

UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION

**IN RE: ENDANGERED SPECIES ACT
SECTION 4 DEADLINE LITIGATION**

MDL No. 2165

ORDER VACATING CONDITIONAL TRANSFER ORDER

Before the Panel:* Pursuant to Panel Rule 7.1, plaintiffs move to vacate our order that conditionally transferred this action (*Xerces Society*) to MDL No. 2165. Defendants¹ oppose the motion.

The actions in MDL No. 2165 share factual questions arising from multiple petitions filed by two plaintiffs to the FWS, seeking the listing of numerous species as threatened or endangered pursuant to the Endangered Species Act (ESA). *See In re: Endangered Species Act Section 4 Deadline Litig.*, 716 F. Supp. 2d 1369 (J.P.M.L. 2010). The actions involved in this MDL were resolved by settlement in 2011. *See In re: Endangered Species Act Section 4 Deadline Litig.*, Order Granting Joint Motion for Approval of Settlement Agreement and Order of Dismissal of WildEarth Guardians' Claims, Case No. 1:10-mc-00377 (D.D.C. Sept. 9, 2011); *In re: Section 4 Deadline Litig.*, Order Granting Joint Motion for Approval of Settlement Agreement and Order of Dismissal of Center for Biological Diversity's Claims, Case No. 1:10-mc-00377 (D.D.C. Sept. 9, 2011).

The status of proceedings in MDL No. 2165 weighs heavily against the transfer of this new action as all MDL No. 2165 actions have been resolved by settlements. Additionally, all actions to date in MDL No. 2165 have involved one of two plaintiffs or have stemmed from the MDL No. 2165 settlements involving those plaintiffs. The *Xerces Society* action, in contrast, was filed by plaintiffs not previously involved in this litigation and involves a species not previously named in an MDL No. 2165 action. Therefore, we are not persuaded that transfer will promote the just and efficient conduct of this action and of the litigation as a whole.

Defendants argue that *Xerces Society* and any other action filed against the FWS involving similar ESA deadline-related claims could disrupt the MDL No. 2165 settlements, and in particular adversely affect the FWS's ability to comply with the agreed upon multi-year schedule for FWS to complete a certain number of listing actions. We are not unsympathetic to defendants' concerns. Transfer of *Xerces Society*, however, would greatly expand the scope of this MDL, which we created

* Judge Marjorie O. Rendell and Judge Lewis A. Kaplan did not participate in the disposition of this matter.

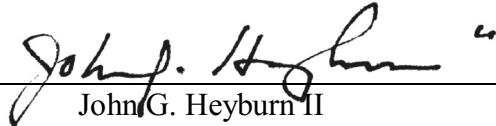
¹ Sally Jewell in her official capacity as Secretary of the Department of Interior, Daniel M. Ashe in his official capacity as Director of the Fish and Wildlife Service (FWS), and the FWS.

-2-

in 2010 specifically to address the FWS's sudden inundation with Section 4 ESA deadline litigation brought by two particular plaintiffs. The MDL was not intended to govern every Section 4 ESA deadline action brought against the FWS. Accordingly, after considering all argument of counsel, we conclude that inclusion of this action in MDL No. 2165 would not necessarily serve the convenience of the parties and witnesses or promote the just and efficient conduct of the litigation.

IT IS THEREFORE ORDERED that the Panel's conditional transfer order designated as "CTO-3" is vacated insofar as it relates to this action.

PANEL ON MULTIDISTRICT LITIGATION

A handwritten signature in black ink, appearing to read "John G. Heyburn II", is written above a horizontal line. The signature is cursive and includes a small mark at the end.

John G. Heyburn II
Chairman

Charles R. Breyer
Ellen Segal Huvelle

Sarah S. Vance

**IN RE: ENDANGERED SPECIES ACT
SECTION 4 DEADLINE LITIGATION**

MDL No. 2165

SCHEDULE A

District of Oregon

XERCES SOCIETY FOR INVERTEBRATE CONSERVATION, ET AL. V. JEWELL,
ET AL., C.A. No. 3:13-01103