

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 in this Northern District of Oklahoma action (*State of Oklahoma*), listed on Schedule A, move to vacate our order that conditionally transferred their action to MDL No. 2165. Defendants¹ oppose the motion to vacate and favor inclusion of this action in MDL No. 2165.

After considering all argument of counsel, we find that transfer of this action to MDL No. 2165 at this time would not serve the convenience of the parties and witnesses or promote the just and efficient conduct of this litigation. 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, and the transferee judge will continue to oversee implementation of the settlements through 2017. *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: Endangered Species Act 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).

Defendants have moved in the transferor court for transfer to the District of District of Columbia pursuant to Section 1404, and that motion is now briefed and pending. In the past, the Panel has declined to transfer an action where, as here, there is a "reasonable prospect" that the resolution of a Section 1404 motion could eliminate the need for transfer pursuant to Section 1407. *See, e.g., In re: Gerber Probiotic Prods. Mktg. & Sales Practices Litig.*, 899 F. Supp. 2d 1378, 1379-80 (J.P.M.L. 2012). Transfer pursuant to Section 1407 "should be the last solution after

* Judge John G. Heyburn II and Judge Ellen Segal Huvelle took no part in the decision of this matter.

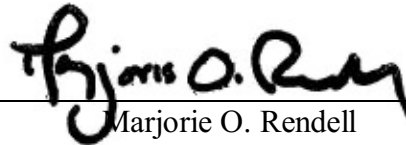
¹ The U.S. Department of the Interior (the DOI); S.M.R. Jewell, as Secretary of the DOI; the U.S. Fish and Wildlife Service (the FWS); Daniel M. Ashe, as director of the FWS; Gary Frazer, as Assistant Director for Endangered Species at the FWS; and Dixie Porter, as Field Supervisor at the FWS Oklahoma Ecological Services Field Office.

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considered review of all other options.” *See id.* at 1379 (quoting *In re: Best Buy Co., Inc., California Song-Beverly Credit Card Act Litig.*, 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011)). Given the pendency of the motion to transfer pursuant to Section 1404, therefore, we will vacate the conditional transfer order with respect to *State of Oklahoma*, without prejudice to the parties to file a motion to transfer pursuant to Section 1407 if the Section 1404 motion is denied.

IT IS THEREFORE ORDERED that the Panel’s conditional transfer order designated as “CTO-4” is vacated insofar as it relates to this action.

PANEL ON MULTIDISTRICT LITIGATION

A handwritten signature in black ink, appearing to read "Marjorie O. Rendell", is written over a horizontal line.

Marjorie O. Rendell
Acting Chairman

Charles R. Breyer
Sarah S. Vance

Lewis A. Kaplan
R. David Proctor

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

MDL No. 2165

SCHEDULE A

Northern District of Oklahoma

THE STATE OF OKLAHOMA, ET AL. v. DEPARTMENT OF THE INTERIOR, ET AL.,
C.A. No. 4:14-00123