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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STATE OF CALIFORNIA, by and through **XAVIER BECERRA, ATTORNEY GENERAL,** and the **CALIFORNIA AIR RESOURCES BOARD;** and **STATE OF NEW MEXICO,** by and through **HECTOR BALDERAS, ATTORNEY GENERAL,**

Plaintiffs,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT; KATHARINE S. MACGREGOR, Acting Assistant Secretary for Land and Minerals Management, United States Department of the Interior; and **RYAN ZINKE,** Secretary of the Interior,

Defendants.

Case No. 3:17-cv-07186-WHO

Related to: Case No. 3:17-cv-07187-WHO

PLAINTIFFS' OPPOSITION TO DEFENDANTS' AND PROPOSED-INTERVENORS' MOTIONS TO TRANSFER

Date: February 14, 2018
Time: 2:00 pm
Courtroom: 4, 17th Floor
Judge: Hon. William H. Orrick

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INTRODUCTION

In these consolidated cases, the State of California, by and through Xavier Becerra, Attorney General, and the California Air Resources Board, and State of New Mexico, by and through Hector Balderas, Attorney General ("Plaintiff States") challenge the December 8, 2017 decision by Defendants U.S. Bureau of Land Management, *et al*. ("BLM") to suspend key requirements of the Waste Prevention, Production Subject to Royalties, and Resource Conservation rule ("Waste Prevention Rule" or "Rule"). 82 Fed. Reg. 58,050 (Dec. 8, 2017) (the "Suspension"). Plaintiff States contend that the Suspension is devoid of legal justification and violates the fundamental requirements of the Administrative Procedure Act ("APA"), the National Environmental Policy Act ("NEPA"), and several federal land management statutes. *See* Complaint for Declaratory and Injunctive Relief ("Complaint"), Dkt. No. 1. On December 28, 2017, this case was related to a similar action filed by several conservation organizations. *See* Dkt. No. 22.

BLM now seeks to transfer these cases to the District of Wyoming, where two separate lawsuits challenging the validity of the Waste Prevention Rule itself were filed in 2016 and were recently stayed at BLM's request. *See* Defendants' Motion to Transfer these Actions to the U.S. District Court for the District of Wyoming ("BLM Motion"), Dkt. No. 50.[1] However, the factors to be considered by this Court in deciding a motion to transfer pursuant to 28 U.S.C. § 1404(a) weigh strongly in favor of keeping venue in this District. The State of California's choice of

[1] Proposed-Intervenors North Dakota and Texas have filed a similar motion. *See* Proposed-Intervenor North Dakota and Texas's Motion to Transfer these Actions to the U.S. District Court for the District of Wyoming; Memorandum of Points and Authorities ("ND Motion"), Dkt. No. 52. As an initial matter, Proposed-Intervenors are not yet parties to this action and have cited no authority that would allow them to file such a motion, nor have they sought leave from the Court in order to do so. While Proposed-Intervenors claim that their motion constitutes a "responsive pleading" pursuant to Federal Rule of Civil Procedure 24(c) (ND Motion at 1), a motion to transfer is not the type of pleading contemplated by the Federal Rules. *See* Fed. R. Civ. P. 24(c) (motion to intervene must "be accompanied by a pleading that sets out the claim or defense for which intervention is sought"); Fed. R. Civ. P. 7(a) (defining "pleading" as various types of complaints or answers); *see also Landry's, Inc. v. Sandoval*, 2016 WL 1239254, *2 (D. Nev. Mar. 28, 2016) ("A pleading accompanying a motion to intervene under Rule 24(c) should be one of those described in Rule 7(a)"). Therefore, the Court would be well within its authority to decline to consider or to strike Proposed-Intervenors' motion. Rather than investing additional resources in moving to strike this largely duplicative motion, and in the interest of finality, Plaintiff States are responding to Proposed-Intervenors' motion in this opposition.

venue in its home forum is entitled to substantial deference; in fact, such deference may be at its highest when the plaintiff is a sovereign state. Moreover, the remaining factors either weigh against transfer or are neutral. BLM's primary contention—that the interest of justice favors transfer because the District of Wyoming is already familiar with the Waste Prevention Rule—is unavailing, given that Plaintiff States' claims in this case are based on a separate agency action and are grounded in APA and NEPA issues that have never been before the Wyoming court. Therefore, this Court should deny the Motions to Transfer.

PROCEDURAL BACKGROUND

BLM promulgated the Waste Prevention Rule on November 18, 2016. 81 Fed. Reg. 83,008 (Nov. 18, 2016). Immediately after the Waste Prevention Rule was issued, two industry groups and the States of Wyoming and Montana (later joined by North Dakota and Texas) (collectively, "Petitioners") filed Petitions for Review of the Rule in federal district court in Wyoming. *Western Energy Alliance v. Jewell*, No. 2:16-cv-00280-SWS (D. Wyo. petition filed Nov. 16, 2016); *State of Wyoming v. Jewell*, No. 2:16-cv-00285-SWS (D. Wyo. petition filed Nov. 18, 2016) (collectively, the "Wyoming Litigation"). In the Wyoming Litigation, the Petitioners have alleged that the Rule (1) exceeds BLM's statutory authority by comprehensively regulating air quality, which they assert may only be accomplished through the federal Clean Air Act; (2) exceeds BLM's authority to regulate "waste" under the Mineral Leasing Act; (3) exceeds BLM's authority by regulating state and private oil and gas interests in communitized units; and (4) and is arbitrary and capricious for several reasons.[2] Wyoming Litigation, Dkt. Nos. 141-143.

On January 16, 2017, following briefing and oral argument on the Petitioners' motions for a preliminary injunction, the Wyoming district court denied the motions, finding that the Petitioners had failed to establish a likelihood of success on the merits or irreparable harm in the absence of an injunction. Wyoming Litigation, Dkt. No. 92, Order on Motions for Preliminary Injunction, 2017 WL 161428 (D. Wyo. Jan. 16, 2017). On January 17, 2017, the Waste Prevention Rule went into effect. *See* 81 Fed. Reg. at 83,008.

[2] As defendant-intervenors in that action, Plaintiff States contest all of these allegations.

The administrative record in the Wyoming Litigation was lodged on May 17, 2017, Wyoming Litigation, Dkt. No. 127, and the merits have been fully briefed by the parties. However, at the request of BLM and several of the Petitioners, the court stayed the litigation on December 29, 2017. Wyoming Litigation, Dkt. No. 189. The court found that it "would be a waste of resources" to "move forward to address the merits of the present Petitions for Review in this cases, in light of the now finalized Suspension Rule and BLM's continued efforts to revise the Waste Prevention Rule." *Id*. at 4.

While the Wyoming Litigation was pending, on June 15, 2017, BLM published a notice in the Federal Register postponing the effectiveness of certain provisions of the Rule. 82 Fed. Reg. 27,430 (June 15, 2017) (the "Postponement Notice"). Citing "the existence and potential consequences of the pending litigation," BLM stated in the Postponement Notice that it "has concluded that justice requires it to postpone the compliance dates for certain sections of the Rule pursuant to [Section 705 of] the Administrative Procedure Act, pending judicial review." *Id*.

The States of California and New Mexico challenged this unlawful action on July 5, 2017 in this court. *See State of California v. U.S. Bureau of Land Mgmt*., --- F. Supp. 3d ---, 2017 WL 4416409 (N.D. Cal. Oct. 4, 2017), *appeal docketed*, No. 17-17456 (9th Cir. Dec. 4, 2017) ("*California v. BLM*"). On October 4, 2017, the court ruled that Section 705 did not apply to an already-effective rule, and that the postponement amounted to a rulemaking that required compliance with the APA's notice and comment procedures. *See California v. BLM*, 2017 WL 4416409 at *7-10. The court also found that BLM's failure to consider the benefits associated with the postponed provisions rendered the action arbitrary and capricious and in violation of the APA. *Id*. at *11-12. Thus, the court vacated the Postponement Notice and the Rule went back into effect. *Id*. at *14. Notably, the court also rejected a similar motion to transfer that case to the District of Wyoming, finding that "Plaintiffs' decision to file suit in this court weighs heavily against transfer" and that none of the remaining factors favored transfer. Dkt. No. 50-1, Exh. E.

The day after this court's ruling on the Postponement Notice, BLM undertook a new rulemaking process to suspend multiple key requirements of the Rule that were already in effect,

or set to take effect in January 2018, until January 17, 2019. 82 Fed. Reg. 46,458 (Oct. 5, 2017). The Suspension was finalized by BLM on December 8, 2017. 82 Fed. Reg. 58,050. Plaintiff States here allege that the Suspension (1) was arbitrary and capricious because BLM failed to provide a reasoned explanation for suspending the rule, failed to consider how the Suspension will fulfill its statutory mandates, offered an explanation for its decision that runs counter to the evidence before the agency, and failed to consider alternatives to a suspension; (2) violated BLM's statutory trust responsibilities or mandates to prevent waste of oil and gas, to protect the interests of the United States and safeguard the public welfare, and otherwise ensure the environmentally responsible development of oil and gas on public lands; (3) violated the requirements of NEPA; and (4) violated the APA by failing to provide the public a meaningful opportunity to participate in the rule making through submission of written data, views, or arguments on the relevant matter presented. Dkt. No. 1. Plaintiff States filed a motion for preliminary injunction, which is set for hearing on February 7, 2018. Dkt. No. 3.

STANDARD OF REVIEW

Pursuant to Section 1404(a), "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a). Determining whether an action should be transferred under this statute is a two-step process. *Ctr. for Biological Diversity v. Lubchenco*, 2009 WL 4545169, *2 (N.D. Cal. Nov. 30, 2009). First, the reviewing court must determine whether the action "might have been brought" in the transferee court, *i.e.*, whether the proposed transferee court is a proper venue for the action. *Id.*

Second, "the plain language of the statute requires the Court to consider at least three factors in deciding whether to transfer a claim to another court: (1) convenience of parties; (2) convenience of witnesses; and (3) in the interest of justice." *Natural Wellness Ctrs. of Am., Inc. v. J.R. Andorin Inc.*, 2012 WL 216578, *9 (N.D. Cal. Jan. 24, 2012). In addition, "Ninth Circuit precedent requires that courts also weigh the plaintiff's choice of forum." *Id.* (citing *Sec. Investor*

Prot. Corp. v. Vigman, 764 F.2d 1309, 1317 (9th Cir. 1985)). In conducting this analysis, courts in this district generally consider the following eight factors:

> (1) the plaintiff's choice of forum; (2) the convenience of the parties; (3) the convenience of the witnesses; (4) ease of access to evidence; (5) familiarity of each forum with applicable law; (6) feasibility of consolidation of other claims; (7) any local interest in the controversy; and (8) the relative court congestion and time [to] trial in each forum.

Doe v. Uber Techs., Inc., 2017 WL 2352032, *3 (N.D. Cal. May 31, 2017); *see Natural Wellness Ctrs.*, 2012 WL 216578, at *9; *Jones v. GNC Franchising*, 211 F.3d 495, 498-99 (9th Cir. 2000)).

"The party moving to transfer venue under Section 1404(a) bears the burden of establishing the factors in favor of transfer." *Earth Island Inst. v. Quinn*, 56 F. Supp. 3d 1110, 1115 (N.D. Cal. 2014) (citing *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979)). Moreover, a "defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum." *Decker Coal Co. v. Commonwealth Edison Co*., 805 F.2d 834, 843 (9th Cir. 1986).

ARGUMENT

I. WYOMING IS A PROPER VENUE ONLY BECAUSE BLM RESIDES THERE—JUST AS IT RESIDES IN CALIFORNIA AND MANY OTHER STATES.

Plaintiff States do not dispute that this action "might have been brought" in the District of Wyoming, but disagree with the rationale provided by Defendants. *See* BLM Motion at 6-7; ND Motion at 4-5. Pursuant to the federal venue statute, a civil action against an agency or officer of the United States may be brought in any judicial district "in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action." 28 U.S.C. § 1391(e)(1).

Here, BLM "can properly be considered a resident of both Wyoming and California" because it maintains an office and manages land in both states (*see* BLM Motion at 6), allowing for venue in either district. However, that is the *only* basis for venue in Wyoming under 28 U.S.C. § 1391(e)(1). Plaintiff States disagree that "the property that is affected by the Suspension Rule" is an appropriate factor to consider here. BLM Motion at 6. First, the Waste Prevention

Rule impacts oil and gas leases on public lands across the nation, including millions of acres in California.[3] Further, the location of potentially impacted property is not a relevant consideration in this case. As this court recently found, this provision of the venue statute is "intended mainly to cover disputes over legal interests in real property." *Earth Island Inst.*, 56 F. Supp. 3d at 1115-16; *see also Natural Res. Def. Council, Inc. v. Tenn. Valley Auth.*, 340 F. Supp. 400, 406 (S.D.N.Y. 1971) (finding that the issue "cannot sensibly be whether real property is marginally affected by the case at issue. Rather, the action must center directly on the real property, as with actions concerning the right, title or interest in real property"), *rev'd on other grounds*, 459 F.2d 255 (2d Cir. 1972). This is not a case that involves a challenge to a right, title, or interest in "real property," but rather challenges BLM's adherence to statutory and procedural requirements surrounding agency rule making under the APA and NEPA. Consequently, Plaintiff States' choice of venue was proper under 28 U.S.C. § 1391(e)(1)(C) because the State of California resides in this District.

In sum, while the District of Wyoming may be a proper venue based on the fact that BLM has an office and manages land in that state, this District is a more appropriate venue for the action under Section 1391(e)(1).

II. PLAINTIFF STATES' CHOICE OF FORUM, THE CONVENIENCE FACTORS, AND THE INTEREST OF JUSTICE FAVOR VENUE IN THIS DISTRICT.

A. Plaintiff States' Choice of Forum is Entitled to Substantial Deference.

BLM's Motion fails to address the substantial deference afforded to the State of California's choice of forum in this District. "Ordinarily, a plaintiff's choice of forum receives substantial deference, especially when the forum is within the plaintiff's home district or state." *Ctr. for Biological Diversity v. McCarthy*, 2015 WL 1535594, *3 (N.D. Cal. Apr. 6, 2015) (citing *Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) ("great weight is generally accorded [the]

[3] California has more acres of federal mineral estate administered by BLM than Wyoming. *Cf.* BLM Motion at 6 ("Wyoming contains 40.7 million acres of federal mineral estate") *with* U.S. Bureau of Land Management, "California Public Lands" ("In California, the BLM oversees 15 million acres of public land (about 15% of the Golden State's total land mass)" and "47 million acres of subsurface mineral estate"), *available at*: https://www.blm.gov/sites/blm.gov/files/documents/files/media-center-public-room-california-public-lands.pdf.

plaintiff's choice of forum"); *see Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981) (recognizing the "strong presumption in favor of the plaintiff's choice of forum," and that "plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum"); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) ("unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed"). As Magistrate Judge Laporte recently found in Plaintiff States' challenge to the Postponement Notice, "[t]his may be especially true when the plaintiff is a sovereign state." Dkt. No. 50-1, Exh. E at 4 (citing *New Jersey v. U.S. Army Corps of Eng'rs*, 2010 WL 1704727, at *3-4 (D.N.J. Apr. 26, 2010)).

While there are situations where a plaintiff's choice of forum is entitled to less deference, this case is not one of them. *See, e.g., Fabus Corp. v. Asiana Express Corp.*, 2001 WL 253185, *1 (N.D. Cal. Mar. 5, 2001) ("[t]he degree to which courts defer to the plaintiff's chosen venue is substantially reduced where the plaintiff does not reside in the venue or where the forum lacks a significant connection to the activities alleged in the complaint."). Here, the State of California has chosen to file this action in a home venue, where significant oil and gas activities are affected by the Suspension. *See* Complaint, Dkt. No. 1, ¶¶ 12, 15, 16; Declaration of James Tichenor, Dkt. No. 50-1, Exh. C, ¶ 4(b); U.S. Bureau of Land Management, "BLM Releases Draft Plan for Oil and Gas Leasing in Central California" (Jan. 5, 2017), *available at*: https://www.blm.gov/press-release/blm-releases-draft-plan-oil-and-gas-leasing-central-california. Defendants have failed to cite any case where a lawsuit filed by a state plaintiff in its home court was transferred pursuant to Section 1404(a).

Proposed-Intervenors claim that Plaintiff States' choice of forum should "be given little weight" because this venue represents "classic forum shopping." ND Motion at 10-11. However, Plaintiff States' decision to file in their home district to protect sovereign interests which are clearly impacted by the Suspension represents a logical and convenient place to file, and is the exact opposite of "classic forum shopping." *See Friends of Scotland, Inc. v. Carroll*, 2013 WL 1192956, *2 (N.D. Cal. Mar. 22, 2013) ("there is no indication that plaintiff went 'forum shopping' by filing the instant action in its home forum"); *Peregrine Semiconductor Corp. v. RF*

Micro Devices, Inc., 2012 WL 2068728, *4 (S.D. Cal. June 8, 2012) ("concerns about forum shopping are low when the plaintiff brings an action in its home forum"); *Cardoza v. T–Mobile USA Inc*., 2009 WL 723843, *3 (N.D. Cal. Mar. 18, 2009) ("A plaintiff's decision to sue in the forum where its company is based does not amount to impermissible forum shopping"), *Stomp Inc. v. NeatO*, 61 F. Supp. 2d 1074, 1082 (C.D. Cal. 1999) (finding that Plaintiffs' "decision to sue in its home forum of California doesn't amount to impermissible forum shopping").

"Unless the balance of the Section 1404(a) factors weighs heavily in favor of the defendants, 'the plaintiff's choice of forum should rarely be disturbed.'" *Lubchenco*, 2009 WL 4545169, at *4 (quoting *Sec. Investor Prot. Corp.*, 764 F.2d at 1317); *see Decker Coal*, 805 F.2d at 843 ("The defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum."). Defendants have failed to make such a showing. In fact, as discussed below, the remaining factors regarding convenience and the interest of justice strongly favor keeping the action in this District.

B. The Convenience of the Parties Weighs Against Transfer.

The convenience of the parties factor weighs in favor of keeping the action in this District. Defendants' assertions that "the District of Wyoming is a more convenient forum" because the State of California and other parties are already involved in litigation there is misplaced. *See* BLM Motion at 13-14; ND Motion at 10. The fact that Plaintiff States chose to become involved in existing litigation in Wyoming as defendant-intervenors to protect their States' interests in the Waste Prevention Rule does not somehow transform Wyoming into a preferred forum that is as convenient as this District or more so.

In fact, Plaintiff States' participation in litigation in the District of Wyoming presents significant hurdles including travel costs, the need for *pro hac vice* admission,[4] securing local counsel to participate in all phases of the proceedings,[5] and additional paperwork associated with out-of-state travel.[6] *See McCarthy*, 2015 WL 1535594, at *4 (finding that transfer would

[4] U.S. District Court for the District of Wyoming, Civil Local Rules (Oct. 30, 2017), Local Rule 84.2(b).
[5] *Id.*
[6] *See* Cal. Gov't Code §§ 11032-33 (requiring special approval for travel or conducting state business outside of the state).

"materially inconvenience plaintiffs" due to "increased travel costs and procedural hurdles, such as paying for costs of admission *Pro Hac Vice* and the retention of local counsel"). Having the Wyoming court "coordinate these cases with the two pending cases challenging the Waste Prevention Rule" would not "limit travel expenses and streamline litigation" for Plaintiff States. *See* BLM Motion at 14.

Meanwhile, Defendants BLM, Katharine S. MacGregor, and Ryan Zinke are based in Washington, D.C. In addition, BLM's counsel appear to be primarily based in Washington, D.C. and Denver, Colorado, and are exempt from the District of Wyoming's *pro hac vice* and local counsel requirements.[7] Proposed-Intervenors North Dakota and Texas have established no particular connection to Wyoming (or any other state, *see* ND Motion at 11), and have also "demonstrated their willingness to litigate" in this District (*see* ND Motion at 10) by moving to intervene in Plaintiff States' challenges to the Postponement Notice and in this matter. Moreover, unlike the Wyoming Litigation, the State of Wyoming is not a party to this action.

Finally, BLM's assertion that this District is "significantly less convenient" for them because of the existing litigation in Wyoming (*see* BLM Motion at 14) mischaracterizes the relationship between this action and the challenges to the Waste Prevention Rule in Wyoming. *See infra* at Part II.C. Moreover, a motion to transfer should be denied where it would "merely shift rather than eliminate the inconvenience." *Decker Coal*, 805 F.2d at 843; *see STX, Inc. v. Trik Stik, Inc.*, 708 F. Supp. 1551, 1556 (N.D. Cal. 1988) ("If the gain to convenience to one party is offset by the added inconvenience to the other, the courts have denied transfer of the action."). Thus, the convenience of the parties factor supports venue in this District.

C. The Litigation Challenging the Waste Prevention Rule and the Unlikelihood of Consolidation Do Not Favor Transfer.

The primary contention made by Defendants is that the "interest of justice" favors transfer "[b]ecause the District of Wyoming is intimately familiar with the Waste Prevention Rule" and these cases involve "precisely the same issues" as the Wyoming Litigation. BLM Motion at 7-13;

[7] U.S. District Court for the District of Wyoming, Civil Local Rules (Oct. 30, 2017), Local Rule 84.2(d). Defendants are also exempt from the *pro hac vice* and local counsel requirements in this District. *See* Local Rule 11-2.

ND Motion at 5-8. However, this argument mischaracterizes the relationship between the present action and the Wyoming Litigation. The cases before this Court challenge a separate federal agency action, involve distinct claims and case law, and simply do not involve "the same issues" as the litigation in Wyoming. Moreover, this Court's handling of the present action is unlikely to lead to "inconsistent results" or pose scheduling challenges with the Wyoming Litigation.

In the Wyoming Litigation, Petitioners challenged the Waste Prevention Rule, promulgated on November 18, 2016, on the alleged basis that Defendants did not have statutory authority to regulate air pollution and that the Rule was arbitrary and capricious. In particular, Petitioners have alleged that the Rule (1) exceeds BLM's statutory authority by comprehensively regulating air quality, which they assert may only be accomplished through the federal Clean Air Act; (2) exceeds BLM's authority to regulate "waste" under the Mineral Leasing Act; (3) exceeds BLM's authority by regulating state and private oil and gas interests in communitized units; and (4) and is arbitrary and capricious for several reasons, including its improper consideration of the "social cost of methane." *See Wyoming*, 2017 WL 161428, at *5-10. The administrative record and merits briefing for the Wyoming Litigation has been completed, although the case has been stayed at the request of BLM.

These issues are not before this Court. To the contrary, Plaintiff States here have challenged BLM's December 8, 2017 Suspension of the Rule on the alleged grounds that it (1) was arbitrary and capricious because BLM failed to provide a reasoned explanation for suspending the rule, failed to consider how the Suspension will fulfill its statutory mandates, offered an explanation for its decision that runs counter to the evidence before the agency, and failed to consider alternatives to a suspension; (2) violated BLM's statutory trust responsibilities or mandates to prevent waste of oil and gas, to protect the interests of the United States and safeguard the public welfare, and otherwise ensure the environmentally responsible development of oil and gas on public lands; (3) violated the requirements of NEPA; and (4) violated the APA by failing to provide the public a meaningful opportunity to comment. *See* Complaint, Dkt. No. 1. In addition to involving different statutes, these claims rely on a separate body of case law

governing the suspension or rescission of a duly promulgated regulation, which is not at issue in the Wyoming Litigation. *See, e.g., F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009); *Organized Village of Kake v. U.S. Dept. of Agric.*, 795 F.3d 956, 968 (9th Cir. 2015); *Public Citizen v. Steed*, 733 F.2d 93, 103 (D.C. Cir. 1984); *N. Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 770 (4th Cir. 2012). Moreover, the administrative record for the Suspension is not before the Wyoming court and will certainly include many documents that are not part of the Wyoming Litigation.

BLM's assertion that transfer of this action to Wyoming would "avoid multiple litigations based on a single transaction" is incorrect. *See* BLM Motion at 7-8 (citing *Wireless Consumers Alliance, Inc. v. T-Mobile USA, Inc*., 2003 WL 22387598, *4-5 (N.D. Cal. Oct. 14, 2003)). In fact, the *Wireless Consumers* case cited by BLM is nothing like the situation here. In that litigation, the court found that the two cases at issue were "intimately related, if not identical," and "nearly all of the claims [in the later-filed action] were copied verbatim from [the first-filed action]." *Wireless Consumers*, 2003 WL 22387598, at *5. By contrast, the cases here challenge two separate agency actions, and are not based on a "single transaction." *See id.* None of the claims in Plaintiff States' challenge to the Suspension are at issue in the District of Wyoming, and *vice versa*. The administrative record in the District of Wyoming does not include the Suspension or any documents post-dating the issuance of the Waste Prevention Rule in November 2016.

For the same reasons, there is no real threat of "inconsistent judgments" if this Court reviews Plaintiff States' challenge to the Suspension, while the District of Wyoming continues to address Petitioners' challenges to the Waste Prevention Rule. *See* BLM Motion at 7-8, 12; ND Motion at 7. Petitioners' arguments challenging the validity of the Waste Prevention Rule are not before this Court and would not be addressed in any decision involving the Suspension. Nor are there schedules that need to be coordinated. BLM Motion at 12; ND Motion at 7. The Wyoming Litigation has been stayed at BLM's request, and the requirement that a party "seek lifting of the stay should circumstances change warranting such relief" (Dkt. No. 50-1, Exh. B at 5) is a simple procedure that does not warrant transfer.

Both BLM and Proposed Intervenors further cite the Wyoming court's statement that these cases are "inextricably intertwined" with the Wyoming Litigation. BLM Motion at 8, 12; ND Motion at 7. However, that court was not evaluating a motion to transfer, and this out-of-context statement does not even reference the standard for such a motion and has no bearing here. Similarly, Plaintiff States' filing of an administrative motion to consider whether these cases should be related to their challenges to the Postponement Notice, pursuant to Local Rule 3-12(b), says nothing about the appropriateness of transfer to the District of Wyoming. *See* BLM Motion at 8 n.2.

While it is true that the District of Wyoming has some familiarity with the Waste Prevention Rule, this does not provide the substantial savings in judicial economy that Defendants suggest, for several reasons. *See* BLM Motion at 8-12; ND Motion at 6-7. First, the legal issues surrounding BLM's issuance of the Suspension raised by Plaintiff States, and the administrative record that will provide the basis for deciding Plaintiff States' claims, are not before the Wyoming court. Although the Wyoming court is aware of the Suspension, its evaluation and resolution of Petitioners' discrete claims in the Wyoming Litigation involved an administrative record that does not go past November 2016 or involve any documents that provided the basis for BLM's Suspension of the Rule. Moreover, as demonstrated in Plaintiff States' Motion for a Preliminary Injunction (Dkt. No. 3), this Court does not need to evaluate Petitioners' challenges to the Waste Prevention Rule, or the full record from the promulgation of the Rule, in order to determine whether BLM violated the law in issuing the Suspension.

In sum, the significant differences between the Wyoming Litigation and this action render this factor neutral. Even assuming a minor benefit to judicial economy, that does not outweigh the other convenience or justice factors, let alone the substantial deference afforded to Plaintiff States' choice of forum.

D. The Court Congestion Factor Weighs Against Transfer.

Considerations of court congestion also favor keeping the action in this District. "Courts may use the average time between filing and disposition or trial as a measure for court

congestion." *McCarthy*, 2015 WL 1535594, at *5; *see Am. Civil Liberties Union of N. Calif. v. Burwell*, 2017 WL 1540606, *6 (N.D. Cal. Apr. 28, 2017). According to the latest data, the average time between filing and disposition in this District is 7.2 months, compared to 10.2 months in the District of Wyoming. *See* United States District Courts—National Judicial Caseload Profile (Sept. 30, 2017), *available at*: http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2017.pdf. This three-month difference is significant given the January 2018 compliance dates at issue, and weighs against transfer of this action. *See Lubchenco*, 2009 WL 4545169, at *4 (finding "a modest difference in the congestion of the courts' calendars that weighs slightly against transfer").

E. The Remaining Factors Are Neutral.

Plaintiff States agree that the remaining factors regarding convenience and the interest of justice are neutral. *See* BLM Motion at 15-16. With regard to the convenience of the witnesses factor, there are no witnesses to consider because this action does not involve disputed material facts and should be decided on motions for summary judgment. *See Lubchenco*, 2009 WL 4545169, at *3. Similarly, the ease of access to evidence factor is neutral in this APA action. *See id*. ("documentary evidence is easily transported to any venue, in this era of electronic communication"). Finally, the familiarity of each forum with applicable law factor is neutral, as the relevant courts in both California and Wyoming are familiar with the APA, NEPA, and federal land management statutes at issue. *See id.* ("Both California and Alaska courts are equally familiar with the environmental laws at issue.").

BLM appears to characterize the local interest in the controversy factor as one favoring transfer, but their actual description of this factor appears to be neutral. *See* BLM Motion at 14-15 (stating that "Wyoming has ties to and an interest in these cases that is at least equal to that of California," and "California has no more of an interest in [the issue of climate change] than Wyoming"). Both states have a significant amount of federal fossil fuel development impacted by the Rule, and California has more federal mineral estate lands. *See supra* at Part I. Moreover,

given that the Suspension "applies to the development of federal oil and Indian minerals nationwide," BLM Motion at 1, this action does not constitute a localized controversy that favors any particular venue under this factor. *See Decker Coal*, 805 F.2d at 843 (the localized interest factor requires the court to consider the current and transferee forums' interests "in having localized controversies decide at home").

III. THE FIRST-TO-FILE RULE IS IRRELEVANT TO THIS ACTION.

Proposed-Intervenors also claim that transfer to the District of Wyoming is warranted under the "first-to-file" rule because these cases involve "many of the same parties," "substantially similar issues," and the Wyoming Litigation has been pending for over a year. ND Motion at 9. However, the first-to-file rule has no relevance here. As described by this court, "when two identical actions are filed in courts of concurrent jurisdiction, the court which first acquired jurisdiction should try the lawsuit and no purpose would be served by proceeding with a section action." *IT Convergence v. Moonracer, Inc.*, 2013 WL 6512732, *2 (N.D. Cal. Dec. 12, 2013) (quoting *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 95 (9th Cir. 1982)). "Courts analyze three factors in determining whether to apply the first-to-file rule: (1) chronology of the actions; (2) similarity of the parties; and (3) similarity of the issues." *Id*. (citation omitted).

Here, Plaintiff States challenge an entirely separate final agency action than was at issue in the Wyoming Litigation, namely, the Suspension of the Waste Prevention Rule that BLM finalized on December 8, 2017. Because the APA only allows for judicial review of "final agency action," 5 U.S.C. § 704, this action could not have been filed until December 8, 2017, at the earliest. At the time the Waste Prevention Rule was finalized and challenged in November 2016, the Suspension (and legal challenges to it) were not even being contemplated. Moreover, as discussed above in Part II.C., this action involves substantially different issues than the Wyoming Litigation. *See IT Convergence*, 2013 WL 6512732 at *2 ("A case is 'substantially similar' if it 'rest[s] on identical factual allegations and assert[s] identical or analogous causes of action'") (citation omitted). Consequently, it makes no sense to apply the first-to-file rule here.

CONCLUSION

For the reasons stated above, Defendants have failed to demonstrate that the convenience and interest of justice factors warrant disturbing Plaintiff States' choice of its home forum. Consequently, Defendants' motions to transfer should be denied.

Dated: January 23, 2018

Respectfully Submitted,

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