IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UTE INDIAN TRIBE OF THE UINTAH AND OURAY INDIAN RESERVATION, Plaintiff, v. UNITED STATES OF AMERICA, *et al.*, and THE STATE OF UTAH, CENTRAL UTAH WATER CONSERVANCY DISTRICT, GARY HERBERT, in his official capacity as Governor of the State of Utah, and THERESA WILHELMSEN, in her official capacity as Utah State Engineer and Director, Utah Division of Water Rights, Defendants.	Civil No. 1:18-cv-00547-CJN

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF MOTION TO TRANSFER VENUE

The Tribe's claims concerning the Green River Block Exchange Agreement (the "GRBE Contract") should be transferred to the District of Utah for two key reasons. First, a related action challenging that same contract and associated environmental review is currently pending in the District of Utah before Judge David Barlow, *Center for Biological Diversity et al., v. Department of the Interior, et al.*, No. 2:19-cv-636 (D. Utah, filed Mar. 21, 2019), following transfer from the District of Columbia on August 20, 2019. Second, the GRBE Contract concerns local water issues and interests focused in Utah. Those issues and interests have no meaningful connection to this District—which is not Plaintiff's home forum—and ought, in the interests of justice, be decided by the federal court in Utah.

The decision to transfer under 28 U.S.C. 1404(a), "is within the Court's discretion and requires 'an 'individualized, case-by-case consideration of convenience and fairness.'" *Plackett v. Washington Deluxe Bus, Inc.*, No. 1:19-cv-00794, 2020 WL 376511, at *2 (D.D.C. Jan. 23, 2020) (J. Nichols) (granting motion to transfer to the District of Maryland) (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)). As shown in the Transfer Motion,[1] the balance of private and public interest factors to be considered by this Court in analyzing a transfer request under section 1404(a) weigh heavily in favor of transfer to the District of Utah. The claims at issue, Claims 12-15 of the Tribe's second amended complaint (ECF No. 57, "Complaint" or "Compl."), concern a Utah-centric environmental controversy and a challenge made by a Utah-based Tribe arising from an environmental assessment ("EA") that Reclamation prepared and executed out of its Utah field office. The EA addresses the GRBE Contract, which is a contract between the State of Utah and the United States, and concerns the Green River, which flows through Utah, and serves a variety of local water users. *See* ECF No. 69-1. The alleged impacts of the agency decisions the Tribe challenges will be felt in Utah. In contrast, the District of Columbia has no meaningful ties to this controversy, aside from the fact that Interior's headquarters happen to be located here. Claims 12-15 should be transferred.

ARGUMENT

The Tribe does not dispute that it could have brought this action in the District of Utah. *See generally* Opposition to Federal Defendants' Motion to Transfer Venue, ECF No. 75 (hereinafter, "Opposition" or "Opp."). It instead advances four primary arguments in opposition: (1) section 1404(a) does not permit transfer under these circumstances; (2) the Tribe's venue choice is entitled to deference and the GRBE claims have a substantial factual nexus to the

[1] United States Motion to Transfer Venue, ECF No. 69 (the "Transfer Motion").

District of Columbia; (3) its claims are of national, even international, significance; and (4) its claims bear only an "attenuated connection" to the pending related action in Utah.[2] Each lacks merit.

A. Transfer Is Permitted Under Section 1404(a)

The relief the United States seeks is permitted under the venue transfer statute, 28 U.S.C. §1404(a). The Tribe has alleged sixteen claims against the United States. *See* Compl. The United States has moved to dismiss twelve of those claims for lack of jurisdiction and failure to state a claim (*see* ECF No. 68), and moved to transfer the four remaining claims, relating to the GRBE Contract, to the District of Utah (*see* Transfer Motion). This Court may properly dismiss those twelve claims and transfer the remaining APA claims to the District of Utah. *See, e.g.*, *Simpson v. Fed. Bureau of Prisons*, No. 1:19-CV-03173 (CJN), 2020 WL 95814, at *4 (D.D.C. Jan. 8, 2020) (J. Nichols) (granting dismissal of certain claims and transferring certain other claims to Pennsylvania).

In the event, however, that any of the Tribe's twelve non-APA claims survive dismissal, as the United States explained in its motion for partial dismissal, the Court would still hold the authority to transfer Claims 12-15. *See* ECF No. 68 at 2 n.2. The Court could either (1) sever the four APA claims challenging the GRBE Contract pursuant to Federal Rule of Civil Procedure 21 and transfer them to the District of Utah as a separate action, or (2) transfer this entire action to the District of Utah, should it find that any of the Tribe's surviving non-APA claims are connected to the GRBE claims. *See, e.g.*, *M.M.M. on behalf of J.M.A. v. Sessions*, 319 F. Supp.

[2] The Tribe also argues that the District of Utah is more congested than the District of Columbia. Opp. at 14. Based on the data cited in the Transfer Motion, Federal Defendants maintain this factor is neutral. Transfer Motion at 11-12. Federal Defendants likewise maintain that the convenience of the parties' factor favors transfer given that the Tribe is located in Utah. Transfer Motion at 15-16.

3d 290, 295 (D.D.C. 2018) (noting standard under Rule 21); *see also Wultz v. Islamic Republic of Iran*, 762 F. Supp. 2d 18, 32 (D.D.C. 2011) ("The federal rules permit the Court to sever claims within the same action at any stage of the proceedings.") (citing Rule 21); *Spaeth v. Michigan State Univ. Coll. of Law*, 845 F. Supp. 2d 48, 57 n.13 (D.D.C. 2012) (severing claims prior to transferring, per section 1404(a)); *Pasem, et al., v. U.S. Citizenship and Immigration Servs.*, No. 20-CV-344 (CRC), 2020 WL 2514749, at *4 (D.D.C. May 15, 2020) (severing claims prior to transfer and explaining that "[a] court may 'sever any claim against any party'" under Rule 21). The relief the United States seeks is thus consistent with both the plain language of section 1404(a) and the Federal Rules of Civil Procedure.

B. The Tribe's Choice Of Venue Is Not Entitled To Deference Because This Action Has No Substantial Ties To The District Of Columbia

Next, the Tribe invokes the usual deference given to a plaintiff's choice of forum. Opp. at 6-8. Here, however, little, if any, deference is due given the absence of any meaningful connection between these claims and the District of Columbia.[3] *See Trout Unlimited v. U.S. Dep't of Agric.*, 944 F. Supp. 13, 17 (D.D.C. 1996); *DeLoach v. Phillip Morris Cos.*, 132 F. Supp. 2d 22, 24-25 (D.D.C. 2000). Indeed, the very case the Tribe relies upon in support of deference, *Renchard v. Prince William Marine Sales, Inc.* (Opp. at 6), expressly recognizes that plaintiff's "choice is 'entitled to deference, *unless* that forum has no meaningful relationship to the plaintiff[']s claims or to the parties.'" 28 F. Supp. 3d 1, 11 (D.D.C. 2014) (emphasis added)

[3] The United States has not argued that it is entitled to deference in its choice of venue—as the Tribe suggests. Opp. at 8-9. Rather, the United States submits that transfer is proper given the balancing of the private and public interest factors to be considered by this Court in evaluating a motion to transfer under section 1404(a), and that the defendant's choice of forum "is a consideration when deciding" such a motion. *Sheffer v. Novartis Pharm. Corp.*, 873 F. Supp. 2d 371, 376 (D.D.C. 2012); *see also Gulf Restoration Network v. Jewell*, 87 F. Supp. 3d 303, 313 (D.D.C. 2015) ("A defendant's 'choice of forum must be accorded some weight' if the defendant presents legitimate reasons for preferring to litigate the case in the transferee district.").

(internal quotation and citation omitted). Moreover, Federal Defendants' burden under section 1404(a) is further lessened "where, as in this case, transfer is sought to the forum with which the plaintiffs have substantial ties and where the subject matter of the lawsuit is connected to that state." *Trout Unlimited*, 944 F. Supp. at 17. The Tribe resides in Utah. Compl. ¶ 6. The challenged decisions and documents were prepared in Utah.[4] The state of Utah is a party to the contract at issue. *See* ECF No. 69-1. And the alleged impacts of the challenged agency actions and decisions will be felt in Utah. *See* Compl. Because this case has substantial ties to Utah and not the District of Columbia, the Tribe's decision to file suit in the District of Columbia is not entitled to deference. *See Valley Cmty. Pres. Com'n v. Mineta*, 231 F. Supp. 2d 23, 44-45 (D.D.C. 2002).

The Tribe argues in response that a "substantial factual nexus" exists with the District of Columbia because the claims are "tied to the government-to-government relation between [the Tribe] and the federal government," and implicate the United States' trust relationship with the Tribe. Opp. at 6. But even a cursory review of the Tribe's Complaint reveals that these four APA claims are narrowly focused on one specific government decision that occurred not in the District of Columbia but in Utah—execution of the GRBE contract and related NEPA analysis. Claim 12 is a run-of-the-mill NEPA claim challenging Reclamation's decision to prepare an EA rather than an EIS. Compl. ¶¶ 307-20. Claim 13 alleges failure to consult and identify Tribal assets as part of Reclamation's NEPA analysis. *Id*. ¶¶ 321-28. And Claims 14 and 15 challenge, generally, the execution and implementation of the GRBE Contract, and the potential effects that agreement may have on the Tribe's water resources in Utah. *Id*. ¶¶ 329-45. The Tribe's attempt

[4] *See* EA available at https://www.usbr.gov/uc/envdocs/ea/20190100-GreenRiverBlockWaterExchangeContract-FinalEAandFONSI-508-PAO.pdf, last visited Aug. 10, 2020.

to repackage these claims in its Opposition as ones implicating broader sovereignty or trust issues in order to demonstrate a factual nexus with the District of Columbia falls flat.

Moreover, that the Tribe's claims concern interpretation of federal statutes cannot alone demonstrate the requisite factual nexus to this District. *See Pres. Soc'y of Charleston*, 893 F. Supp. 2d at 55 (D.D.C. 2012) ("[T]he mere fact that a case concerns the application of a federal statute by a federal agency does not provide a sufficient nexus to the District of Columbia to weigh against transfer." (citations omitted)). In the single case the Tribe cites in support of that proposition, Opp. at 7 (citing *Greater Yellowstone Coalition v. Bosworth*, 180 F. Supp. 2d 124, 128-29 (D.D.C. 2001)), two of the five plaintiffs had offices in the District of Columbia and plaintiffs alleged that the challenged agency decision-making occurred (at least in part), in the District of Columbia. Neither additional supporting nexus to the District of Columbia exists here.

The Tribe, the sole plaintiff, resides in Utah. And while the Tribe baldly asserts in its Opposition that these claims "arose in connection with events and decisions made in the District of Columbia" (Opp. at 9), it has not alleged that any NEPA analysis or decision-making with respect to the GRBE Contract occurred in the District of Columbia. *See* Compl. ¶¶ 219-35, 307-28. Its citation to, and discussion of, wholly separate government actions, many of which occurred decades, and in some cases centuries, ago, is irrelevant to the present analysis. Opp. at 9-11. That other government actions respecting the Tribe's water rights have involved, or even continue to involve, decision-making in the District of Columbia does not establish that this separate, independent government action—the execution and implementation of the GRBE Contract—also has a factual nexus to this District. And the Tribe has not shown otherwise. *See* Opp. at 9-11.

C. The Local Interest In Having This Local Controversy Decided in Utah Supports Transfer

The Tribe argues that its claims "go far beyond 'local interests'" (Opp. at 14-16) and present issues of "national significance under federal law" (Opp. at 15). But the Tribe's attempt to characterize this dispute as nationally—even internationally—significant simply because it involves the Colorado River, which serves a wide variety of water users and is the subject of federal laws and management (Opp. at 14-16), is undermined by numerous cases in which courts have found that similar local environmental controversies should be resolved in the forum that is most convenient for "the people 'whose rights and interests are in fact most vitally affected by the suit.'" *Trout Unlimited*, 944 F. Supp. at 20; *see also Nat'l Wildlife Fed'n v. Harvey*, 437 F. Supp. 2d 42, 47 (D.D.C. 2006); *see also W. Watersheds Project v. Tidwell (W. Watersheds Project I)*, 306 F. Supp. 3d 350, 357 (D.D.C. 2017). There can be no doubt that it is the water users in Utah, including the Tribe and the state of Utah, that will be most affected by the GRBE Contract and the results of this litigation.

Moreover, the Tribe provides no case law supporting its implicit argument that any decision related to a water project on any major river (such as the Colorado River) necessarily makes the decision one of national significance, supporting venue in the District of Columbia. *See* Opp. at 14-16. Neither of the cases the Tribe cites support such a proposition. Opp. at 15. In *Greater Yellowstone Coal. v. Bosworth*, the court found that the matter had "some national significance" given that the claims involved "interpretation of federal statutes, *and* because federal government officials in the District of Columbia were involved in the decision to reissue the HBA grazing permit." 180 F. Supp. 2d 124, 128–29 (D.D.C. 2001) (emphasis added). The latter element is not present here. And in *Wilderness Society v. Babbitt*, half of the plaintiffs were headquartered in D.C., national environmental organizations were involved, and plaintiffs

"convincingly demonstrate[d] that [the Secretary of the Interior's] involvement in the [ ] leasing decision was not routine, and that [the Secretary] made the final decision of record in this matter." 104 F. Supp. 2d 10, 17-18 (D.D.C. 2000). Again, none of these additional connections to the District of Columbia is present here.

That this action involves a sovereign Indian Tribe does not negate the overwhelming interest in having local water interests and issues adjudicated by local courts. *See W. Watersheds Project v. Pool*, 942 F. Supp. 2d 93,102 (D.D.C. 2013) ("[T]he interests of justice are promoted when a localized controversy is resolved in the region it impacts."). Numerous cases hold that the interests of the citizens most affected by the controversy are a significant factor, if not "the most persuasive factor" to be considered in decided a motion to transfer. *See, e.g., Shawnee Tribe v. U.S.*, 298 F. Supp. 2d 21, 26 (D.D.C. 2002) ("What the Court finds to be the most persuasive factor favoring transfer of this litigation. . . is the local interest in deciding a sizeable local controversy at home."); *DeLoach v. Philip Morris Cos.*, 132 F. Supp. 2d 22, 26 (D.D.C. 2000) (noting that "most persuasive factor" supporting transfer of venue to North Carolina was fact that "[p]laintiffs' allegations are far more likely to constitute a 'matter of great public concern' to the citizens of North Carolina than to the citizens of the District of Columbia.") (citation omitted).

In other cases similarly invoking a substantial local interest, courts in this District have regularly transferred cases to the forum with a close connection to the subject matter of the action. *See, e.g. Harvey*, 437 F. Supp. 2d at 49–50 (holding that even though the plaintiffs' claims involved federal law, related to the Everglades ecosystem at large, and were brought by national organizations, transfer to Florida was proper because the controversy was located in Florida, the decisions challenged were made in Florida, and plaintiffs failed to show that District

of Columbia officials were personally involved in those decisions); *Shawnee Tribe*, 298 F. Supp. 2d at 26–27 (transferring case involving sale of federal land in Kansas); *W. Watersheds Project I*, 306 F. Supp. 3d at 352 (transferring case involving Forest Service's issuance of a special-use authorization permit that allowed a Wyoming state agency to undertake supplemental elk feeding activities); *Trout Unlimited*, 944 F. Supp. at 19–20 (transferring case involving federal management of Colorado reservoir); *Valley Cmty*, 231 F. Supp. 2d at 47 (granting motion for change of venue in part because "the resolution of this action will have its most profound impact on New Mexico residents who live in the area of the proposed [highway] construction project"). The Court should do the same here.

In sum, because Claims 12-15 concern local water issues and interests, and the results of this challenge will impact local water users in Utah, this public interest factor strongly supports transfer.

D. The Pendency Of A Related Action In The District Of Utah Supports Transfer

Unsurprisingly, the Tribe gives short shrift to the significance of the pending related action in the District of Utah, *Center for Biological Diversity et al., v. Department of the Interior, et al.*, Case No. 2:19- cv-636 (D. Utah), which involves a substantially similar and overlapping NEPA challenge. Opp. at 12-13. The Tribe posits that its claims have only "an attenuated connection" to that action. Opp. at 13. But, as Federal Defendants showed in the Transfer Motion, the claims overlap significantly because both challenge the same final agency action. Transfer Motion at 9-11. Specifically, both challenge Reclamation's EA and FONSI, including Reclamation's alleged failure to adequately consider impacts, as well as Reclamation's alleged failure to prepare an EIS. *Compare* Compl. ¶¶ 307-28, *with* ECF No. 69-2 ¶¶ 103-31. That plaintiffs in the *Center for Biological Diversity* action are not an Indian Tribe is of no moment. Rather, the salient inquiry is whether the "factual background and legal issues" in the related

pending action in Utah are "similar and largely intertwined." *Nw. Forest Res. Council v. Babbitt*, No. CIV.A. 93-1579 JHG, 1994 WL 908586, at *3 (D.D.C. Apr. 13, 1994). Here, they are. For that reason, this public interest factor strongly favors transfer. *See id*.

Indeed, as one court in this District explained, the "presence of [a] closely related litigation" is "the most significant factor weighing in favor of transferring [a] case . . ." *Barham v. UBS Fin. Servs.*, 496 F. Supp. 2d 174, 180 (D.D.C. 2007). The Tribe fails to distinguish any of the cases Federal Defendants cited on this point (*see* Transfer Motion at 9-10) or cite a single case in support of its position that the Court should afford little weight to this related pending action. Opp. at 13.

Instead, the Tribe attempts to demonstrate that the GRBE claims relate to its broader civil action. Opp. at 12-13. As shown above, however, Claims 12-15 are readily distinct from the remainder of the Tribe's action because those four new APA claims (alleged for the first time in the Tribe's second amended complaint) challenge the same distinct agency action (execution of the GRBE Contract and related NEPA analysis). *See* Compl. ¶¶ 307-28. That agency action is not at issue in, or even implicated by, any of the Tribe's other twelve non-APA claims. *See* Compl. Moreover, given that the United States has moved to dismiss the Tribe's twelve non-APA claims, the relationship between those claims and the GRBE claims is irrelevant. If any of those twelve claims survive dismissal, the Court may consider whether they should be severed, and remain in the District of Columbia, or transferred with the GRBE claims to the District of Utah. Thus, the relationship, if any, between Claims 12-15 and the Tribe's larger action should carry little, if any, weight in the analysis.

CONCLUSION

These claims have no meaningful connection to the District of Columbia. They involve local water issues and interests in Utah. And a related pending case, challenging the same agency action, is already pending in Utah, following transfer from this District. The Court should, in the interest of justice, transfer these claims to the District of Utah.

Dated: August 13, 2020

JEAN E. WILLIAMS
DEPUTY ASSISTANT ATTORNEY GENERAL
U.S. Department of Justice
Environment & Natural Resources Division

/s/ Sally J. Sullivan
SALLY J. SULLIVAN (D.C. Bar No. 1021930)
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
4 Constitution Square
150 M Street NE
Suite 3.142
Washington, D.C. 20002
Tel: (202) 514-9269
Fax: (202) 305-0506
Email: sally.sullivan@usdoj.gov

Counsel for the United States

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2020, I filed the foregoing Reply in Support of the Motion to Transfer Venue electronically through the Court's CM/ECF system, which caused notice to be sent to the parties of record.

/s/ Sally J. Sullivan
SALLY J. SULLIVAN