EXHIBIT B

South Carolina's [Proposed] Motion to Transfer Venue

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

STATE OF NEVADA, Plaintiff, vs. UNITED STATES; UNITED STATES DEPARTMENT OF ENERGY; RICK PERRY, in his official capacity as Secretary of Energy; NATIONAL NUCLEAR SECURITY ADMINISTRATION; and LISA E. GORDON-HAGERTY, in her official capacity as Administrator of the National Nuclear Security Administration and Undersecretary of Nuclear Security, Defendants	Case 3:18-CV-00569-MMD-CBC **STATE OF SOUTH CAROLINA'S MOTION TO TRANSFER VENUE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

COMES NOW the State of South Carolina (South Carolina), by and through its counsel, and respectfully moves to transfer this action to the United States District Court for the District of South Carolina. In support, South Carolina states as follows: (1) 28 U.S.C.A. § 1404(a) authorizes this Court in the interest of justice to transfer this action to another district where it might have been brought; (2) this action might have been brought in the United States District Court for the District of South Carolina; (3) the interest of justice weighs heavily in favor of transferring this action to the District of South Carolina; and (4) considerations of comity and the orderly administration of justice heavily support transfer. The underlying facts and legal basis for this Motion are more fully set forth in the Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff alleges the Federal Defendants violated the National Environmental Protection Policy Act (NEPA), 42 U.S.C.A. §§ 4321, *et seq.*, implementing regulations promulgated by the Council on Environmental Quality (CEQ) at 40 C.F.R. § 1502.9(c)(1), and United States Department of Energy (DOE) NEPA regulations at 10 C.F.R. § 1021.314(a) when they issued a Supplement Analysis for its Final Complex Supplemental Programmatic Environmental Impact State, dated July 2018. The relief requested by Plaintiff for the alleged violation is a declaration that the Federal Defendants actions have violated NEPA, as well as CEQ and DOE regulations, and an order enjoining them from shipping any plutonium from the Savannah River Site (SRS), located in South Carolina, to DOE's Nevada National Security Site (NNSS).

On December 20, 2017, in an action brought by the State of South Carolina against the Federal Defendants, the United States District Court for the District of South Carolina issued an Injunction Order instructing the Federal Defendants that:

> Within two years from entry of this injunctive order (or at the latest by 1/1/2020), the Secretary of Energy shall, consistent with the

> National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, and other applicable laws, remove from the State of South Carolina, for storage or disposal elsewhere, not less than one metric ton of defense plutonium or defense plutonium materials, as defined by 50 U.S.C. § 2566.

South Carolina v. United States, 2017 WL 7691885, *5 (D.S.C. Dec. 20, 2017). This Injunction Order was issued to enforce the State of South Carolina's statutory rights, 50 U.S.C.A. § 2566(c), to the mandatory removal of not less than one metric ton of defense plutonium or defense plutonium materials from the state for storage or removal elsewhere.

Pursuant to the Injunction Order, the District of South Carolina has ordered the Secretary of Energy to (1) remove one metric ton of defense plutonium from South Carolina and (2) act consistent with NEPA. *South Carolina v. United States*, 2017 WL 7691885 at *5. Importantly, the Injunction Order expressly provides that the South Carolina District Court "shall retain jurisdiction to enforce the terms of the order and to make such further orders as may be necessary or appropriate." *Id.* The terms of the Injunction Order further require the Federal Defendants to submit regular status reports, with each report required to set forth in detail the status and substance of any NEPA review and "any impediments to Defendants' compliance with this injunctive order and any steps Defendants are taking to address such impediment(s)." *Id.* at *6. The Fourth Circuit affirmed the Injunction Order on October 26, 2018. *South Carolina v. United States*, 907 F.3d 742 (4th 2018).

II. ARGUMENT

A. Transfer is appropriate pursuant to 28 U.S.C.A. § 1404(a).

The interests of justice demand that this Court transfer this action to the District of South Carolina, where this action might have been brought and where judicial review and jurisdiction concerning the Federal Defendants' proposed actions continues. "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.A. § 1404(a). A court has discretion to adjudicate a motion for transfer on an "individualized, case-by-case consideration of convenience and fairness." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988); *see also Jones v. GNC Franc., Inc.*, 211 F.3d 495, 498 (9th Cir. 2000).

Factors a court may consider in adjudicating a motion to transfer include:

> (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof.

Jones, 211 F.3d at 498-99. No single factor is dispositive. *Park v. Dole Fresh Vegetables, Inc.*, 964 F. Supp.2d 1088, 1093 (N.D. Cal. 2013) (citations omitted). However, availability of witnesses and proof are unlikely to be factors in a NEPA record review case because the relevant agency action will be evaluated based on a paper record. *Earth Island Inst. v. Quinn*, 56 F. Supp.3d 1110, 1117 (N.D. Cal. 2014). Because the remaining statutory factor, the interest of justice, weighs heavily in favor of transfer, this matter must be transferred to the District of South Carolina.

i. <u>This action could have been brought in the District of South Carolina</u>.

This Action might have been filed in the District of South Carolina. Venue is proper in an action against the United States in "any judicial district in which … a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated." 28 U.S.C. § 1391(e)(1). This Action might have been brought in the District of South Carolina because the plutonium is currently stored in and pending removal from South Carolina, a substantial part of the events related to the

transportation of the plutonium has occurred or will occur within South Carolina, and the Injunction Order prompting the removal of such plutonium and NEPA compliance for the Federal Defendants' actions was issued by the District of South Carolina and that court retains continuing jurisdiction.

ii. <u>The interest of justice demands transfer to the District of South Carolina</u>.

The interest of justice weighs heavily in favor of transferring this action to the district court where an action concerning the Federal Defendants' proposed actions is currently pending. Under the interest of justice factor, courts consider several interests including: (1) the desire to avoid multiplicity of litigation as a result of a single transaction or event; (2) the local interest in deciding local controversies at home; and (3) the relative familiarity of both venues with the governing laws. *Wildearth Guardians v. U.S. Bureau of Land Mgmt.*, 922 F. Supp.2d 51, 54 (D.D.C. 2013) (citations omitted). Here, the public interest weighs in favor of transfer because there is already an action pending regarding the Federal Defendants' proposed actions and South Carolina has a significant local interest in maintaining the Injunction Order issued in the District of South Carolina.

The desire to avoid multiplicity of litigation as a result of a single transaction or event – the Federal Defendants' removal of defense grade plutonium and plutonium materials from South Carolina – weighs heavily in favor of transfer. Transfer under § 1404(a) is the proper vehicle for related cases in different federal courts to be transferred to a single district court. *See Sprint Communications Co., L.P. v. APCC Services, Inc.*, 554 U.S. 269, 291 (2008). "Litigation of related claims in the same tribunal is favored in order to avoid duplicitous litigation, attendant unnecessary expense, loss of time to courts, witnesses and litigants, and inconsistent results." *Cambridge Filter Corp. v. Int'l Filter Co., Inc.*, 548 F. Supp. 1308, 1310 (D. Nev. 1982).

The instant action is clearly related to the claims in the District of South Carolina. Indeed, Nevada seeks to enjoin actions the Federal Defendants are preparing to take to comply with an order from the District of South Carolina. Nevada also seeks declaratory relief requiring the Federal Defendants to do something that the South Carolina District Court has already ordered: comply with NEPA. *South Carolina v. United States*, 2017 WL 7691885, *5. Further, in the Injunction Order, the South Carolina District Court expressly retained jurisdiction over the Federal Defendants and their actions concerning the removal of plutonium from the SRS, including their actions to comply with NEPA. *Id.* Specifically, as the Fourth Circuit recognized in affirming the Injunction Order, the District of South Carolina retained jurisdiction to resolve disputes over the Federal Defendants' compliance with the Injunction Order and to modify the Injunction Order if circumstances warrant. *South Carolina v. United States*, 907 F.3d at 765. Because the South Carolina District Court ordered the Federal Defendants to act in compliance with NEPA, this includes the jurisdiction to answer questions related to their compliance with the provisions of NEPA to effectuate and implement the Injunction Order.

Furthermore, South Carolina has a significant local interest in preserving the Injunction Order and in having any disputes related to the Federal Defendants' proposed actions to comply with that order resolved by the District of South Carolina. South Carolina has a significant statutorily and judicially recognized interest in the Federal Defendants' removal of plutonium from the SRS – the very action Nevada seeks to enjoin. The Federal Defendants have been ordered by Congress and the District of South Carolina to remove one metric ton of plutonium from the state. Despite its clear and express statutory right to removal, *see* 50 U.S.C.A. § 2566(c), South Carolina was required to engage in protracted litigation with the Federal Defendants to secure enforcement of that right, which it obtained in the Injunction Order. While Nevada has articulated an interest in the transfer of the plutonium to their state, that interest can

readily be resolved by the Court that already has adjudicated many of the issues at play in this action and that has expressly retained jurisdiction over issues related to the Federal Defendants' compliance with the Injunction Order. Thus, South Carolina has a very real and significant interest in the Federal Defendants' ability to comply with the Injunction Order and proceed with their current removal plans.

This Court has the authority to transfer this action to the District of South Carolina, where it could have been brought and where another action related to the Federal Defendants' proposed actions is already pending. Because transfer would avoid multiplicity of litigation, and because South Carolina has a unique and significant interest in the District of South Carolina resolving disputes related to the Federal Defendants' removal actions, this Court should grant a transfer pursuant to 28 U.S.C.A. § 1404(a).

B. <u>Considerations of comity and orderly administration of justice support transfer</u>.

Principles of comity and orderly administration of justice also support transferring this matter to the District of South Carolina. Allowing Nevada's action to proceed in this Court has the potential of significantly interfering with an earlier filed action and the resulting Injunction Order. *Treadaway v. Acad. of Motion Picture Arts & Scis.*, 783 F.2d 1418, 1422 (9th Cir. 1986) (internal citations omitted) ("When a court entertains an independent action for relief from the final order of another court, it interferes with and usurps the power of the rendering court just as much as it would if it were reviewing that court's equitable decree."); *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24, S. Atlantic*, 751 F.2d 721, 729 (5th Cir. 1985) ("The federal courts have long recognized that the principle of comity requires federal district courts – courts of coordinate jurisdiction and equal rank – to exercise care to avoid interference with each other's affairs."); *Brittingham v. Comm'r,* 451 F.2d 315, 318 (4th Cir. 1971) ("[C]omity dictates that

courts of coordinate jurisdiction not review, enjoin or otherwise interfere with one another's jurisdiction.").

An inherent conflict will arise if a different court of the same level exercises jurisdiction over an action that impacts the Injunction Order. *See Cont'l Grain Co. v. The FBL-585*, 364 U.S. 19, 26 (1960) ("To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent."). More specifically,

> for a nonissuing court to entertain an action for such relief would be seriously to interfere with, and substantially usurp, the inherent power of the issuing court … to supervise its continuing decree by determining from time to time whether and how the decree should be supplemented, modified or discontinued in order properly to adapt it to new or changing circumstances.

Lapin v. Shulton, Inc., 333 F.2d 169, 172 (9th Cir. 1964); *see Feller v. Brock*, 802 F.2d 722, 730–31 (4th Cir. 1986) (one district court's injunction conflicted with another district court's injunction, and the latter-issued injunction was an abuse of discretion because it interfered with the prior injunction); *Exxon Corp. v. U.S. Dep't of Energy,* 594 F. Supp. 84, 89-91 (D. Del. 1984) (holding that a district court should not exercise its jurisdiction over the action because in order to do so it would have to interfere with the jurisdiction and outstanding injunction of a court of coordinate standing); *see Baliles v. Donovan*, 549 F. Supp. 661, 667 n.6 (W.D. Va. 1982) (issue of comity arises where plaintiff seeks a declaration that would interfere with another district's injunction in a practical way); *see also Kutob v. L.A. Ins. Agency Franchising, LLC*, No. 218CV01505APGPAL, 2018 WL 4286171, at *2 (D. Nev. Sept. 7, 2018) (holding that the first-filed rule applied and that "one court resolving these issues will avoid the potential embarrassment of two courts reaching inconsistent decisions on the same issue"); *Harper v. Trans Union, LLC*, No. CIV.A. 04-3510, 2005 WL 697490, at *2 (E.D. Pa. Mar. 24, 2005) ("One district court should not review the decision of another district court.").

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This does not leave Nevada without an avenue to pursue its claims. The issues presented by Nevada may be resolved by the District of South Carolina, which has already ordered the Federal Defendants to comply with NEPA in removing plutonium from the SRS. The Injunction Order specifically requires removal of one metric ton of plutonium "consistent with NEPA" and the District of South Carolina "retain[ed] jurisdiction to enforce the terms of [the Injunction Order] and to make such further orders as may be necessary or appropriate." *South Carolina v. United States*, 2017 WL 7691885 at *5. Thus, the District of South Carolina already has directed compliance with NEPA by the Federal Defendants and, given the existence of the Injunction Order, Nevada should advance its claims and seek its requested relief in the District of South Carolina – the Court best situated to adjudicate the competing federal and state interests in the context of its own Injunction Order. *See Mullis v. U.S. Bankr. Court for Dist. of Nevada*, 828 F.2d 1385, 1393 (9th Cir. 1987) ("In addition, were the district court to grant the injunctive relief appellant here requests, it would in essence be issuing a writ of mandamus to the bankruptcy court and the district court in the underlying proceeding. A district court lacks authority to issue a writ of mandamus to another district court.") (internal citation omitted); *In re McBryde*, 117 F.3d 208, 225 n.11 (5th Cir. 1997) ("[T]he structure of the federal courts does not allow one judge of a district court to rule directly on the legality of another district judge's judicial acts or to deny another district judge his or her lawful jurisdiction.") (internal quotation marks and citation omitted); *Dhalluin v. McKibben*, 682 F. Supp. 1096 (D. Nev. 1988) (same).

But if this Court proceeds and grants the relief requested by Nevada – an order enjoining the Federal Defendants from proceeding with their plans for the removal of plutonium from the SRS – it would significantly impair the Federal Defendants' ability to comply with the injunction issued by the South Carolina District Court, which requires removal of the plutonium from South Carolina within two years of the date of the injunction. *South Carolina v. United States*, 2017

WL 7691885 at *5. Transferring this matter to the District of South Carolina would allow that Court to apply its order and evaluate all the interests at issue in this case, including those of Nevada, South Carolina, and the Federal Defendants. But injunctive relief from this Court in favor of Nevada would undermine and contravene the Injunction Order, and could render the relief ordered from the District of South Carolina a nullity. That, in turn, may then require the District of South Carolina to take action to preserve the integrity of the Injunction Order and its jurisdiction, which may render this Court's judgment a nullity. In short, Nevada's action presents a very real possibility of establishing a cascading conflict between two district courts of equal rank in the federal system.

This scenario of interference and dispute between two district courts that Nevada creates in this Action is the scenario the Ninth Circuit has unequivocally advised district courts to decline to exercise jurisdiction over.

> When an injunction sought in one federal proceeding would interfere with another federal proceeding, considerations of comity require more than the usual measure of restraint, and such injunction should be granted in only the most unusual cases.… In such cases the proper exercise of restraint in the name of comity keeps to a minimum the conflicts between courts administering the same law, conserves judicial time and expense and has a salutary effect upon the prompt and efficient administration of justice.

Bergh v. Washington, 535 F.2d 505, 507 (9th Cir. 1976); *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 408 (5th Cir. 1971) ("When a court is confronted with an action that would involve it in a serious interference with or usurpation of this continuing power, considerations of comity and orderly administration of justice demand that the nonrendering court should decline jurisdiction …."). Because this action will seriously interfere with the South Carolina District Court's continuing jurisdiction over the Injunction Order, and potentially compliance with the Injunction Order, this Court should decline to exercise jurisdiction by transferring it to the

District of South Carolina for adjudication, which places the relief sought by Nevada in the context of the existing case and legal obligations of the Injunction Order.

III. CONCLUSION

For the reasons set forth above, the State of South Carolina respectfully requests that this Court issue an order transferring this action to the United States District Court for the District of South Carolina and such other relief as the Court may deem just and proper.

DATED this 3rd day of January 2019.

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CERTIFICATE OF SERVICE

The undersigned, an employee of Dickinson Wright PLLC, hereby certifies that on the 3rd day of January 2019, pursuant to Fed. R. Civ.P. 5(b) a copy of **STATE OF SOUTH CAROLINA'S MOTION TO TRANSFER VENUE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** was served electronically to all parties of interest through the Court's CM/ECF system as follows:

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