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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DESERT SURVIVORS, et al.,
Plaintiffs,
v.
US DEPARTMENT OF THE INTERIOR, et
al.,
Defendants.

Case No. 16-cv-01165-JCS

**ORDER DENYING DEFENDANTS’
MOTION TO TRANSFER VENUE**

Re: Dkt. No. 12

I. INTRODUCTION

Plaintiffs Desert Survivors, Center for Biological Diversity, WildEarth Guardians, and Western Watersheds Project (collectively “Plaintiffs”) brought the instant action seeking to protect the Bi-State Sage-Grouse (“BSSG”), a large bird found on the border between California and Nevada. In the Complaint, Plaintiffs allege that Defendants Department of Interior of the United States and United States Fish and Wildlife Service (“Service”) (collectively “Defendants”) improperly withdrew a proposed rule (the “Withdrawal”) that the BSSG be listed as a threatened species under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1534, and seek an order directing the Service to reconsider listing the BSSG as threatened under the ESA.

Presently before the Court is Defendants’ Motion to Transfer Venue (“Motion”). In the Motion, Defendants ask the Court to transfer venue from the Northern District of California to the Eastern District of California. A hearing on the motion was held at 9:30 a.m. on July 15, 2016. For the reasons stated below, the Motion is DENIED.¹

¹ The parties have consented to the jurisdiction of the undersigned magistrate judge for all purposes pursuant to 28 U.S.C. § 636(c).

1 **II. BACKGROUND**

2 **A. Factual Background**

3 Sage-grouse are large birds known for their elaborate mating ritual that live in sagebrush
4 habitats. Complaint for Declaratory and Injunctive Relief (“Compl.,” dkt. 1) ¶ 38. The Bi-State
5 Sage-Grouse is a distinct population of greater sage-grouse species that live in the “far
6 southwestern reach of the greater sage-grouse’s range” in the central border region of eastern
7 California and western Nevada. *Id.* ¶ 40 (citing 80 Fed. Reg. 22,828, 22829). The BSSG has
8 suffered from habitat and population loss for many years. *Id.* ¶ 45 (citing 80 Fed. Reg. at 22,831).
9 The BSSG’s “small population size and isolation, coupled with stressors caused by human
10 activities, threaten the population’s long-term survival.” Compl. ¶ 43 (citing U.S. Fish and
11 Wildlife Service, Species Status Assessment: Bi-State Distinct Population Segment of Greater
12 Sage-Grouse at 6 (Mar. 1, 2015)).

13 **B. Related Litigation and Agency Action**

14 Environmental groups have been advocating and petitioning the Service for the protection
15 of the BSSG for more than a decade.

16 In 2002, the Institute for Wildlife Protection petitioned the Service to emergency list sage
17 grouse found in the Mono County, California and Lyon Count, Nevada (the animals who later
18 became known as the BSSG) as an endangered distinct population segment of the greater sage-
19 grouse. *See* Compl. ¶ 49; 71 Fed. Reg. 76,058. Later that year, the Service found that the petition
20 lacked “substantial scientific or commercial information” that the listing was not warranted based
21 on the lack of information about whether these sage-grouse were a distinct population segment and
22 whether they were faced with extinction. 71 Fed. Reg. at 76,058–59. Entities must be a distinct
23 population segment in order to be listed under the ESA. *Id.* In November 2005, the petitioners
24 filed suit in the Western District of Washington challenging the Service’s finding that listing was
25 not warranted. *Id.*

26 Also in November 2005, a set of environmental groups petitioned the Service to list the
27 BSSG as threatened or endangered. *See* Compl. ¶ 49; 71 Fed. Reg. at 76,059. The petitioning
28 groups were the Center for Biological Diversity (CBD), the Western Watersheds Project, the

1 Sagebrush Sea Campaign, and Christians Caring for Conservation.² 71 Fed. Reg. at 76,059. In
2 March 2006, the Service responded to the petition with a letter indicating that it reviewed the
3 petition and the listing was not necessary. *Id.* The Service further informed the petitioners that
4 because of “court orders and settlement agreements for other listing and critical habitat actions”
5 the Service was unable to further address the petition. *Id.* In April 2006, the petitioning
6 environmental groups sent the Service a notice of their “intent to sue the Service for violating the
7 Act’s requirement to make a petition finding within 12 months after receiving a petition.” *Id.*

8 The Service settled both of these matters in an April 2006 settlement agreement where the
9 Service agreed to evaluate the November 2005 petition, re-evaluate the 2002 petition, and publish
10 a finding on the petitions in December 2006. *Id.* The Service did so and found that the petitions
11 “did not provide sufficient information to show that the population may warrant listing.” Compl. ¶
12 49 (citing 71 Fed. Reg. 76,058).

13 In 2007, the CBD, the Sagebrush Sea Campaign, Western Watersheds Project, and Desert
14 Survivors brought an action in this Court challenging the Service’s 2006 finding. *See* Compl. ¶ 49
15 (citing *Ctr. for Biological Diversity v. U.S. Fish and Wildlife Serv.*, Case 3:07-cv-04347(JCS)
16 (N.D. Cal.), dkt. 25)). The parties reached a settlement in 2008 when the Service agreed to review
17 the petition again and “found that the [BSSG] could warrant listing, and issued multiple findings
18 on species’ status.” *Id.* (citing 78 Fed. Reg. 64,358, 64,360). This settlement resulted in a May
19 2010 finding by the Service that the BSSG was suitable for listing under the ESA but its listing
20 was “precluded by higher listing priorities.” *Id.* ¶ 50 (citing 78 Fed. Reg. at 64,360).

21 In a 2011 settlement in a consolidated case with WildEarth Guardians and other groups in
22 the District of Columbia, the Service agreed to publish proposed rules for protection or findings
23 that protection was not warranted for the 251 species that were candidates for protection under the
24 ESA in 2010. 78 Fed. Reg. at 64,361.

25 As a direct result of that settlement agreement and developing from prior petitions to
26

27 ² The Sagebrush Sea Campaign was later absorbed into WildEarth Guardians, a plaintiff in the
28 instant action. Cotton Decl. at 2–3.

1 protect the BSSG, in October 2013 the Service issued a Proposed Rule to list the BSSG as
2 threatened under the ESA. *See* Compl. ¶ 52; 78 Fed. Reg. at 64,361. In conjunction with the
3 Proposed Rule, the Service proposed designating 1.8 million acres of land as critical habitat for the
4 BSSG. *Id.* (citing 78 Fed. Reg. at 64,328).

5 In April 2015, the Service withdrew the proposed rule to list the BSSG on the basis that
6 ongoing conservation efforts had reduced the threats to the BSSG. Compl. ¶ 59 (citing 80 Fed.
7 Reg. 22,828).

8 **C. The Complaint**

9 In response to the withdrawal of the proposed rule, Plaintiffs initiated this action in the
10 Northern District of California alleging that the Service (1) “failed to properly apply the ESA’s
11 listing factors, failed to adhere to the best available science, and failed to adequately explain why
12 it withdrew the proposed rule;” (2) “violated the ESA in adopting [and misapplying] the
13 Significant Portion of its Range Policy;” and (3) “violated the ESA by misapplying the Service’s
14 Policy on the Evaluation of Conservation Efforts (PECE Policy).” Compl. ¶¶ 80, 83–84, 87
15 (internal citations and quotation marks omitted).

16 Claim One is brought under the ESA and the Administrative Procedure Act (“APA”) §
17 706(2)(A) based on the theory that the Withdrawal was “arbitrary [and] capricious” because the
18 Service failed to adhere to the best available science, improperly defined the foreseeable future,
19 improperly interpreted population models, concluded that existing regulations adequately protect
20 the BSSG on federal land, concluded that existing regulations will sufficiently conserve the BSSG,
21 and failed to adhere to the best available science regarding threats to the BSSG. Compl. ¶ 80(a)–
22 (f).

23 Claim Two is brought under the ESA and APA § 706(2)(A), alleging that the Service’s
24 adoption of the Significant Portion of its Range Policy (SPOR) is arbitrary and capricious. Compl.
25 ¶ 85. The Service is required to list to a species “if it is endangered or threatened throughout ‘all
26 or a significant portion of its range.’” Compl. ¶ 20 (citing 16 U.S.C. §§ 1532(6), 1532(20),
27 1532(a)–(b)). SPOR interprets the phrase “significant portion of its range” and provides that an
28 entire species will be listed if it is found to be threatened or endangered in a significant portion of

1 its range. It also requires that a distinct population segment be listed when it is threatened or
2 endangered within its range. A portion of a range is significant when the portion’s “contribution
3 to the viability of the species is so important that, without the members in that portion, the species
4 would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of
5 its range.” Compl. ¶ 23 (citing 79 Fed. Reg. 37578). Plaintiffs claim that SPOR is arbitrary and
6 capricious because it does not consider the geographic area the species historically inhabited,
7 renders portions of the definitions of “endangered species” and “threatened species” superfluous,
8 and “sets such a high threshold” to invoke SPOR that it cannot protect species that are not
9 otherwise eligible for listing. *Id.* ¶ 83.

10 Claim Three is also brought under the EPA and APA § 706(2)(A) based on the theory that
11 the Service’s application of the PECE Policy to the BSSG was arbitrary and capricious. *Id.* ¶ 89.
12 The PECE Policy “establishes criteria to be applied by the Service in evaluating whether
13 identified, but not yet implemented, conservation efforts can be considered as part of a listing
14 decision.” *Id.* ¶ 30. The policy considers the certainty of the implementation and the certainty of
15 effectiveness. Plaintiffs claim that the Service misapplied the nine criteria laid out in the PECE
16 Policy to assess the certainty of the implementation of BSSG conservation efforts. *Id.* ¶ 87.
17 Plaintiffs also claim that the Service misapplied the six criteria provided by the PECE Policy for
18 evaluating the certainty of effectiveness of BSSG conservation efforts. *Id.* ¶ 88.

19 **D. The Parties**

20 Plaintiffs are four environmental organizations with tens of thousands of members
21 nationwide. Plaintiff Desert Survivors is an “affiliation of desert lovers” who are “committed to
22 experiencing, sharing, and protecting desert wilderness.” Decl. of Gerald Goss (Dkt. 16-1) at 2.
23 Desert Survivors is headquartered in Oakland and has nearly 400 members in the Northern District
24 of California. *Id.* Members of Desert Survivors have visited the habitat of the BSSG and intend
25 to do so in the future. *Id.* at 3.

26 Plaintiff Center for Biological Diversity (“CBD”) is a non-profit corporation incorporated
27 in California. Decl. of Roman Czebiniak (Dkt. 16-2) at 2. CBD maintains an office in Oakland
28 which “acts as a hub for much the legal and programmatic work at CBD” as well as offices in

1 Humboldt and Marin Counties. *Id.* at 3; Decl. of Peter Galvin (Dkt. 16-3) at 2. CBD has nearly
2 48,000 members nationwide and more than 5,000 members who live in the Northern District of
3 California. Czebiniak Decl. at 3.

4 Plaintiff Western Watersheds Project is a conservation organization headquartered in
5 Idaho. Decl. of Michael Connor (Dkt. 16-4) at 2. It maintains a field office in California. *Id.*
6 Western Watersheds Project has over 1,400 members, 75 of whom live in the Northern District.
7 *Id.*

8 Plaintiff WildEarth Guardians is a non-profit organization that works to “protect and
9 restore the wildlife, wild places, wild rivers, and health of the American West.” Decl. of Bethany
10 Cotton (Dkt. 16-5) at 2. It maintains an office in San Francisco and has more than 4,000 members
11 who live in the Northern District. *Id.*

12 Defendants are the United States Department of the Interior and the United States Fish and
13 Wildlife Service. The Service holds the “primary authority for the day-to-day administration of
14 the ESA with respect to terrestrial species.” Compl. ¶ 16. The challenged rulemaking occurred in
15 the Service’s Pacific Southwest Regional Office in Sacramento and the Reno, Nevada Fish and
16 Wildlife Office. *See* Compl. ¶ 59 (citing 80 Fed. Reg. 22,828, 22,866).

17 **E. The Motion**

18 In the Motion, Defendants ask the Court to transfer this action to the Eastern District of
19 California pursuant to 28 U.S.C. § 1404(a). Defendants contend that both of the requirements for
20 transfer under § 1404(a) are met because: (1) venue is proper in the Eastern District; and (2)
21 transfer is for the “convenience of the parties and in the interests of justice.” 28 U.S.C. § 1404(a).
22 In support of their assertion that venue is proper in the Eastern District of California, Defendants
23 cite the fact that the BSSG “inhabits portions of the Eastern District of California (whereas it
24 inhabits no portions of the Northern District of California), and most of the challenged rulemaking
25 occurred in the Eastern District of California (whereas no rulemaking occurred in the Northern
26 District of California).” Mot. at 6.

27 Second, Defendants argue that the “convenience factors” that courts typically use to
28 determine if transfer would be for the “convenience of the parties and in the interest of justice”

1 mandate transfer to the Eastern District. *Id.* at 4–6. The “convenience factors” include: (1) a
2 plaintiff’s choice of forum, (2) convenience of the parties and witnesses, (3) ease of access to
3 sources of proof, (4) local interest in the controversy, (5) familiarity of each forum with the
4 applicable law, and (6) relative congestion in each forum. *Id.* at 4 (citing *Ctr. For Food Safety v.*
5 *Vilsack*, No. 11-cv-00831, 2011 WL 996343 (N.D. Cal. Mar. 17, 2011)).

6 Defendants claim that factors three, five, and six—ease of access to evidence and
7 witnesses, court congestion, and the forums’ familiarity with the law—are neutral in this case. *Id.*
8 at 14. First, Defendants note that the Plaintiffs’ “claims are likely to be resolved through
9 dispositive briefing” and thus it is unlikely that witnesses or “extra-record fact finding” will be
10 required. *Id.* at 15. Second, Defendants contend there is little difference in the congestion of the
11 two forums; the average time to resolution is less than one month faster in the Northern District.
12 *Id.* at 16 (citing The Administrative Office of the United States Courts, U.S. District Courts—
13 Combined Civil and Criminal Federal Court Management Statistics, United States Courts (June
14 30, 2015), [http://www.uscourts.gov/statistics/table/na/federal-court-management-](http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/06/31-1)
15 [statistics/2015/06/31-1](http://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2015/06/31-1)). Third, since the issue is one of federal law, both forums are presumed to
16 be equally familiar with the applicable statutes. *Id.* at 14.

17 Regarding the first factor, the Plaintiffs’ choice of forum, Defendants assert it is due
18 “minimal deference” as only one of the Plaintiff organizations resides in the Northern District of
19 California and none of the operative facts occurred in this District. *Id.* Defendants claim that all
20 of the operative facts occurred in the Eastern District as it “is the location of the [BSSG], the
21 challenged agency rulemaking, and the localized impacts therefrom.” *Id.* at 8. Defendants further
22 claim that the Northern District has “no particular interest in either the parties or the subject
23 matter.” *Id.* at 9. They argue that “if a ‘significant connection to the activities alleged’ is lacking,
24 then less deference is due ‘even if the plaintiff is a resident of the forum.’” *Id.* at 10 (citing
25 *Chesapeake Climate Action Network v. Exp.-Imp. Bank of the U.S.*, No. 13-cv-03532 (WHA),
26 2013 WL 6057824 (N.D. Cal. Nov. 15, 2013)). Defendants also assert that Plaintiffs’ choice of
27 forum is “less significant” “because ‘a majority of the named plaintiffs do not reside in this
28 district.’” *Id.* at 11 (quoting *Le v. Zuffa*, 108 F. Supp. 3d 768, 779 (N.D. Cal. 2015)).

1 Defendants argue further that there is a “countervailing ‘local interest in having localized
2 controversies decided at home.’” *Id.* at 12 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509
3 (1947)). Defendants claim that “courts in this District routinely grant transfers to the forum that is
4 ‘most affected’ by the case.” *Id.* at 13 (citing *Animal Legal Def. Fund v. U.S. Dep’t of Agric.*, No.
5 CV 12-4407 (SC), 2013 WL 120185 (N.D. Cal. Jan. 8, 2013) (“ALDF”); *Earth Island Instit. v.*
6 *Quinn*, 56 F. Supp. 3d 1110 (N.D. Cal. 2014); *Ctr. for Biological Diversity v. Rural Utils. Serv.*,
7 No. C-08-1240 (MMC), 2008 WL 2622868 (N.D. Cal. June 27, 2008); *Ctr. for Biological*
8 *Diversity v. Kempthorne*, No. C-07-0894 (EDL), 2007 WL 20203515 (N.D. Cal. July 12, 2007)
9 (“*Kempthorne I*”); *Trout Unlimited v. Lohn*, No. 06-VS-904 (RSL), 2006 WL 2927737 (W.D.
10 Wash. Oct. 10, 2006)). Defendants additionally note the Service held two public meetings
11 regarding its rulemaking in the Eastern District, published notice in three newspapers in that
12 district, and received “substantial input . . . from local government entities” in the Eastern District.
13 *Id.* at 12.

14 In their Opposition to the Motion, Plaintiffs argue that the Court should not transfer this
15 action under 28 U.S.C. § 1404(a). Plaintiffs contend that venue is proper in the Northern District
16 and the transfer would not be “for the convenience of parties” or “in the interest of justice” as the
17 convenience factors weigh in favor of retaining this action in the Northern District of California.
18 *See Opp’n* at 2–3.

19 Plaintiffs first contend that venue is proper in the Northern District of California under §
20 1391(e)(1), which provides that venue is proper where the plaintiff resides, because one of the
21 plaintiffs, Desert Survivors, is headquartered in Oakland and therefore is a resident of the Northern
22 District. *Id.* at 2.

23 Plaintiffs then argue that their choice of venue should not be disturbed. *Opp’n* at 3.
24 Plaintiffs note that Defendants bear the burden of proving why their selected forum is
25 inappropriate and “must make a strong showing of inconvenience” to do so. *Id.* at 2 (citing
26 *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986)). They do not
27 contest Defendants’ claim that venue would also be proper in the Eastern District, but instead
28 argue that their choice to litigate in the Northern District is due “substantial deference” because

1 they have chosen to litigate at home. *Id.* at 4. In response to Defendants’ contention that their
2 choice of forum is only due minimal deference, Plaintiffs claim that the exception to the
3 “substantial deference” rule requires both that “the operative facts have not occurred within the
4 forum of original selection *and* that forum has no particular interest in the parties or the subject
5 matter.” *Id.* at 4 (citing *Pac. Car & Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968)).
6 Plaintiffs assert that the standard is not met because the Northern District has a particular interest
7 in the parties and subject matter based on the fact that Desert Survivors is a resident of the District
8 as are the “thousands of [Plaintiffs’] members, supporters, and staff who live in this District and
9 who rely on Plaintiffs to represent their interests in protecting endangered wildlife and public
10 health.” *Id.* at 4–6.

11 Plaintiffs agree with Defendants that some of the convenience factors are neutral,
12 including: ease of access to evidence and witnesses, each forum’s familiarity with the law, and
13 court congestion. *Id.* at 8, 16.

14 They disagree, however, with Defendants’ claim that transfer is warranted because the
15 Eastern District of California has a localized interest in this conflict. *Id.* at 9. Plaintiffs argue that
16 “citizens of other regions and other states have an interest in ensuring the survival of threatened
17 and endangered species, wherever those species may exist” and that Defendants are “ignoring the
18 larger regional and national interests implicated by this action.” *Id.* Plaintiffs claim that “[w]hile
19 individuals in other areas may also have interests in the species and habitats at issue, the courts
20 should not overlook the interests of individuals in other districts to protecting the environment.”
21 *Id.* at 12.

22 Finally, Plaintiffs argue that transfer to the Eastern District would “substantially
23 inconvenience” them. *Id.* at 14. Plaintiffs note that convenience considerations may include
24 balancing the costs to the parties and considering “the relative means of the parties.” *Id.* (citing
25 *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498–99 (9th Cir. 2000); *Bloom v. Express Servs.*,
26 No. C 11-00009 (CRB), 2011 WL 1481402, *6 (N.D. Cal. April 19, 2011)). Plaintiffs claim that a
27 “major factor” in Plaintiffs’ decision to file in the Northern District of California, where their
28 counsel is located, is that “travel costs can accrue to be a substantial drain on [Plaintiffs’]

1 organizational resources.” *Id.* at 15. Plaintiffs Desert Survivors and CBD’s “staff and members
2 wish to attend court hearings in this case” and Plaintiffs lack the “substantial resources [the federal
3 government has] for its staff.” *Id.* Plaintiffs conclude that “transfer of this case to another venue
4 would cost Plaintiffs unnecessary time, inconvenience, and expense” whereas “Defendants do not
5 argue that Plaintiffs’ choice is inconvenient for Defendants.” *Id.* at 1, 15.

6 In response, Defendants assert that Plaintiffs’ claims of inconvenience are unconvincing.
7 Reply Memorandum in Support of Defendants’ Motion to Transfer Venue (“Reply,” dkt. 24) at
8 12. Defendants assert that because this case is likely to be decided on the record, Plaintiffs’ claims
9 of their staff being unable to attend hearings are of little significance. *Id.* at 13–14. Defendants
10 also claim that Plaintiffs’ argument that transfer to the Eastern District would substantially
11 increase Plaintiffs’ costs is “completely conclusory” absent Plaintiffs’ estimate of what those costs
12 are likely to be. *Id.* Further, Defendants claim that Plaintiffs “cannot reasonably claim to be
13 inconvenienced by the transfer” in light of Plaintiffs’ “specific connections” to the Eastern District
14 and frequent litigation there. *Id.* at 14–15.

15 **III. ANALYSIS**

16 **A. Legal Standard**

17 In order to determine if a transfer of venue is appropriate under § 1404(a) courts apply a
18 two-part test. *Ctr. for Biological Diversity v. McCarthy*, No. 14-CV-05138 (WHO), 2015 WL
19 1535594, at *1 (N.D. Cal. Apr. 6, 2015) (citing *Hatch v. Reliance Ins. Co.*, 758 F.2d 409 (9th Cir.
20 1985)). First, courts consider whether the case could have been brought in the proposed transferee
21 district. *Id.* Second, if the case could have been brought in the transferee district, courts
22 determine if the case should be moved to that forum “for convenience of parties and witnesses
23 [and] in the interest of justice.” *Id.*; 28 U.S.C. § 1404(a). Courts in this District typically consider
24 eight factors when weighing the convenience of transfer (the “convenience factors”): (1) the
25 plaintiff’s choice of forum; (2) the convenience of the parties; (3) the convenience of the
26 witnesses; (4) ease of access to evidence; (5) familiarity of each forum with applicable law; (6)
27 feasibility of consolidation of other claims; (7) any local interest in the controversy; and (8) the
28 relative court congestion in each forum. *Id.*

B. Venue Would Be Proper in the Eastern District of California

1 Under § 1391(e)(1), when a United States agency is a defendant in an action venue is
2 proper where (1) “a defendant in the action resides,” (2) “a substantial part of the events or
3 omissions giving rise the claim occurred,” or (3) “the plaintiff resides if no real property is
4 involved in the action.” 28 U.S.C. § 1391(e)(1). In similar environmental protection cases, courts
5 have found that a “substantial part” of the events giving rise to a claim could be found where the
6 protected species is located or where past litigation and agency action relating to the issue
7 occurred. *See Otter v. Salazar*, 718 F. Supp. 2d 62, 63 (D.D.C. 2010) (granting transfer of action
8 relating to listing of slickspot peppergrass as a threatened species under the ESA to the District of
9 Idaho because slickspot peppergrass is only found in a limited area in southwestern Idaho and past
10 litigation relating to listing the peppergrass had occurred there even though the final rule to list the
11 peppergrass was issued in the District of Columbia where the action was originally filed); *Oceana*
12 *v. Bureau of Ocean Energy Mgmt.*, 962 F. Supp. 2d 70, 74 (D.D.C. 2013) (granting transfer of
13 action relating to the environmental effects of the *Deepwater Horizon* oil spill from the District of
14 Columbia to the District of Alabama where a prior suit over the lease of the oil rig had been heard
15 and oil spill impacted local species and resources). A substantial part of the events giving rise to a
16 claim can occur in multiple districts, which, in turn, support venue in more than one place.

17 Here, venue is proper in both the Eastern District and the Northern Districts of California
18 since substantial parts of the events giving rise to the Plaintiffs’ claims occurred in both locations.
19 Past litigation relating to listing the BSSG under the ESA occurred in the Northern District and
20 Defendant’s concede that venue in the Northern District is proper. *See* Compl. ¶ 49; Opp’n at 3.
21 Similarly, Plaintiffs do not contest that venue would be proper in the Eastern District as most of
22 the Service’s decisions, including the challenged Withdrawal, were considered and made at the
23 Service’s regional office in Sacramento in the Eastern District. *See* Opp’n at 3; 80 Fed. Reg.
24 22,828, 22,866. Therefore, this action could have been brought in the proposed transferee district.

C. The Convenience Factors

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27 Of the eight convenience factors that courts typically weigh when determining if transfer is
28 appropriate, the parties have agreed that five of them are neutral or do not apply here. *See* Mot. at

1 14–15; Opp’n at 8, 16.

2 **1. Factors that are Neutral or Do Not Apply**

3 The five factors that are neutral or do not apply are: convenience of the witnesses, ease of
4 access to evidence, the feasibility of consolidation of other claims, each forum’s familiarity with
5 applicable law, and relative court congestion. First, the parties agree that this case is likely to be
6 decided on the motions without any “extra-record fact finding.” *See* Mot. at 15; Opp’n at 8. Thus,
7 convenience of the witnesses and ease of access to evidence are irrelevant to the Court’s
8 consideration. Next, neither party asserts that there are claims with which this case should be
9 consolidated. The parties agree that this case presents a question of federal law with which both
10 the Eastern District and the Northern District are equally familiar, rendering this factor neutral.
11 *See* Mot. at 14; Opp’n at 8. The parties also agree that the relative court congestion between the
12 districts is approximately the same and so this factor is neutral. *See* Mot. at 15; Opp’n at 16.

13 **2. Factors that are Relevant**

14 Three factors remain which are relevant to this Court’s analysis: the convenience of the
15 parties, the Plaintiff’s choice of forum, and local interest in the controversy.

16 **a. Convenience of the Parties**

17 It is inappropriate to grant a motion to transfer where transfer would not minimize overall
18 inconvenience but simply shift the inconveniences of litigating in a non-preferred forum between
19 the parties. *See Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir.
20 1986). When considering the convenience of the parties, courts typically consider the location of
21 the parties relative to the forum and the ease of the parties’ participation in the litigation. *See*
22 *Alaska Wilderness League v. Jewell*, F. Supp. 3d 112, 120 (D.D.C. 2015). But “the location of
23 counsel is not an appropriate factor for the Court to consider when deciding a motion to transfer
24 under § 1404(a).” *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the United States*, No. C 12-
25 6325 (SBA), 2013 WL 5273088, at *6 (N.D. Cal. Sept. 17, 2013) (“*Ex-Im Bank*”) (citing *Clark v.*
26 *Sprint Spectrum L.P.*, No. C 10-03625 (SI), 2010 WL 5173872, at *3 (N.D. Cal. 2010); *Bibo v.*
Federal Express, Inc., No. C07-2505 (TEH), 2007 WL 2972948, at *3 (N.D. Cal. 2007)).

27 The Court finds that the convenience of the parties is a neutral factor in the transfer
28 analysis. The Court finds both parties’ arguments about their staff’s ability to attend hearings

1 unpersuasive. As the parties have agreed, this case is likely to be decided on the administrative
 2 record and it is unlikely that any hearings will be held for the parties’ staff to attend. *See* Reply at
 3 14. As the “location of counsel is not an appropriate factor,” the Court does not give any weight
 4 to Plaintiffs’ argument that requiring Plaintiffs’ counsel to travel to the Eastern District to attend
 5 hearings poses a special inconvenience. *See Ex-Im Bank*, 2013 WL 5273088, at *6. Neither party
 6 has demonstrated that litigating in the Northern District poses any inconvenience that could be
 7 eliminated by transferring the case to the Eastern District. Therefore, the convenience of the
 8 parties is a neutral factor.

9 **b. Plaintiffs’ Choice of Forum**

10 The importance of Plaintiffs’ choice of forum depends on the degree of deference to which
 11 it is entitled. Typically, “substantial deference” is given to the plaintiff’s choice of forum. *Ctr. for*
 12 *Biological Diversity v. McCarthy*, No. 14-CV-05138 (WHO), 2015 WL 1535594, at *3 (N.D. Cal.
 13 Apr. 6, 2015). Under that standard, defendants bear the burden of “mak[ing] a strong showing of
 14 inconvenience to warrant upsetting the plaintiff’s choice of forum.” *Decker Coal*, 805 F.2d at
 15 843. This is especially true where the plaintiff has chosen to bring suit at home. *Ctr. for*
 16 *Biological Diversity v. Lubchenco*, No. C-09-4087 (EDL), 2009 WL 454169, at *4 (N.D. Cal.
 17 Nov. 30, 2009). On the other hand, where “the operative facts have not occurred within the forum
 18 of original selection *and* that forum has no particular interest in the parties or the subject matter,
 19 the plaintiff’s choice is entitled only to minimal consideration.” *Pac. Car & Foundry*, 403 F.2d at
 20 954 (emphasis added); *see also Lubchenco*, 2009 WL 454169, at *4 (denying transfer and noting
 21 that the usual deference to plaintiff’s choice of forum will not be discounted unless both
 22 conditions are fulfilled). Operative facts are those facts that relate to the underlying action giving
 23 rise to the instant issue. *See McCarthy*, 2015 WL 1535594, at *3; *Ctr. for Biological Diversity v.*
 24 *Kemphorne*, No. C 08-1339 (CW), 2008 WL 4543043, at *3 (N.D. Cal. Oct. 10, 2008)
 25 (*“Kemphorne IP”*); *Otter*, 718 F. Supp. 2d at 64. Operative facts in environmental protection
 26 cases are often the location of the protected species or resource, where environmental impacts are
 27 felt, where prior agency rulemaking has occurred, and where prior and related litigation has
 28 occurred. *See McCarthy*, 2015 WL 1535594, at *3; *Kemphorne II*, 2008 WL 4543043, at *3;

1 *Otter*, 718 F. Supp. 2d at 64.

2 Defendants fail to satisfy either of the conditions necessary to discount the “substantial
3 deference” given to the plaintiff’s choice of forum under *Pacific Car & Foundry*.

4 First, Defendants have not established that none of the operative facts occurred in this
5 District. Mot. at 7. It is undisputed that the BSSG is found in the Eastern District of California
6 and that the rulemaking that led to the challenged Withdrawal was also made in the Eastern
7 District. *Id.* at 8. These are not the only relevant facts, however. The place where the legal
8 challenge was developed and related litigation occurred are also relevant operative facts. *See*
9 *Lubchenco*, 2009 WL 454169.

10 In *Lubchenco*, the CBD (also a plaintiff in the instant action) challenged a National Marine
11 Fisheries Service decision not to list the ribbon seal as a threatened or endangered species under
12 the ESA. *Lubchenco*, 2009 WL 454169, at *1. Although the ribbon seal lives in the waters
13 around Alaska and the National Marine Fisheries Service’s decision was made in Alaska, the
14 *Lubchenco* court held that “California has a significant connection to the activities in this case
15 because some of the operative events occurred here, in that the petition drafting process that
16 triggered the status review of the ribbon seal and the [challenged decision], occurred in the
17 Northern District of California.” *Id.* at *4.

18 Plaintiffs’ and other environmental groups’ prior litigation in the Northern District of
19 California is an operative fact that prevents the Court from discounting the substantial deference
20 due to the Plaintiffs’ choice of forum. As in *Lubchenco*, where plaintiffs’ actions triggered the
21 challenged decision, here, all four plaintiffs and other environmental groups were involved in a
22 series of lawsuits to protect the BSSG in the Northern District. *See Lubchenco*, 2009 WL 454169,
23 at *4; 78 Fed. Reg. 64358, 64360–61. The instant action arises from the 2015 Withdrawal of a
24 2013 Proposed Rule to protect the BSSG. Compl. ¶ 59 (citing 80 Fed. Reg. 22,828). The 2013
25 Proposed Rule confirmed a 2010 finding by the Service that the BSSG merited listing under the
26 ESA. *See* Compl. ¶ 52; 78 Fed. Reg. at 64,361. That 2010 finding was the direct result of a 2007
27 suit brought by all four Plaintiffs in this Court. Compl. ¶ 50 (citing 78 Fed. Reg. at 64,360). Due
28 to prior litigation in the Northern District, indeed in this Court, the Defendants have failed to show

1 that no operative facts occurred in the Northern District.

2 Second, Defendants have not demonstrated that the Northern District has “no particular
3 interest in the parties or the subject matter.” *Pac. Car & Foundry*, 403 F.2d at 954. In similar
4 cases involving issues of environmental protection, courts in this district have generally held that
5 even a single plaintiff’s residence here gives rise to a “particular interest.” *See Ex-Im Bank*, 2013
6 WL 5273088, at *5; *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Dep't of Interior*, No. 12-2158
7 (JSC), 2012 WL 3236163, at *1–2 (N.D. Cal. Aug. 6, 2012); *Lubchenco*, 2009 WL 454169, at *4.
8 In *Ex-Im Bank*, the court found that “the Northern District of California has a particular interest in
9 this action because Plaintiffs are residents of California and each has an office in this district as
10 well as members that reside in this district who are concerned about the potential impacts” of the
11 challenged conduct. *Ctr. for Biological Diversity v. Exp.-Imp. Bank of the United States*, No. C
12 12-6325 (SBA), 2013 WL 5273088, at *5 (N.D. Cal. Sept. 17, 2013) (“*Ex-Im Bank*”). Similarly,
13 in *Lubchenco*, the court held that “Plaintiff’s choice of forum weighs heavily because California
14 has an interest in this litigation involving . . . one of its residents.” *Lubchenco*, 2009 WL 454169,
15 at *4. Finally, in *Pacific Coast*, the Fisherman’s Associations challenged the Department of the
16 Interior’s approval of water service contracts that would export water from the San Francisco
17 Bay/Sacramento River Delta to the Central Valley on the basis that the water exports would
18 negatively impact wildlife in the Northern District. *Pac. Coast*, 2012 WL 3236163, at *1–2. The
19 court found that the plaintiff’s choice of forum was entitled to “substantial deference” where “at
20 least one of the plaintiffs, or its members, appears to reside in this District” and the plaintiffs
21 alleged that the challenged contracts would lead to “harm of Plaintiffs’ members in this District.”
22 *Id.* at *4.

23 This is precisely why the Northern District has a “particular interest” in the instant matter.
24 As in *Ex-Im Bank*, *Lubchenco*, and *Pacific Coast*, one of the Plaintiffs resides in this district. *See*
25 *Ex-Im Bank*, WL 5273088, at *5; *Pac. Coast*, 2012 WL 3236163, at *4; *Lubchenco*, 2009 WL
26 454169, at *4. Plaintiff Desert Survivors is headquartered in Oakland. Goss Decl. at 2. Like in
27 *Ex-Im Bank*, where each of the other plaintiffs maintained an office in the Northern District, here,
28 all of the other plaintiffs maintain an office in California of which at least two are located in the

1 Northern District. *See Ex-Im Bank*, WL 5273088, at *2, 5; Goss Decl. at 2; Czebiniak Decl. at 2;
2 Connor Decl. at 2; Cotton Decl. at 2. Similar to *Pacific Coast*, where the court found the
3 Northern District had a particular interest based on the residence of members of the plaintiff
4 organization, here, Plaintiffs have nearly 10,000 total members who live in the Northern District.
5 *See Pac. Coast*, 2012 WL 3236163, at *4; Goss Decl. at 2; Czebiniak at 3; Connor Decl. at 2;
6 Cotton Decl. at 3. These connections are sufficient to establish that the Northern District has a
7 “particular interest” in the parties.

8 Defendants cite to *Le v. Zuffa* for the proposition that if “a ‘significant connection to the
9 activities alleged’ is lacking, then less deference is due ‘even if the plaintiff is a resident of the
10 forum.’” *Zuffa*, 108 F. Supp. 3d at 779. In that case, a class of mixed martial arts athletes brought
11 suit against a mixed martial arts promoter for using anticompetitive practices to maintain a
12 monopoly in the industry. *Id.* at 772–73. There, the court transferred the action from the Northern
13 District of California to the District of Nevada because of a forum selection clause in the athletes’
14 contracts with the promoter and because Nevada was more convenient for the parties and
15 witnesses. *Id.* at 772, 778. *Le* is distinguishable from the instant case because there were fourteen
16 named plaintiffs in *Le*, the majority of whom resided outside the Northern District and had little or
17 no connection to the District at all. *Id.* at 778. That is not the case here, where there are only four
18 plaintiffs—all of whom have significant connections to the Northern District.

19 Because Defendants have failed to show that all of the operative facts occurred outside this
20 district and this district has no particular interest in the parties or the subject matter, the Court
21 finds that Plaintiffs’ choice of forum is entitled to “substantial deference.” Therefore, this factor
22 points away from transfer to the Eastern District of California.

23 **c. Local Interest in the Controversy**

24 Finally, in order to determine if a transfer of venue is appropriate, this Court must consider
25 “the local interest in having localized controversies decided at home.” *Decker Coal Co. v.*
26 *Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). In order to determine if a local
27 interest exists in the transferee district in environmental cases, courts often look to the breadth of
28 the challenged regulation and where the operative facts occurred. *See Ctr. for Biological Diversity*

1 *v. Lubchenco*, No. C-09-4087 (EDL), 2009 WL 454169, at *6–7 (N.D. Cal. Nov. 30, 2009);
 2 *Animal Legal Def. Fund v. U.S. Dep’t of Agric.*, No. CV 12-4407 (SC), 2013 WL 120185, at *5–6
 3 (N.D. Cal. Jan. 8, 2013) (“ALDF”); *Ctr. for Biological Diversity v. McCarthy*, No. 14-CV-05138
 4 (WHO), 2015 WL 1535594, at *5–6 (N.D. Cal. Apr. 6, 2015).

5 In *Lubchenco*, where the CBD challenged the National Marine Fisheries Service’s decision
 6 not to list the ribbon seal as threatened or endangered under the ESA, the court compared the
 7 breadth of the challenged regulation to the challenged regulation in that court’s *Kemphorne I*
 8 decision. *Lubchenco*, 2009 WL 454169, at *6. In *Kemphorne I*, “the issue of oil and gas
 9 activities on Alaskan coastal lands and waters was the focus because the challenged decision
 10 authorized the ‘incidental take’ of polar bears and walrus in the course of these localized economic
 11 activities.” *Id.* at *6. In contrast, the *Lubchenco* plaintiffs’ challenge to the National Marine
 12 Fisheries Service’s decision not to list the ribbon seal under the ESA was based on the “primary
 13 issue of global warming melting the far offshore sea-ice,” which threatened the ribbon seals. *Id.*
 14 In denying the National Marine Fisheries Service’s motion to transfer venue, the court noted that
 15 “it is difficult to conceive of a less localized issue than global climate change.” *Id.* at *7.

16 *ALDF* presents the opposite end of the spectrum from *Lubchenco*. There, plaintiffs
 17 brought suit in the Northern District of California alleging that a single orca whale named “Lolita”
 18 was kept in inhumane conditions in an aquarium in Miami in violation of the Animal Welfare Act.
 19 *ALDF*, 2013 WL 120185, at *1. The court stated, “cases concerning specific environmental
 20 locales or individual animals—as opposed to cases based on more all-encompassing phenomena
 21 like global warming—can give certain districts an especially acute interest in having cases
 22 decide[d] there, where they would have the most localized impact.” *Id.* at *6. The court found
 23 there was some local interest in the issue in the Northern District based on the plaintiff’s residence
 24 in this District but found that there was a stronger interest in Lolita’s home jurisdiction, the
 25 Southern District of Florida. *Id.* at *5–6.

26 In *McCarthy*, the CBD and the Center for Environmental Health brought suit against the
 27 Environmental Protection Agency in the Northern District of California for allegedly failing to
 28 comply with its obligations to approve air quality improvement plans in fifteen other districts

1 under the Clean Air Act. *McCarthy*, 2015 WL 1535594, at *1. There, the court noted that similar
2 “cases in [the Northern District] indicate that transferee forums also have an interest when the
3 operative facts occurred in those forums, and that this interest outweighs [a district’s] interest in
4 cases involving its citizens.” *Id.* at *5. The court found “[the Northern District] has some
5 localized interest in this case because both plaintiffs are California residents . . . whose California
6 members have an interest in traveling to the affected areas.” *Id.* This was offset by “each of the
7 potential [fifteen] transferee forums [that] has a stronger localized interest because those forums
8 are in the states whose air quality is at issue or are located where the actors or omissions at issue
9 allegedly occurred or will occur.” *Id.* The court ultimately declined to transfer the case because
10 the large number of proposed transferee districts diluted the local interest such that the interest in
11 each transferee district was only marginally stronger than in the Northern District of California.

12 Here, the Court concludes that the Eastern District of California has a slightly stronger
13 local interest in this controversy than the Northern District. With respect to the breadth of
14 Plaintiff’s challenge, the challenged Withdrawal is simultaneously national in scope but local in
15 effect; therefore, this factor does not weigh in favor of a strong local interest in either forum. The
16 operative facts linking this action to the Eastern District, however, are decisive in indicating a
17 stronger local interest in the Eastern District.

18 The breadth of the challenged action does not indicate a stronger local interest in either the
19 Northern District or the Eastern District of California. Like in *Lubchenco*, the challenged decision
20 in this case is a federal government agency’s failure to protect a species (rather than an individual
21 animal) under the ESA and is national in scope. *See Lubchenco*, 2009 WL 454169, at *1.
22 Plaintiffs also challenge the Service’s adoption of the SPOR policy, which underlies the
23 challenged Withdrawal and every other listing decision the Service has made since 2014. *See*
24 *Compl.* ¶ 20, 21, 83. But like *ALDF*, Plaintiffs’ challenge primarily concerns “a specific
25 environmental locale” since the BSSG’s habitat is a discrete area within the Eastern District of
26 California and the District of Nevada. *See ALDF*, 2013 WL 120185, at *6; 78 Fed. Reg. 64,358,
27 64,361. Unlike *Lubchenco*, the Plaintiffs’ challenge is not so clearly premised on a “global”
28 issue—instead Plaintiffs are seeking to protect the BSSG from activities occurring entirely within

1 the Eastern District of California and the District of Nevada. *See id.* at *6; 78 Fed. Reg. 64,358,
2 64,361. Because the challenged Withdrawal is national in scope but will have predominantly local
3 effects, the breadth of the challenge does not point to a stronger local interest in one forum over
4 the other.

5 While the breadth of the challenge does not strongly support the conclusion that there is a
6 stronger local interest in the Eastern District, the Eastern District has a slightly stronger local
7 interest in this controversy because the operative facts that occurred in the Eastern District are
8 more immediately related to the instant action than those in the Northern District. There are
9 significant operative facts that connect this action to the Eastern District of California. The
10 Eastern District is home to the BSSG and where the challenged agency rulemaking occurred. 80
11 Fed. Reg. 22,828, 22,866. As part of the rulemaking process, the Service collected public
12 comments on the Proposed Rule, including comments from each of the Boards of Supervisors of
13 Mono, Inyo, and Alpine Counties. Decl. of Ren Lohofner Ex. A (Dkt. 12-1) at 3. The location
14 of the BSSG, the agency rulemaking and the input from local agencies in the Eastern District are
15 more immediately related to the instant action and the challenged Withdrawal than the prior
16 litigation in the Northern District.

17 It is true that there are also operative facts that link this action to the Northern District of
18 California. In particular, the Northern District of California was the home to prior litigation to
19 protect the BSSG and a settlement agreement that contributed to the 2013 Proposed Rule, without
20 which the instant action may not have arisen. Compl. ¶ 49 (citing 71 Fed. Reg. at 76,058). As
21 discussed above, this connection to the Northern District along with the fact that Plaintiffs' have a
22 presence in this District, is sufficient to warrant affording deference to the Plaintiffs' choice of
23 forum.

24 3. Weighing the Relevant Factors

25 “[I]n most environmental cases, the issue of which federal district court should adjudicate
26 the issues is determined by weighing a plaintiff’s choice of forum against the competing interest in
27 ‘having localized controversies decided at home.’” *Kemphorne II*, 2008 WL 4543043, at *5.
28 That is the case here. Having eliminated factors that are neutral or irrelevant, the question before

1 the Court comes down to whether the deference to which the Plaintiffs’ choice of forum is entitled
2 outweighs the localized interest of the Eastern District in this case. The Court finds that it does.

3 In *Kemphorne II*, where the CBD challenged the Service’s determination that the polar
4 bear was threatened, rather than endangered, under the ESA, the court found that even a strong
5 local interest in the controversy in Alaska was not sufficient to overcome the plaintiff’s choice of
6 forum. *Kemphorne II*, 2008 WL 4543043, at *3–4. There, the plaintiffs were “entitled to some
7 degree of deference” in their choice of forum as one plaintiff resided in the Northern District of
8 California and the others maintained offices here. *Id.* at *3. The court held that even though the
9 Northern District “does not have significant ties to the polar bear or to Defendant’s rulemaking
10 activity” and “direct interactions between humans and polar bears occur only in” the District of
11 Alaska, this was insufficient to disturb the plaintiffs’ choice of venue. *Id.* at *4.

12 Similarly, in *Ex-Im Bank*, where the CBD brought suit against the Export-Import Bank of
13 the United States for failing to consider the environmental impacts of financing a natural gas
14 project in Australia, the court denied the defendant’s motion to transfer even though the transferee
15 district had a stronger local interest in the controversy, was the site of the challenged decision, and
16 was the home of the defendants. *Ex-Im Bank*, 2013 WL 5273088, at *7. The CBD acknowledged
17 that residents of the Northern District would not “suffer a unique harm” as a result of the
18 challenged decision, since the challenge was national in scope. *Id.* When weighing the plaintiffs’
19 choice of forum against the transferee district’s local interest, the court held it was not a “sufficient
20 showing to warrant upsetting Plaintiff’s choice of forum.” *Id.* at *8.

21 The facts here are similar to those in *Ex-Im Bank* and *Kemphorne II*. The challenged
22 listing is national in scope and the BSSG is only found in the Eastern District of California and the
23 District of Nevada. In both *Ex-Im Bank* and *Kemphorne II* these ties were insufficient to
24 overcome the deference due to the plaintiffs’ choice of forum; accordingly, the Court concludes
25 that the localized interest in the Eastern District of California is not strong enough to warrant
26 disturbing Plaintiffs’ choice of forum.

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IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Transfer Venue is DENIED.

IT IS SO ORDERED.

Dated: July 15, 2016



JOSEPH C. SPERO
United States Magistrate Judge