF No. 23.

Federal Defendants argue that "[t]he hunters, American Indian tribes, and state interests that will be harmed by the emergency relief they seek are all in Montana." Fed. Defs.' Br. 3. That misstates the facts. The tribes who moved for leave to file an *amicus curiae* brief include tribes from four states: Washington, Idaho, Oregon, and Montana. *See generally* Tribes' Mot. These cross-cutting jurisdictional lines and impacts that transcend boundaries undermine Federal

Defendants' argument that the District of Montana qualifies as the home district or that this presents a localized controversy. It presents a national controversy in Yellowstone.

2. *All United States Citizens Treasure Yellowstone*

This Court has previously denied a motion to transfer a Yellowstone case because, "[w]hile [it] does not discount the importance of these issues to the people of Wyoming, the Court finds, as it has done previously, that the management of Yellowstone National Park and more broadly, the interpretation of various federal mandates governing the NPS, present questions of national significance." *Greater Yellowstone Coal. v. Kempthorne*, at *16. Yellowstone does not belong to Montana or to Wyoming, but "is truly a national icon." *Id.* at *17.

This Court recognized that "[t]he management of the National Parks and the interpretation of federal environmental statutes are nationwide concerns." *Id.* at *18. It found that "[m]ore than 70% of visitors to Yellowstone and Grand Teton National Parks are from states other than Wyoming, Montana and Idaho, the States in which those Parks are located in whole or in part." *Id.* at 17.

The same considerations weigh heavily here. The Park Service and the Forest Service have recognized that every year, "United States citizens and people from all over the world spend more than 9 million visitor days of recreation in developed sites of the Yellowstone area . . . ." IBMP EIS xxx. Many of those visitors come to see bison. "[I]n modern times, wildlife viewing is the primary activity for many visitors who come to [Yellowstone]. Bison are ranked as one of the top 10 animals visitors hope to see on a visit . . . ." *Id.* Yellowstone qualifies as a national treasure, and the consequences to so many people—some no doubt from this District—undermine Federal Defendants' arguments that these impacts center on Montana.

This Court has held that "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." *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 11 (D.D.C. 2007) (Lamberth, J.); *Concerned Rosebud*, 34 F. Supp. 2d at 776 (Green, J.) (declining to transfer a case on a pork production facility located solely in South Dakota). Here in particular, Federal Defendants admit that "bison remain an essential component of the Greater Yellowstone ecosystem, which spans millions of acres across parts of Idaho, Montana and Wyoming." Fed. Defs.' Opp. to Pls.' Mot. for a TRO and PI 2, ECF No. 25. That later statement contradicts their earlier argument that "the federal and state natural resources at issue are located" in Montana. Fed. Defs.' Br. 17-18.

Moreover, Ms. Lynn's guests come from around the world, and fewer come because of the bison hunting. Lynn Decl. ¶ 18. One who made the journey and witnessed the hunt "cried at the despicable wanton slaughter happening outside her doorway's view." *Id.* ¶ 46. The rest took negative impressions with them, so the impacts extend beyond the boundaries of the District of Montana. The national significance of Yellowstone and the Yellowstone bison, its regional impacts in two other judicial districts, and the interstate and international visitors all demonstrate that the actions here do not cause only localized impacts in the District of Montana.

3. *Federal Defendants Fail to Account for the Secretary of the Interior's Personal Directions on Bison Management.*

Federal Defendants have forfeited any right to ask to transfer this case to Montana because in 2018, the Secretary of the Interior took over Yellowstone bison management decision-making as a national issue. This Court has declined to transfer other cases when "high-ranking government officials in Washington, D.C. were involved in inter-agency discussions regarding the [decision in Yellowstone]." *Greater Yellowstone Coal. v. Bosworth*, 180 F. Supp. 2d at 128; *Greater Yellowstone Coal. v. Kempthorne*, at *12 ("Plaintiffs aver significant involvement on the part of

high-level Executive Branch officials, up to and including those in the White House."). This presents Presidential-Cabinet-level involvement in Yellowstone.

Secretary Zinke pushed Superintendent Wenk out, so Secretary Zinke could install a new superintendent who would adopt the bison management policy he preferred. As Superintendent Wenk explained, he clashed with Secretary Zinke only over bison management. Edward O'Brien, *Yellowstone Park Chief Blames Bison Politics For His Departure*, Yellowstone Public Radio (Aug. 9, 2018), mtpr.org/post/yellowstone-park-chief-blames-bison-politics-his-departure ("Wenk says bison management is . . . the only issue that caused friction between himself and [Secretary] Zinke."). Later Park Service Deputy Director P. Dan Smith issued an ultimatum memorandum, from this District, that gave Superintendent Wenk four options for leaving his position.[13] That juxtaposition leads to only one conclusion, as Superintendent Wenk told reporters: Secretary Zinke pushed him out over Yellowstone bison management. *See* Matthew Brown, *Yellowstone boss says Trump administration forcing him out*, Associated Press (June 7, 2018), apnews.com/24808bac6ff445998da7254d5b299ced.[14] Thus, Secretary Zinke called the shots on Yellowstone bison management from this District.[15] This evidence undermines any conclusion that Yellowstone bison management qualifies only as a local controversy. It weighs against transferring this case.

[13] *See* Memo. from Deputy Director, Exercising the Authority of the Director, P. Dan Smith to Dan Wenk (undated), documentcloud.org/documents/4498098-Wenk-Yellowstone.html, Ex. C.

[14] This statement does not qualify as hearsay because "the party's agent or employee [made it] on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2)(C).

[15] If Federal Defendants dispute these facts, and if the Court feels inclined to grant this motion, Federal Defendants reserve the right to conduct discovery. *See Starnes*, 512 F.2d 934 ("In some cases an evidentiary hearing may be necessary to develop relevant facts . . . . [W]here the evidence and arguments supporting a transfer are in doubt, a hearing or conference would be desirable before the district court decides the motion.") (quotations and alterations omitted).

CONCLUSION

Federal Defendants have failed to make a strong case, based on clear and convincing evidence, that the District of Columbia is so inconvenient as a forum that it compels this Court to transfer this case to the District of Montana. Because Federal Defendants have failed to carry their burden, this Court can only deny their motion.

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