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**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

The Save the Peaks Coalition; Kristin  
Huisinga; Clayson Benally; Sylvan Grey;  
Don Fanning; Jeneda Benally; Frederica  
Hall; Berta Benally; Rachel Tso; Lisa Tso,

Plaintiffs,

v.

U.S. Forest Service; Nora Rasure (in her  
official capacity as Forest Supervisor for the  
Coconino National Forest),

Defendants.

Case No. CV 09-08163-PCT-MHM

**RESPONSE IN OPPOSITION TO  
DEFENDANTS' MOTION TO  
TRANSFER TO THE HONORABLE  
PAUL G. ROSENBLATT**

On October 16, 2009, Defendants, the U.S. government, filed, *inter alia*, Notices of Appearance in a case that has been closed since 2006. This strained legal machination was intended to support the government's apparent effort to "Judge shop." Having appeared in a closed case, the government filed a Motion to Transfer the instant matter to Judge Rosenblatt, pursuant to Local Rule 42.1(a)(1) and Judge Rosenblatt presided over the matter that was closed in 2006. The plain language of Rule 42(a) of the Federal Rules of Civil Procedure, as well as Local Rule 42.1(a) ("Consolidation of Related Cases"), however, makes clear that the rule only applies to cases currently pending before the Court. LRCiv

1 42.1(a) (öWhenever two or more cases are pending before different Judges. . .ö); *See, also*  
2 *e.g. Pan American World Airways v. U.S. Dist. Court*, 523 F.2d 1073, 1080 (9<sup>th</sup> Cir. 1975)  
3 (öThe powers conferred by Rule 42 are available only when actions involving a common  
4 question of law or fact are pending before the court.ö); *Oregon Egg Producers. v. Andrew*,  
5 458 F.2d 382, 383 (9<sup>th</sup> Cir. 1972) (öRule 42 applies to cases that are properly before the same  
6 court. . . ö); *Owen v. Labor Ready Inc.*, 146 Fed.Appx. 139, 141, 2005 WL 1994417, \*\*1  
7 (9<sup>th</sup> Cir. 2005) (Same). Defendantsø assertion, that öthe Court has broad discretion to transfer  
8 under Local Rule 42.1,ö is true. *See* Defendantsø Memorandum In Support of Motion to  
9 Transfer at 4. Local Rule 42.1 (öConsolidation of Related Casesö), however, is not  
10 applicable to the instant case.  
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13 Indeed, applicable law does not provide an avenue for the filing of a Notice of  
14 Appearance in a case that has been closed for three years. Neither Rule 42, nor any other  
15 rule or statute, authorizes the consolidation and/or transfer of a case to a particular judge  
16 selected by one of the parties, when there is no related case pending, venue is proper, and the  
17 party is not seeking recusal.  
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20 **A. In Arizona Neither a Party Nor a Judge Can Reassign a Matter to a Specific**  
21 **Judge.**

22 Local Rule 3.8 provides, in pertinent part, that:

23 [C]ivil cases . . . shall be assigned among the Judges of the division by the  
24 Clerk by automated random selection and in a manner so that neither the Clerk  
25 nor any parties or their attorneys shall be able to make a deliberate choice of a  
26 particular Judge for a particular case. . .

1 LRCiv 3.8(a). This random case assignment system was expressly approved by the judges in  
2 accordance with the statutory command found in 28 U.S.C. § 137 (öThe business of a court  
3 having more than one judge shall be divided among the judges as provided by the rules and  
4 orders of the court.ö). There is no extant authority for a judge of this court to unilaterally  
5 make a decision concerning case assignments. *See, U.S. v. Phillips*, 59 F.Supp.2d 1178,  
6 1183 (D. Utah 1999); *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100, 1103 (10<sup>th</sup> Cir. 1972)  
7 (The Chief Judge cannot unilaterally reassign a case under the terms of 28 U.S.C. § 137).  
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10 This mandatory random assignment process prevents judge shopping, enhances public  
11 confidence in the assignment of cases, and protects the integrity of the judicial system. *U.S.*  
12 *v. Phillips*, 59 F.Supp.2d at 1180 (citations omitted). The requisite random assignment of  
13 cases should not, and indeed cannot, be disregarded at the request of a party.<sup>1</sup>  
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15 **1. U.S. v. Phillips, 59 F.Supp.2d 1178 (D. Utah 1999) is on Point and**  
16 **Instructive.**

17 In *Phillips*, the United States sought the conviction of the same defendants in a prior  
18 case. The prior case was dismissed without prejudice. Twelve days after the dismissal of the  
19 first case, the present indictment was filed. *Id.* at 1181. The case was assigned pursuant to  
20 the random assignment process of the Court. The United States moved the Court to  
21 transfer/reassign the case to the judge that had heard the first case because, in part,  
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24 <sup>1</sup> Local Rule 3.8(b) provides for the reassignment of a case (using a random process) in  
25 exigent circumstances. The existence of an express Local Rule permitting a limited  
26 deviation from the case assignment process, further militates against a finding that the Court  
has any inherent authority to reassign a case at the request of a party. LRCiv. 3.8(b); *U.S. v.*  
*Phillips*, 59 F.SUPP.2d at 1182.

1 assignment to any other judge would entail substantial duplication of labor and resources.  
2 *Id.* In its Motion for Reassignment, the United States conceded that no express rule covered  
3 the relief it sought. Thus, the government relied on rules claimed to be analogous to provide  
4 some guidance. In the alternative, the government asserted the inherent power of the court to  
5 grant the requested transfer. The Court rejected each of these asserted bases for the transfer  
6 of a case to a particular judge.  
7

8 The Court, based on an analysis of local rules that mirror Arizona's local rules, found,  
9 *inter alia*, that: (1) Rule 42 (Consolidation of Related Cases) applies only when there is  
10 more than one case pending (*Id.* at 1182-1183); (2) the Court does not have the inherent  
11 authority to unilaterally reassign a case to a particular judge even though it may have been  
12 done previously (*Id.* at 1183); and (3) there is no authority in the local rules or elsewhere for  
13 a judge to reassign a case at the request of a party. *Id.* at 1183.  
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16 Notwithstanding the foregoing, the Court addressed, and specifically rejected, the  
17 government's assertion, that the requested judge who supervised the case for nearly two  
18 years . . . may be better equipped to handle the case because he is familiar with the issues  
19 related to the case. . . *Id.* at 1184. According to the Court:  
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21 [t]he United States Supreme Court has recognized that [j]udges, if faithful to  
22 their oath, approach every aspect of each case with a neutral and objective  
23 disposition. They understand their duty to render objective decisions upon a  
24 proper record and to disregard earlier judicial contacts with a case or party.  
25 *Liteky v. U.S.*, 510 U.S. 540, 561-62 (1994) (Kennedy, Blackmun, Stevens, and  
26 Souter, JJ., concurring). Thus, even if this case had been assigned to, or is  
reassigned to, the requested judge, any special knowledge he may have gleaned  
from supervising the dismissed criminal case, should be put aside or  
disregarded for purposes of this case. *See id.* at 562-63. If not, as suggested

1 by justices Kennedy, Blackmun, Stevens and Souter, he should heed his  
2 judicial oath and seek recusal. *See id.* at 563. Thus, any familiarity that  
3 another judge, including the requested judge, may have with the issues and the  
defendants from a prior case cannot support reassignment of this case.

4 *U.S. v. Phillips*, 59 F.Supp.2d at 1184.

5 The government makes the same arguments in the instant case. The analysis of  
6 essentially the same rules under similar circumstances provided by the U.S. District Court in  
7 Utah is instructive. Supreme Court precedent is controlling. There is no authority for the  
8 reassignment of a case to a specific judge at the request of a party.  
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11 **B. Defendants' Reliance on *Gagan v. Estate of Sharar*, 2008 WL 2810978 (D. Ariz. 2008) (Unreported) is Misplaced.**

12 Defendants' arguments in support of transfer are based solely on *Gagan*. *Gagan*, an  
13 unreported, District Court opinion, does not analyze the ability of the Court to transfer a case  
14 to another judge in the context of applicable rules. The Court assumes, but does not decide,  
15 that such transfer is available. Indeed, the issues identified in the instant matter were not  
16 identified as issues in *Gagan* and hence [were] not refined by the fires of adversary  
17 presentation. i.e. *dicta*. See, e.g., *Sanches v. Mukasey*, 521 F.3d 1106, 111 (9<sup>th</sup> Cir. 2008)  
18 (where parties did not raise or brief the issue, the decision was *dicta*); quoting, *U.S. v.*  
19 *Crawley*, 837 F.2d 291, 293 (7<sup>th</sup> Cir. 1988) (Judge Posner discussing the meaning of *dicta*);  
20 see also, e.g., *U.S. v. Johnson*, 256 F.3d 895, 916 n.9 (9<sup>th</sup> Cir. 2001) (". . . *dicta* based on  
21 whether the earlier panel intended to decide the issue, not whether discussion was logically  
22 necessary to . . . disposition.ö).  
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1            *Gagan* is also distinguishable on its facts from the instant case. *Gagan* was a  
2 collections case that was based on the enforcement of a default judgment in Illinois. The  
3 Court oversaw that enforcement for over a decade. *Id.* at \*1. In many instances, the debtor  
4 transferred his interests in certain property. It appears that the subsequent claims were  
5 brought by subsequent transferees in interest to the same property covered by the default  
6 judgment. As such, they were part of the same claim and transaction.  
7

8            In the instant case: (1) none of the plaintiffs are the same as in the closed case; (2) the  
9 Administrative Procedures Act claims in the closed case were decided, based on the  
10 administrative record, on motions for summary judgment (three years ago); and (3) Judge  
11 Rosenblatt did not rule on, or consider, the specific NEPA issue(s) currently before the Court  
12 so it is not clear why the government thinks there is some sort of institutional memory  
13 justifying transfer. The government is trying to have this case transferred to Judge  
14 Rosenblatt because he ruled against the plaintiffs in the closed case on all counts that were  
15 before him, not because he has some sort of institutional memory that could, or should,  
16 justify transfer of the instant matter. The government is “Judge Shopping.”<sup>2</sup>  
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20        **C. Conclusion**

21            Assignment of judges is, by rule and statute, based on random selection. There is no  
22 ancillary authority that allows the Court, in the instant case, to reassign this matter to a  
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24            <sup>2</sup> Plaintiffs take issue with the “background” and many of the “facts” provided by the  
25 government to support their motion. A specific dissertation of the facts surrounding this case  
26 should not, however, be relevant to this Court’s decision on whether or not to transfer the  
instant case to another judge.

1 particular judge especially at the request of one of the parties. For the reasons stated  
2 above, Plaintiffs respectfully request that the government's Motion to Transfer this case to  
3 another judge be denied.<sup>3</sup>  
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5 Respectfully submitted this 20<sup>th</sup> day of October, 2009.

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16 The foregoing was filed via the CM/ECF  
17 system this 20<sup>th</sup> day of October, 2009  
18 constituting service on the following  
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<sup>3</sup> As a housekeeping matter, defendants' recently filed appearances in a closed matter should probably be stricken.