




**IT IS FURTHER ORDERED** that Defendants' Motion to Transfer to the Austin Division of the Western District of Texas (ECF No. 8) is **GRANTED**.

**SIGNED** this 20th day of December, 2022.



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ALAN D ALBRIGHT  
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION**

**GENERAL LAND OFFICE OF THE  
STATE OF TEXAS,**

**Plaintiff,**

**v.**

**UNITED STATES DEPARTMENT  
OF THE INTERIOR, et al,**

**Defendants.**

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**CASE NO. 6:22-CV-00044-ADA-JCM**

**REPORT AND RECOMMENDATION OF  
THE UNITED STATES MAGISTRATE JUDGE**

**TO: THE HONORABLE ALAN D ALBRIGHT,  
UNITED STATES DISTRICT JUDGE**

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(C), Fed. R. Civ. P. 72(b), and Rules 1(f) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. Before the Court is Defendants United States Department of Interior, Debra Haaland, United States Fish and Wildlife Service, Martha Williams, and Amy Lueders's Motion to Transfer Venue to the Austin Division of the Western District of Texas (ECF No. 8) and the responses, replies, and supplemental briefing thereto. For the reasons described below, the Court **RECOMMENDS** that Defendants' Motion be **GRANTED**.

**I. BACKGROUND**

Plaintiff, the General Land Office of the State of Texas, is an agency of the State of Texas charged with maximizing revenues from Texas public lands dedicated to the Permanent

School Fund. Pl.’s Compl. at ¶ 2 (ECF No. 1). Plaintiff gets those revenues by selling public school lands and leasing their mineral rights. *Id.* The Defendants are all either federal agencies or individuals who were acting in their capacity with a federal agency. *Id.* at ¶ 3–7.

Plaintiff sued the Defendants, claiming that the Defendants disobeyed orders from the Fifth Circuit and the Austin Division of the Western District of Texas by continuing to violate the Endangered Species Act and its implementing regulations. *Id.* at ¶ 1. Defendants then filed this Motion to Transfer Venue to the Austin Division.

## II. LEGAL STANDARD

A party may move to transfer a case from a proper venue to a preferable proper venue. 28 U.S.C. § 1404(a). When presented with a Section 1404(a) motion, the transferor court must first consider whether the transferee court is a proper venue for the suit. *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004). The court will then weigh a series of private and public interest factors to determine the convenience of the transferee venue for the parties and witnesses. *Id.* Private interest factors include “relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981). Public interest factors include “administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.” *Id.* (internal quotations omitted).

### **III. DISCUSSION**

#### **A. Venue is proper in the Austin Division.**

The court must first consider whether the transferee court is a proper venue for the suit. *In re Volkswagen AG*, 371 F.3d at 203. Venue is proper anywhere “in the judicial district in which” a violation of the Endangered Species Act occurs and where “a substantial part of property that is the subject of the action is situated” in any civil action against the United States. *See* 16 U.S.C. § 1540(g)(3)(A); 28 U.S.C. § 1391(e)(1).

Plaintiff does not dispute that venue would be proper in Austin. *See generally* Pl.’s Resp. Additionally, Plaintiff brought the former litigation in the Austin division. Defs.’ Mot., Ex. A. The 90-day Finding that is the subject of this litigation was written and promulgated from the Fish and Wildlife Service’s Austin Division. Defs.’ Mot. at 2. Accordingly, venue is proper in the Austin Division.

#### **B. The private interest factors favor transfer to the Austin Division.**

The Court next considers whether the private interest factors favor a transfer. *In re Volkswagen*, 371 F.3d at 203. The private interest factors are (1) relative ease of access to sources of proof; (2) availability of compulsory process to secure the attendance of witnesses; (3) cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive. *Id.*

The first factor, relative ease of access to sources of proof, favors transfer to the Austin Division. The Defendants argue that the documents that make up the administrative record are mostly located in Austin and will be compiled primarily by the Austin Ecological Services Field Office. Defs.’ Mot. at 13; Zerrenner Decl. ¶ 5. The Defendants acknowledge that many of these documents are stored online, and the administrative record will be mailed to the parties and the

Court. Defs.’ Mot. at 13. Plaintiff agrees that most, if not all, of the documents related to this case are in Austin. Pl.’s Resp. at 7. Plaintiff argues that despite the documents being in Austin, “transferring this case from the Waco Division a short drive down the road to the Austin Division would not markedly improve any party’s access to the record.” *Id.* The Fifth Circuit has held that this is still a meaningful factor, even though technological developments may reduce the inconvenience of accessing the records. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 316 (5th Cir. 2008). Since Plaintiff has pointed to no records in Waco and seems to agree that most records relevant to this case are in Austin, this factor favors transfer.

The second factor, availability of compulsory process to secure the attendance of witnesses, is neutral in this case. In cases on the administrative record, witnesses are unlikely to be called in and such witnesses would likely be party witnesses. Thus, the second factor is neutral.

The third factor, cost of attendance for willing witnesses, favors transfer to the Austin Division. Defendants argue that “the most knowledgeable individuals regarding the 90-day finding work in the Austin Ecological Services Field Office.” Defs.’ Mot. at 14. Plaintiff argues that since the Waco Division courthouse is approximately 100 miles from the Defendants’ field office in Austin, that this factor is neutral. Pl.’s Resp. at 8. Plaintiff asserts that the Fifth Circuit held in *In re Volkswagen* that “only distances over 100 miles increase ‘inconvenience to witnesses’ needed to testify.” *Id.* citing *In re Volkswagen*, 371 F.3d at 204–05. Plaintiff misstates the Fifth Circuit’s holding in that case. The Fifth Circuit held that, “When the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled.” *In re Volkswagen*, 371 F.3d at 204–05. This is far from a finding that

“only distances over 100 miles increase ‘inconvenience to witnesses.’” *See* Pl.’s Mot. at 8. Moreover, in a case also cited by the Plaintiff, the Fifth Circuit clarified that it did not imply that “a transfer within 100 miles does not impose costs on witness or that such costs should not be factored into the venue-transfer analysis.” *In re Radmax, Ltd.*, 720 F.3d 285, 289 (5th Cir. 2013). Accordingly, this factor weighs in favor of transfer.

The fourth factor, all other practical problems that make trial of a case easy, expeditious, and inexpensive, is neutral in this case. Defendants do not point to any practical problems in this case other than the geographical distance between Austin and Waco. *See generally* Defs.’ Mot. Nor does Plaintiff point to any practical problems that make Waco a more efficient and inexpensive venue for the resolution of this matter. *See generally* Pl.’s Resp. Therefore, this factor is neutral.

Two of the four private interest factors favor transfer to the Austin Division. The other two private interest factors are neutral. The private interest factors favor transfer to the Austin Division.

### **C. The public interest factors favor transfer to the Austin Division.**

The Court finally considers whether public interest factors favor transfer. *In re Volkswagen*, 371 F.3d at 203. The public interest factors are (1) administrative difficulties flowing from court congestion; (2) local interest in having localized interests decided at home; (3) familiarity of the forum with the law that will govern the case; and (4) avoidance of unnecessary problems of conflict of law or in the application of foreign law. *In re Volkswagen AG*, 371 F.3d at 203.

The first public interest factor, administrative difficulties flowing from court congestion, favors transfer to Austin. In 2020, 1,313 cases were filed in the Waco Division, while 1,372

cases were filed in the Austin Division. U.S. District Court Western District of Texas, 2020 Calendar Year Report, *available at* <https://www.txwd.uscourts.gov/wp-content/uploads/District%20Statistics/2020/Calendar%20Year%20Statistics%202020.pdf> (last visited Oct. 21, 2022). The Report shows that slightly more cases were filed in the Austin Division than in the Waco Division. The Austin Division has two District Judges, two Senior District Judges, and three Magistrate Judges. The Waco Division has one District Judge and two Magistrate Judges. Plaintiff argues that the mere existence of more judges in one court than another does not imply the existence of administrative difficulty in the division with fewer judges. Pl.'s Resp. at 5. Plaintiff mischaracterizes the Defendants' argument. Clearly, the Waco Division has a much higher caseload per judge at 437 cases per judge compared to the Austin Division's 196 cases per judge. This factor, therefore, favors transfer to the Austin Division.

The second public interest factor, local interest in having localized interests decided at home, also favors transfer. The Defendants argue that (1) the Austin Division is located in the center of the golden-cheeked warbler's known Central Texas range; (2) the Austin Ecological Services Field Office has been primarily responsible for the Fish and Wildlife Service's activities relating to the bird; (3) biologists in this Austin-based office wrote both of the 90-day findings challenged by Plaintiff; (4) counties in the Austin division have been a significant focus of the bird's recovery and protection efforts; (5) the City of Austin and Travis County have engaged in significant efforts to conserve the bird's habitat while facilitating development; (6) two of the four Petitioners seeking delisting of the bird are Austin-based; (7) Plaintiff's primary office is in Austin; (8) the initial lawsuit involving the bird was filed in Austin; and (8) none of the parties in this case or the previous litigation reside in the Waco Division. Defs.'s Mot. at 9 – 12. Further,



an Austin-based group, the Save Our Springs Alliance, has moved to intervene in the case. Defs.’ Reply at 4.

The Plaintiff argues that because it is an agency of the State of Texas, it is at home throughout the state. Pl.’s Resp. at 5. Plaintiff further contends that because it owns the surface or mineral rights to 62 properties of various sizes within the Waco Division that it is at home here. *Id.* at 5–6. Plaintiff rightly points out that the bird’s listing concerns the Waco Division as well the Austin and San Antonio Divisions. *Id.* at 6. Plaintiff finally argues that “this is not that prior case” filed in Austin, and that “the instant lawsuit simply seeks to enforce the Fifth Circuit’s order” from that prior case. *Id.* at 6–7. The Court is unpersuaded at this line-drawing attempt and notes that this case is a continuation of the former case.

The second public interest factor favors transfer to the Austin division. The Court is unpersuaded that the Plaintiff is at home throughout the entire state simply because it is a state agency. Further, the case cited by Plaintiff to support this proposition is not as broad as Plaintiff asserts. Rather, that case holds that a state agency may be also reside in a venue in which the agency has an office and conducts a significant portion of its business from that office. *Fla. Nursing Home Ass’n v. Page*, 616 F.2d 1355, 1360, *overruled on other grounds*, 450 U.S. 147 (1981), citing *Buffalo Teachers Federation, Inc. v. Helsby*, 426 F.Supp. 828, 829 (S.D.N.Y. 1976). Plaintiff does not argue that it has a field office or conduct a significant portion of its business from the Waco Division. Therefore, the Court cannot conclude that Plaintiff resides within the Waco Division. While the Court recognizes that the Waco Division is impacted by the 90-day finding and has an interest in this litigation, the Austin Division is more greatly impacted by the listing and entities within the Austin Division have a stronger interest in the outcome of this litigation. This factor, then, supports a transfer to the Austin Division.

The third and fourth public interest factors, familiarity of the forum with the law that will govern the case, and avoidance of unnecessary problems of conflict of law or in the application of foreign law, are neutral. The Waco and Austin Divisions are likely equally familiar with the law and there is no conflict of law issue likely to arise in this case. Therefore, these factors are neutral.

As with the private interest factors, two private interest factors favor transfer and two are neutral. The private interest factors favor transfer. As the Defendants point out, it is extraordinary error to deny a request to transfer venue when no relevant factor favors the chosen venue. *In re Volkswagen*, 545 F.3d at 318. Thus, the Court should transfer the case to the Austin Division of the Western District of Texas.

#### **IV. CONCLUSION**

For the reasons outlined above, the undersigned **RECOMMENDS** that the Defendants' Motion (ECF No. 8) be **GRANTED**.

#### **V. OBJECTIONS**

The parties may wish to file objections to this Report and Recommendation. Parties filing objections must specifically identify those findings or recommendations to which they object. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. U.S. Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 150–53 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc). Except upon grounds of plain error,

failing to object shall further bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas*, 474 U.S. at 150–53; *Douglass*, 79 F.3d at 1415.

**SIGNED this 21st day of October 2022.**



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JEFFREY C. MANSKE  
UNITED STATES MAGISTRATE JUDGE