IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:15-cv-2026-WYD

WILDEARTH GUARDIANS,

Plaintiff,

v.

SALLY JEWELL, in her official capacity as U.S. Secretary of the Interior,
U.S. DEPARTMENT OF THE INTERIOR, and
U.S. OFFICE OF SURFACE MINING AND RECLAMATION

Federal Defendants,

STATE OF WYOMING, ANTELOPE COAL LLC,
NEW MEXICO COAL RESOURCES LLC, BOWIE RESOURCES LLC,
THUNDER BASIN COAL COMPANY LLC,

Applicant-Intervenor-Defendants.

PLAINTIFF'S CONSOLIDATED RESPONSE TO FEDERAL DEFENDANTS' MOTION TO SEVER AND TRANSFER CLAIMS AND APPLICANT-INTERVENOR-DEFENDANTS' BRIEFS IN SUPPORT OF THE MOTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

INTRODUCTION

Federal Defendants' (collectively, Office of Surface Mining or "OSM") moves to sever and transfer portions of WildEarth Guardians' ("Guardians") claims relating to OSM's Mining Plan approvals for coal mines outside Colorado. However, Guardians' Petition does not contain discrete, mine-specific claims that can be rationally severed from this action. In granting OSM's severance request, the Court would be taking the atypical action of severing *sections* of claims rather than severing discrete *claims* from Guardians' Petition. OSM has also moved to transferred the severed sections of claims and asks the Court to substitute OSM's preferred fora for Guardians' chosen forum based on general local-interest considerations the Tenth Circuit has never identified as relevant to venue transfer decisions under 28 U.S.C. § 1404(a). OSM's request for severance is an attempt to dilute the strength of the logic that unifies this case. Guardians alleges that OSM is exhibiting a pattern and practice of both: (1) failing to providing for any public notice or participation in the Mining Plan approvals as required by the National Environmental Policy Act ("NEPA"); and (2) rubber-stamping Mining Plans and using other agencies' NEPA documents without critically evaluating those documents to ensure that each adequately analyzes the environmental impacts of coal mining. *See* 40 C.F.R. § 1506.6(a), 43 C.F.R. §§ 46.120, 46.305(c). All four of the challenged Mining Plans share these compliance failures.

There is no dispute that the District of Colorado is a proper venue. Motion at 1 (Dkt. 26). The responsibility to involve the public in the NEPA process for mining plan decisions rests with OSM's Western Regional Office in Denver, the same office responsible for producing NEPA analyses and recommending the Assistant Secretary of the Interior approve the challenged Mining Plans. Thus, OSM bears the burden of persuading the Court that it would be more

convenient to resolve the claims regarding OSM's unlawful approvals of the mining plans for the Wyoming and New Mexico mines in their respective states. However, OSM's severance and transfer arguments are not about convenience. OSM argues that severing sections of Guardians' claims relating to the Wyoming and New Mexico Mining Plans from its Petition and transferring the partial claims to their respective states is proper because any mine expansion impacts would be felt there, some agency actions leading to the challenged approvals were made there, the State of Wyoming has moved to intervene in the case, and a court in this district transferred claims relating to several mining plans to their respective states in a previous Guardians' lawsuit. Motion at 1. As argued below, none of these arguments weigh in favor of severance and transfer here because severance and transfer promotes neither "the interests of justice" nor the "convenience of the parties and witnesses." 28 U.S.C. § 1404(a). Local-interest considerations have nothing to do with access to evidence, convenience of witnesses, convenience for the parties or their lawyers, impaneling a jury, familiarity with local law, or anything else that might yield efficiency or fairness. Accordingly, Guardians respectfully requests that the Court deny the Motion in its entirety and exercise its discretion to keep this case.

BACKGROUND

I. THE MINING PLAN APPROVAL PROCESS

Pursuant to the Mineral Leasing Act ("MLA"), once the Secretary of the Interior ("Secretary") issues a federal coal lease, but "[p]rior to taking any action on a leasehold which might cause a significant disturbance of the environment . . . the lessee shall submit for the Secretary's approval an operation and reclamation plan." 30 U.S.C. § 207(c). Referred to as a "mining plan" by the Surface Mining Control and Reclamation Act ("SMCRA") and its implementing regulations, the Secretary "shall approve or disapprove the [mining] plan or

require that it be modified." 30 U.S.C. § 1273(c). Mining operations may not commence on "lands containing leased Federal coal", unless and until the Assistant Secretary for Land and Minerals ("Assistant Secretary") approves a mining plan. 30 C.F.R. § 746.11(a).

In addition to an approved mining plan, SMCRA provides that mining may commence only after either the Secretary or a federally-delegated state surface mining agency approve a surface mining permit application and reclamation plan ("SMCRA permit"). *See* 30 U.S.C. § 1256(a). The SMCRA permit governs surface disturbance for coal mining operations. In SMCRA, Congress authorized the Secretary to delegate administration and enforcement of SMCRA to states that have a federally approved surface mining program. 30 U.S.C. § 1273(c). However, Congress expressly prohibited the Secretary from delegating approval of *mining plans* to a state with an approved SMCRA program. 30 U.S.C. § 1273(c). Therefore, the Secretary's *mining plan* decision is wholly separate and independent from the State's SMCRA permitting decision. *Id*.; *see also S. Utah Wilderness Alliance*, 163 IBLA 142, 147 (2004) ("Not included [in State of Utah's jurisdiction] would be approval of [the applicant's] mining plan, since that authority was retained by the Secretary, under 30 C.F.R. § 745.13, and delegated to the Assistant Secretary[.]"). Under SMCRA, Congress also explicitly prohibits the Secretary from delegating authority to the states to comply with NEPA and other federal laws, therefore the responsibility to conduct the environmental analyses for mining plan approvals also rests with the Secretary rather than with states.[1] 30 C.F.R. § 745.13(b). Only after the State has approving the mining

[1] Although the Secretary of Interior is charged with approving, disapproving, or modifying a mining plan, OSM is charged with "prepar[ing] and submit[ting] to the Secretary a decision document recommending approval, disapproval or conditional approval of the mining plan[,]" 30 C.F.R. § 746.13. Thus, OSM plays a critical role in adequately informing the Secretary of Interior's mining plan decisions.

permit and the Assistant Secretary has approved the mining plan, may the permittee engage in mining activities.

A "mining plan shall remain in effect until modified, cancelled or withdrawn[.]" 30 C.F.R. § 746.17(b). The Assistant Secretary must modify a mining plan where, among other things, there is "[a]ny change in the mining plan which would affect the conditions of its approval pursuant to federal law or regulation[,]" "[a]ny change which would extend coal mining and reclamation operations onto leased federal coal lands for the first time[,]" or "[a]ny change which requires the preparation of an environmental impact statement under the National Environmental Policy Act[.]" 30 C.F.R. §§ 746.18 (a), (d)(1), (d)(4), and (d)(5).

II. CURRENT AND PRIOR MINING PLAN LITIGATION

With this litigation, Guardians seeks to remedy OSM's chronic failure to address the potentially significant environmental impacts of coal mining at four mines in three Western states and to involve the public in mining-related decisions in accordance with federal law. At issue here are OSM's approvals of "mining plans" for four mines which authorize the development of federally owned coal: the Bowie No. 2 Mine in Colorado; the El Segundo Mine in New Mexico; and the Antelope and Black Thunder Mines in Wyoming. Petition ¶¶ 56-59 (Dkt. 1). In approving all of these plans, however, OSM failed to comply with NEPA in two ways: (1) OSM failed to ensure that the public was appropriately involved in the mining plan approvals, and (2) OSM failed to take a hard look at potentially significant environmental impacts to air quality and climate from mine expansion. *Id*. ¶¶ 96-123.

A court in this district has already determined that OSM has a practice of approving mining plans for federal coal without complying with NEPA's requirements. On May 8, 2015, Judge Jackson issued an Opinion and Order in *WildEarth Guardians v. U.S. Office of Surf.*

Mining Reclamation and Enforcement et al., Case No. 13-cv-00518, 2015 WL 2207834 (D. Colo. May 8, 2015) ("*WildEarth Guardians*"), that speaks directly to all of the issues in this case; the only difference between *WildEarth Guardians* and this case is the specific mining plans at issue. There, Guardians challenged OSM's approvals of two mining plans for federal coal, claiming failure to comply with NEPA on the same grounds as here—that OSM failed to involve the public in mining plan approvals and failed to take a hard look at potentially significant impacts to air quality from the expansion of coal mining. *Id.* at *1. There, Judge Jackson agreed with Guardians on all points. *Id*. at *9-10 (lack of public notice), *13-14 (failure to analyze direct effects), *14-15 (failure to consider indirect effects of coal combustion).

In a similar case in Montana Federal District Court challenging OSM's approval of a mining plan for the Spring Creek Mine, on October 23, 2015 the magistrate judge there issued Finding and Recommendations in favor of Guardians on all points. *WildEarth Guardians v. U.S. Office of Surf. Mining Reclamation and Enforcement et al.*, Case No. CV 14-13-BLG-SPW-CSO, 2015 WL 6442724 (D. Mont. Oct. 23, 2015)[2]. A third Guardians' case challenging OSM's approval of the mining plan for the San Juan Mine in New Mexico is awaiting a decision from the New Mexico Federal District Court. *WildEarth Guardians v. U.S. Office of Surf. Mining Reclamation and Enforcement et al.*, Case No. 14-cv-112-MV-CG (D.N.M).

LEGAL STANDARDS

OSM moves to sever portions of claims relating to mines in Wyoming and New Mexico pursuant to Fed. R. Civ. P. 21. Motion at 10. Rule 21 provides that "[o]n motion, or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim

[2] The magistrate judge's Findings and Recommendations are not final. Objections and Responses to Objections have been filed with the Article III judge related to these Findings and Recommendations. The Article III judge has not yet issued a final ruling.

against a party." A court may sever claims where they "do not arise out of the same transaction or occurrence or do not present some common question of law or fact." *Preacher v. Wiley*, 2009 WL 6409350 at *2 (D. Colo. Nov. 20, 2009). Severance is not proper where "there is a risk of inconsistent judgment or a judicial economy to be gained by litigating all alleged claims in one suit." *WildEarth Guardians v. USOSMRE*, 2007 WL 50365 at *2 (D. Colo. Feb. 7, 2014).

OSM moves to transfer portions of Guardians' claims relevant to mines in Wyoming and New Mexico under 28 U.S.C. § 1404(a). OSM Motion at 14. Section 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 or to any district or division to which all parties have consented.

28 U.S.C. § 1404(a). A decision to transfer or keep a case under Section 1404(a) is committed to the Court's discretion. *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991) ("Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness.") (quoting *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)).

OSM concedes that venue in the District of Colorado is proper. Motion at 14, 16. So, OSM bears the burden of showing, first, that claims relating to the mining plan approvals for mines in Wyoming and New Mexico could have been brought in those respective districts and, second, that the District of Colorado is an inconvenient forum. Motion at 14 (citing, *inter alia*, *Chrysler Credit Corp.*, 928 F.2d at 1515). Guardians concedes that it could have challenged the Mining Plans for mines in Wyoming and New Mexico in those districts. Thus, the only question to resolve is whether adjudicating this case in the District of Colorado is inconvenient.

OSM correctly asserts that the Court should weigh nine matters to answer that question: (1) plaintiff's choice of forum; (2) accessibility of witnesses and other sources of proof,

including the availability of compulsory process to insure attendance of witnesses; (3) cost of making the necessary proof; (4) questions as to the enforceability of a judgment if one is obtained; (5) relative advantages and obstacles to a fair trial; (6) difficulties that may arise from congested dockets; (7) possibility of the existence of questions arising in the area of conflict of laws; (8) advantage of having a local court determine questions of local law; and, (9) all other considerations of a practical nature that make a trial easy, expeditious and economical. *Chrysler Credit Corp.*, 928 F.2d at 1516.[3] As explained further below, the other *Chrysler Credit Corp*. factors are neutral or inapplicable. A plaintiff's choice of venue, though, is entitled to some deference. Furthermore, practical considerations make resolving this case in Colorado easier, more expeditious, and more economical (including the cost of making the necessary proof).

ARGUMENT

I. SEVERANCE IS NOT APPROPRIATE

A. Guardians' Petition Presents Common Questions of Law and Fact.

Although Guardians' claims arise from four transactions—the Mining Plan approvals—rather than a single transaction, all four challenged decisions present common legal and factual questions. Guardians' Petition challenges OSM's pattern and practice of failing to comply with NEPA when it approved Mining Plans—specifically its failure to provide *any* public notice of its approvals, its wholesale adoption of other agencies' NEPA documents without evaluating the adequacy of those documents, and its failure to address the potentially significant environmental

[3] If the "interest of justice" is a separate consideration not subsumed by these nine factors (a position unsupported by Tenth Circuit precedent), it is an additional one that must *also* be satisfied and is not alone a sufficient basis to justify transfer absent a finding that this forum is inconvenient. *See Headrick v. Atchison, T. & S.F. Ry. Co.*, 182 F.2d 305, 310 (10th Cir. 1950) ("Under the provisions of the statute, it is necessary, prior to making a transfer under Section 1404(a), that the court find that such transfer will be not only for the convenience of the parties and their witnesses but further that it is in the interests of justice.").

effects of coal mining at the four mines covered by the challenged Mining Plan. Petition ¶¶ 96-123.

First, for all of its decisions OSM failed to ensure that the public was appropriately involved in the NEPA process supporting its decisions to approve the Mining Plan authorizing additional coal mining. Petition ¶ 97, 100. This "public involvement" claim is common to all of the challenged Mining Plan approvals and will turn on this Court's construction of the same NEPA regulations. *See* 40 C.F.R. § 1506.6(a) (stating that Federal agencies must "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures."); § 1506.6(b) (stating that at a minimum, agencies must "[p]rovide public notice of . . . the availability of environmental documents so as to inform those persons and agencies who may be interested or affected."); 43 C.F.R. § 46.305(c) (requiring that the public be notified "of the availability of an environmental assessment and any associated finding of no significant impact once they have been completed."). As OSM disclosed in prior mining plan litigation, its practice is to place hard copies of environmental documents for mining plan decisions on a shelf in its Western Regional Office in Denver, a practice this District found violated NEPA's public involvement requirements. *WildEarth Guardians*, 2015 WL 2207834 at *10; *see also WildEarth Guardians* (Montana case), 2015 WL 6442724 at *7 (accord). Accordingly, Guardians "public involvement" claim for all four Mining Plans alleging violations of NEPA's public involvement requirements shares common questions of law (interpretation of NEPA's public involvement requirements) and fact (OSM's practice of placing NEPA documents for mining plans on a shelf in its Denver office without public notice).

Second, for all of its challenged decisions OSM relied on NEPA documents prepared by other agencies. Dkt. 14-7 (Antelope Mine NEPA adoption statement); Ex. 1[4] (Black Thunder NEPA adoption statement); Ex. 2 (Bowie Finding of No Significant Impact); Ex. 3 (El Segundo Finding of No Significant Impact). Although NEPA's regulations allow OSM to adopt or incorporate by reference other agencies' NEPA documents, those same regulations also require that OSM provide "an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects." 43 C.F.R. 46.120(c); *see also* 43 C.F.R. § 46.135(a, b) (incorporating by reference another agency's document requires a determination "that the analysis and assumptions used in the referenced document are appropriate for the analysis at hand" and that the agency cite the specific information or analysis from the referenced document by "page numbers or other relevant identifying information."). Yet OSM provided no documentation in its decision records for the challenged Mining Plans meeting the requirements of these regulations. Petition ¶ 108. As was the case for the public involvement claim in the previous mining plan lawsuits, both this District and the magistrate judge's preliminary findings in the District of Montana found OSM's practice of uncritically adopting preexisting NEPA documents violated NEPA. *WildEarth Guardians*, 2015 WL 2207834 at *11; *see also WildEarth Guardians* (Montana case), 2015 WL 6442724 at *7 (accord). Like Guardians' public involvement claim, the substantive NEPA claims relating to OSM's practice of adopting prior NEPA documents without any evaluation on the record as to the adequacy of those documents also share common legal and factual questions.

OSM argues against any legal or factual commonalities among the challenged decisions because of "the uniqueness of the geographic tracts and operational details of the mining plans"

[4] All referenced exhibits are filed concurrently with this Response.

and "the diverse factual circumstances of each administrative proceeding." Motion at 12. However, these facts are not relevant to the issues the Court must decide in this case: (1) whether placing NEPA documents in an office library in Denver without notifying the public of the existence of these documents violated NEPA's public involvement mandate; (2) whether adopting preexisting NEPA documents without any evaluation of the continuing sufficiency of those documents on the record violated NEPA; and (3) whether the adopted documents took a hard look at mining's air quality and climate impacts. The size and character of the tracts to be mined under the challenged Plans, mining methods, and the circumstances of administrative proceeding for state mining permits do not factor into the Court's consideration of the legal issues and, therefore, do not support severance.[5, 6]

B. There are No Wyoming or New Mexico "Claims" for the Court to Sever.

OSM's severance arguments are based on the erroneous premise that the claims in Guardians' Petition are "claims against four separate mines" when, in fact, Guardians' Petition does not include any mine-specific claims. *Compare* Motion at 10 with Petition at 31-32 (claims for relief). All Petition claims allege NEPA violations common to all four of the challenged

[5] In its support of OSM's Motion, New Mexico Coal Resources invokes additional factual dissimilarities including the different dates of Mining Plan approvals, the amount of coal produced under each Mining Plan, different sizes and location of mines, the type of environmental document adopted, and the differing time periods between the date of adopted NEPA documents and the date of Mining Plan approvals. Dkt. 32 at 3-5. However, as is true for the factual dissimilarities highlighted by OSM, none of these facts are relevant to the legal issues in this case and will have no bearing on the Court's determination of whether OSM's violated NEPA when it approved the challenged Mining Plans.

[6] Antelope Coal argues that there are defenses "unique" to the Wyoming Mining Plan approvals that support severance and transfer. Dkt. 34 at 3. Antelope asserts that because the Environmental Impacts Statements OSM adopted for the Wyoming Mining Plan approvals have "withstood judicial scrutiny" in prior litigation, the Wyoming mines may raise the "unique" defenses of res judicata or collateral estoppel not available for the other challenged Plans. *Id*. at 2-3. However, Antelope is not precluded from raising these defenses if this case is not severed and transferred. Nor is the District of Wyoming in any better position than this District to evaluate the applicability of these defenses.

Mining Plans rather than being divided by mine. For example, Claim 1 alleges that OSM's failure to provide for public participation in the NEPA process for all four Mining Plans violates NEPA:

> Federal Defendants did not provide notice to the public of the availability of or the opportunity to review and/or comment on OSM's FONSIs, "Statements of NEPA Adoption and Compliance," and other information prepared pursuant to comply with NEPA prior to the approval *of the Mining Plans challenged herein*. Federal Defendants' failure to provide notice of the availability of environmental documents prior to decisions being made violates NEPA, 40 C.F.R. §§ 1501.4(e)(1); 1506.6, and the APA, 5 U.S.C. §§ 706(2)(A).

Petition ¶ 100 (emphasis added); *see also* ¶ 105 (Claim 2 alleging "Federal Defendants violated NEPA by failing to supplement the EAs and EISs relied on *for each Mining Plan decision challenged herein* before approving the Plans) (emphasis added); ¶¶ 109, 116, 119, 123 (alleging NEPA violations common to all Mining Plans). Thus, there are no discrete, mine-specific claims that can be severed from the Petition and transferred to different districts. OSM's severance request is really asking the Court to order Guardians to redraft its Claims for Relief and pursue its litigation in the manner OSM prefers. But OSM is not the plaintiff here and, as discussed more fully below, unlike Guardians (who would be prejudiced by severing and transferring this case), OSM is neither prejudiced nor inconvenienced by keeping this case whole.

Because Guardians' Petition does not contain discrete mine-specific claims, Judge Kane's decision to sever and transfer mine-specific claims in *WildEarth Guardians v. USOSMRE*, 2014 WL 503635 (D. Colo. Feb. 7, 2014), does not provide guidance here. There, Guardians' Petition divided up the claims by mine, resulting in individual, mine-specific claims that could rationally be severed from the Petition and transferred to different districts. Ex. 4 at 30-41 (Petition from 13-cv-518). The earlier Petition alleged 15 claims against OSM for NEPA violations covering four mining plans. *Id*. OSM and an Intervenor mining company moved to

sever and transfer Claims 7-15, which were specific to mining plans for Wyoming and New Mexico mines and which the court granted. *WildEarth Guardians*, 2014 WL 503635 at *3. The court also severed and transferred *sua sponte* claims 5-6 relating to a mining plan for a Montana mine. *Id*. Although Judge Kane held that "there is nothing problematic with carving up an environmental action involving multiple claims," he was not faced with the question of whether it was proper to carve up *claims* in the manner requested by OSM here.

Rule 21 contemplates severance of *discrete* claims, not severing *portions* of claims that remove some of the bases of proof for the alleged illegalities. *See Rice v. Sunrise Express*, 209 F.3d 1008, 1016 (7th Cir. 2000) (noting district courts' "broad discretion" under Rule 21 "[a]s long as there is a *discrete and separate claim*.") (emphasis added). Here, OSM has not identified "discrete" claims for severance but instead generally (and incorrectly) refers to mine-specific claims as appropriate for severance. Yet there are no discrete, mine-specific claims in this Petition that can be logically severed from the others, as there were in the earlier Petition for which Judge Kane granted OSM's severance request. Therefore, severing portions of Guardians' claims is not proper.

C. Severance Will Prejudice Guardians.

In deciding whether severance of claims is proper, courts also look to the time and expense invested in the case and the various prejudices to the parties. *Schudel v. Miller*, 2013 WL 1815730, at *5 (D. Colo. April 29, 2013). Here, Guardians will incur additional and unnecessary expenses, as well as potential litigation delays if the Court severs portions of Guardians' claims and transfers them to Wyoming and New Mexico. This is not the typical transfer situation where Guardians' entire case or discrete claims would be transferred to another venue and litigated there. Rather, portions of Guardians' claims would be carved up into three

cases in three different judicial districts. Such a result would prejudice Guardians in two ways. First, it would increase Guardians' litigation expenses because Guardians would have to litigate in three separate courts and would need to find local counsel in Wyoming. This would require significant additional expense and time. While local counsel expenses might be insignificant for many litigants, such expenses are not insignificant to public interest groups with defined and limited budgets for litigation. Additionally, it is difficult for Guardians to obtain local counsel in Wyoming because many lawyers in Wyoming have direct conflicts of interest as they represent coal companies, or will not otherwise work with Guardians for business or political reasons. Yet retaining local counsel would be necessary because none of Guardians' staff attorneys are licensed to practice in Wyoming. Although OSM points out that Guardians has previously retained local counsel when a coal leasing case was transferred from Colorado to Wyoming, Motion at 13, the co-plaintiff in that case covered local counsel's retainer. Ex. 5 ¶ 4 (declaration). In addition, the individual who served as Guardians' local counsel in that case has since passed away so is not available to serve as Guardians' local counsel if the Court severs and transfers claims relating to the Antelope and Black Thunder Mines to Wyoming. *Id*. ¶ 5.

Second, severance and transfer will prejudice Guardians by delaying resolution of the merits of the case for a year or more. This delay is not merely speculative but certain given the history of Guardians' previous mining plan case filed in this District and ultimately carved into four separate cases across four states. Guardians filed *WildEarth Guardians v. U.S. Office of Surf. Mining Reclamation and Enforcement et al.*, Case No. 13-cv-00518 on February 27, 2013. Four months later, OSM moved to sever and transfer claims for mines outside Colorado to their respective states. Eight months later, and nearly a year after Guardians filed its Petition, the court

granted the motion and Guardians' Petition was carved into four cases in Colorado, Wyoming,[7] Montana, and New Mexico. *WildEarth Guardians v. OSMRE*, 2014 WL 503635 (D. Colo. Feb. 7, 2015). Four months later, OSM served the administrative records for the two Colorado mining plan decisions, and the parties completed merits briefing by the end of 2014. By the time the court held argument on the merits, mining of the tracts covered by the challenged mining plans was nearly complete, and Intervenor-Defendant mining companies asked the court to dismiss the case on prudential mootness grounds. *WildEarth Guardians*, 2015 WL 2207834 at *7. Here, OSM's decision to move to sever and transfer claims related to mines outside Colorado will likely result in the same lengthy delay in resolving the merits of Guardians' claims, necessitating Guardians to take measures to protect itself from prejudice by filing a motion for preliminary injunction to temporarily enjoin mining under the challenged mining plans, pending resolution of the merits of the claims.

II. TRANSFER WILL SEVERELY PREJUDICE GUARDIANS

If the Court determines that severance of portions of the claims relating to the Wyoming and New Mexico Mining Plans is appropriate, creating three separate cases, the Court should deny OSM's request to transfer those new cases to Wyoming and New Mexico. First, the Court should not summarily disregard Guardians' choice of forum as OSM suggests. Second, OSM has not demonstrated that Colorado is an inconvenient forum for the cases even if the Court severs portions of the claims. Finally, Wyoming's and New Mexico's "local interests" do not outweigh the prejudice and inconvenience to Guardians from disturbing its choice of venue and creating two additional cases. Severing the claims into three cases, consolidating them, and keeping the

[7] Because Guardians was unable to retain local counsel when its claims against Wyoming mining plans were transferred to the District of Wyoming, Guardians was unable to prosecute its claims against OSM over the Wyoming mining plans and was forced to voluntarily dismiss that case. Ex. 5 ¶ 2.

cases in this District would reduce the prejudice to Guardians from delayed resolution of the merits and the unanticipated expenses of litigating in three separate courts.

A. The Court Should Not Disregard Guardians' Choice of Forum.

Typically, "[u]nless the balance is strongly in favor of the movant[,] the plaintiff's choice of forum should rarely be disturbed." *William A. Smith Contracting Co. v. Travelers Indem. Co.*, 467 F.2d 662, 664 (10th Cir. 1972). Tenth Circuit precedent, though, allows the Court to give a plaintiff's choice of forum little weight if the facts giving rise to this lawsuit do not have a significant connection to Colorado. *See Emp'rs Mut. Cas. Co. v. Bartile Roofs*, 618 F.3d 1153, 1167–68 (10th Cir. 2010). All of the challenged Mining Plans in this case are significantly connected to Colorado because OSM's Western Regional Office in Denver recommended approval of the Plans to the Secretary based on preexisting NEPA documents and the Western Regional Office's consultations with other federal agencies. *See*, *e.g.*, Dkt. 14-5 (OSM recommendation for Antelope Mining Plan); *see also* 30 C.F.R. § 746.13 (charging OSM with "prepar[ing] and submit[ting] to the Secretary a decision document recommending approval, disapproval or conditional approval of the mining plan"). Thus, OSM's Western Regional Office's actions are central to mining plan approvals.

If these connections to Colorado are not significant enough to justify the usual strong deference given to a plaintiff's choice of forum, that does not mean Guardians' choice of forum should be given *no* weight. It should still be a thumb on the scales in favor of keeping the case in this District. Indeed, if all other considerations are a wash, the balance should tip to the plaintiff's chosen forum. *Creative Socio-Medics, Corp. v. City of Richmond*, 219 F. Supp. 2d 300, 309 (E.D.N.Y. 2002) ("[W]here the balance of convenience is in equipoise, plaintiff's choice of forum should not be disturbed.") (quoting *Photoactive Prods., Inc. v. AL-OR Int'l. Ltd.*,

99 F.Supp.2d 281, 292 (E.D.N.Y. 2000)); *Sparshott v. Feld Entm't, Inc.*, 89 F.Supp.2d 1, 4 (D.D.C. 2000) (deferring to plaintiffs' choice of forum after concluding that factors bearing on convenience and interests of justice were in equipoise); *United Radio, Inc. v. Wagner*, 448 F.Supp.2d 839, 843 (E.D. Ky. 2006) (same).

B. OSM Has No Argument That Colorado is an Inconvenient Forum.

Convenience is the touchstone of the venue-transfer analysis under Section 1404(a). *See Van Dusen v. Barrack*, 376 U.S. 612, 634 (1964) ("Congress, in passing § 1404(a), was primarily concerned with the problems arising where, despite the propriety of the plaintiff's venue selection, the chosen forum was an inconvenient one."). After all, the statute gives district courts authority to transfer cases "for the convenience of the parties and witnesses, in the interest of justice…." 28 U.S.C. § 1404(a). As a leading Tenth Circuit decision on Section 1404(a) puts it: "The party moving to transfer a case pursuant to § 1404(a) bears the burden of establishing that the existing forum is inconvenient." *Chrysler Credit Corp.*, 928 F.2d at 1515.

OSM's motion all but ignores this mandate, making only a hasty suggestion that witnesses in Wyoming or New Mexico conceivably could be needed at some point. Motion at 21. OSM probably takes this tack because it would be *more convenient* to keep the cases in the District of Colorado, as explained below.

1. There is little chance that witnesses from Wyoming or New Mexico will be needed, and these states are no more accessible for sources of proof.

This case will be decided based on administrative records (which will be created by OSM's Western Regional Office in Denver) that can be reviewed just about anywhere. *See Friends of the Norbeck v. U.S. Forest Serv.*, 2010 WL 4137500, at *3 n.3 (D. Colo. Oct. 18, 2010) (observing that "[t]he concerns underlying [the location of the administrative record] have

been, for the most part, rendered irrelevant and anachronistic" given that it can be compiled and reproduced electronically) (unpublished). There will be no depositions. There will be no trial. There will be no jury. Thus, the possibility of inconveniencing potential witnesses or jurors should not matter at all. *See Friends of the Norbeck*, 2010 WL 4137500, at *3 ("Ordinarily, in a record review case, there would be no need for witnesses or other sources of proof.").

OSM speculates that witness testimony, not on the merits but about injunctive relief, "may" be required to attest to harm which might flow from the injunction relief Petitioner seeks." Motion at 21. Yet in three prior mining plan cases where plaintiffs prevailed, the court either vacated the challenged decision and remanded for further agency proceedings consistent with the court's decision or remanded for further agency proceedings and delayed vacatur to allow the agency time to complete a new NEPA analysis on remand. *See*, *e.g.*, *Diné CARE v. OSMRE*, 2015 WL 3751225 (D. Colo. April 8, 2015) (remand and vacatur of OSM's unlawful mining approval); *WildEarth Guardians*, 2015 WL 2207834, at *16 (remand with delayed vacatur). Even if the Court were to eventually consider issuing a permanent injunction, there is no telling at this early stage whether the Court will take live testimony to do so (or instead rely on declarations), and whether any witnesses the parties would offer will be in Wyoming or New Mexico. *See Zurich Am. Ins. Co. v. Acadia Ins. Co.*, 2014 WL 3930487, *6–7 (D. Colo. Aug. 12, 2014) (acknowledging that "it is unwise for a judge to enter an order of transfer in the early stages of a case before it can be determined just what the issues in that case are going to be"); *Sierra Club v. Van Antwerp*, 523 F.Supp.2d 5, 12 (D.D.C. 2007) (rejecting argument that witnesses might be needed in an administrative-record case and finding that "convenience of witnesses and access to proof [were] irrelevant to the issue of transfer of venue").

2. It will be easier and less costly to resolve these cases in Colorado.

The chief cost for both parties is near certain to be the time and expenses of their attorneys. Yet no party's attorneys live or work in Wyoming. Defendants' and New Mexico Coal Company's counsel work in Washington, D.C., and will need to travel for any in-person matters regardless of whether the cases remain in Colorado or are split among Colorado, Wyoming, and New Mexico. Counsel for the Wyoming mines are based in Denver and, if the Court grants their motions for intervention, will expend additional and expense to travel to Wyoming for any in-person matters. Although Guardians' lead counsel lives in New Mexico, if the Wyoming claims are transferred to Wyoming, as discussed in Section I.C above Guardians' counsel would be required to associate another lawyer as local counsel and incur unanticipated expenses of doing so because Guardians does not have in-house or pro bono counsel in Wyoming.

There is no denying that cases have said that convenience of counsel is not a relevant consideration under Section 1404(a). *See, e.g.*, *Bailey v. Union Pac. R. Co.*, 364 F.Supp.2d 1227, 1230 (D. Colo. 2007); *WildEarth Guardians v. U.S. Forest Serv.*, 2012 WL 1415378, *4 (D. Colo. Apr. 24, 2012). But some courts have gone the other way. *See Rasure v. Sitter*, 2007 WL 4458119, *5 (D. Colo. Dec. 11, 2007) (observing that forum where defense counsel was located was more convenient because plaintiff would have to travel regardless); *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 939 F. Supp. 1, 3 (D.D.C. 1996) (considering convenience of counsel in Section 1404(a) transfer decision). And because Guardians is represented by in-house lawyers, inconvenience of *counsel* is inconvenience of the *parties*. Regardless, the issue here is less about mere inconvenience for Guardians' attorneys and more about the unnecessary costs and use of staff time that transfer will impose on the plaintiff non-profit. *See, e.g.*, *Blumenthal v.*

Mgmt. Assistance, Inc., 480 F. Supp. 470, 474 (N.D. Ill. 1979) (recognizing that "if the convenience of counsel bears directly on the cost of litigation, it becomes a factor to consider").

3. The balance of relevant considerations favors keeping the cases in Colorado.

Most of the remaining *Chrysler* factors are not relevant. There are no questions as to the enforceability of a judgment, conflicts of law, or of local law that can be best resolved by a local court. But transferring this case will necessarily cause delay, disserving the expeditious resolution of this case. Guardians filed this lawsuit on September 15, 2015. OSM has not yet filed an answer, choosing instead to wait until the last minute before moving to sever and transfer portions of Guardians' claims resulting in significant delay in resolving the merits of the case as discussed in Section I.B above. Although the location of the case, even if severed, is irrelevant to production of the administrative record, OSM has not provided Guardians with the administrative records and is not likely to do so until the Court rules on the Motion. Meanwhile, coal mining under all four of the challenged Mining Plans is marching forward even though OSM's approvals were issued unlawfully, increasing the environmental harm to Guardians' members. Thus, the expeditious resolution of the severed cases would be best served by keeping them in the existing forum. *See e.g. Smith v. Colonial Penn Ins. Co.*, 943 F. Supp. 782, 784–85 (S.D. Tex. 1996) ("[T]he Court declines to disturb the forum chosen by the Plaintiff and introduce the likelihood of delay inherent in any transfer…").

* * *

In sum, the convenience factors do not justify sending the claims, even if severed, to the Districts of Wyoming and New Mexico, and OSM has failed to carry its burden. *See Chrysler Credit Corp.*, 928 F.2d at 1515 ("The party moving to transfer a case pursuant to § 1404(a) bears the burden of establishing that the existing forum is inconvenient.")

C. The general "local interests" of Wyoming and New Mexico are not sufficient bases for disturbing Guardians' choice of venue.

Because the relevant factors do not support its Motion, OSM's main argument for severing and transferring claims related to Wyoming and New Mexico Mining Plans is that the mines are located there, state permitting approvals were made there, and coal mining would impact the states' citizens and their economies. Mot. 18-20. There are two problems with this "local interest" argument, which, in combination, are a more than sound reason to give Wyoming's and New Mexico's local interests no or little weight.

First, a general local interest is not among the nine considerations the Tenth Circuit has said courts should weigh in deciding whether to transfer cases under Section 1404(a). *Chrysler Credit Corp.*, 928 F.2d at 1516.[8] The advantage of having a local court determine questions of local law is a factor, but OSM's arguments about Wyoming's and New Mexico's local economic interests have no connection to questions of local law. Significantly, even if OSM's argument did involve local law, this case has nothing to do with local law, but turns wholly on federal law.[9]

The Court should give little credit to the cases OSM cites for the idea that the local interest should be an important consideration. True enough, the Supreme Court said in an old *forum non conveniens* case that there is a local interest in deciding "localized controversies" at

[8] The Tenth Circuit in *Bartile Roofs* cited a district court quotation of the Supreme Court's statement in *Gilbert* that there is a local interest in deciding localized controversies at home. 618 F.3d at 1171. But the court's analysis was focused on the advantage of having a Wyoming court apply Wyoming state law. *Id.*

[9] Antelope asserts that the Court's resolution of the legal issues for the Wyoming Mining Plans in this case "will require" consideration of the State of Wyoming's SMCRA permitting process, implying that the Court will be required to interpret and apply Wyoming law. Dkt. 34 at 4. This is not true. As discussed in Background Section I, OSM's *mining plan* decision is wholly separate and independent from the State's SMCRA permitting decision, and OSM cannot delegate NEPA compliance to states. Guardians is not challenging any state SMCRA permitting decisions, therefore the Court will not have to review any state laws to resolve the issues in this case.

home. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947). But that point was based on factors not at issue here—that a jury ought not be forced to hear a case that has nothing to do with its community, that (in an era long before the Internet and even widespread television use) a trial should be within the view and reach of the community whose affairs it may touch, and that a diversity action should proceed in the forum whose state law may apply. *Id.* at 508–509. Not one of the District of Colorado opinions that OSM cites explains how the local interest fits into the nine factors articulated by the Tenth Circuit. *See* Motion at 18-19. All the other cases OSM relies on are from jurisdictions outside the Tenth Circuit that look to a different list of considerations under Section 1404(a). *Id*.

Second, there is a good reason why the local interest should have little, if anything, to do with whether the severed claims should be transferred to Wyoming and New Mexico: it has no bearing on what it will cost to resolve these cases or how these cases should turn out. Even if there may be cases where the local interest should factor into a court's venue-transfer decision, this is not one of them. The question to resolve here is whether Federal Defendants complied with federal law in managing federal lands and mineral resources that belong to the United States. OSM offers no reason why "local interests" would have anything to do with that question.[10] *See Concerned Rosebud Area Citizens v. Babbitt*, 34 F. Supp. 2d 775, 776 (D.D.C. 1999) ("The Government complains that a number of interested groups may be foreclosed from effectively participating in this case if it remains here. But the argument ignores the limited task of the Court. Plaintiffs seek a backward-looking review of an administrative process that is complete and has resulted in a final decision.").

[10] Nor does New Mexico Coal Resources' discussion of local interests in coal mining at the El Segundo Mine address this issue. Dkt. 32 at 2-3.

CONCLUSION

For all the reasons set forth above, Guardians respectfully requests that the Court deny OSM's motion to sever and transfer Guardians' claims related to Mining Plan approvals for mines outside Colorado to their respective districts. If the Court finds that severance is appropriate, then Guardians' respectfully requests that the Court exercise its discretion and not transfer the severed claims to Wyoming and New Mexico and that these new cases remain in the District of Colorado. Guardians also respectfully requests oral argument on the Motion because OSM's request to sever portions of claims, rather than discrete claims, is an issue of first impression.

Respectfully submitted on this 7th day of January, 2016.

/s/ Samantha Ruscavage-Barz
WildEarth Guardians
516 Alto Street
Santa Fe, NM 87501
(505) 401-4180
sruscavagebarz@wildearthguardians.org

/s/ Sarah McMillan
WildEarth Guardians
P.O. Box 7516
Missoula, MT 59807
(406) 549-3895
smcmillan@wildearthguardians.org

Attorneys for Plaintiff WildEarth Guardians

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing RESPONSE was served on all counsel of record through the Court's ECF system on this 7th day of January 2016.

/s/ Samantha Ruscavage-Barz