Venue in Conservation Cases: A Potential Pitfall for Environmental Lawyers

Joseph J. Brecher*

The forum in which environmental lawsuits are tried is an element of increasing importance. For a number of reasons environmental attorneys prefer to bring suit in the District Court for the District of Columbia. Government defendants, however, are seeking to have such cases transferred to other forums with significantly increasing frequency. The resulting conflict over venue is the subject of this paper. The author draws extensively from his experience as an attorney for one of the parties to the "Four-Corners" Southwest power plant controversy, contributing valuable insights to the difficult issue of venue transfer. He calls attention to an emerging judicial interpretation of the venue statutes and advises environmental litigants on how to avoid the venue pitfall.

On July 21, 1971, the solicitor for the Department of Interior confirmed environmentalists' suspicions that the government had adopted a policy of seeking transfers of conservation cases brought in the District of Columbia Circuit to the district in which projects with environmental impact were located. "There is no delaying action," he said. "These cases ought to be tried in the areas where the problems have arisen."¹ The new policy imposes a severe hurdle to overcome; in many environmental law suits, the question of venue can spell the difference between victory and defeat.

The heads of all federal agencies with environmental responsibilities have their official residence in Washington, D.C., and may, therefore, be sued there under the general provisions of the federal venue statute.² There are a number of strategic reasons environmental lawyers prefer to bring suits in Washington, D.C.


2. 28 U.S.C. § 1391(e) provides:

A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1)
The District of Columbia Circuit is by far the most sophisticated and knowledgeable circuit on environmental matters. That court has written many landmark conservationist opinions in recent years: Calvert Cliffs, the Three Sisters Bridge case, the Amchitka Atomic Test case, Friends of the Earth v. Federal Communications Comm'n, Soucie v. David, Environmental Defense Fund v. Ruckelshaus, Wellford v. Ruckelshaus, Environmental Defense Fund v. Hardin.

A defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

A major purpose of § 1391(e) is to make it more convenient for citizens to sue government agencies and their officials. Such suits keep the government responsive to its citizens and insure that agencies fulfill Congressional intent. Natural Resources Defense Council v. TVA, 3 ERC 1468, Civil No. 71-1719 (S.D.N.Y., decided Dec. 9, 1971).

3. Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n, 449 F.2d 1109, 2 ERC 1779 (D.C. Cir. 1971). The court ordered the A.E.C. to revise its review procedures regarding, inter alia, the nonradiological environmental consequences of its actions, under the mandate of the National Environmental Policy Act (NEPA). The controversy arose from the proposed construction of an atomic power plant on the Chesapeake Bay in Maryland.

4. D.C. Federation of Civic Associations, Inc. v. Volpe, 434 F.2d 436 (D.C. Cir. 1970), was a suit to enjoin the construction of a bridge over the Potomac River from Virginia to Washington. The case was remanded to determine whether the Department of Transportation had complied with those sections of the Federal-Aid Highway Act providing for public hearings and consideration of the environmental impact of proposed projects. The court recently held invalid the Secretary's determination that all possible planning had been done to minimize harm to parkland. 3 ERC 1143, Civil No. 24,834 (1971).

5. Committee for Nuclear Responsibility v. Seaborg, 3 ERC 1126, Civil No. 71-1732 (D.C. Cir., filed Oct. 5, 1971). The court reversed a summary judgment against the suit to enjoin the Amchitka Nuclear Test in Alaska. The allegation of violation of NEPA, resulting from the exclusion of all negative scientific opinions from the Environmental Impact Statement (EIS), was deemed not to be disposed of by the mere fact of Congressional appropriations for the project.

6. 449 F.2d 1164, 2 ERC 1900 (D.C. Cir. 1971). The F.C.C. was held to be obliged to apply the "fairness" doctrine to the issue of automobile and gasoline commercials in its review of a licensee's discharge of its public service obligations.

7. 448 F.2d 1067, 2 ERC 1626 (D.C. Cir. 1971). The court reversed the dismissal of a suit under the Freedom of Information Act to compel disclosure of the government's SST evaluation report.

8. 439 F.2d 584, 2 ERC 1114 (D.C. Cir. 1971). The Secretary of Agriculture was ordered to commence proceedings to determine whether DDT should be registered, which determination should contain an adequate explanation of the evidence considered and the factors contributing to the final decision.

9. 439 F.2d 598, 2 ERC 1123 (D.C. Cir. 1971). The court ordered the defendant to develop standards for the safe use of the herbicide 2,4,5-T with respect to farm workers, in compliance with the Federal Insecticide, Fungicide and Rodenticide Act.

10. 428 F.2d 1093, 1 ERC 1347 (D.C. Cir. 1970). The court affirmed that organizations devoted to environmental protection had standing to challenge the Secretary of Agriculture's failure to act on a request for interim suspension of registration of DDT.
and Environmental Defense Fund v. H.E.W.\textsuperscript{11} are among them. These cases reflect a grasp of ecology, the legal structure of NEPA, and general administrative inadequacy that can result only from repeated exposure to the federal administrative process.

It is usually more convenient and less expensive to try environmental cases in Washington than at the scene of the problem. Most arise in very rural areas of the West, while experienced environmental lawyers usually have their offices in coastal cities. In an extreme case, such as the Alaska Pipeline case,\textsuperscript{12} the added expenses of trying the case in Alaska probably would have required the plaintiffs to drop the case. These added expenses are not so crushing to the government and private proponents of a project, who stand to gain a substantial tactical advantage from transfer, and who are in a much better position to bear any added expense and inconvenience. The extra time needed to conduct litigation in remote areas also works against environmental lawyers, who are seldom in a position to re-distribute their other work to other firm members; the large firms that usually represent industry have far more flexibility.

Publicity is an important element in all environmental campaigns. Often the lawsuit is of secondary importance, serving primarily to focus public attention on an issue. An executive or legislative solution is far more satisfactory than a judicial pronouncement in the long run,\textsuperscript{13} and political decisions in the conservation arena are largely a function of public pressure. A suit in Washington is certain to receive more extensive coverage by the media than one in the District of Utah, for example. All major newspapers, wire services, and broadcasting networks have Washington bureaus; this is rarely the case in rural areas.

Environmental lawyers are often handicapped when a trial is

\textsuperscript{11} 428 F.2d 1083, 1 ERC 1341 (D.C. Cir. 1970). The court ordered the defendant to publish in the Federal Register plaintiff's proposals for zero tolerance level of DDT in raw food products and to commence administrative proceedings on the proposal.

\textsuperscript{12} Wilderness Soc'y v. Hickel, 325 F. Supp. 422, 1 ERC 1335 (D.D.C. 1970). The court enjoined issuance of a permit for a hauling road along the Trans-Alaska pipeline due to the insufficiency of the EIS submitted to satisfy NEPA.

\textsuperscript{13} For example, in Environmental Defense Fund v. Corps of Engineers, 324 F. Supp. 878, 2 ERC 1173 (D.D.C. 1971), the court issued a preliminary injunction against further construction on the Cross-Florida Barge Canal until the Army Corps of Engineers complied with the National Environmental Policy Act, 42 U.S.C. §§ 4321, et seq. (1971). Ultimately, the defendants could have made the detailed study called for by NEPA and continued construction. Four days later, largely in response to public pressure, President Nixon ordered a permanent halt to the project in order to prevent "a past mistake from causing permanent damage." 1 ER—CURREN DEV. 1010 (1971).
held in a rural problem area. Few circuits are as understanding of the conservationist cause and of the difficult issues raised in conservation cases as the D.C. Circuit. Many conservation battlegrounds lie in the Ninth Circuit, a court which has so far been distinctly unsympathetic to environmental concerns. That Circuit, for instance, ruled that the Sierra Club had no special interest in the Sierras.\textsuperscript{14}

A judge or jury trying a case in the local problem area is likely to be unsympathetic to the conservationist point of view. Local residents and newspapers are apt to favor projects in their locality, even at the cost of substantial environmental damage, for two reasons. First, large federal landholdings or depressed economic conditions often make the local tax base extremely small. Thus, residents see the construction of new projects in terms of upgraded schools, libraries, roads and other public facilities. Second, public leaders in the affected area often support such projects because of the new jobs and economic expansion associated with them.\textsuperscript{15} Judges and juries in the affected areas are likely, therefore, to feel that the public interest\textsuperscript{16} lies in building a project, rather than preserving the environment.

\textsuperscript{14} Sierra Club v. Hickel, 433 F.2d 24, 1 ERC 1669 (9th Cir. 1970), aff'd sub nom. Sierra Club v. Morton, 40 U.S.L.W. 4397 (U.S. Apr. 19, 1972). Similarly, in Alameda Conservation Ass'n v. California, 437 F.2d 1087, 2 ERC 1175 (9th Cir. 1971), cert. denied, 402 U.S. 908, 2 ERC 1910 (1971) the plaintiff conservation group was held not to have standing to challenge a California land transfer statute without supportive allegations of damage to its property rights or interests. For other examples, see Union Oil Co. v. Minier, 437 F.2d 408, 2 ERC 1067 (9th Cir. 1970), which upheld an injunction to prevent the Santa Barbara District Attorney from attempting to halt development of offshore oil leases; County of Santa Barbara v. Malley, 426 F.2d 171, 1 ERC 1285 (9th Cir. 1970) cert. denied, 396 U.S. 950, 2 ERC 1909 (1971), which upheld the denial of an injunction to prohibit the granting of further oil drilling permits for the Santa Barbara Channel where such denial was based on a finding that plaintiffs probably would not prevail on the merits as to their rights to an administrative hearing; and Santa Barbara v. Hickel, 426 F.2d 164, 1 ERC 1288 (9th Cir. 1970), which upheld the denial of an injunction to prohibit further oil production in the Santa Barbara Channel where a showing of irreparable damages was absent. It is ironic that under Sierra Club v. Hickel, the Ninth Circuit dismissed an action brought by a national conservation organization for lack of standing. But if the plaintiffs try to overcome this technical barrier by getting local residents to join them, the danger of transfer is greatly increased. See text accompanying note 77 infra.

\textsuperscript{15} See, e.g., the Draft Environmental Statement prepared by the Bureau of Reclamation for the Navajo power project, September, 1971, at 59:

Direct or long-range economic benefits from the jobs created by the station and the tax base in the energy produced will occur. Many proponents of the station see this as offsetting any risks involved from possible environmental defects.

NTIS Order No. PB-202 905D.

\textsuperscript{16} "Public interest" may be a crucial element in obtaining an injunction, the most frequently used environmental remedy. The general principle is announced in Yakus v. United States, 321 U.S. 414, 441 (1944). It has been applied to the area
There is also a logistical problem. Conservationists often must rely on experts who are motivated by commitment, and who are prepared to waive their usual fees. While such men can often find the time to testify in Washington, transportation to environmental problem areas is usually so time-consuming that it becomes a real sacrifice for them to appear. Industry experts are not called upon to exhibit such magnanimity—they receive their usual fees for transit time.

I

FORUM NON CONVENIENS

A court may refuse to hear a case under the doctrine of forum non conveniens, discussed in the leading case of *Gulf Oil Corp. v. Gilbert*. In that case Gilbert, the owner of a warehouse in Lynchburg, Virginia, sued Gulf for fire damage to his warehouse and customers' property stored inside. The fire allegedly was due to Gulf's negligence in delivering gasoline to warehouse tanks and pumps. Gulf, a Pennsylvania corporation, was licensed to do business in New York and jurisdiction was obtained in that state by serving a New York official designated by Gulf to receive service of process. The court conceded that the action could be commenced in New York under applicable federal venue statutes, but concluded that the district court in that state was correct when it declined to exercise jurisdiction under the doctrine of forum non conveniens.

The Court explained that doctrine as follows:

The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute . . . . A plaintiff sometimes is under temptation to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.  

The Court acknowledged that a definite rule for granting a dismissal under the doctrine could not be formulated, due to the wide range of circumstances that could be involved. Therefore, it concluded, the trial court must exercise broad discretion. But the factors

of environmental protection in National Helium Corp. v. Morton, 326 F. Supp. 151, 2 ERC 1378 (D. Kan. 1971), aff'd, 3 ERC 1129, Civil No. 71-1369 (10th Cir., decided Oct. 4, 1971); Environmental Defense Fund v. Corps of Engineers, 324 F. Supp. 878, 2 ERC 1173 (D.D.C. 1971); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232, 2 ERC 1422 (4th Cir. 1971). None of these cases defines "public interest," however, other than to say that it is different from "private interest."

18. Id. at 507.
to be considered by the court are “easily identifiable”: relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; the possibility of a view of the premises; the enforceability of a judgment, if one is obtained, and “all other practical problems that make the trial of a case easy, expeditious, and inexpensive.”

Although a plaintiff may not choose a forum so as to “vex,” “harass,” or “oppress” his opponent, “unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.” Several factors of public interest should also be weighed: the court congestion that can occur when cases are not handled at their place of origin; the unfairness of imposing jury duty on people of a community that has no relation to the litigation; the local interest in having a trial within the view and reach of citizens concerned with its outcome; and, in diversity cases, the appropriateness of having a case tried by a court familiar with the applicable state law, free from conflict-of-laws problems.

Applying these principles to the facts in the Gilbert case, it was clear that the doctrine applied: the plaintiff and everyone on his side of the case (except his attorney and, possibly, some expert witnesses) resided outside New York; everyone who participated in the allegedly negligent delivery resided in or near Lynchburg; the defendant might need to interplead the Virginia independent contractor who delivered the gasoline; fact witnesses, such as warehouse customers, police, and firemen, were Lynchburg residents; compulsory process for these witnesses could not be obtained in New York; Virginia state law governed the case, and a local federal court would be more conversant with that law; and there would be potential conflict-of-laws problems if the case were tried in New York.

The only justification offered by the plaintiff for having the trial in New York was that Virginia jurors would be “staggered” by a claim for $400,000 and might be reluctant to award such a large amount. The Court found this to be a “strange argument.” The plaintiff also alleged undue local influences, but the Court noted “there is no specification of any local influence, other than accurate knowledge of local conditions, that would make a fair trial improbable.”

19. Id. at 508.
20. Id. This dictum has been repeatedly quoted. See, e.g., North Branch Products, Inc. v. Fisher, 284 F.2d 611, 613 (D.C. Cir. 1960); General Portland Cement Co. v. Perry, 204 F.2d 316, 319 (7th Cir. 1953).
21. 330 U.S. at 508-09.
22. Id. at 510.
II

THE TRANSFER STATUTE AND JUDICIAL INTERPRETATION

The doctrine of *forum non conveniens* was codified in 1948.23 The government (invariably joined enthusiastically by resource-user intervenors) has in most instances relied on this statute to seek the transfer of cases from Washington. 28 U.S.C. § 1404(a) provides:

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.24

A. General Judicial Interpretation

The factors enumerated in the *Gilbert* case25 are still the ones to be considered on a motion to transfer under 28 U.S.C. § 1404(a).26 But there is one major distinction between the common law and the statutory remedy. Under the doctrine of *forum non conveniens*, if the defendant prevails, the case is *dismissed*; under § 1404(a), it is merely transferred to another district or division. The consequences of the application of the former doctrine to the plaintiff are potentially far more severe, since the statute of limitations may run out before he can refile his case in the new forum.27 Thus, transfer under § 1404(a) is a much less harsh action and may be granted more liberally. In the words of the Supreme Court, "We believe that Congress . . . intended to permit courts to grant transfers upon a lesser showing of inconvenience."28

Despite this apparent liberalization, the courts have repeatedly emphasized the defendant's heavy burden of showing inconvenience under § 1404(a) in order to upset judicial acceptance of the plaintiff's choice of forum. For example, in *Shutte v. Armco Steel Corp.*, the Third Circuit stated:

It is black letter law that a plaintiff's choice of a proper

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24. Other statutes can form a basis for transfer under special circumstances. See note 74 infra.
25. See text accompanying notes 19-21 supra.
28. *Id.* at 32. There is some dispute between the circuits on the status of the common-law doctrine in federal practice. One circuit holds that a court may still grant dismissals on the ground of *forum non conveniens*. See e.g., *Gross v. Owen*, 221 F.2d 94 (D.C. Cir. 1955); *Altman v. Central of Georgia Ry.*, 363 F.2d 284 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 920 (1966). But at least one circuit concludes that § 1404(a) has completely superseded that common law doctrine, and that a dismissal may no longer be granted. See *Collins v. American Automobile Ins. Co.*, 230 F.2d 416, 418 (2d Cir. 1956), *petition for cert. dismissed*, 352 U.S. 802 (1956).
forum is a paramount consideration in any determination of a transfer request and that choice “. . . should not be lightly disturbed” . . . . The burden is on the moving party to establish that a balancing of proper interests weighs in favor of the transfer . . . and . . . “unless the balance of convenience of the parties is strongly in favor of the defendant, the plaintiff’s choice of forum should prevail.”29

In a similar vein, a district court in Crawford Transport Co. v. Chrysler Corp. said:

The statute requires the moving party to show more than a limited degree of added convenience for trying the case in a different jurisdiction. It requires a strong and preponderant balance in favor of the defendant before the plaintiff’s choice of a forum will be denied.30

B. The District of Columbia Interpretation

Although a strict interpretation of the law may indicate that transfer under § 1404(a) should be granted sparingly, district judges in Washington, D.C. have been granting transfers frequently in conservation cases in response to the requests of the government and its industrial allies. The Rainbow Bridge case31 was the first conservation case which was transferred from Washington on the basis of § 1391 (e).32 In that case, two conservation organizations and an individual sued to enjoin the Secretary of the Interior and the Bureau of Reclamation from operating the Glen Canyon Dam in such a way that the waters of Lake Powell would back up into the Rainbow Bridge National Monument in Utah and under the bridge itself. Their case was based largely on the statutory language of Section 3 of the Act authorizing construction of the Glen Canyon Dam and Reservoir, which said, in part: “It is the intention of Congress that no dam or reservoir constructed under the authorization of this Act shall be within any national park or monument.”33 The government moved to transfer or, in the alternative, to dismiss.

30. 191 F. Supp. 223, 228 (E.D.Ky. 1961). Other cases that emphasize the defendant’s heavy burden include: Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145, 147 (10th Cir. 1967); General Portland Cement Co. v. Perry, 204 F.2d 316, 319 (7th Cir. 1953); Menendez Rodriguez v. Pan American Life Ins. Co., 311 F.2d 429, 434 (5th Cir. 1962); Lykes Bros. Steamship Co. v. Sugarman, 272 F.2d 679, 681 (2d Cir. 1959); Blake v. Capitol Greyhound Lines, 222 F.2d 25 (D.C. Cir. 1955); Akers v. Norfolk & W. Ry., 378 F.2d 78 (4th Cir. 1967); Pacific Car & Foundry Co. v. Pence, 403 F.2d 949 (9th Cir. 1968).
32. See note 2 supra.
The government emphasized three points. First, the "Upper Basin" Colorado River states—Colorado, Utah, Wyoming and New Mexico—had a keen interest in maintaining Lake Powell at a higher elevation, since the extra water would belong to and could be used by those states. The states and their water users might want to intervene or appear as amicus curiae in order to protect their interests.

Second, the government noted that, although some potential witnesses were Washington-based Bureau of Reclamation employees, most witnesses were people from the Bureau's western offices and other Westerners. If evidence had to be presented, for example, on an application for a preliminary injunction or on the issue of the balance of equities for permanent injunctive relief, it would be more convenient for these witnesses to testify in Utah.

Third, the government emphasized that the case would involve detailed and technical considerations of western water law in general and "the law of the Colorado River" in particular; a Utah court would be far more capable of dealing with these questions than the court in Washington. The government noted that 28 U.S.C. § 1391(e), adopted in 1962, expanded the venue for suits against government officials to include the district in which the affected real property was located. Previously, suits against government officials could be brought only in Washington. Now that § 1391(e) was available, the District of Columbia courts need not be burdened with deciding local and regional questions involving western mining, land use, and water law. The government also argued that the court in Young v. Director, U.S. Bureau of Prisons, had held that transfer was in accord with Congress' purpose in enacting § 1391(e)—to relieve congestion in the District of Columbia Circuit.

The plaintiffs countered by arguing that the inconvenience to the Upper Basin states and their residents could not be properly considered by the court, since they were neither parties nor witnesses, and their interest in the case was speculative, at best. They noted, further, that the case primarily involved an issue of statutory construction and the major factual allegation—that water would, in fact, enter the Rain-
bow Bridge National Monument—had been conceded by the government. Therefore, the convenience of witnesses was not a major factor. They also argued that the case was not merely of local concern—that the matter was of national significance and interest, involving federal laws, a national monument, and the tax moneys of all United States citizens.

District Judge Jones granted a transfer, relying heavily on Young v. Director, U.S. Bureau of Prisons and the presumed Congressional intent embodied in § 1391(e), to relieve the crowded District of Columbia court dockets. The court also indicated that complicated questions of western water law should be decided by a western court and found it "entirely possible and not improbable that to properly consider the public interest as well as private interests, evidence will need to be taken." The Court of Appeals for the District of Columbia Circuit denied plaintiffs' application for a writ of mandate to overturn Judge Jones's decision on July 20, 1971.

The court's decision in the Rainbow Bridge case was erroneous on several grounds. First, the issue of familiarity with western water law is a red herring. The plaintiffs were not asking the court to determine a question that touched on water rights or on the long series of statutes and cases dealing with the allocation of Colorado River water. Rather, the simple question presented was whether Section 3 of the Upper Colorado River Storage Project Act of 1956 was still in force, or whether it had been repealed by later appropriation acts. The determination of such a question is merely a matter of statutory interpretation, a task that can be performed as ably by a judge in Washington as one in Utah.

Second, even if one were to concede that evidence would have to be taken in the case, the government did not present a sufficient showing on the issue of witnesses' convenience. It is not enough merely to assert generally that "the majority of witnesses will come from the Western states." The law is clear that the defendant is required "to list the witnesses by name and their place of residence, and . . . to state generally what is expected to be proved by the witness named."

The judge's reliance on 28 U.S.C. § 1391(e) and its legislative history is unfounded. That section was enacted for the convenience of plaintiffs, not defendants; the section gives plaintiffs another forum in addition to Washington, in which they can sue government officers in cases involving real property. Indeed, the Senate Report quoted by Judge Jones supports this thesis:

The broadened venue provided in this bill will assist in achieving prompt administration of justice by making it possible to bring these actions in courts throughout the country, many of which are not nearly as burdened as the District Court for the District of Columbia.⁴⁰

Furthermore, while the possibility of the defendant's receiving a speedier trial in another district may be considered on a motion for transfer,⁴¹ “[n]o district court may, however, order such a transfer only to serve its personal convenience.”⁴² As the court remarked in Collins v. American Auto Ins. Co.,⁴³

We think it dangerous to suggest that a judge may deny entrance to his court to a litigant on the ground of his serious burdens; his understandable complaints should be directed elsewhere, as to the executive and the legislature.⁴⁴

In any event, docket congestion and attendant trial delays are “never [factors] to which great weight is assigned.”⁴⁵

The Young⁴⁶ case is clearly distinguishable. There, two inmates of the federal penitentiary in Lewisburg, Pennsylvania, sought declaratory judgments regarding the validity of their parole revocations. The

Minn. 1964). For further discussion of this point, see text accompanying notes 66-68 infra.


⁴³. 230 F.2d 416 (2d Cir. 1956), petition for cert. dismissed, 352 U.S. 802 (1956).

⁴⁴. 230 F.2d at 419.


District of Columbia Circuit upheld orders transferring their cases to the Middle District of Pennsylvania, noting that this type of action "should ordinarily be transferred as a matter of course." The court emphasized that the men were not confined and were not sentenced in the District of Columbia and that the issues involved were in no way related to that jurisdiction. The court also noted that the liberalized venue provisions of 28 U.S.C. § 1391(e) now made trial possible in the affected district, thus eliminating the unpleasant possibility that the Washington court would be flooded with similar cases. It also based its holding on the logistical difficulty of bringing prisoners from all over the country to Washington for trial, if an evidentiary hearing proved necessary, and on the fact that the court would have to deal with events occurring in different parts of the country.

In the Rainbow Bridge case, on the other hand, the actions of Washington officials concerning a National Monument of interest to the whole country were at issue. The peculiar problem of transporting prisoners was not involved, and factual issues were of minimal importance. The Young case, therefore, was a very narrow exception to the general rule favoring the plaintiff's choice of venue. Its expansion to cover conservation cases, in which the whole country has such a vital stake, is clearly unwarranted.

District of Columbia district judges have shown a disturbing tendency to shift the burden of proof to the conservationists on transfer motions. Defendants are granted transfers of cases upon a lesser showing of inconvenience than that seemingly required by § 1404(a). In the one case where the government's motion for transfer was denied by that court, the Alaska Pipeline case, Judge Hart said:

I think generally conservation and ecological questions should be decided by courts in the areas involved and had the Govern-

47. Id. at 332.

48. At least one district court has declined to follow the D.C. District Court's approach in the Rainbow Bridge case. In Natural Resources Defense Council v. Tennessee Valley Authority, 3 ERC 1468, Civil No. 71-1719 (S.D.N.Y., decided Dec. 9, 1971), the plaintiffs attacked the T.V.A.'s contracts to purchase strip-mined coal. The action was brought in the Southern District of New York. The government claimed that under 16 U.S.C § 831g (1971), proper venue was in the Northern District of Alabama. That statute provides that the official residence of the T.V.A. is in Alabama. The court found that this section was not an exception to the general provision of 28 U.S.C. § 1391(e) (1971), which allows the plaintiff to bring an action in the district of his residence against United States Government officials. The motion to transfer was therefore denied.

The Second Circuit recently reversed this decision. — F.2d —, 40 U.S.L.W. 2692 (2d Cir. March 27, 1972). It noted that the T.V.A. is a corporation, rather than a government official. Therefore, since T.V.A. did no business in the southern district of New York, venue could not properly be laid there.

ment moved a year ago to transfer this case, I would have considered the burden on the plaintiffs to show the court why it shouldn't be moved.\textsuperscript{50}

He denied a transfer only because the government's motion was made over a year after he had issued a preliminary injunction and the plaintiffs would have suffered an enormous burden due to the delay if a transfer had been granted.

III

THE SOUTHWEST POWER CASES

Section 1404(a) has been invoked by Federal District judges in the District of Columbia in three recent environmental cases,\textsuperscript{51} all related to various aspects of the gigantic Southwest power complex now under development. Ten electric companies propose to construct a network of six coal-fired electrical generating stations in the Four Corners area of Utah, New Mexico, Arizona, and Nevada that will ultimately produce as much as 13,000 megawatts, about as much power as the entire output of the Tennessee Valley Authority. Virtually none of this power is to be used in the region; it is to be shipped to distant load centers such as Los Angeles, San Diego, Las Vegas, Phoenix, and Tucson. The coal for four of the six plants is to come from three gigantic strip mines; the other two plants will be fueled by underground mines. Altogether the plants will burn about 144,000 tons of coal every day. Cooling water will be drawn from the already severely overdrafted Colorado River at the rate of 250,000 acre-feet (about 80 billion gallons) per year, more than twice the annual consumption of the entire city of San Francisco. Estimates of the air pollution associated with the power complex stagger the imagination: over 200 tons of particulates, 1,350 tons of sulfur oxides and 1,000 tons of nitrogen oxides will be produced every day—more than in Los Angeles, the nation's smog capitol.\textsuperscript{52}

The situation is even more appalling when one considers that the Four Corners region is one of the last areas of relatively clean air left in the country. It contains some of our most prized scenic, recreational and cultural treasures: the Grand Canyon, Mesa Verde, Zion, Bryce Canyon, Lakes Mead and Powell, and Canyon de Chelly. In this area, too, live some of the last groups of Indians who have

\textsuperscript{50} Excerpt from transcript reprinted at 1 ELR 10131 (1971).


been succeeding in maintaining their ancient way of life against the relentless pressures toward assimilation presented by modern American technology. Traditionalist Navajos and Hopis, who believe that the beauty and harmony of undisturbed nature is essential for the survival of mankind, looked on with dismay as their skies began to darken, the soil in their sacred Black Mesa area was uprooted by giant power shovels, and their reservations were crisscrossed with massive transmission lines, a pipeline, access roads, and an automated coal-haul railroad.

The role of the federal government, particularly the Interior Department, in this story is discouraging. It has long been recognized that the government has a strong fiduciary obligation to preserve and protect Indians' health, welfare, safety, and way of life. This federal obligation extends to protecting the environment of its Indian wards. Yet, the government not only approved and encouraged the Southwest power development, it actually is participating directly in it. The Bureau of Reclamation is selling cooling water to several of the plants, the Bureau of Land Management and the Forest Service have approved transmission line and transportation rights-of-way over lands in their charge, the Corps of Engineers has approved water intake facilities, and several Interior departments have issued approvals for pollution abatement facilities that many environmentalist consider grossly inadequate.

Perhaps the most flagrant conflict of interest concerns the Navajo power plant at Page, Arizona, on Lake Powell, where one branch of the Interior Department, the Bureau of Reclamation, is a one-quarter owner of the generating capacity. At the same time, another branch of the department, the Bureau of Indian Affairs, approved Navajo and Hopi leases of coal, water, and the plant site itself, without having fully advised those tribes of the environmental hazards involved.

53. See, e.g., Seminole Nation v. United States, 316 U.S. 286 (1942); United States v. Kagama, 118 U.S. 375 (1886); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971). President Nixon, in a recent message on Indian affairs, reaffirmed the trust relationship, noting that the United States Government acts as a legal trustee for the land and water rights of American Indians. . . . Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill.


55. See e.g., the statement by Peter MacDonald, Navajo Tribal Chairman, in Hearings on the Problems of Electric Power Production in the Southwest Before the
Thus, the Interior Department is in the position of approving both the purchase and sale of Indian assets, a clear case of self-dealing.\(^5\)

Shocked and infuriated by this massive and arrogant desecration, individual Navajos and Hopis, other area tribes, and environmental organizations began a series of suits to block the power complex in the spring of 1971. The Jicarilla Apache Tribe is asserting that the construction of the power plants has been in violation of NEPA. Several Navajos are suing the Secretary of the Interior for unlawfully granting a lease of Indian lands to the power companies, and a group of traditional Hopis are attempting to challenge the power of the Hopi tribal council and the Hopi constitution, which had been imposed on them by the federal government. Unfortunately, this legal activity is somewhat belated. One of the plants, the Four Corners plant near Farmington, New Mexico, had been in operation since 1963 and the Mohave plant in Nevada had been on line since late 1970. Three of the other plants were already under construction and most of the important federal permits and approvals had been issued.

A. The NEPA Violation Suit

In the first such suit, \textit{Jicarilla Apache Tribe of Indians v. Morton},\(^5\) the Jicarilla tribe, the Committee to Save Black Mesa, the Sierra Club, and six individual Navajos sued the Secretaries of Interior, Agriculture, and the Army, as well as the head of the Corps of Engineers on the ground that their approval of various phases of the Southwest power complex violated the National Environmental Policy Act (NEPA)\(^5\) in several respects.\(^5\)

Federal officials issued many of these approvals after January 1, 1970 (the effective date of NEPA) without having filed any environ-

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59. There were several other causes of action set forth in the complaint, based on the Government's trust obligation, as well as other statutes, including the Fish & Wildlife Coordination Act, 16 U.S.C. §§ 661 et seq. (1971), and declarations of Congressional policy contained at 16 U.S.C. §§ 460l et seq. (1971), §§ 470 et seq. (1971). In their first amended complaint, the plaintiffs deleted these separate causes of action on the theory that those duties are subsumed under NEPA, 42 U.S.C. §§ 4321 et seq. (1971).
mental impact statements, under the mandate of NEPA § 102.\textsuperscript{60} Draft impact statements\textsuperscript{61} were submitted only after those decisions had already been made. The plaintiffs contend that these draft statements are fatally defective—aside from their being issued too late—because they did not reflect active, independent investigations by the federal officials involved. Instead, the officials blindly accepted data and conclusions submitted by the power companies while ignoring detrimental information supplied by Indians, environmentalists, and, in some cases, the Government's own consultants.\textsuperscript{62}

Another defect of the draft statements is their failure to deal meaningfully with the potentially disastrous cumulative, synergistic, and regional effects of the six-plant network.\textsuperscript{63} Finally, the plaintiffs maintain that the federal defendants violated NEPA by failing to reassess projects under construction and approvals issued before the effective date of NEPA in order to consider possible alterations and modifications that might ameliorate environmental degradation.\textsuperscript{64}

The plaintiffs moved for a preliminary injunction against the issuance of any further federal permits until the defendants had complied with NEPA. In support of the motion, they filed more than twenty affidavits from experts concerning the adverse effects to be

\textsuperscript{60} NEPA § 102(2)(c), codified at 42 U.S.C. § 4332(C) (1971), requires agencies proposing "major Federal actions significantly affecting the quality of the human environment" to file a "detailed statement" on environmental impact, adverse environmental effects that cannot be avoided, alternative possibilities, the relation between short-term uses and long-term productivity, and irreversible and irretrievable commitments of resources.

\textsuperscript{61} Agencies are required to prepare and circulate for comment an initial draft statement before filing a final statement with the Council on Environmental Quality. See Statements on Proposed Federal Actions Affecting the Environment, ¶ 7, 36 Fed. Reg. 7725 (1971).


\textsuperscript{64} Such a reassessment of ongoing projects is required under the rationale of the Calvert Cliffs' decision, 449 F.2d 1109, 1127-28, 2 ERC 1779, 1792 (D.C. Cir. 1971).
expected from the air and water pollution, strip mining, and other forms of environmental degradation associated with the power complex.

Before that motion could be heard, the ten power companies with interests in the six plants and the coal company operating the Black Mesa strip mine moved to intervene under Rule 24 of the Federal Rules of Civil Procedure and to transfer the case to Arizona under § 1404(a). The federal defendants joined in the latter motion. Numerous grounds were set forth in support of the motion in several separate briefs.

The principal point argued was that the complaint raised factual issues concerning the effects of the power complex on the environment, Indian culture and religion, historical landmarks, scenic beauty, and recreation. The intervenors and the government contended that their employees, expert witnesses, and other witnesses from Arizona and surrounding states would have to testify with regard to these effects. It would be far more convenient for these witnesses to testify in Arizona than in Washington. They also pointed out that, with the exception of federal employees, compulsory process was unavailable in Washington for unwilling witnesses. They noted that virtually all the experts who submitted affidavits in support of the plaintiffs' motion for a preliminary injunction also lived in the Southwest.

With the exception of one power company, neither the intervenors nor the government specifically identified the witnesses they intended to call or the exact subject matter of their testimony. The law requires that "[t]he moving party must set out in the affidavit the names of the witnesses and the substance of the evidence that each will give." The reason for this rule is sound: "Unless the court has at least a general idea of the materiality of the evidence to be offered, virtually the entire decision on whether to transfer the case would be left to speculation and conjecture."}

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65. Under Fed. R. Civ. P. 45(e)(1), a subpoena may be served only within the district in which the trial will be held or within 100 miles of the place of trial. No other states are within 100 miles of Phoenix; thus, compulsory process would be available only in Arizona, not in other Southwestern states. This fact considerably weakens the defendants' argument, since five of the six plants, four of the major load centers, and the two relevant offices of the Bureau of Reclamation are outside Arizona.


Instead of the detailed statement identifying witnesses and the substance of their testimony required by the cases, vague, general statements were submitted. A typical statement reads:

Representatives of all these federal offices will be called as witnesses to testify concerning their review and evaluation of the several documents approved by them as a part of the transaction complained of by the plaintiffs.\(^{68}\)

Only one of the eleven intervenors presented a detailed statement. An affidavit submitted on behalf of the Public Service Company of New Mexico listed eight witnesses who presumably would be inconvenienced by a trial in Washington. Three were company officers or employees. It is rather anomalous for an intervenor to ask to be made a party to a lawsuit and then to seek to remove the case from a forum with which the other parties were satisfied in order to suit its own convenience.\(^{69}\)

The inconvenience to three other witnesses would have been minimal. Two experts on meteorology and air pollution abatement equipment design were from the Denver area. Their inconvenience would have amounted to the difference in air fare between a Denver-Washington and a Denver-Phoenix trip—about $110 apiece, round trip. Another consultant, who would testify about the effects of sulphur oxides on plants, was from Salt Lake City: the difference in air fare is about $150.

Another potential witness was a New Mexico state official,\(^{70}\) who would testify as to the inspections and findings of his department regarding air pollution and whether the Four Corners and San Juan plants complied with his state's air pollution law. His statement would be irrelevant, however; compliance with state and local laws and regulations is not a substitute for a full environmental assessment under NEPA. The *Calvert Cliffs* case specifically forbade "abdication of NEPA authority to the standards of other agencies."\(^{71}\) Furthermore, the official personally assured the author by telephone that he would have been willing to travel to Washington to testify, if necessary.

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\(^{69}\) Indeed, there is some question whether an intervenor even has standing to seek a transfer in the first place. See 3B J. Moore, *Federal Practice* \(\S\) 24.19 (1969); 2 W. Barron & A. Holtzoff, *Federal Practice and Procedure With Forms* \(\S\) 593 (Rules ed. 1961).

\(^{70}\) Larry Gordon, Director of the New Mexico Dep't of Health and Public Services.

\(^{71}\) 449 F.2d 1109, 1122, 2 ERC 1779, 1788 (D.C. Cir. 1971).
Besides, testimony of this type can be submitted in writing, often by stipulation; there would simply be no need for him to appear in person. The last witness named was the manager of a small New Mexico power cooperative, who would testify that his company needed the power from the San Juan plant.

The fundamental point common to all eight witnesses listed in the Public Service Company’s affidavit was that none of their testimony was relevant to the basic issue in the case. That issue is whether the federal officers had followed the “not inherently flexible,”\textsuperscript{72} precise procedural requirements of NEPA. None of the proposed testimony could shed any light on this fundamental question.\textsuperscript{73} The narrow issue of statutory compliance, which is central to all NEPA cases, is basically a question of statutory interpretation. The only relevant factual issues concern the actions taken by government officers, and these actions are virtually all documented in official records.\textsuperscript{74}

The government and intervenors asserted speculative reasons in support of transfer. They emphasized the sizeable economic interest in the six-plant network centered in the Southwest. Other Southwest power companies and large electrical consumers might wish to intervene or file amicus briefs, they argued, and it would be easier and more convenient for them to do so nearer home. Mere speculation that third parties might become part of a lawsuit, however, does not warrant transfer.\textsuperscript{75} The government argued, in a similar vein,

\textsuperscript{72} 449 F.2d 1109, 1115, 2 ERC 1779, 1782 (D.C. Cir. 1971).

\textsuperscript{73} The plaintiffs in all three of the transferred Southwest power cases are moving for summary judgment. Indeed, in the \textit{Jicarilla} case, the defendants agree that there are no factual disputes—they have filed a counter motion for summary judgment. In this context, testimony from the witnesses described by the intervenors would be manifestly unimportant.

\textsuperscript{74} Unfortunately, the \textit{Jicarilla} complaint also contained several non-NEPA causes of action based on such minor statutes as the Fish & Wildlife Coordination Act, 16 U.S.C. \S\S 661 \textit{et seq.} (1971). See note 59 supra. The question of compliance with these statutes \textit{did} raise issues of fact concerning which Western witnesses’ testimony would be necessary. Section 662, for example, calls for consultation with state wildlife officials. It appeared to the plaintiffs’ attorneys at the hearing on the transfer motion that the judge was impressed with the argument that it would be inconvenient for those officials to testify in Washington.

The courts have repeatedly emphasized that NEPA confers no substantive rights; relief can be granted only a showing of procedural irregularities. \textit{See, e.g.,} Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749, 755, 2 ERC 1260 (E.D. Ark. 1971); \textit{see also} Calvert Cliffs’ Coordinating Comm. v. Atomic Energy Comm’n, 449 F.2d 1109, 1112, 2 ERC 1779, 1780 (D.C. Cir. 1971). Therefore, courts may view detailed factual allegations concerning potential environmental harm to be surplusage. For this reason, and due to the danger of inviting a motion for change of venue, such allegations should not be included unless essential to the case.

that location of the suit in the Southwest would help to avoid repetitious and multiple litigation, although no possible examples were cited. Again, the government advanced a purely conjectural reason; yet conjecture is simply not enough to satisfy the requirement that a strong showing is needed to overturn the plaintiff's choice of forum.\textsuperscript{76}

Many of the proponents of transfer placed great store by the fact that the plaintiffs—as well as the defendants' witnesses—were from the Southwest. The plaintiffs' residence should not be a factor in a transfer motion. In \textit{Heiser v. United Air Lines, Inc.},\textsuperscript{77} the court said:

I do not see where plaintiff's inconvenience is of any moment on a motion of this type. If plaintiff is willing to suffer inconvenience and expense by suing in this district, his disposition to do so is entirely his concern.\textsuperscript{78}

As in the \textit{Rainbow Bridge} case, some of the intervenors argued that the case involved issues of western water law, with which a Western court would have more familiarity. In the \textit{Jicarilla} case, as in \textit{Rainbow Bridge}, a national statute, NEPA, was involved. \textit{NEPA} § 101 declares a \textit{national} policy and issues directives to \textit{federal}, not local officers. The question in \textit{Jicarilla} does not involve state and local air and water pollution regulations and enforcement procedures, or the law governing the allocation of western waters, but the decision-making process of responsible federal officials acting in Washington.\textsuperscript{79} Indeed, it can be argued that the national ties of the \textit{Jicarilla} case are stronger than those of \textit{Rainbow Bridge}. \textit{Jicarilla} involves a declared national environmental policy statute, while \textit{Rainbow Bridge} was concerned with a statute that dealt with a specific geographical area.

Two of the intervenors argued that the government officials named in the complaint were somehow "nominal" defendants, who would not actually be needed as witnesses. The "real" defendants, they maintained, were local federal officers and the owners of the power complex, and they were all located in the Southwest. This assertion is simply incorrect, as was recently pointed out by the Supreme Court in \textit{Citizens to Preserve Overton Park, Inc. v. Volpe}.\textsuperscript{80}

In that case, the Court emphasized that a court reviewing wheth-

\textsuperscript{76} See text accompanying notes 29-30 \textit{supra}.

\textsuperscript{77} 167 F. Supp. 237, 238 (S.D.N.Y. 1958). \textit{See also} Clendenin \textit{v. United Fruit Co.}, 214 F. Supp. 137, 139 (E.D. Pa. 1963), in which the court said: "I think [the plaintiff is] entitled to inconvenience himself if he wants to without defendant's interference"; 

\textsuperscript{78} 167 F. Supp. 237, 238 (S.D.N.Y. 1958).


\textsuperscript{80} 401 U.S. 402, 2 ERC 1250 (1971).
er an administrative action complied with environmental statutes must consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." The Court went on to indicate that the way in which the Secretary of Transportation made his decision and the nature of the record that was before him were important considerations and that he and other top decision-makers might have to testify regarding their actions. Therefore, it is patently erroneous to conclude that the Secretaries involved are mere "nominal" defendants.

Finally, the intervenors and the government argued that they could get a quicker trial in Phoenix, pointing to the crowded trial calendar in Washington and several opinions, such as Young v. Director, U.S. Bureau of Prisons, in which District of Columbia courts commented on their heavy trial loads. As already indicated, this argument does not have much force. Furthermore, it is almost certain that the case will be disposed of on motion—either for summary judgment or on the defendants' motion to dismiss—and the waiting time for a hearing on a motion in Washington and Phoenix is about the same.

The plaintiffs in the Jicarilla case advanced two major lines of argument in opposing the transfer motion. One, dealing with the national, rather than local, nature of the suit, will be discussed in connection with the Lomayaktewa case. The second dealt with a very serious and important concern in the field of public interest law, pro bono publico work.

All of the plaintiffs were represented without fee by nonprofit litigators; many of the Indians were indigent. The attorneys were fortunate to procure assistance, pro bono publico, from an outstanding Washington law firm. The plaintiffs urged that the District of Columbia bar was best equipped to handle pro bono publico work of this type because it has the most experience with administrative practice. They noted:

81. Id. at 416.
82. Id. at 420.
83. 367 F.2d 331, 333 (D.C. Cir. 1966).
84. See text accompanying notes 41-46 supra.
85. See note 73 supra.
86. See text accompanying notes 96-109 infra.
87. The plaintiff's inability to bear the expenses of a trial in the transferee district has been a factor in several denials of transfer requested by defendant. General Portland Cement Co. v. Perry, 204 F.2d 316, 320 (7th Cir. 1953); Walter v. Walter, 235 F. Supp. 146, 147 (W.D. Pa. 1964); Seaboard Machinery Co. v. Bethlehem Steel Co., 120 F. Supp. 591, 593 (N.D. Fla. 1954); Mason v. Chicago, Rock Island & Pac. R.R., 96 F. Supp. 361, 363 (W.D. Mo. 1951).
If public interest litigation is forced to proceed without the aid of the bar that most frequently practices before federal agencies it perforce will suffer and the task of the judiciary will be made correspondingly difficult.  

Despite these arguments, the trial judge in Washington ordered the *Jicarilla* case transferred to Arizona on the following grounds: the ease of access, the sources of proof, the availability of compulsory process, the possibility of viewing the premises, the better understanding of regional problems . . . the physical location of the property involved in the action and a number of other reasons . . . .

Plaintiffs' petition for a writ of mandate was summarily denied by the District of Columbia Circuit.

**B. The Lease-Approval Suit**

In *Yazzie v. Morton,* five Navajos who live near the Four Corners plant alleged that air pollution abatement methods at the plant do not comply with the standards written into the plant site lease with the Navajo Tribe and approved by the Secretary of the Interior. They contend that Interior's approvals and its failure to demand strict compliance with the terms of the lease are a breach of its fiduciary duty to Indians. The same theory is advanced against the failure of the Secretary of the Department of Health, Education and Welfare to make the follow-up investigations recommended by a 1970 HEW study. That study showed that there were definite health hazards associated with the plant's emissions. The plaintiffs seek an injunction to compel the Secretary of the Interior to withdraw his approval of certain parts of the lease and of some of the air pollution abatement equipment installed at Four Corners. They are also asking that HEW be required to make detailed studies of the air pollution problem.

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Once again, the plaintiffs argued that this was not a suit about "ecology," but about the administrative decision-making process—a process that takes place in Washington. Again, they argued that witnesses from the Southwest could not speak to that issue. Nevertheless, transfer to Arizona was granted.

Judge Hart of the District of Columbia District Court remarked:

Isn't ecology an essential part of the suit? It certainly is. If there is any type of suit that ought to be heard in the neighborhood involved, it is this type of suit. What, in the name of heaven, does somebody sitting in Washington know about the Navajo Indian and ecology of the southwest? We couldn't be more ignorant. We have not known anything about the Indians here since 1620.

One can readily agree with Judge Hart's skepticism regarding Washington officialdom's knowledge of Indians and the Southwest. But those officials are, in fact, the ones who have final authority to make decisions affecting the southwest environment. It is the inadequacy of those decisions that is the basis of the suit.

C. The Hopi Tribal Government Suit

The last of the three suits relating to the southwest power complex to be transferred was Lomayaktewa v. Morton. In this action, sixty-two chiefs and religious leaders of the traditional branch of the Hopi Tribe challenged Peabody Coal Company's Black Mesa strip-mining operation. This branch of the Hopi Tribe is trying, against tremendous odds, to maintain the age-old Hopi ways in the face of strong outside pressures toward change. They emphasize a simple, agrarian existence, based on reverence for and harmony with nature. John Lansa, one of those leaders, spoke of that operation in these terms:


93. It is no strange quirk that the government and power companies asked for a transfer to Arizona, rather than New Mexico, the site of the plant. New Mexicans are up in arms about Four Corners plant pollution; indeed, the state is a plaintiff in a public nuisance action against the plant. New Mexico ex rel. Nowell v. Arizona Public Service Co., Civil No. 17994 (D.N.M., filed Sept. 13, 1971). Arizona, on the other hand, is a far friendlier forum. Residents of Phoenix and Tuscon receive the power from Four Corners but are unaffected by its smog.


95. The plaintiffs filed a petition for a writ of mandate in the D.C. Circuit, but the petition was denied, again without comment. Yazzie v. Hart, Civil No. 71-1726 D.C. Cir., decided Sept. 9, 1971).

Nature is everything important to the Hopi. It is the land, all living things, the water, the trees, the rocks—it is everything. It is the force or the power that comes from these things that keeps the world together. . . . This is the spiritual center of this land. This is the most sacred place. Right here in this mesa . . . . Now there is a big strip mine where coal comes out of the Earth to send electricity to the big cities. They cut across our sacred shrines and destroy our prayers to the six directions. . . . Peabody is tearing up the land. . . . It is very bad that Peabody takes away the water because it upsets the balance of things. You can't do things like that and have Nature in balance.97

The plaintiffs have three basic complaints about the way the strip-mine lease was executed by the Hopi Tribal Council and approved by the Interior Department. They argue that the Hopi Tribal Council, whose authority has never been recognized by the traditionals, does not have the power under the Hopi Constitution98 to dispose of or lease Hopi lands. They also argue that a quorum was not present when the Tribal Council approved the lease, since several delegates who purportedly represented certain traditional villages had not been certified by village leaders, as required by the Hopi Constitution. In the face of these deficiencies, Interior's approval of the lease was unlawful, it is claimed. Another cause of action alleges arbitrary interference by the Interior Department in the internal affairs of the Hopi Tribe and discrimination against the petitioners. The plaintiffs sought to overturn the lease approval on those grounds.

As in the Jicarilla and Yazzie cases, the affected power companies intervened and, joined by the government moved to transfer the case to Arizona for basically the same reasons advanced in the earlier cases. The plaintiffs countered with arguments similar to those used before but also emphasized two other points.

The ties of the Lomayaktewa case to Washington are strong. When the issues of a case turn on the validity of an instruction or decision of a government official who resides in Washington, the District of Columbia is a proper forum for resolving the matter in controversy.99 Here, the Secretary of Interior made the critical government decision to delegate to the Hopi Tribal Council the power to lease Reservation lands, a power not included in the Hopi Constitu-

98. Hopi traditionals have consistently maintained that the Hopi Constitution was imposed on them against their will in 1936. They claim that it is completely alien to Hopi traditional values.
VENUE IN CONSERVATION CASES

The decision was made in Washington. The trial judge, Judge Corcoran conceded:

[As you know here in D.C., it's commonplace to have cases against cabinet members and administrative heads, . . . as to the propriety of their action, and half our business around here is people who customarily come to Washington to test the propriety of the actions of a cabinet officer, commissioner, or anyone. They pick their venue because the man is here and the records are here.

The plaintiffs also argued that the "interests of justice" militated against a trial in Arizona. They contended that the very magnitude of Arizona's supposed need for and interest in receiving the power from Black Mesa coal was a major factor against trying the matter there. Public opinion in Phoenix and Tucson in favor of the Southwest power complex is overwhelming. Along with their petition for a writ of mandate, the plaintiffs attached a series of articles and editorials from central and southern Arizona newspapers that very strenuously supported the development.

Transfer should be denied where there is a presumptive impossibility of getting a fair trial in the transferee district. In Wilson v. Great Atl. & Pac. Tea Co., the court ruled that possible racial prejudice against the plaintiff, a Negro, in the proposed transferee district, (where race riots had recently taken place,) was a sufficient reason to deny the motion.

100. See Memorandum for Plaintiffs in Opposition to Transfer Motion at 7-8, Lomayaktewa v. Morton, Civil No. 974-71 (D.D.C., decided Oct. 13, 1971).
102. This may constitute the overriding consideration on a transfer motion. Manifestly the most important criterion in determining the advisability of transfer is the "interest of justice." In most cases, if the convenience of the parties and witnesses will be served by transfer it usually follows that justice will also be served by transfer. This does not necessarily follow, however, and irrespective of the convenience to parties and witnesses, I am of the opinion that whether or not transfer will be ordered should be governed in large measure by the effect of transfer upon the "interest of justice."

103. The plaintiffs had another important symbolic reason for wanting the case to be heard in Washington. It is their feeling that the Hopi Tribal Council and Constitution were imposed on them, against their will, by the unilateral action of government officials in the capital. These actions, written into law with the supposed purpose of "protecting" the Hopis, are now being negated by other national officials. To the plaintiffs, it seems appropriate for a Washington court to order those officials to adhere to their own laws. See Plaintiffs' Petition for a Writ of Mandate, Supporting Affidavit of John E. Echohawk at 3, Lomayaktewa v. Corcoran, Civil No. 71-2002 (D.C. Cir., decided Feb. 1, 1972).
105. Id. at 769; see also Haase v. Gilroy, 246 F. Supp. 594 (E.D. Wis. 1965).
This argument, however, could backfire. The bench is sensitive to suggestions that the decision of a fellow district judge might be influenced by local pressure.106 Indeed, at the hearing on the motion in Lomayaktewa, Judge Corcoran remarked: "I'm sure that issue will never arise in a Federal Court."107

The Lomayaktewa case was ordered transferred, even though it was conceded by the Government that there were no issues of fact (and hence no need to call witnesses from the Southwest).108 The court based its decision on the possible need to hear testimony on the defenses of laches and estoppel raised by the Government and on the discrimination count in the complaint. The plaintiffs' writ of mandate against transfer was once again denied.109

IV

AVOIDING THE VENUE PITFALL

There are several steps that an environmental lawyer can take to obviate transfer. First, the complaint should emphasize the government's improper administrative activities, not the environmental damage in suits based on NEPA or other statutes containing procedural mandates. Descriptions of environmental effects should be only detailed enough to show that the plaintiff is or will be harmed. The complaint should be short and devoid of technical details in order to avoid overwhelming the judge.110


108. Id. at 7.


The Cross-Florida Barge Canal case was also transferred out of the capital by the Judicial Panel on Multi-District Litigation. In re Cross-Florida Barge Canal Litigation, 329 F. Supp. 543, 544, 2 ERC 1796, 1 ELR 20366 (1971). In that case, the Environmental Defense Fund had obtained a preliminary injunction in Washington against further work on the canal [Environmental Defense Fund v. Corp of Engineers, 324 F. Supp. 878, 2 ERC 1173 (D.D.C. 1970)] and, before the order was entered, the President personally ordered a halt to construction. The Canal Authority then filed an action in Florida challenging the President's order. The Panel ordered the cases consolidated, to be tried in Florida because the canal, its engineers, and most witnesses on ecological impact were located there. The Panel believed these factors overrode the familiarity with the issues in the case developed by the trial judge in Washington.

110. It is not a good idea to "throw in" minor causes of action in a NEPA suit. They can make a case seem far more complex and the factual issues far more difficult and important. These apparent factors do not prompt swamped Washington judges to retain jurisdiction. In general, the complaint should be framed so as to avoid controversial factual issues—proof of facts usually requires local witnesses, thereby
Second, a motion for summary judgment should be filed before transfer is sought, if possible. The motion papers will show there are no factual issues, hence, no need for local witnesses. If the motion provokes a government cross-motion for summary judgment, the "no factual issue" contention will be greatly bolstered.

Third, if possible, a motion for a preliminary injunction should be presented after the issue of transfer is settled. Three of the four elements that must be shown in order to obtain preliminary relief involve factual questions—irreparable injury, balance of hardships, and the relative importance of the plaintiff's rights against the defendant's acts. The government would otherwise be able to argue that proof (or disproof) of those facts will require local witnesses.

Fourth, experts should be gathered from all parts of the country, especially the Northeast, not just from the affected area. It will then be easier to counter the argument of witnesses' convenience.

Fifth, the emphasis in argument should be on the national nature of environmental problems and the national interest in making sure that Washington bureaucrats follow Congressional directives.

The trend toward transfer of environmental cases appears to be growing stronger. A new rule, shifting the burden of proof to the plaintiffs, appears to be emerging in the District of Columbia District Court, despite extensive authority to the contrary. It can only be hoped that the District of Columbia Circuit will address itself to this controversy and issue definitive guidelines. Until that time, environmental lawyers should be prepared to head off into the sunset to try their cases.

increasing the persuasiveness of a transfer motion. See note 74 and accompanying text supra.

111. Perry v. Perry, 190 F.2d 601, 602 (D.C. Cir. 1951). The fourth factor—probability of ultimate success on the merits—is often a question of law.