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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---------------------------|---|---------------------|
| Gulf Restoration Network, |) | |
| |) | File No. CA 14-1773 |
| Plaintiff, |) | |
| |) | Date: March 3, 2015 |
| v. |) | Time: 10:00 a.m. |
| |) | |
| Sally Jewell, et al., |) | |
| |) | |
| Defendants. |) | |

TRANSCRIPT OF ORAL ARGUMENT
HELD BEFORE
THE HONORABLE AMIT P. MEHTA
UNITED STATES JUDGE

APPEARANCES:

| | |
|---------------------|---|
| For the Plaintiffs: | Robert Wiygul Waltzer & Wiygul, LLP 1011 Iberville Drive Ocean Springs, MS 39564 |
| For the Defendants: | Kristofor Swanson Department of Justice P.O. Box 7611 Washington, DC 20044 |
| Court Reporter: | Janice E. Dickman, RMR, CRR Official Court Reporter U.S. Courthouse, Room 6523 333 Constitution Avenue, N.W. Washington, DC 20001 (202) 354-3267 |

* * *

1 THE COURT: Bear with me for one moment. We're
2 still trying to work the kinks out here. Thanks, everyone,
3 for being here this morning and working with Miss White to
4 be here this morning.

5 The reason I called this hearing -- and we're
6 here, obviously, on the defendant's motion to transfer this
7 matter to the Southern District of Alabama. I have looked
8 at the cases, read all of your papers, which have been very
9 helpful. And the -- you know, the courts in this
10 jurisdiction have looked at a number of factors, all of
11 which you have pointed out, both public and private, in
12 determining whether to transfer a case outside the District
13 of Columbia.

14 The courts have looked at -- I believe it's nine
15 factors. But really, when you look at those factors, there
16 are really only three that, certainly in this case and in
17 most cases, that come into play. And that is the
18 plaintiff's choice of forum and the amount of deference
19 that's to be afforded to the plaintiff's choice of forum.

20 Two, where the claim itself actually arises. And,
21 three, whether the controversy at issue is one that is
22 properly characterized as one of more national scope or more
23 local interest.

24 And I will tell you, as I read through the papers,
25 I found this case to be a hard one. And the reason is that

1 this case, I think, is fairly unique in that while it
2 involves what it arguably a local -- or, what is a local
3 project; a local project, the Alabama Convention Center
4 arises out of an event, certainly of national importance and
5 national scope, the Deepwater Horizon oil spill. And it
6 arises out of, from what I can tell, a sort of unique
7 federal-state process by which this was one of, I think, 44
8 projects selected for early restoration work.

9 And so, I'm still undecided about what to do, I
10 will be perfectly honest with you. And the reason I called
11 this is to get some help from counsel in answering some
12 questions that I have, that I don't fully appreciate the
13 answers to, that really have to do with the three areas, the
14 three factors I just identified. And so, that's why I've
15 called this hearing and would appreciate counsel's efforts
16 in helping me answer some of those questions.

17 So, let me, actually, ask government counsel to
18 begin. And I'm sure you have prepared remarks and have
19 things you would like to present to the court, but I have a
20 number of questions that I'd just like to jump into, if
21 that's okay with you.

22 MR. SWANSON: Absolutely. Whatever you prefer.

23 THE COURT: The first is a fairly routine question
24 and that is I am not quite sure I understand the difference
25 between what is Defendant's Exhibit 3, which is styled

1 Programmatic and Phase III Early Restoration Plan, and Early
2 Restoration Programmatic Environmental Impact Statement,
3 which is dated June of 2014 and what is your Exhibit 1,
4 which is the record of decision that effectively has the
5 same title but is dated several months later and signed
6 October 2nd, 2014.

7 Could you just tell me what -- and you're Mr.
8 Swanson?

9 MR. SWANSON: Kristofor Swanson, yes, representing
10 Federal Defense.

11 THE COURT: What's the difference between those two?

12 MR. SWANSON: Exhibit 4 is the restoration plan
13 and environmental impact statement, and that is a
14 requirement of the Oil Pollution Act and the National
15 Environmental Policy act in this case.

16 THE COURT: Exhibit 4 is the stipulation.

17 MR. SWANSON: I'm sorry. Exhibit 3.

18 THE COURT: Right. The one with the nice
19 photograph of the beach.

20 MR. SWANSON: I'm sorry. Exhibit 3 is the
21 Restoration Plan and Environmental Impact Statement. And
22 those are planning documents required by law under the Oil
23 Pollution Act, OPA, and the National Environmental Policy
24 Act, NEPA. In OPA it is for purposes of considering the
25 factors for restoration projects and getting public input

1 and comments on this projects. And for NEPA, NEPA requires
2 federal agencies to consider the environmental effects of
3 their actions before they act. And that's done through
4 either an environmental assessment or environmental impact
5 statement. In this case it was an environmental impact
6 statement.

7 So those are procedural steps before you get to
8 the actual decision, which is the record of decision in this
9 case, which is Exhibit 1.

10 THE COURT: So Exhibit 3 is both -- is really the
11 environmental impact statement?

12 MR. SWANSON: Extracts of it, yes.

13 THE COURT: Extracts, okay. Okay. And then the
14 record of decision is the final document?

15 MR. SWANSON: That's right.

16 THE COURT: That incorporates both the selection
17 of the various projects -- or, identifies the projects and
18 then also incorporates the impact statement that is dated
19 June 14th?

20 MR. SWANSON: That's right. Relies on the impact
21 statement for both other purposes and NEPA purposes.
22 Documents the information that the agencies are relying upon
23 to reach their decision, what they considered in reaching
24 the decision.

25 THE COURT: That's helpful because I wasn't 100

1 percent clear on the difference between the two exhibits.

2 So let me ask you, and one of the reasons -- one
3 of the questions that I posed in the order convening this
4 hearing, was I'm still unclear on precisely what -- how this
5 process worked. Specifically, when they talk about which
6 process here, because we really have two separate but
7 related processes here. We have the selection of the
8 Alabama Convention Center and then we have the environmental
9 review. I understand the two of them are related, but I
10 would like to think of them separately just for these
11 purposes.

12 Can you explain to me how the selection actually
13 came about? And in addressing that, address both the role
14 of the Alabama trustees and the other state trustees, to the
15 extent they had a role, and the federal trustees.

16 MR. SWANSON: Sure. You know, you said something,
17 Your Honor, at the very beginning here which I think is very
18 at the point, and that is a very unique process that state
19 involvement -- unlike a lot of the case law that the parties
20 relied upon, this was not a federal agency acting
21 unilaterally. There's federal involvement here on a
22 multistate and federal trustee council aimed at restoring
23 some of the resources that were damaged.

24 So for purposes of including this Gulf State Park
25 project in the Phase III planning, that's done on the

1 trustee -- through the trustee council, which includes state
2 and federal representatives. And the day-to-day work on
3 that council is really done through what's called an
4 executive committee. On that committee there are -- it was
5 a principal representative and an alternative representative
6 from each of the five states and the four federal trustee
7 agencies.

8 THE COURT: Does that committee have a physical
9 location?

10 MR. SWANSON: It does not. They, as you would
11 expect, being gulf centric here, a lot of their
12 correspondence is done through e-mail and telephone.

13 THE COURT: Okay. So they act virtually.

14 MR. SWANSON: Right. But the relevant period
15 here, I think, is March 2012 through May 2013, in terms of
16 including Gulf State Park in the Phase III planning. March
17 2012 is what we identified when that trustee council started
18 to consider this project as part of the Phase III project.
19 And May 2013 was the date when the trustees publicly
20 announced their intent to move forward with that Phase III
21 planning.

22 THE COURT: Let me interrupt. So am I
23 understanding correctly that the trustee council, and that's
24 composed of both the federal and state trustees, began
25 considering this project in March of 2012, is that right?

1 MR. SWANSON: That's right.

2 THE COURT: So who proposed the convention center
3 as a project for the trustees considering? I'm
4 specifically -- if you look at Exhibit 3, page 57, what's on
5 page 57. First full paragraphs starts, "The Alabama
6 trustees consider a range of project types to determine how
7 best to proceed with early restoration projects aimed at
8 restoring lost recreational use."

9 A couple pages earlier, on what is page 1, it's a
10 couple pages earlier in the exhibit: While all the projects
11 proposed to be implemented in Alabama are being put forth by
12 the trustees, the specifics of each project in this region
13 were developed and brought to the trustees for approval by
14 the, quote, implementing trustees. For this project that
15 would be the Alabama trustee. Then it goes on to say: Each
16 trustee conducted an initial screening process to decide
17 which projects to move forward to the trustee council for
18 consideration as an early restoration project proposal.

19 So, I think I understand what that means, but tell
20 me what that means in the context of this specific project.

21 MR. SWANSON: Yes. Alabama, as I think all the
22 other states do, has a public projects solicitation process.
23 They have a website where the public can submit projects for
24 consideration, both in early restoration and on the longer-
25 term restoration that would occur. This project was one of

1 those submitted. Alabama had its own internal screening
2 process to select projects for early restoration and Alabama
3 proposed the Gulf State Park project to the trustee council
4 for inclusion in Phase III.

5 THE COURT: Okay.

6 MR. SWANSON: And then from there the trustee
7 council again acts through those principal representatives
8 and the alternates. They do a -- some technical screening
9 and some negotiation with BP because this is their latest
10 restoration that BP will fund, and then at the end of the
11 day decide to include projects in Phase III.

12 You had asked if there is a location of that
13 executive committee. There is not. But as I mentioned, it
14 did meet 12 times. None of those meetings were in the
15 District of Columbia.

16 THE COURT: That's separate from the public
17 meetings.

18 MR. SWANSON: That's separate from the public
19 meetings, which were part of the environmental review
20 process, EIS.

21 THE COURT: So what are you talking? What
22 meetings are you talking about?

23 MR. SWANSON: This is the executive committee of
24 the trustee council, meeting to discuss negotiations with
25 BP, discuss projects, move forward with various things for

1 restoration.

2 THE COURT: Are these open meetings, closed
3 meetings?

4 MR. SWANSON: I believe they're closed meetings,
5 but there are some publicly available documents that are
6 posted on websites.

7 THE COURT: Would this project have been discussed
8 at those meetings?

9 MR. SWANSON: Yes, potentially, during that time
10 period.

11 THE COURT: Is there a record of that discussion?

12 MR. SWANSON: The meeting minutes, I think,
13 reflect discussion at three or four of those meetings. I'm
14 not recalling the specific dates.

15 THE COURT: Okay. I would like you to submit
16 those to the court.

17 MR. SWANSON: The meeting minutes?

18 THE COURT: The meeting minutes. And
19 particularly, if any of the meeting minutes reflect
20 discussion about this project.

21 MR. SWANSON: Okay.

22 THE COURT: Did -- and when you say a meeting, was
23 there a physical location for these meetings?

24 MR. SWANSON: Yes. There was 12 of them in that
25 March to -- March of 2012 to May of 2013 timeframe. None of

1 those occurred in D.C. One was in Alabama, one was in -- at
2 a park service facility in West Virginia, and the remainder
3 were in the other four Gulf States.

4 THE COURT: Okay. So, once the project itself,
5 the Alabama Convention Center project is proposed to the
6 executive committee, can you tell me what the individual
7 federal trustees did in terms of assessing the project? And
8 specifically, who's doing the assessing and where is the
9 assessing taking place?

10 MR. SWANSON: Now we're moving to the EIS and that
11 review process. That also --

12 THE COURT: I'm sorry. I'm sticking just with the
13 actual selection of the convention center. Because what
14 you've told me, as I understand it, is that the Alabama
15 trustee makes a proposal to the council, the council
16 consists of both the federal and state trustees. So -- and
17 ultimately, seems like everybody needs to sign off, all of
18 the trustees, both federal and state, must sign off before a
19 project is approved, is that correct?

20 MR. SWANSON: The framework agreement with BP
21 requires that, yes.

22 THE COURT: Okay. So, I take it that the federal
23 trustees must have done some evaluation of the -- whether
24 the project complies with the Oil Pollution Act and the
25 framework agreement?

1 MR. SWANSON: Right. Yes. There is some initial
2 screening that is done to consider presenting projects to BP
3 for negotiation purposes. But the final review of whether
4 the projects are consistent with OPA and the review required
5 by NEPA, that is done through the EIS process.

6 So the way the process worked is projects are
7 bought forth by the trustees, the council determines
8 collectively whether or not to negotiate with BP regarding
9 those projects for inclusion in the restoration. If an
10 agreement with BP is reached, yes, we think we can use early
11 restoration funding on these projects, then the trustees
12 collectively move to that public review process under OPA
13 and NEPA using EIS as that document, develop the public
14 comment that is considered in their review and then
15 ultimately get to the record of decision point, which is the
16 final decision to move forward with those projects.

17 THE COURT: Okay. And so what then -- I've got a
18 Phase III document and it's important to know who signed it.
19 But -- and in particular, just -- it's you've got three --
20 you've got four federal trustee signatories. You've got
21 Agriculture, EPA, Interior, and NOAA, those are the four.
22 Two of those four signatories, the individuals, Miss
23 Kopic--probably pronouncing her name incorrectly, I
24 apologize to her--Miss Mills are both clearly D.C. based.
25 The NOAA signatory is based in Silver Spring.

1 MR. SWANSON: And one is in Seattle, Washington.

2 THE COURT: I have Cynthia Dohner, the signatory
3 in Atlanta, and then one of the NOAA signatories is in
4 Seattle. So tell me what, to the extent that you know, Mr.
5 Kopic and Miss Mills did, or whether others who reported to
6 them did, in evaluating this project.

7 MR. SWANSON: I don't know the details of their
8 deliberations. I do know that the individuals that signed
9 the ROD are not necessarily the individuals that are serving
10 on the executive committee. I think that the number count,
11 in terms of D.C. versus elsewhere, is the same. For EPA Mr.
12 Kopic is also the principal representative.

13 For agriculture, however, the principal
14 representative is the director of their restoration team and
15 he is based in Madison, Mississippi. And they would be the
16 folks who were -- the first instance, the principal
17 representatives on the executive committee. There are
18 alternates also. EPA's alternate was based out of
19 Mississippi during this time period and USDA's alternate
20 during this time period was based out of D.C.

21 THE COURT: Out of D.C.?

22 MR. SWANSON: Right.

23 THE COURT: And what's your sense of -- again, to
24 the extent you know, what's your sense of what each of these
25 individual federal trustees did in reviewing the project? I

1 can see various possibilities, one of which is, for example,
2 one of the federal trustees took a lead and the others
3 essentially followed. Or perhaps each of the trustees felt
4 an independent obligation to make their own assessments and
5 they did that. What's your sense of how this actually
6 played out?

7 MR. SWANSON: I think if you're talking -- my
8 sense, if you're talking about the final record of decision,
9 sort of, is this a no-go, go type signature, that's
10 something, certainly, each agency independently reached.
11 I'm sure they collaborated in reaching that decision.

12 But if you're talking about the environmental
13 review process and that public process and developing that
14 documentation and the information considered, there was
15 certainly lead agencies there.

16 THE COURT: Okay. We'll talk about the
17 environmental review process in a moment.

18 Question about the -- so, fair to say then --
19 well, would it be fair to characterize what you've just
20 described as a decisionmaking process, although diffuse
21 because there are a number of players in it, there is some
22 D.C. connection?

23 MR. SWANSON: Yes.

24 THE COURT: We've got at least two folks from the
25 District of Columbia and at least one person who's actually

1 on the executive committee, it sounds like, ultimately
2 making a decision about the inclusion of this convention
3 center as part of the Phase III restoration. And you've got
4 at least two people in Silver Spring. And do we know to
5 what extent those folks were involved in the executive
6 committee?

7 MR. SWANSON: Yes. NOAA's principal
8 representative on the executive committee is Craig O'Connor,
9 who also signed the ROD, and he's based out of Seattle,
10 Washington. And the alternate is NOAA's general counsel,
11 who works in the commence building in D.C.

12 THE COURT: Is there a document that spells out
13 who's on the executive committee and who the alternates are?

14 MR. SWANSON: There is not. I am aware of -- I've
15 seen at least two of the agencies, agencies themselves, at
16 least two of them I know of, documented, I believe, for the
17 benefit of the other trustees, who their principal
18 representative and who their alternate representative would
19 be. I've seen those documents. I don't know if Agriculture
20 or EPA have those same documents.

21 THE COURT: Is it possible for you to inquire and
22 make a submission to the court as to who the primary
23 representative is from each federal agency and who the
24 alternate is?

25 MR. SWANSON: Certainly.

1 THE COURT: I would like you to do that. Okay.
2 So, then unless you have more to say on the inclusion of the
3 project, I would like to turn to the environmental
4 assessment.

5 MR. SWANSON: Yes, that's fine.

6 THE COURT: Okay. So walk me through the actual
7 decisionmaking process of the environmental assessment from
8 the time the project is identified as a potential project.
9 At some point there are negotiations with BP, at some point
10 the project is approved by the trustees. Where in that time
11 horizon does the environmental impact assessment occur?

12 MR. SWANSON: I mentioned that May 2013 date,
13 which was when the trustees stated their intent to move
14 forward with planning for some Phase III projects, which
15 include Gulf State Park. From that point until the ROD was
16 signed in October of 2014, that would be the period in which
17 the environmental review was being developed. And the first
18 step in that under NEPA are the scoping meetings. And
19 that -- the intent of scoping under NEPA is to identify
20 public and stakeholder issues of concern, to try to identify
21 issues where you'd want to focus and pay the most attention
22 to certain things.

23 There were six scoping meetings here. This was in
24 our briefs. One of those scoping meetings was in D.C., the
25 other five were in the Gulf States.

1 THE COURT: This is an important issue, or an
2 issue that I fully appreciate. So the scoping meetings and
3 the public meetings that are referred in your papers, those
4 deal only with the environmental assessment? Or do they
5 also deal with the project selection process?

6 MR. SWANSON: It would be both. And by both, in
7 terms of project selection, I mean whether or not this
8 project is appropriate for a restoration project under the
9 Oil Pollution Act.

10 THE COURT: Okay. All right. So you had scoping
11 meetings, one of which took place in D.C., the remainder
12 took place in the Gulf and then there were public meetings
13 thereafter.

14 MR. SWANSON: Right. And the -- there's also
15 another couple other terms of art under NEPA which may be
16 important here. That's lead agency and cooperating agency.
17 Lead agency, under NEPA, is the agency that supervises and
18 oversees development of the EIS or EA, NEPA documentation.
19 Here that lead agency was an interior subcomponent, the U.S.
20 Fish and Wildlife Service, its Region 4 office in Atlanta.
21 And they contracted the day-to-day process of that to a
22 consulting firm in the Boston area.

23 There were 17 cooperating agencies on the EIS
24 here. Cooperating agencies, again, a term of art. Under
25 NEPA they provide staff support, funding in some cases,

1 expertise. Here, of course, the Gulf State project, Alabama
2 was one of those cooperating agencies. Several Alabama
3 agencies. Seventeen cooperating agencies; thirteen of them
4 were the state agencies, the other four were federal
5 agencies.

6 THE COURT: Okay. So when you say the lead
7 agency's interior and in its Region 4 Atlanta office, does
8 that mean that that is the federal subdivision or federal
9 sub-agency office that was the lead and primarily
10 responsible for assessing this convention project under
11 NEPA, NEPA compliance?

12 MR. SWANSON: That's correct. And here again,
13 given the Gulf scope of this and the multistate -- the EIS,
14 because the EIS consider many projects, the focus was pretty
15 wide in terms of where people actually came from. NEPA
16 requires a list of preparers to be appended to an EIS. Here
17 there were 189 individuals identified in that list of
18 preparers. Only six of those individuals work in the
19 District of Columbia.

20 THE COURT: Do we know which individuals worked on
21 this project in particular? Were they were located?

22 MR. SWANSON: It's hard to say. Do know that
23 Alabama had 17 individuals; that includes staff and
24 contractors, 17 individuals that were on the list of
25 preparers. We know that -- the Department of Interior --

1 well, I should say there are 113 state individuals and
2 contractors and 76 federal agency contractor -- federal
3 agency staff or contractors. Interior had the most of
4 those. And there was a total of seven federal staff that
5 were located in Alabama field offices.

6 THE COURT: How many in D.C.?

7 MR. SWANSON: Federal contractors, two federal
8 staff and two federal contractors.

9 THE COURT: Do you know whether any of those folks
10 worked on the assessment for this project?

11 MR. SWANSON: I do not know for certain. One of
12 the D.C. staffers was an attorney. The other, it was an EPA
13 staff employee, so I don't know the direct role they would
14 have played in reviewing the Gulf State project.

15 THE COURT: So if you were sitting where I am and
16 you have to answer the following question: Where does this
17 claim arise? It ain't in the southern district of Alabama.
18 Because, at least as I view the cases, the cases look,
19 primarily, in terms of that element, there's a separate
20 question about whether there's a local interest.

21 MR. SWANSON: Right.

22 THE COURT: The assessment of whether -- where a
23 claim arises seems to focus primarily on where the decision-
24 making occurs that is at issue. Here we've got two
25 separate -- I should say, two interrelated decisions; the

1 selection of the project and the environmental assessment.

2 Where does -- where do those two decisions arise?

3 Because that is what's at issue in this case.

4 MR. SWANSON: I think in both instances the most
5 correct answer is that these claims arise in the Gulf of
6 Mexico, the Gulf States. That's where the vast, vast
7 majority of people working on these projects were, the vast
8 majority of the environmental review occurred, vast majority
9 of the meetings of the executive committee; 14 of the 15
10 public meetings that occurred were in the Gulf. These were
11 were Gulf centric decisions, not D.C. decisions.

12 And then the issue becomes, well, where in the
13 Gulf should this go? And the answer there is this project --

14 THE COURT: It could be the other way, too. It's
15 not then once we've identified a region, we then find a
16 specific district in the region. There are at least a
17 couple of cases in this jurisdiction that have actually
18 said, look -- the *National Home Builders* case, for example,
19 in which the courts said the fact that we have such a -- you
20 know, that the decisionmaking is actually much broader than
21 a particular locality actually suggests, that this is not
22 something that is a particular, localized controversy.

23 And then most recently, Judge Contreras' decision
24 about the leases in the Gulf, in which he essentially sort
25 of goes in the opposite direction that you were going in,

1 which is, yes, this, arguably, primarily impacts the Gulf
2 States because those are the states that border the Gulf and
3 that's where the drilling leases are. But he actually
4 viewed that as a reason to not transfer the matter because
5 it wasn't specific to a particular district or state.

6 MR. SWANSON: Right. And the problem with all
7 these factors, of course, was that none of them are really
8 dispositive.

9 THE COURT: Right. That is the problem.

10 MR. SWANSON: So, in the situation like this where
11 you have decisionmaking that's certainly touched on D.C.,
12 not necessarily D.C. centric, so both outside and inside,
13 courts then consider the other factors that come up, right?
14 I think there's six cases that we cite, that are cited in
15 the briefs here, that have the inside and outside D.C.
16 decisionmaking and that -- in which the motion to transfer
17 ended up being denied.

18 In four of those cases D.C. was the plaintiff's
19 home forum, which of course implicates the -- choice of
20 forum. The other two were *Otay Mesa*, which involved private
21 land in California, and the court said that's private land,
22 so that's not a local interest. So that factors away. And
23 the second was *Stand Up California*, which was in the context
24 of an emergency injunction for transferring the case.

25 So there's other things coming into play. And

1 *Oceana*, using that as an example, there there was no land in
2 Alabama. The leases were on federal land in the outer
3 continental shelf. So there was no local controversy, local
4 consideration that would have then tipped that balance back
5 to Alabama because you have the decisionmaking that was both
6 touched on D.C. and Gulf of Mexico.

7 THE COURT: Okay. Let me just ask you one last
8 question and then, of course, I'll give you the opportunity
9 to argue points that I may not have raised in my questions.
10 On the issue of the deference, our courts have worded that
11 inquiry in a variety of ways, whether there is no factual
12 nexus, you know, if the decisionmaking process centered, is
13 how Judge Leon phrased it in the case that he decided
14 involving one of the Indian tribes.

15 On the record that I have before me, it's, I
16 think, one thing you can agree to, is that there is a D.C.
17 nexus to these decisions, correct?

18 MR. SWANSON: Yes. There is some D.C. connection,
19 yes.

20 THE COURT: And we can decide what the proper
21 verb -- or, the adjective is to put in front of the word
22 nexus. But there is certainly no factual nexus to the
23 District of Columbia. Would you agree with that?

24 MR. SWANSON: There's no factual -- there's no --
25 no no factual.

1 THE COURT: There's no no factual, right. So in
2 this case when there is some factual nexus--you can agree or
3 disagree whether it's substantial, significant, whatever the
4 word you may want to use--should I then defer to the
5 plaintiff's choice of forum because there is a factual nexus
6 in the District of Columbia?

7 MR. SWANSON: Not in this case, no.

8 THE COURT: Okay. Why not?

9 MR. SWANSON: You're correct that there is
10 significant connection to D.C. as one of the factors, but
11 there's also a significant connection to the plaintiff.
12 Does the District of Columbia have a connection to the
13 plaintiff? And here there is none. D.C. is not its own
14 forum; there's no headquarters, there's no office. But it's
15 more than just about offices.

16 There's also the fact that Gulf Restoration
17 Network is a regionally focused organization. Its purpose
18 is to protect and restore the Gulf region's natural
19 resources. And when the plaintiff has no connection under
20 the case law, that is enough, by itself, to remove that
21 deference. Shawnee tribe, Judge Leon discussed that there.
22 I think the *Delush* (ph.) opinion also says that, that when
23 the plaintiff has no connection, that alone, then you're
24 talking about, you know, you're thinking why are we here?
25 And that's what we have in this case.

1 I think the only other points I wanted to make on
2 the connection to D.C. and deference question, the fact that
3 the underlying resources here that are at issue are also in
4 Alabama, not the District of Columbia. The point of the
5 Gulf State Park Project is to compensate for the lost use of
6 federal and state natural resources in Alabama.

7 So no matter what happens in this case, whether
8 that project goes forward, whether the money goes to some
9 other project, whether it's just dropped all together, at
10 the end of the day, the citizens of the District of Columbia
11 are in no different position.

12 THE COURT: I don't think I asked you earlier,
13 does the administrative record in this case have a physical
14 location?

15 MR. SWANSON: You know, these days that factor --
16 sometimes in field offices the records are kept in paper and
17 that's an issue, but here it's all digital, so it's not a
18 big factor.

19 THE COURT: Okay.

20 MR. SWANSON: The only point I wanted to make, and
21 the court also had a question about the MDL, and I can
22 answer that.

23 THE COURT: Yes.

24 MR. SWANSON: But the point I wanted to make was
25 this local controversy, you know, and you mentioned some of

1 the case law that references national type issues. So what
2 is it about this case that makes it local? Well, again,
3 there's -- despite the EIS covering 44 projects when talking
4 about the Gulf in general, this case involves one project,
5 and that project is in Alabama. It's unlike *Oceana*, where
6 there is no project in Alabama. It's a state park, the
7 project is a state park. By its very nature its
8 constituency is local and state constituency. It's unlike
9 that *Otay Mesa* case, that was private land. It is more like
10 *Trout Unlimited* and those other cases where there was some
11 local link to the federal project.

12 The implementing trustee here is the state of
13 Alabama, not the federal government, which also makes this
14 case different. Another important point here, plaintiffs in
15 their briefs say, you know, that this is more than just
16 local because if this money is not spent on the Gulf State
17 Park Project, it could go somewhere else in the Gulf.
18 That's not entirely accurate because the trustees have an
19 allocation agreement for that framework agreement money with
20 BP. Each state got \$100 million, so if this project doesn't
21 go forward, the money that would have been spent is going to
22 remain in Alabama, just for some other project.

23 It's also worth pointing out here that the claims
24 in this case, three of them are EPA claims. The point of
25 NEPA is for agencies to consider the environmental effects

1 of their actions. Here the action is in Alabama, the
2 environmental effects would also be in Alabama. So it is
3 Alabama citizens that are more directly impacted, and that's
4 what makes this case local.

5 The court had asked about the MDL and whether it
6 was appropriate to transfer the case to Judge Barbier.

7 THE COURT: The reason I ask is because I notice
8 the stipulation, I believe the document is called, the
9 stipulation with respect to the Alabama Convention Center
10 was actually filed with Judge Barbier in the MDL, and that's
11 why I raised the question. I have some familiarity, based
12 on my past life, with that MDL and I know how busy he is.
13 So to the extent that one of the factors I need to consider
14 is the congestion -- the relative congestion of the dockets,
15 I know that he is far more congested than I am. And so I
16 know that's a consideration, as well.

17 MR. SWANSON: And I don't think the court even
18 needs to get to those considerations, just because
19 circumstances here wouldn't be appropriate to transfer to
20 the MDL, and I'll get to that.

21 But to answer your point about the stipulations,
22 the stipulation is filed there just because the framework
23 agreement requires it. It says for informational purposes
24 only. There's two reasons why transfer to the MDL would not
25 be appropriate here; one is substantive and the other is

1 procedural.

2 Substantively, MDLs, of course, the whole point of
3 them is common questions of facts and to allow some
4 efficiencies in pretrial discovery, avoid inconsistent
5 pretrial orders. And here the MDL was created by the MDL
6 panel and its order, it's actually at 731 F.Supp.2d 1352,
7 and it created the MDL because the cases have a common
8 question of fact related to the cause of the spill.

9 This is a very different case. For one, it's an
10 APA case, which means that judicial review is going to be
11 based on the administrative record. There is no fact
12 finding. So there are no common questions of fact with the
13 case in the MDL or any others. This case, of course, has
14 nothing to do with the cause of the spill. Because it's an
15 APA case, there is also going to be no discovery and no
16 pretrial proceedings. So there's no efficiencies to be
17 gained. The purpose of it isn't met.

18 In fact, Judge Barbier, on the United State's
19 motion, early in that MDL, removed two APA cases. We had
20 argued the same reasons, that they're not appropriate, and
21 he ultimately dismissed them.

22 The procedural reason is because we're not in the
23 Eastern District of Louisiana. The order transferring the
24 case to the MDL would have to come from the multidistrict
25 litigation panel.

1 So with that, I didn't have anything else, unless
2 you have any further questions.

3 THE COURT: No, I have nothing further. Thank
4 you, Counsel.

5 It's Mr. Wiygul?

6 MR. WIYGUL: Wiygul, Judge.

7 THE COURT: W-I --

8 MR. WIYGUL: W-I-Y-G-U-L.

9 Thank you, Judge. I appreciate the opportunity to
10 be here today. I don't know if you have specific questions
11 for me to start with, but --

12 THE COURT: A few.

13 MR. WIYGUL: If I may, could a respond to a couple
14 points that were made here that I think are particularly
15 important?

16 THE COURT: Sure.

17 MR. WIYGUL: The federal defendants are really
18 asking the court here to break some new ground in terms of
19 transfer of cases under 1404(a) in this district. They're
20 asking you to take a case, which everyone can see it's
21 properly before this court and that has a connection to this
22 district -- and I'll tell you why it's substantial in just a
23 minute. And everybody can see it's your decisions and
24 decision-makers here. The documentation was signed here and
25 they're asking you to move it to a forum where there were

1 not federal decision-makers or, as you said, the claim did
2 not arise. There wasn't a decisionmaking process in the
3 Southern District of Alabama and there aren't any state law
4 questions, and there's not even state law decision-makers in
5 the Southern District of Alabama. All issues in this
6 complaint and in this matter are federal. National
7 Environmental Policy Act and the Oil Pollution Act.

8 There are no state issues that are at play here.
9 And that is a contrast, a very stark contrast to cases like
10 the *Trout Unlimited* case that's been cited in Colorado where
11 you're going to have state law issues that would come into
12 play. It's a very stark contrast to the *National Wildlife*
13 *Federation* case.

14 In Florida, for example, where you had a whole
15 panoply of impact of that decision which was made in
16 Florida, with Florida decision-makers, that's going to
17 have -- gosh, they had a huge list of them; navigation,
18 tourism, waterfront, and everglades.

19 THE COURT: Let me press you on that a little bit,
20 because what struck me as unique about this case, and unlike
21 the others that we had seen in this jurisdiction, is that
22 there truly are state actors involved in the decisionmaking
23 here. I'm not aware of any case in this jurisdiction--I'm
24 happy to be told otherwise--in which there are actually
25 state actors. Both -- in this case you had Alabama state

1 legislature actually passing legislation of some kind
2 authorizing the convention center or the use of the funds
3 for the building of a convention center. You have an
4 Alabama trustee that vetted projects, potential projects,
5 and made a recommendation to the other trustees.

6 Why does that make this case different than a lot
7 of the other cases in which the court has said, you know,
8 we'll keep it here, even though there is a local impact?

9 MR. WIYGUL: I'll you why, Judge. Because this is
10 a situation where we're talking about what the federal
11 trustees did and the decision that they made. Without the
12 federal trustees--implying that there are obligations under
13 federal law which were not shared by any of those state
14 actors--this project would not have gone forward. That
15 framework agreement and -- I want to go a little bit further
16 back in the process because I think it's very important in
17 this case. Without that framework agreement which
18 structured this whole process and really drives this whole
19 process, without the federal trustees agreeing to that
20 framework agreement, this case wouldn't even be here today.
21 They have a veto over this project.

22 THE COURT: Is that accurate, that they have a
23 veto over this project?

24 MR. WIYGUL: If they do not, I'm subject to being
25 corrected. But if all of the trustees do not agree to a

1 project, that project is not going to be part of the
2 process. I would be happy to be corrected if I'm wrong
3 about that, but that's my understanding.

4 THE COURT: Okay. I'll ask counsel for the
5 government to address that.

6 MR. WIYGUL: Sure. So what we're talking about
7 here are federal obligations, not the state trustees'
8 obligations. This is a federal matter that deals with
9 federal law and process and whether bad process leads to a
10 bad outcome, which is something that we, as attorneys, are
11 all very familiar with.

12 THE COURT: Now, of course, most of the cases are
13 of that nature, correct? I mean, most of the cases in which
14 this transfer issue arises involve challenges to federal
15 decisionmaking and whether they comply with federal law.

16 MR. WIYGUL: Absolutely true.

17 THE COURT: That issue, by itself, really doesn't
18 move the dial, or shouldn't move the dial. The real
19 question, in my mind, is does the substantive decisionmaking
20 happen in this district? At least that seems to be one of
21 the key factors. And if it doesn't happen here, if it's
22 happening elsewhere, that seems to be a pretty significant
23 issue that the courts in this jurisdiction have looked to to
24 determine whether to transfer or not.

25 MR. WIYGUL: Can I put that in a little context?

1 Because I think that's a very important part. You do have
2 multiple cases from this district in which you have -- and
3 this is certainly to be expected in this day and age,
4 there's going to be decision-makers or processes in
5 different places. Absolutely true. I mean, D.C., Silver
6 Spring -- Silver Spring is one Metro stop from D.C. I don't
7 think any of us would say that that office is not in the
8 D.C. orbit here, certainly.

9 But you have diffused decisionmaking processes.
10 And what some of the cases have said, again, as you've
11 noted, that's what really shows that there's a national
12 interest and this is not a localized controversy. And it
13 also means that the Southern District of Alabama doesn't
14 have any more claim to this than any other venue does.

15 Now, this is interesting to me, when you read
16 these cases, and I may be getting a little into leads here,
17 section 1404(a), you know, that started out as a statutory
18 articulation of forum non conveniens, right? For the
19 convenience of the witnesses and the parties. And what the
20 Supreme Court has said about it, it's to afford defendants
21 protection where the maintenance of the action in the
22 plaintiff's choice of forum will make litigation
23 oppressively expensive, inconvenient, difficult or harassing
24 to defend. And what, you know, we are really getting to
25 here is they don't say it's inconvenient for them to be here

1 at all. They're saying that my client ought to find it
2 inconvenient to be here. But we do not.

3 We chose this forum because these decisions
4 started at the top here in D.C. and this framework agreement
5 that we talked about, the structure of this, this was signed
6 by Ken Salazar when he was secretary of the Interior, Jane
7 Lubchenco when she was running NOAA, signed by Mr. Verrilli
8 over at the Justice Department here in D.C., and these
9 results flowed from that.

10 THE COURT: One of the questions I had for you is
11 how do I deal with the issue of -- for presumption of the
12 plaintiff's selection of forum? We've got -- I think those
13 are two competing strains here. There's a line of cases and
14 authorities that say if there is some nexus or a factual
15 nexus to the District of Columbia, then the presumption is
16 to be respected. On the other hand, there's a line of
17 cases, with the *Piper Aircraft* decision in the Supreme
18 Court, that says if the plaintiff is not -- is foreign, as
19 your client is, doesn't actually reside in the District of
20 Columbia, then that difference is diminished.

21 So I've got two competing strains here and
22 ultimately where do I come out?

23 MR. WIYGUL: The way that the cases and the way
24 that the courts -- and I'm talking about *Gulf Oil*
25 *Corporation v. Gilbert* here and, for example, the *Akiachak*

1 case here in this forum. The way that is articulated is
2 typically conjunctive, Judge. It is -- I'm quoting here:
3 Plaintiff's choice of forum is usually accorded great
4 deference, unless the plaintiff chooses a forum that is not
5 his home and that has no substantial connection to the
6 subject matter of the action.

7 THE COURT: I know those two cases do that. But
8 the Supreme Court is also telling me, in *Piper Aircraft*,
9 which is a forum non conveniens case, to afford less
10 deference when the chosen forum is not that of the
11 plaintiff, when the plaintiff is actually foreign to that
12 forum.

13 MR. WIYGUL: In some ways -- have you ever run
14 into one of those cases where you have an evidentiary
15 standard, something like clear and convincing evidence,
16 right, which none of us know how that differs from a
17 preponderance of the evidence, really. I think the
18 important point here is we still get deference, it's just a
19 somewhat lesser deference. And they don't tell the court
20 how much that deference is supposed to be lessened. And
21 I'll tell you, on a case like this, it shouldn't be.

22 Again, this was and is an issue of national
23 importance. It's an issue that had key decisions being made
24 here in the District of Columbia. In fact, the weight of
25 the people signing these documents -- and while I understand

1 decisionmaking processes may be different from the signer,
2 one certainly hopes a signer is reading a document and
3 making a decision for that agency.

4 Now, again, these days the idea that an entity
5 that is based in New Orleans, Louisiana is somehow
6 handicapped or has less deference, we all work all over the
7 country. Organizations like that may be based anywhere and
8 work all over the country. This case came here because this
9 is where decisions were being made and because, frankly, the
10 D.C. Circuit is less congested than the Eleventh Circuit.

11 THE COURT: Let me ask you the following, whether
12 you would agree to the following: Would you agree that the
13 Alabama Convention Center Project, the economic,
14 environmental impacts of that project are primarily going to
15 be felt in Alabama?

16 MR. WIYGUL: Judge, let me -- I would not
17 necessarily agree with that as articulated. Because, again,
18 this is funding that came about as a result of a settlement.
19 There was an allocation formula that was put in place,
20 that's certainly true. Even if this goes to other resources
21 in Alabama, right? it may go to curing problems with federal
22 resources if damaged by the oil spill, as well. And these
23 are things that affect all people of the United States.

24 Yes. I will tell you this, and it would be
25 disingenuous to say otherwise, yes, the place where this

1 would be built will be in Alabama and there is a local
2 interest. They've been trying to get this funded for 15
3 years. But, among the things that they say is that the idea
4 is this is going to bring a bunch more people to the beach,
5 right? So people can enjoy the beach at this convention
6 center and hotel. Those are not going to be folks from the
7 Southern District of Alabama, they're going to be folks from
8 all over the place.

9 THE COURT: Yeah, maybe. But, look, I have a hard
10 time -- and I appreciate your trying to -- your answer, but,
11 this does strike me as a -- unlike some of the other
12 decisions in this jurisdiction in which, for example, that
13 may have involved an easement or some kind of property
14 dispute in a remote region in the state, this is a fairly
15 localized project, that the impacts will be felt locally, in
16 terms of employment, environmental impacts. Any impact on
17 the economy is all going to be felt in Alabama. So if
18 that's the case, and I know you can -- you disagree with me
19 on that, but if that's the case, are there cases that you're
20 aware of in which that kind of impact, in which you have
21 that kind of local impact, in which there hasn't been a
22 transfer?

23 MR. WIYGUL: Judge, I would look at the *Otay Mesa*
24 *Property Owners Association* case.

25 THE COURT: But, of course, that's a private land

1 case out in San Diego, it's private landowners. That case
2 is different. You've got a state park here and the impacts
3 are going to be much broader than a couple of private
4 landowners.

5 MR. WIYGUL: Let me disagree with you to some
6 extent there. I'm not sure this is different, and I'll tell
7 you why; because this hotel and convention center, I don't
8 believe the state of Alabama is going to be running it.
9 It's going to be a hotel corporation. I mean, this is
10 fundamentally -- it's no different than if it was a private
11 enterprise that was running the hotel. And that's, to me --
12 I think it's quite similar.

13 THE COURT: We don't have private parties involved
14 right now and the decisionmaking that you're challenging
15 doesn't involve a private party, unlike the *Otay Mesa* case.
16 So, other than *Otay*, are you aware of any other case in
17 which the, kind of, localized economic, environmental
18 interests exists in which it was not transferred because the
19 decisionmaking was done in the District?

20 MR. WIYGUL: I'll look at this again, but, the
21 *Greater Yellowstone Coalition* case, which involved a federal
22 grazing lease out there and, of course, having practiced out
23 west, I know that federal grazing leases occupy an exalted
24 position, both in our mythology and in the economy out
25 there. And so I think that's another situation where you're

1 really looking at something that's quite similar. And that
2 was, of course, federal grazing leases are public property.
3 That was another -- that was a situation where there were
4 actually decision-makers in the forum for the federal
5 defendants.

6 You know, Judge, leaping back, I think Gulf
7 Restoration Network is still entitled to deference for its
8 choice of forum here. And this forum has more substantial
9 connections than the Southern District of Alabama does in
10 terms of decisionmaking process.

11 Now, I do want to say this: The executive
12 committee and some of the things that were brought in here
13 today were not in the briefings. We have not had a chance
14 to respond to those. What was in the briefing was, with
15 deference to my colleagues here, quite modest, in terms of
16 its description of the decisionmaking process.

17 THE COURT: Which is why I called the hearing,
18 because I wanted more facts about it.

19 MR. WIYGUL: Right. And, Judge, if we're going to
20 be really looking at having additional information submitted
21 to the court, I feel like I need to say for my client, we
22 need the administrative record because that's going to tell
23 us what decisionmaking process actually took place here in
24 D.C. We don't get to do discovery in these cases.

25 THE COURT: No, I understand. My understanding is

1 the administrative record is public, it's online.

2 MR. SWANSON: Sort of the documents may be online,
3 but the actual whole record as certified is not yet. I
4 don't think that certification is completed.

5 THE COURT: Okay. Okay. Your point is a good one
6 and it's one I want to ponder a little bit. But if you have
7 further argument, I'm happy to hear it.

8 MR. WIYGUL: I do just have a couple of points.
9 Judge, as you noted, the -- many of the factors that
10 traditionally have been looked at don't come into play here.
11 And frankly, I think at some point that needs to be
12 overhauled to recognize that we have these electronic
13 administrative records and all that and there's no longer a
14 physical nexus in these kind of cases to any particular
15 place.

16 But, there is some case law here which addresses
17 whether a controversy is local in nature and sets out a
18 number of factors, including where the challenged decision
19 was made, which was not in the Southern District of Alabama.
20 Whether the decision directly affected the citizens of the
21 transferee state. Which I think we've acknowledged that,
22 yes, they've wanted to be build this and it will be built
23 there. Location of the controversy, which is really here.
24 Whether the issue involves federal constitutional issues
25 rather than local property laws or statutes, which is --

1 this is all about federal laws. Whether there are issues of
2 state law, which there are not. Whether the controversy has
3 national significance, which clearly it does. Absolutely
4 does. And I would disagree strenuously with any claim that
5 this is a local controversy. And whether there was personal
6 involvement by a District of Columbia official, which there
7 was. And it's *National Wildlife Federation v. Harvey*, 437
8 F.Supp.2d 42.

9 All of those really point to this is not a
10 localized controversy. And even -- you know, you can push
11 the deference level down and this forum still has more
12 connection than the Southern District of Alabama does
13 because that's just not localized controversy.

14 Now, Judge, if you have any other questions, I
15 would be happy to answer them.

16 THE COURT: I don't at this time. Thank you very
17 much.

18 MR. SWANSON: Your Honor, a couple of questions
19 you had asked me during --

20 THE COURT: Yes.

21 MR. SWANSON: You asked about consensus decision-
22 making on the part of the trustees. The framework agreement
23 with BP, BP does ask that all the trustees have consensus on
24 projects for early restoration. However, the allocation
25 agreement between the trustees, where they're allocated

1 certain amounts of money, says that if a trustee is making
2 use of that money and proposes a project for its money, that
3 that's majority decisionmaking. And that is just a move for
4 the planning process.

5 THE COURT: I'm sorry. I didn't understand that.

6 MR. SWANSON: So the allocation agreement, which
7 dedicated or identified \$100 million for each of the states,
8 says that if that trustees want to move forward with a
9 project, presents it to the council, that it's a majority
10 vote to begin the planning process to include that project.
11 But at the end of the day, the framework agreement with BP,
12 what would be at the ROD stage, still requires consensus
13 decisionmaking.

14 THE COURT: Okay. So, Gulf Restoration's counsel
15 used the word veto. So let me ask the question this way:
16 If one of the federal trustees had said no, this project is
17 not consistent with the restoration purposes of the
18 framework agreement, is it accurate to say that the project
19 would not have gone forward?

20 MR. SWANSON: The early stage of --

21 THE COURT: At whatever stage.

22 MR. SWANSON: I think -- and this has not
23 happened, so I don't know how it would play out.

24 THE COURT: I understand.

25 MR. SWANSON: And I think the politics of the

1 group probably would prevent this from happening, but if you
2 do the math on the allocation agreement, there's nine
3 trustees, if you count the states and the four federal
4 agencies. So if all four said no and all states said yes,
5 you would still have a majority for moving forward with the
6 planning. But at the end of the day, I think you would need
7 all trustees to say yes for a project.

8 THE COURT: Bottom line is if the federal
9 government -- if the federal government had said -- had
10 concluded that this project was not consistent with the
11 framework agreement and its purposes and the Oil Pollution
12 Act purposes, etcetera, fair to say the project would not
13 have gone forward?

14 MR. SWANSON: I think that's probably a fair
15 conclusion, yeah. Yeah.

16 I'm trying to read my notes here. In your
17 conversation with Mr. Wiygul you were talking about the
18 connection to D.C. And I think there's important -- he
19 keeps making the point that there's no decision-maker in
20 Alabama. I don't think that's accurate because of the role
21 the Alabama trustee played here and also federal staff in
22 Alabama that was involved in all this. But, the question
23 for connection to D.C. is D.C., not the transferee forum.
24 The transferee forum comes into play in the local
25 controversy. But if you're trying to address that

1 connection to D.C., where those other decision-makers may be
2 outside of D.C. is not relevant.

3 There's also the issue of the administrative
4 record. The administrative record is being developed. It
5 is not complete. It would be premature to file it now, as
6 it is not ready and because different courts across the
7 country have different procedures and rules for
8 administrative records. So if we file now and end up in
9 Alabama, it would just slow the case.

10 THE COURT: All right, folks. This has been
11 extremely helpful, informative, and very grateful for the
12 presentation of both counsel. And we'll take it all under
13 consideration. We'll have a decision for you soon. Thank
14 you.

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CERTIFICATE OF OFFICIAL COURT REPORTER

I, JANICE DICKMAN, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenograph notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 26th day of March, 2015.

/s/ _____

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