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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	NO. **CR 10-60066-HO**
Plaintiff,	)	
	)	**MOTION FOR TRIAL**
v.	)	**IN THE PENDLETON DIVISION**
	)	
STEVEN DWIGHT HAMMOND and	)	**REQUEST FOR**
DWIGHT LINCOLN HAMMOND, JR.,	)	**EVIDENTIARY HEARING**
	)	
Defendants.	)	
	)	

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Pursuant to Federal Rule of Criminal Procedure 18 and the Sixth Amendment to the United States Constitution, defendant Steven Dwight Hammond, by and through his attorneys Lawrence H. Matasar and Lawrence Matasar, P.C., and defendant Dwight Lincoln Hammond, Jr., by and through his attorneys Marc D. Blackman and Ransom Blackman LLP, move the Court to conduct the trial of this case in the Pendleton Division on the grounds that due regard for the convenience of the defendants, the witnesses, and the prompt administration of justice mandates that trial be held in Pendleton.

In support of this motion, the Court is respectfully referred to the Points and Authorities below.

Defendants request an evidentiary hearing on this motion.

Defendants reserve the right to supplement this Motion and the Points and Authorities below following the pretrial evidentiary hearing.

Dated this 21st day of March, 2011.

Respectfully submitted,

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POINTS AND AUTHORITIES

A. Factual Setting

Defendants are charged in a 19-count indictment with conspiracy, arson, and operating an aircraft in violation of Federal Aviation Administration regulations. Each of the overt acts of the conspiracy count and each of the substantive counts alleges that the events occurred on or around Steens Mountain and "in Harney County, Oregon." The arson counts allege that defendants set numerous rangeland fires over a period of more than 20 years. Discovery provided by the government and investigation conducted by the defense establishes that virtually all fact witnesses reside in counties that lie in the Pendleton Division of the United States District Court for the District of Oregon. The defendants themselves are life-long ranchers who have lived and worked at the Hammond Ranch in Diamond, Harney County, Oregon for over 30 years. For the witnesses and defendants, therefore, trial in Pendleton rather than Eugene would clearly be more convenient: although the nominal road distances from Harney County to Eugene and Pendleton are somewhat similar [310.50 miles to Eugene; 249.20 miles to Pendleton], the actual travel time, in good weather, is significantly different [according to Mapquest, approximately 5 hours and 50 minutes to Eugene; approximately 4 hours and 56 minutes to Pendleton]. And the weather is not always good. When it isn't, the travel time difference is much greater, because one has to cross the Cascades to get from Harney County to Eugene.

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More important, the Willamette Valley is an environment alien to the defendants and the vast majority of their witnesses. The vast differences between life in Eastern Oregon and life in Eugene were dramatically shown during the November 8, 2010 status conference before Magistrate Judge Coffin. Defendants were permitted to appear by telephone. Steven Hammond called in while working and sounds of mooing cattle could be heard distinctly in the background.

Some other obvious differences are:

1. Major civic events in the Valley are college football games and the Oregon Country Fair; Major civic events in Eastern Oregon are the Pendleton Roundup and local county fairs;

2. There are 10 Starbucks stores in Eugene; the closest Starbucks to Diamond is in Bend, nearly 4 hours away;

3. According to the 2000 U.S. Census,[1] 19.4% of the Harney County population [and similar percentages of the other counties in the Pendleton Division] works in agriculture, forestry, fishing and hunting, and mining; in Lane County, 2.3% works in these fields;

4. According to the U.S. Census Bureau, there is less than one person [.8] per square mile in Harney County and more than 70 persons [70.9] per square mile in Lane

[1] The most recent available.

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County. Harney County is representative of all counties within the Pendleton Division,[2] which range in population density from .9 persons per square mile [Wheeler], through 1.6 to 6.0 [Baker, 5.5; Crook, 5.5; Gilliam, 1.6; Grant, 1.8; Malheur, 3.2; Morrow, 5.4; Sherman, 2.3; and Wallowa, 2.3], to fewer than 22 [Umatilla, 21.9; Union, 12.0] ;[3]

5. According to the Oregon Cattlemen's Association, there are approximately 113,000 cattle and calves in Harney County [16.2 per person] and 24,000 in Lane County [.1 per person]. In the counties within the Pendleton Division, cattle substantially outnumber people;

6. In the Valley, when people hear about fire on and around Federal lands (*i.e., National Forest system lands* administered by the U.S. Forest Service and *public lands* administered by the Bureau of Land Management), they picture large, fast burning *forest fires*; in Eastern Oregon, when people hear about fires on and around Federal lands, they picture the rangeland brush fires they actually are. Moreover, unlike forest fires in the Valley, which are associated solely with destruction and loss, *range fire* in Eastern Oregon is, is seen as, and is even used by the Federal government as, an essential land management tool.[4]

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[2] The Pendleton Division includes Baker, Crook, Gilliam, Grant, Harney, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa, and Wheeler counties.

[3] The most recent U.S. Census Bureau "quickfacts" for Harney and Lane Counties are appended hereto as Exhibits 1 and 2.

[4] Appended to this Motion as Exhibit 3 are photographs of a public education display on the Steens Mountain Loop Road [which was one border of the Granddad Fire,

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LEGAL DISCUSSION

Federal Rule of Criminal Procedure 18 provides, in relevant part:

> [T]he government must prosecute an offense in the district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

The four divisions of the United States District Court for the District of Oregon: Portland, Pendleton, Eugene, and Medford, "are established to distribute the judicial work and to align counties for juror management purposes." LR 3-2(a).[5] This rule requires that a civil case be filed in the division "in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the actions is situated." LR 3-2(b). In addition, LR 3-4(b) provides that "upon motion of any party, the Court may order that a case be tried in Pendleton."

Although a defendant does not have "a right to be tried in a particular division" [*United States v. Wipf*, 397 F.3d 677, 686 (8th Cir. 2005) [*quoting United States v. Davis*,

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one of the fires at issue in this case]. These displays are sponsored by the BLM and the Oregon Water Enhancement Board. They are titled, "Too Much of a Good Thing" and state, "Without fire, long-lived juniper gains a competitive edge over its plant neighbors. It slowly tops species such as sagebrush and rabbit brush and crowds out stands of aspen. More critically, an average juniper tree guzzles between 40 to 60 gallons of water each day!" The display further advises that: "The high desert ecosystems historically depended on wildfire. Periodic blazes kept the slow-growing juniper seedlings in check...."

[5] The Eugene Division includes Benton, Coos, Deschutes, Douglas, Lane, Lincoln, Linn and Marion counties. As noted previously, the Pendleton Division includes Baker, Crook, Gilliam, Grant, Harney, Malheur, Morrow, Sherman, Umatilla, Union, Wallowa, and Wheeler counties.

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785 F.2d 610, 616 (8th Cir. 1986)]], convictions have been reversed when the district court improperly denied a motion for change of divisional venue. *United States v. Stanko,* 528 F. 3d 581 (8th Cir. 2008), *United States v. Burns,* 662 F.2d 1378 (11th Cir. 1981), discussed *infra*.

A defendant's request for trial in a division convenient to the defendant and his witnesses should be allowed unless the court finds, in the sound exercise of discretion, that a transfer of the place of trial would interfere with "the prompt administration of justice." *United States v. Davis, supra*, 785 F.2d at 616; *United States. v. Scholl*, 166 F.3d 964 (9th Cir. 1999). In *United States v. Garza*, 593 F. 3d 385 (5th Cir. 2010), a decision that reversed a trial court's *sua sponte* transfer of a trial to a division less convenient to the defendants, the Fifth Circuit held that the sound exercise of discretion consisted of balancing the "convenience of the [D]efendant[s]" against "the prompt administration of justice." The court identified the factors relevant to convenience as: "(1) the distance from the defendant's home;" "(2) the location of the defendant's witnesses;" and "(3) the ability of the defendant's family and friends to attend the trial." *United States v. Garza*, 593 F. 3d at 390. It identified only a single factor as relevant to "the prompt administration of justice:" "the impact the trial location will have on the timely disposition of the instant case." *Ibid*. *See also United States v. Lipscomb,* 299 F.3d 303, 340 (5th Cir. 2002) and *Dupoint v. United States,* 388 F.2d 39, 44 (5th Cir. 1967).

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Applying these factors to the present case, it would be an abuse of discretion to deny defendant's request for trial in Pendleton. One the one hand, it is more accessible, and hence, more convenient to the defendants, their witnesses, and their friends and family. On the other, it would have absolutely no affect on "the timely disposition of the case;" trial is set in October, 2011 and can and will take place at that time whether in Eugene or Pendleton. Put succinctly, because trial in Pendleton would have no effect on the "prompt administration of justice," there is nothing on that side of the scale to weigh against the defendants' convenience.

As the Eighth Circuit held in *United States v. Stanko,* 528 F. 3d 581 (8th Cir. 2008), in reversing a conviction when the district court denied a motion for change of divisional venue when the defendant demonstrated "that (1) he [wa]s a resident of Sheridan County, Nebraska, (2) Sheridan County is approximately 500 miles from Omaha, (3) the crime is alleged to have occurred in Sheridan County, (4) all witnesses reside between 400 and 600 miles from Omaha, (5) a trial in Omaha would not provide him with a jury of rural western Nebraska jurors, and (6) the distance that witnesses and jurors from western Nebraska would have to travel to attend the trial in Omaha would cause an undue hardship." The Eighth Circuit held:

> While the district court retains considerable discretion in determining the place of trial, that discretion is contingent upon the court's consideration of the factors provided in Rule 18 when ruling on a proper motion for change of venue. Although we cannot say that proper consideration would have necessarily resulted in the transfer of the trial to North Platte, absent such a showing of consideration,

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> we are left with no alternative than to reverse Stanko's conviction and sentence and remand this matter for a new trial after appropriate consideration of Stanko's change-of-venue motions. *United States v. Stanko,* 528 F. 3d at 586.

See also United States v. Burns, 662 F.2d 1378 (11th Cir. 1981), in which the court reversed a conviction because the trial court relied on the Speedy Trial Act in denying defendants request to be tried in the Northeastern rather than the Southern Division of the Northern District of Alabama:

> We think that a district judge's exercise of discretion resulting in a trial in an environment alien to the accused over a proper objection must be supported by a demonstration in the record that the judge gave due regard to the factors now incorporated in Rule 18. The record in this case does not contain such a demonstration. Obviously trial in Birmingham was inconvenient to objecting defendants. Obviously trial in Birmingham was inconvenient to virtually all of the many witnesses. For speedy trial considerations to outweigh such factors they should be set forth in findings that are sufficiently detailed to allow review. The record before us does not furnish any hint of a reason why a trial could not be held in the Northeastern Division within a reasonable time except for the policy of the court not to do so. The requirements of Rule 18 compel that this be held insufficient. *United States v. Burns, supra*, 662 F.2d at 1383.

United States v. Scholl, *supra*, is also instructive. In that case, the trial court denied a motion to transfer trial from Phoenix, Arizona to Tucson, Arizona by finding that "the convenience of...Phoenix to witnesses [from]...Las Vegas...; the unavailability of a courtroom in Tucson...; the effect such a transfer would have on resolution of pending motions and discovery issues in other matters; substantial pretrial publicity in Tucson; and the efficiency...gained by not transferring the matter to another judge" outweighed the

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fact that Tucson was "the home of the defendant, counsel for both the government and [defendant], and most of the principal witnesses;" that [defendant had] particularly weighty family obligations;" and that trial in Phoenix would "impose burdens of travel and expense" on defendants. *United States. v. Scholl*, *supra*, 166 F.3d at 970. Although the Ninth Circuit held that, on this record, "we cannot say that the denial of the transfer was an abuse of discretion," it went on to note that "we might have decided the matter differently." *Ibid*.

In this case, defendants have equal or stronger grounds than did the defendant in *Scholl* to be tried in Pendleton rather than Eugene. Not only is the Pendleton Division the site of the offense and the home of the defendants and most of the principal witnesses; not only do the defendants have weighty family obligations; not only would trial in Eugene impose additional burdens of travel and expense; but in addition, the defendants are Eastern Oregonians whose fate should be determined by fellow Eastern Oregonians. Conversely [and perhaps more importantly], none of the countervailing factors relied on by the trial court in *Scholl* in denying defendant's change of divisional venue motion are present. Trial in Pendleton is more convenient for the witnesses; there is an available courtroom in Pendleton; a transfer would have no effect on the Court's resolution of pending motions and discovery issues in other matters; a Google search demonstrates that there has been more publicity about the case in the Willamette Valley than in Eastern Oregon; and trial in Pendleton would not require transfer to another judge.

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Conversely, maintaining trial in Eugene would have no positive effect on the disposition of the case. Whether trial is in Eugene or Pendleton, trial will occur in October, 2011.

Under these circumstances, the sound exercise of discretion mandates that defendant's motion for trial in Pendleton be granted.

CONCLUSION

For each of the reasons set forth above, defendants respectfully urge the Court to grant their Motion for Trial in the Pendleton Division.

Dated this 21st day of March, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing MOTION FOR TRIAL IN THE PENDLETON DIVISION; REQUEST FOR EVIDENTIARY HEARING on the following attorney:

Kirk A. Engdall
Assistant United States Attorney
United States Attorney's Office
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by electronic file notice of a true copy on the 21st day of March, 2011.

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