EXHIBIT 1

Plaintiff's [Proposed] Opposition to State of South Carolina's [Proposed] Motion to Transfer Venue and Memorandum of Points and Authorities in Support Thereof

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

STATE OF NEVADA,

Plaintiff,

vs.

UNITED STATES; *et al.*,

Defendants.

Case No. 3:18-cv-00569-MMD-CBC

PLAINTIFF'S OPPOSITION TO STATE OF SOUTH CAROLINA'S MOTION TO TRANSFER VENUE

Plaintiff, the State of Nevada, by and through legal counsel, hereby files its Opposition to the State of South Carolina's ("South Carolina") Motion to Transfer Venue and Memorandum of Points and Authorities in Support Thereof ("Motion to Transfer Venue"). This Opposition is based on the attached points and authorities and all pleadings on file, and the exhibits attached thereto.

South Carolina's request for this Court to exercise its discretion to transfer this case to the United States District Court for South Carolina is entirely unjustified. South Carolina's Motion fails to even make the threshold showing that Nevada could have properly brought this action in the United States District Court for South Carolina. *AFG, LLC v. Attia*, 2011 WL 1807138, at *1 (D. Nev. May 11, 2011). Further, private and public interests, such as Nevada being able to litigate this case in the jurisdiction that would experience the environmental impacts of DOE's proposed actions, strongly weigh in favor of maintaining this court as venue. *The Wilderness Soc. v. Babbitt*, 104 F. Supp. 2d 10, 12 (D.D.C. 2000). For these reasons, Plaintiff requests that this Court deny South Carolina's Motion to Transfer Venue.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL AND PROCEDURAL HISTORY

Defendants, the United States Department of Energy, Rick Perry, Secretary of Energy in his official capacity, the National Nuclear Security Administration, and Lisa E. Gordon in her official capacity as Administrator of the National Nuclear Security Administration (collectively "DOE" or "U.S. Defendants"), propose to ship one metric ton of plutonium from DOE's Savannah River Site in South Carolina, to DOE's Nevada National Security Site ("NNSS"), located approximately 90 miles northwest of the City of Las Vegas, Nevada. *See* Complaint (ECF No. 1) at ¶ 2. The material DOE proposes to ship is primarily plutonium-239, a fissile material that is toxic to humans. *Id.* ¶ 4. Nevada will suffer irreparable harm due to DOE's failure to adequately describe its proposed action as required by the National Environmental Policy Act ("NEPA"), failure to prepare an environmental impact statement ("EIS") and failure to provide Nevada with an

opportunity to meaningfully participate in the NEPA process. *Id.* ¶ 42. Plaintiff contends that DOE's proposed action will result in increased radiation doses to Nevada citizens and would, in some circumstances, lead to contamination of the lands and the groundwater of Nevada with radioactive materials. *Id.* at ¶ 16.

In early 2000, DOE decided to construct and operate a mixed plutonium-uranium oxide nuclear fuel fabrication facility at DOE's Savannah River Site in South Carolina. *Id.* at ¶ 17. By statute, if DOE's mixed oxide fuel ("MOX") objective was not achieved by January 1, 2014, then "the Secretary shall remove" from South Carolina "not less than one metric ton of defense plutonium" by no later than January 1, 2016. *Id.* at ¶ 18; *see also* 50 U.S.C. § 2566(c)(1). The statute further requires that removal of the defense plutonium be consistent with NEPA and all other applicable laws. DOE did not meet its MOX production objective by January 1, 2014, or any time thereafter. *See South Carolina v. U.S.*, 2017 WL 7691885 at *1 (D.S.C. Dec. 20, 2017), *aff'd*, 907 F.3d 742 (4th Cir. 2018). As a result, on February 9, 2016, South Carolina initiated a lawsuit (the "South Carolina case") against the underlying U.S. Defendants,[1] requesting that the United States District Court for South Carolina require DOE to remove the defense plutonium from South Carolina. *Id.*

On December 20, 2017, the United States District Court for South Carolina issued an injunction against the U.S. Defendants. *Id.* at *5. The court ordered that "the Secretary of Energy shall, consistent with [NEPA] and all other applicable laws, remove from the State of South Carolina, for storage or disposal elsewhere, not less than one metric ton of defense plutonium." *Id.* The court's order provides only that "this court shall retain jurisdiction to enforce the terms of this injunctive order and to make such further orders as may be necessary or appropriate." *Id.* South Carolina requested that the court order DOE "to initiate a NEPA review within 60 days after the injunction is ordered," but the court declined this request. *Id.* at 4. The court understood the request "as directing

[1] In the South Carolina case, the plaintiff listed Lt. General Frank G. Klotz in his official capacity as Administrator of the National Nuclear Security Administration as a Defendant. Lisa E. Gordon succeeded Mr. Klotz on February 16, 2018, and is therefore a Defendant in the present case.

the Secretary on *how* to accomplish the removal task, which the court must avoid." *Id.* Instead, the court elected "to abide by the language of the statute in this regard and order that the Secretary shall, consistent with NEPA and other applicable laws, remove from South Carolina for storage or disposition elsewhere one metric ton of defense plutonium." *Id.* at *4. On October 26, 2018, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's decision. *South Carolina v. U.S., et al.*, 907 F.3d 742 (4th Cir. 2018).

On August 28, 2018, DOE informed Nevada that it would soon post a supplement analysis to support the proposed shipment of one metric ton of plutonium to Nevada. *See* Complaint (ECF No. 1) at ¶ 40. On August 30, 2018, DOE issued its Supplement Analysis for the Removal of One Metric Ton of Plutonium from the State of South Carolina to Nevada, Texas, and New Mexico (the "SA"). *Id.* The SA proposed that "up to one metric ton of plutonium would be transported from SRS to the Device Assembly Facility" at NNSS. *See* Exhibit A to Plaintiff's Complaint (ECF No. 1-1) at 13. In the SA, NNSA concluded that "there are no substantial changes in the proposed action that are relevant to environmental concerns or significant new circumstances or information relevant to environmental concerns that would supplement or require a new environmental analysis." *Id.* at iii.

On November 30, 2018, Plaintiff filed its Complaint against Defendants, which alleged that: (1) Defendants violated NEPA; (2) Defendants violated the Council on Environmental Quality NEPA Regulations; and (3) Defendants violated their own regulations. Concurrent with the filing of its Complaint, Plaintiff also filed a Motion for Preliminary Injunction. Notably, Nevada's Complaint and Motion for Preliminary Injunction relate **only to the DOE's proposed action to ship plutonium *to Nevada***. The Motion for Preliminary Injunction does not request that this Court require DOE to retain the plutonium in South Carolina or ship it to any other specific state.

On January 3, 2019, South Carolina filed its Emergency Motion to Intervene and Memorandum of Points and Authorities in Support Thereof. South Carolina's Motion to Intervene included a proposed Motion to Transfer Venue.

II. LEGAL ANALYSIS

28 U.S.C. § 1404(a) provides that "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." "The purpose of 28 U.S.C. § 1404(a) is to prevent the waste of time, energy, and money and to protect litigants, witnesses, and the public against unnecessary inconvenience and expense." *Morse v. Ten X Holdings, LLC*, 2017 WL 4079264, at *2 (D. Nev. Sept. 13, 2017).

"The moving party bears the burden of establishing that the proposed district is a more appropriate forum for the action." *Port of Subs, Inc. v. Tahoe Inv., Inc.*, 2016 WL 6561560, at *2 (D. Nev. Nov. 3, 2016). "The district court has discretion to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness." *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000). "The moving party must first show that the action could have been brought in the transferee district." *AFG, LLC v. Attia*, 2011 WL 1807138, at *1 (D. Nev. May 11, 2011). Once the court has made this threshold determination, it "must balance a number of case-specific factors which include the private interests of the parties as well as public interests such as efficiency and fairness." *The Wilderness Soc. v. Babbitt*, 104 F. Supp. 2d 10, 12 (D.D.C. 2000).

A. South Carolina Has Failed to Make the Threshold Showing that Nevada Could Have Properly Brought this Action in the United States District Court for South Carolina.

"The moving party must first show that the action could have been brought in the transferee district." *AFG, LLC v. Attia*, 2011 WL 1807138, at *1 (D. Nev. May 11, 2011). 28 U.S.C. § 1391(b)(2) provides that "a civil action may be brought in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated."

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This case is only tangentially related to South Carolina, and it would have been inappropriate for Nevada to have brought this case within that district. This case relates only to DOE's proposed action of transporting defense plutonium to Nevada for indefinite "staging." The South Carolina case relates to DOE's compliance with 50 U.S.C. § 2566(c)(1), a statute specifically created to deal with MOX production in South Carolina. *See South Carolina v. U.S.*, 2017 WL 7691885 at *1 (D.S.C. Dec. 20, 2017), *aff'd*, 907 F.3d 742 (4th Cir. 2018). The only factual connection between the two cases is that the plutonium DOE is proposing to ship to Nevada is currently being stored in South Carolina. Although the plutonium may be coming from South Carolina, that fact is unrelated to the focus of Plaintiff's claims. Plaintiff primarily asserts a case based on NEPA. This case will involve assessment of all the environmental impacts that DOE's proposed action will have on Nevada. If the plutonium in question was to be transported from any other state in the country, rather than South Carolina, it would make no difference in the Plaintiff's case. Thus, South Carolina's loose factual connection to this case is secondary to the NEPA-based case that Plaintiff will present.

Additionally, the fact that South Carolina has secured a district court order requiring DOE to remove one metric ton of defense plutonium by January 1, 2020, does not abrogate any law with which DOE must comply with in removing the plutonium. The Court will not apply any less stringent NEPA standard to ensure that DOE can abide by the South Carolina court's injunction. Ultimately, the South Carolina court's injunction should be *irrelevant* in determining whether DOE complied with NEPA in this case.

For these reasons, it would have been inappropriate for Nevada to file this case in the United States District Court for South Carolina under 28 U.S.C. § 1391(b)(2). Therefore, this Court should deny South Carolina's Motion to Transfer Venue for failing to meet its threshold burden.

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B. Private and Public Interests Weigh in Favor of Maintaining this Court as the Venue for this Case.

Even if this Court finds that South Carolina has met its threshold burden of establishing that Nevada could have brought this case in South Carolina, the interests of the parties and the public weigh in favor of maintaining the current venue. "In exercising its broad discretion under section 1404(a), the court must balance a number of case-specific factors which include the private interests of the parties as well as public interests such as efficiency and fairness." *The Wilderness Soc. v. Babbitt*, 104 F. Supp. 2d 10, 12 (D.D.C. 2000).

1. Private Interests

"Private interest considerations include: (1) the plaintiffs' choice of forum, unless the balance of convenience is strongly in favor of the defendants; (2) the defendants' choice of forum; (3) whether the claim arose elsewhere; (4) the convenience of the parties; (5) the convenience of the witnesses, but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and (6) the ease of access to sources of proof." *Id.*

"The Ninth Circuit has held that plaintiff's choice of forum should rarely be disturbed." *GNLV, Corp. v. Se. Amusement, Inc.*, 2015 WL 13678048, at *5 (D. Nev. Mar. 27, 2015). In the present case, Plaintiff has chosen Nevada as its forum. Nevada is where DOE proposes to transport the plutonium at issue. *See* Complaint (ECF No. 1) at ¶ 2. The plutonium would then be "staged" in Nevada for an indefinite period of time. *Id.* DOE's proposed actions would result in Nevada's citizens being exposed to increased radiation doses. *Id.* at ¶ 16. Further, Nevada's lands and groundwater may be contaminated with radioactive materials. *Id.* With these considerations in mind, Plaintiff determined that Nevada was the most appropriate forum for this case. Plaintiff's choice is entitled to deference under 28 U.S.C. § 1404(a).

The next private consideration examines Defendants' choice of forum. "The defendant must make a strong showing of inconvenience to warrant upsetting the

plaintiff's choice of forum." *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986). In the present case, only South Carolina, the Intervenor-Defendant, has stated any inclination to transfer venue. Yet, South Carolina's Motion to Transfer Venue provides no showing of inconvenience to South Carolina. South Carolina has already retained local counsel to defend the action in Nevada. Therefore, South Carolina has failed to make a strong showing of inconvenience as required to upset the Plaintiff's choice of forum.

The third private interest consideration looks at "whether the claim arose elsewhere." *The Wilderness Soc. v. Babbitt*, 104 F. Supp. 2d 10, 12 (D.D.C. 2000). The claims in this case arise directly out of DOE's decision to transport plutonium to Nevada for "staging." Although the plutonium may be coming from South Carolina, that fact is ancillary to the focus of Plaintiff's claims. Plaintiff primarily asserts a case based on NEPA. This case will involve assessment of all environmental impacts that DOE's proposed action will have on Nevada. If the plutonium in question were to be transported from any other state in the country, rather than South Carolina, it would have almost no impact on the Plaintiff's case. Thus, Nevada's claim arises out of DOE's decision to transport and store defense plutonium in Nevada, regardless of where that plutonium is coming from.

The only other relevant private interest consideration is the convenience of the witnesses. *The Wilderness Soc. v. Babbitt*, 104 F. Supp. 2d 10, 12 (D.D.C. 2000). "The convenience of witnesses is of considerable importance in the determination of whether to transfer to another federal district." *Strack v. Morris*, 2015 WL 4647880, at *10 (D. Nev. Aug. 5, 2015). In this case, most of the likely witnesses will be in Nevada. Plaintiff will likely present witnesses to testify regarding: (1) transportation issues within Nevada that Defendants failed to address in accordance with NEPA; (2) Nevada's topography, specifically at NNSS, the proposed site of indefinite "staging;" and (3) Nevada state government witnesses with direct knowledge of conversations with DOE prior to the Complaint being filed. This is not an exhaustive list of witnesses, but rather an example

of testimony that will be relevant to the present case. Since this case will center on the environmental impacts to Nevada likely to result from DOE's proposed actions, this factor weighs heavily in maintaining Nevada as the forum to resolve this case.

2. Public Interests

In addition to the private interest factors listed above, the court may consider public factors and the interest of justice. *AFG, LLC v. Attia*, 2011 WL 1807138, at *1 (D. Nev. May 11, 2011). "Under the interest of justice factor, courts consider several public 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).

South Carolina's Motion to Transfer Venue argues that allowing this action to remain in Nevada would result in multiplicity of litigation. *See* South Carolina's Motion to Transfer Venue at 4. Once again, South Carolina overstates that connection between the present case and the South Carolina case. This case relates only to DOE's proposed action of transporting plutonium to Nevada for indefinite "staging." The South Carolina case relates to DOE's compliance with 50 U.S.C. § 2566(c)(1), a statute specifically created to deal with MOX production in South Carolina. *See South Carolina v. U.S.*, 2017 WL 7691885 at *1 (D.S.C. Dec. 20, 2017), *aff'd*, 907 F.3d 742 (4th Cir. 2018). The South Carolina case contained no discussion of the actual environmental impacts of transporting the plutonium or staging the plutonium in Nevada. *Id.* In fact, the court cautioned that it must not order DOE regarding how or where it must ship the plutonium. *Id.* at *4 (the court stated it must avoid "directing the Secretary on *how* to accomplish the removal task"). Instead, the court only stated that the plutonium must be stored or disposed of "elsewhere." *Id.* at *5. Thus, although the two cases are tangentially related, retaining the current venue would not result in multiplicity of litigation. Moreover, South Carolina has failed to identify any meaningful way that the United States District Court for South

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Carolina is any better situated than this Court to hear a case revolving around environmental impacts to Nevada.

Next, South Carolina's Motion to Transfer Venue argues that the principle of comity supports venue transfer by again misstating Nevada's request for a preliminary injunction. South Carolina's Motion states, "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." *See* Motion to Transfer Venue at 5. Again, Nevada's Complaint and Motion for Preliminary Injunction relate **only to the DOE's proposed action to ship plutonium *to Nevada***. The Motion for Preliminary Injunction does not request that this Court require DOE to retain the plutonium in South Carolina or ship it to any other specific state. To support its comity argument, South Carolina cites to various cases that stand for the proposition that comity requires courts to "avoid the potential embarrassment of two courts reaching inconsistent decisions on the same issue." *See* South Carolina's Motion to Transfer Venue at 7 (*quoting Kutob v. L.A. Ins. Agency Franchising, LLC*, 2018 WL 4286171 at *2 (D. Nev. Sept. 7, 2018)). However, this argument misses the point that the present case and the South Carolina case do not involve the same issue, nor does this case risk inconsistent decisions between courts.

Moreover, the South Carolina court's existing injunction requiring DOE to remove one metric ton of plutonium by January 1, 2020, should have no bearing on the Plaintiff's case. 50 U.S.C. § 2566, the statute which requires removal of the plutonium from South Carolina, provides that removal shall be "consistent with the National Environmental Policy Act of 1969 and other applicable laws." The fact that South Carolina has secured a district court order requiring removal by January 1, 2020, does not have any impact on the rules that DOE must comply with to remove the plutonium. No less stringent NEPA standard is applied to ensure that DOE can comply with the South Carolina court's injunction. Ultimately, the South Carolina court's injunction should be *irrelevant* in determining whether DOE complied with NEPA in this case.

Lastly, South Carolina argues that the United States District Court for South Carolina has retained jurisdiction of NEPA compliance for plutonium removal. *See* South Carolina's Motion to Intervene at 5 ("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"). This is a mischaracterization of the court's order. The court's order provides only that "this court shall retain jurisdiction to enforce the terms of this injunctive order and to make such further orders as may be necessary or appropriate." *South Carolina v. U.S.*, 2017 WL 7691885, at *5 (D.S.C. Dec. 20, 2017). South Carolina requested that the court order DOE "to initiate a NEPA review within 60 days after the injunction is ordered," but the court declined this request. *Id.* at 4. The court understood the request "as directing the Secretary on *how* to accomplish the removal task, which the court must avoid." *Id.* Instead, the court elected "to abide by the language of the statute in this regard and order that the Secretary shall, consistent with NEPA and other applicable laws, remove from South Carolina for storage or disposition elsewhere one metric ton of defense plutonium." *Id.* at *4. *See* 50 U.S.C. § 2566(c) ("If the MOX production objective is not achieved by January 1, 2014, the Secretary shall, consistent with the National Environmental Policy Act of 1969 and other applicable laws, remove from State of South Carolina…"). Thus, the South Carolina court's injunction does not retain jurisdiction over all NEPA issues involved in shipping the plutonium, and the court recognized that it would be inappropriate to do so.

III. CONCLUSION

Ultimately, South Carolina has failed to show that this Court should exercise its discretion to transfer this case to the United States District Court for South Carolina. First, South Carolina's Motion fails to make the threshold showing that Nevada could

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have properly brought this action in the United States District Court for South Carolina. Additionally, private and public interests weigh in favor of maintaining this Court as the venue for this case. For these reasons, Plaintiff requests that this Court deny South Carolina's Motion to Transfer Venue.

DATED this 9th day of January, 2019.

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