

**UNITED STATES JUDICIAL PANEL**  
**on**  
**MULTIDISTRICT LITIGATION**

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

MDL No. 2165

**TRANSFER ORDER**

**Before the Panel:** Plaintiffs in the District of Nevada action (*F.I.M. Corp.*) listed on the attached Schedule A move under Panel Rule 7.1 to vacate our order conditionally transferring their action to the District of District of Columbia for inclusion in MDL No. 2165.<sup>1</sup> Responding federal government defendants oppose the motion.<sup>2</sup> In their reply brief, plaintiffs request, in the alternative, that if we order transfer of the action, we separate and remand their equitable estoppel claim (Count VII in their amended complaint).

After considering the argument of counsel, we find that *F.I.M. Corp.* involves common questions of fact with the actions previously transferred to this MDL, and that transfer of the action in its entirety under 28 U.S.C. § 1407 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. The actions in the MDL involve factual questions arising out of petitions that two environmental organizations – WildEarth Guardians (WildEarth) and the Center for Biological Diversity (CBD) – filed before the United States Fish and Wildlife Service (FWS) seeking to have FWS list many species as threatened or endangered under the Endangered Species Act (ESA). *See In re: Endangered Species Act Section 4 Deadline Litig.*, 716 F. Supp. 2d 1369, 1369 (J.P.M.L. 2010). Because FWS has a single, limited budget for ESA listing activities, it argued that it was unable to issue timely all of the required findings for the unusually large number of species involved in the actions filed by WildEarth and CBD. In ordering centralization, we found that all actions involved common questions of fact regarding FWS’s nationwide listing budget, priorities, and workload. *See id.*

In 2011, WildEarth and CBD reached settlements with FWS establishing a schedule for FWS to issue listing decisions. The transferee judge, the Honorable Emmet G. Sullivan, will continue to oversee implementation of the settlements through fiscal year 2017. *See In re: Endangered Species Act Section 4 Deadline Litig.*, Order Granting Joint Motion for Approval of Settlement Agreement

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<sup>1</sup> Plaintiffs are the Nevada Association of Counties, the Nevada Mineral Resources Alliance, F.I.M. Corp., Fred Fulstone, Marianne Leinassar and Kristofor Leinassar, and the American Exploration & Mining Association.

<sup>2</sup> Defendants are the United States Department of the Interior; S. M. R. Jewell, in her official capacity as Secretary of the Interior; the United States Fish and Wildlife Service; Daniel M. Ashe, in his official capacity as the Service’s Director; Gary Frazer, in his official capacity as the Service’s Assistant Director for Ecological Services; Ren Lohofener, in his official capacity as the Service’s Pacific Southwest Regional Director; and Edward Koch, in his official capacity as Field Supervisor of the Service’s Nevada Fish and Wildlife Office.

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and Order of Dismissal of WildEarth Guardians' Claims, C.A. 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, C.A. No. 1:10-mc-00377 (D.D.C. Sept. 9, 2011). Under the settlement agreements, FWS has agreed to issue proposed listing rules or "not warranted" findings for more than 250 candidate species no later than the end of fiscal year 2017.<sup>3</sup> With respect to the two species at issue in *F.I.M. Corp.* – the Greater Sage-Grouse and the Bi-State Distinct Population Segment (DPS) of the Greater Sage-Grouse – FWS has proposed listing the Bi-State DPS as "threatened," and has committed to make a listing decision for the Greater Sage-Grouse by September 30, 2015.

The *F.I.M. Corp.* action is highly similar to two actions – *State of Oklahoma* and *Hutchison* – that we transferred, over those plaintiffs' objections, earlier this year. See Transfer Order (J.P.M.L. Feb. 5, 2015) (ECF No. 132). Like the *State of Oklahoma* and *Hutchison* plaintiffs, the *F.I.M. Corp.* plaintiffs (1) "seek[] relief from [FWS's] purporting to alter its obligations under Federal statutes through settlement of litigation with no Congressional action," (2) allege that by entering into the settlement agreements in the MDL, FWS has "circumvented the legislative process and fundamentally changed its obligations under the ESA," and (3) assert that they have been injured by FWS's implementation of the settlements' provisions eliminating ESA's warranted-but-precluded alternative.<sup>4</sup> Also like the *State of Oklahoma* and *Hutchison* plaintiffs, the *F.I.M. Corp.* plaintiffs contend that by requiring FWS to issue, on a particular schedule, proposed listing rules or not warranted findings for certain species covered by the MDL No. 2165 settlement agreements, and thereby eliminating ESA's warranted-but-precluded option, FWS's actions pursuant to the settlement agreements violate the Administrative Procedure Act and ESA. In both *F.I.M. Corp.* and *State of Oklahoma*, plaintiffs further allege that the settlement agreements violate the Fifth Amendment's due process clause (by binding non-participating third parties to terms without their participation), and Article II (by binding the executive branch to a settlement that transfers authority from that branch to special interest litigants). In ordering transfer of *State of Oklahoma* and *Hutchison*, we stated: "As plaintiffs aim to modify the implementation of the settlement agreements, these actions necessarily will involve questions of fact as to the FWS's nationwide listing budget, priorities, and workload, the very questions also involved in the MDL actions." Transfer Order, at 3. Our rationale for transferring *State of Oklahoma* and *Hutchison* applies with equal force here.

In opposing transfer, the *F.I.M. Corp.* plaintiffs principally argue that the MDL was "resolved" via the 2011 settlements; that their action involves a unique equitable estoppel claim that will entail a fact-specific inquiry into plaintiffs' and the State of Nevada's expenditure of time and resources in developing its own conservation plan, as well as how defendants' threatened action will

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<sup>3</sup> Under ESA, within twelve months after receiving a petition to list a species as threatened or endangered, the FWS must find that (1) the listing is not warranted; (2) the listing is warranted; or (3) the listing is warranted, but listing the species is precluded by pending proposals for other species ("warranted-but-precluded").

<sup>4</sup> See *F.I.M. Corp.* Am. Compl. ¶ 2; *State of Oklahoma* Second Am. Compl. ¶¶ 2, 6-9; and *Hutchison* First Am. Compl. ¶¶ 2, 6-9.

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interfere with implementation of that plan;<sup>5</sup> and that they will be inconvenienced by transfer. We do not find these arguments convincing. In transferring *State of Oklahoma* and *Hutchison*, we explained: “Since the transferee judge will oversee implementation of the settlement agreements through fiscal year 2017, we are not persuaded that this MDL has reached the point that transfer of these related actions would not benefit from inclusion.” *Id.* Plaintiffs’ equitable estoppel claim, like their other claims, seeks modification of the MDL settlements. As the Government argues, the claim presumes that the settlement agreements impose an “arbitrary listing deadline” with respect to the Greater Sage-Grouse,<sup>6</sup> and, as to remedy, plaintiffs ask the court to estop defendants from taking any regulatory action, including any ESA listing “pursuant to or as a result of the Settlements.”<sup>7</sup> Plaintiffs’ convenience-related argument also is unavailing. In deciding issues of transfer under Section 1407, we look to the overall convenience of the parties and witnesses, not just that of plaintiffs or defendants in a single action. *See In re: Watson Fentanyl Patch Prods. Liab. Litig.*, 883 F. Supp. 2d 1350, 1351-52 (J.P.M.L. 2012).

IT IS THEREFORE ORDERED that the *F.I.M. Corp.* action is transferred to the District of District of Columbia and, with the consent of that court, assigned to the Honorable Emmet G. Sullivan for inclusion in the coordinated or consolidated pretrial proceedings.

PANEL ON MULTIDISTRICT LITIGATION




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Sarah S. Vance  
Chair

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R. David Proctor

Charles R. Breyer  
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<sup>5</sup> In their reply brief, plaintiffs also argue that the Government is estopped even from advocating Section 1407 transfer, quoting a statement made to Judge Sullivan by the Government’s counsel at a hearing concerning the approval of the settlement agreements. That quotation, however, contains no reference to Section 1407 and does not otherwise support plaintiffs’ argument.

<sup>6</sup> *See F.I.M. Corp.* Am. Compl. ¶ 135 (describing the listing deadline as “arbitrary”).

<sup>7</sup> *Id.* ¶ 139.

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

MDL No. 2165

**SCHEDULE A**

District of Nevada

F.I.M. CORP., ET AL. v. U.S. DEPARTMENT OF THE INTERIOR, ET AL.,  
C.A. No. 3:14-00630