

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY;  
NATURAL RESOURCES DEFENSE COUNCIL;  
and GREENPEACE, INC.,

No. C 08-1339 CW

Plaintiffs,

v.

DIRK KEMPTHORNE, United States  
Secretary of the Interior; and UNITED  
STATES FISH AND WILDLIFE SERVICE,

ORDER DENYING ARCTIC  
SLOPE REGIONAL  
CORPORATION'S MOTION  
TO TRANSFER AND  
TAKING DEFENDANTS'  
MOTION TO TRANSFER  
UNDER SUBMISSION

Defendants.

Defendants Dirk Kempthorne and the U.S. Fish and Wildlife Service move to transfer this case to the United States District Court for the District of Columbia. Intervenor-Defendant Alaska Oil and Gas Association (AOGA) joins in this motion. Plaintiffs Center For Biological Diversity, Natural Resources Defense Council and Greenpeace oppose Defendants' motion. Potential Intervenor-Plaintiff Defenders of Wildlife (DOW) also opposes the motion. Intervenor-Defendant Arctic Slope Regional Corporation (ASRC) moves separately to transfer the case to the District of Alaska. Plaintiffs, DOW and Defendants oppose ASRC's motion. In addition,

1 AOGA has filed a motion with the Judicial Panel on Multidistrict  
2 Litigation (MDL Panel) seeking to transfer this case to the D.C.  
3 District Court. Having considered all of the papers submitted by  
4 the parties, the Court denies ASRC's motion and takes Defendants'  
5 motion under submission pending a decision by the MDL Panel.

6 BACKGROUND

7 Plaintiffs filed this action on March 10, 2008, charging  
8 Defendants with failing to comply with the Endangered Species Act's  
9 (ESA) deadline to issue a determination on whether the polar bear  
10 should be listed as a threatened or endangered species. On April  
11 2, 2008, Plaintiffs moved for summary judgment. Defendants opposed  
12 this motion, conceding that they had failed to meet the deadline  
13 but arguing that the relief Plaintiffs sought was unjustified.

14 On April 28, 2008, the Court granted Plaintiffs' motion and  
15 ordered Defendants to publish their listing determination by May  
16 15, 2008. Defendants complied with this order and published a  
17 final rule designating the polar bear as threatened. In addition,  
18 Defendants promulgated a special rule under section 4(d) of the  
19 ESA, which permits the Fish and Wildlife Service to specify  
20 prohibitions and authorizations that are tailored to the specific  
21 conservation needs of a particular species. The special rule here  
22 allows certain activities that might otherwise be prohibited under  
23 the ESA or its associated regulations. Specifically, the rule  
24 provides that, if an activity is authorized under the Marine  
25 Mammals Protection Act (MMPA) and the Convention on International  
26 Trade in Endangered Species of Wild Fauna and Flora, the activity  
27 is exempt from ESA provisions that might otherwise prohibit it as a  
28 take of polar bear. The rule also exempts activities outside of

1 Alaska from the ESA's incidental take prohibition. In addition,  
2 the rule exempts activities that generate greenhouse gases, no  
3 matter where they occur, from the ESA's consultation requirements.

4 On May 16, 2008, Plaintiffs filed an amended complaint adding  
5 two claims. The first new claim charges Defendants with violating  
6 the Administrative Procedures Act (APA) by promulgating the section  
7 4(d) rule without first publishing a notice of proposed rule-making  
8 and giving interested persons an opportunity to comment. The  
9 second new claim charges Defendants with violating the National  
10 Environmental Policy Act (NEPA) by promulgating the section 4(d)  
11 rule without first conducting an environmental impact statement or  
12 an environmental assessment.

13 On July 16, 2008, Plaintiffs filed a second amended complaint  
14 adding four new claims. All four claims are brought pursuant to  
15 the APA and are based on Defendants' alleged failure to comply with  
16 either the ESA or the MMPA. The first challenges the decision to  
17 classify the polar bear under the ESA as a threatened, rather than  
18 an endangered, species. The second challenges the substance of the  
19 section 4(d) rule as contrary to the ESA. The third charges  
20 Defendants with violating the ESA by failing to designate critical  
21 habitat for the polar bear. The fourth alleges that Defendants  
22 violated the MMPA by failing to publish a list of guidelines for  
23 safely deterring polar bears through the use of non-lethal methods.  
24 The parties subsequently reached a negotiated settlement of these  
25 last two claims.

26 Since Plaintiffs initiated this action, four related actions  
27 have been filed in the District Court of the District of Columbia:  
28 1) a case brought by the State of Alaska challenging, among other

1 things, the government's determination that the polar bear is a  
2 threatened species; 2) a case brought by the American Petroleum  
3 Institute and other industry groups challenging the portion of the  
4 section 4(d) rule that exempts activities outside of Alaska from  
5 the incidental take provisions of the ESA;<sup>1</sup> 3) a case brought by  
6 the Safari Club, a hunters' group, challenging the government's  
7 prohibition on the importation of trophies of polar bears legally  
8 hunted in Canada; 4) a second case brought by the Safari Club  
9 challenging the government's determination that the polar bear is a  
10 threatened species.

11 LEGAL STANDARD

12 Title 28 U.S.C. § 1404(a) provides as follows: "For the  
13 convenience of parties and witnesses, in the interest of justice, a  
14 district court may transfer any civil action to any other district  
15 or division where it might have been brought." The statute  
16 identifies three factors that should be considered on a motion to  
17 transfer: (1) the convenience of the parties; (2) the convenience  
18 of the witnesses; and (3) the interests of justice. The Ninth  
19 Circuit has articulated other considerations that are subsumed in  
20 these basic factors, including: the plaintiff's choice of forum;  
21 ease of access to the evidence; the familiarity of each forum with  
22 the applicable law; the nexus between the forum and the causes of  
23 action; the feasibility of consolidating other claims; any local  
24 interest in the controversy; the relative court congestion and time  
25 to trial in each forum; the location where the relevant agreements

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27 <sup>1</sup>The API alleges that the rule irrationally subjects  
28 greenhouse gas emissions within Alaska to the ESA's incidental take  
provisions while exempting greenhouse gas emissions elsewhere.

1 were negotiated and executed; the parties' contacts with the  
2 forums; any difference in the costs of litigation between the two  
3 forums; and the availability of compulsory process to compel  
4 attendance of unwilling non-party witnesses. Decker Coal Co. v.  
5 Commonwealth Edison Co., 805 F.2d 834, 843 (9th Cir. 1986); Jones  
6 v. GNC Franchising, Inc., 211 F.3d 495, 498-99 (9th Cir. 2000). No  
7 single factor is dispositive, and a district court has broad  
8 discretion to adjudicate motions for transfer on a case-by-case  
9 basis. Stewart Org. Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988);  
10 Sparling v. Hoffman Constr. Co., Inc., 964 F.2d 635, 639 (9th Cir.  
11 1988). The parties do not dispute that this action could have been  
12 brought either in Alaska or in the District of Columbia. Thus, the  
13 only question before the Court is whether the above factors support  
14 the transfer of this case.

15 DISCUSSION

16 I. ASRC's Motion

17 ASRC seeks to have this case transferred to the District of  
18 Alaska, primarily on the basis that Alaska is the only state with  
19 meaningful ties to the subject matter of the litigation. It is  
20 true that Alaska is the only state inhabited by polar bears and  
21 that Defendants' decision to classify the polar bear as a  
22 threatened species directly affects primarily Alaska residents.  
23 However, ASRC incorrectly treats Alaska's interest in the  
24 controversy as essentially dispositive of the present motion. In  
25 fact, there are other considerations that militate against  
26 transferring this case to Alaska.

27 First, a plaintiff's choice of forum is ordinarily given  
28 significant weight and will not be disturbed unless other factors

1 weigh substantially in favor of transfer. Decker Coal, 805 F.2d at  
2 843. This is especially true when the plaintiff resides in the  
3 forum and the forum has a significant connection with the cause of  
4 action. L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 89  
5 F.R.D. 497, 499 (C.D. Cal. 1981) (citing Pac. Car and Foundry Co.  
6 v. Pence, 403 F.2d 949, 954 (9th Cir. 1968)). Although the  
7 Northern District of California does not have significant ties to  
8 the polar bear or to Defendants' rulemaking activity, which was  
9 conducted in Alaska and the District of Columbia, Plaintiff  
10 Greenpeace resides here and the other Plaintiffs maintain offices  
11 here. Plaintiffs are therefore entitled to some degree of  
12 deference in their choice of forum. In addition, although Alaska  
13 arguably has a greater interest than California in the polar bear's  
14 classification in that direct interactions between humans and polar  
15 bears occur only in that State, citizens of other states have an  
16 interest in ensuring the survival of threatened and endangered  
17 species, wherever those species may exist. Moreover, Plaintiffs'  
18 challenge to the section 4(d) rule, if successful, could  
19 potentially affect greenhouse gas emissions in all fifty states.  
20 In this sense, Alaska is not the only state with an interest in the  
21 litigation.

22 A number of other factors are neutral as between venue in  
23 Alaska and the Northern District of California, and thus weigh  
24 against disturbing Plaintiffs' choice of forum. Neither Plaintiffs  
25 nor Defendants contend that Alaska would be a more convenient forum  
26 for them than California, and ASRC does not suggest that its own  
27 convenience, as a voluntary intervenor in this action, should be  
28 taken into account. Furthermore, the parties believe this matter

1 is amenable to summary judgment without trial, and thus the  
2 convenience of witnesses is not at issue. Nor does the location of  
3 relevant documents support transfer, in that Defendants are  
4 compiling the administrative record in electronic format. Relative  
5 congestion and the time to trial also do not support ASRC's motion.  
6 Although ASRC submits that the docket of the Northern District of  
7 California is more crowded than that of the District of Alaska,  
8 this case has already been scheduled for summary judgment, and the  
9 case management order does not reflect any delay due to congestion.  
10 Nor has ASRC shown that courts in the District of Alaska are  
11 particularly familiar with the facts and legal issues involved in  
12 this case.

13       The appropriateness of transferring this case to the District  
14 of Alaska also cannot be evaluated without considering the fact  
15 that four related cases are pending in the District of Columbia.  
16 Where, as here, multiple actions in different districts involve  
17 common issues of law and fact, "the 'interest of justice' considers  
18 the feasibility of their consolidation so that inconsistent  
19 verdicts are avoided." Hernandez v. Union Pac. R.R. Co., 2005 WL  
20 396614, at \*3 (N.D. Cal.); see also A.J. Indus., Inc. v. U.S. Dist.  
21 Court, 503 F.2d 384, 389 (9th Cir. 1974) (noting that the  
22 "feasibility of consolidation is a significant factor in a transfer  
23 decision"). While transferring this action to the District of  
24 Columbia would permit consolidation and would ameliorate the risk  
25 of inconsistent judgments, transferring the action to Alaska would  
26  
27  
28

1 not.<sup>2</sup>

2 The Court concludes that, under the circumstances, there is  
3 not an adequate basis for disturbing Plaintiffs' choice of venue in  
4 favor of venue in the District of Alaska.

5 II. Defendants' Motion

6 In light of the cases currently pending in the District of  
7 Columbia and the consequent possibility of inconsistent judgments,  
8 Defendants' motion to transfer presents a closer question than  
9 ASRC's motion. Ordinarily, the preferred venue in the case of  
10 parallel litigation is the district in which the first lawsuit was  
11 filed. See Alltrade, Inc. v. Uniweld Prods., Inc., 946 F.2d 622,  
12 623 (9th Cir. 1991). However, the parties appear to agree that the  
13 actions pending in the District of Columbia could not have been  
14 brought in the Northern District of California in the first  
15 instance, because venue would not have been proper under 28 U.S.C.  
16 § 1391(e). Those cases thus cannot be transferred to this District  
17 under 28 U.S.C. § 1404(a). At the same time, Defendants' motion  
18 raises questions of forum shopping and delay. Although the  
19 plaintiffs in the D.C. cases may not have been able to bring a new  
20 lawsuit in this District because venue would not have been proper,  
21 if they were concerned about inconsistent judgments, they could  
22 have moved to intervene in this case.

23 The issue of transferring this case for pretrial purposes to  
24 the District of Columbia is currently before the MDL Panel. This

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26 <sup>2</sup>Although ASRC has apparently requested that the MDL Panel  
27 transfer all of the related cases to the District of Alaska, the  
28 Court will not grant ASRC's motion based on the mere possibility  
that the actions currently pending in the District of Columbia will  
be transferred to Alaska. Moreover, if the Panel were to grant  
ASRC's request, its present motion would be moot.



1 Court will defer to the Panel. If the Panel transfers this case to  
2 the District of Columbia, Defendants' motion will become moot.  
3 Alternatively, the Panel may determine that it is appropriate to  
4 transfer the D.C. cases to this District because the first case was  
5 filed here. Unlike the Court, the Panel is not limited to  
6 transferring cases to a district in which they could have been  
7 brought in the first instance. Compare 28 U.S.C. § 1407(a) with 28  
8 U.S.C. § 1404(a).

9 Accordingly, the Court will take Defendants' motion under  
10 submission and will rule on it once the MDL Panel has issued its  
11 decision. Meanwhile, the case will proceed on schedule in this  
12 District.

13 CONCLUSION

14 For the foregoing reasons, ASRC's motion to transfer (Docket  
15 No. 154) is DENIED. Defendants' motion to transfer (Docket No.  
16 152) is hereby taken under submission on the papers. The hearing  
17 currently scheduled for October 16, 2008 is VACATED.

18 IT IS SO ORDERED.

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20 Dated: 10/10/08



21 CLAUDIA WILKEN  
United States District Judge  
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