

1
2
3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF CALIFORNIA
6
7

8 Coalition for a Sustainable
9 Delta, et al.,

10 Plaintiffs,

v.

11 John Carlson, Jr., in his
12 official capacity as Executive
13 Director of the California
Fish and Game Commission, et
al.,

14 Defendants.
15

2:08-cv-00220-FCD-KJM

NOTICE OF INTENT TO TRANSFER
CASE AS RELATED TO CASE
1:05-cv-01207-OWW-GSA, NRDC
v. *KEMPTHORNE* AND
1:06-cv-00245-OWW-GSA, *PCFFA*
v. *GUTIERREZ* UNDER EASTERN
DISTRICT LOCAL RULE 83-123

16 This case has been referred from U.S. District Judge Frank
17 C. Damrell, Jr., under the Eastern District of California Local
18 Rules governing related cases, Rule 83-123.

19 On January 29, 2008, the Coalition filed a complaint for
20 declaratory and injunctive relief ("Complaint") against John
21 Carlson, Jr., in his official capacity as Executive Director of
22 the California Fish and Game Commission; Richard Rogers, in his
23 official capacity as President of the California Fish and Game
24 Commission; Cindy Gustafson, in her official capacity as Vice
25 President of the California Fish and Game Commission; Jim
26 Kellogg, in his official capacity as Member of the California
27 Fish and Game Commission; Michael Sutton, in his official
28 capacity as Member of the California Fish and Game Commission;
the California Fish and Game Commission (collectively "CFGC");

1 John McCamman, in his official capacity as Interim Director of
2 the California Department of Fish and Game; and the California
3 Department of Fish and Game (collectively, "CDFG"). The
4 Coalition filed the Complaint in the Sacramento Division of the
5 Eastern District of California under 16 U.S.C. § 1540(g)(3)(A),
6 the citizen suit provision of the Endangered Species Act ("ESA"),
7 which provides that venue is appropriate "in the judicial
8 district in which the violation occurs."

9 Plaintiffs are a coalition of agricultural water users in
10 the San Joaquin Valley that depend on State Water Project ("SWP")
11 water deliveries from the Delta, water districts that contract
12 for SWP water with the Kern County Water Agency, and one
13 individual who uses the Delta for recreational purposes. The
14 crux of the Coalition's Complaint is that CFGC's and CDFG's
15 maintenance and enforcement of striped bass fishing regulations
16 cause the unlawful "take" of four species of ESA "listed" fish
17 including the Sacramento River winter-run Chinook salmon
18 ("winter-run Chinook"), the Central Valley spring-run Chinook
19 salmon ("spring-run Chinook"), the Central Valley steelhead ("CV
20 steelhead"), and the Delta smelt (collectively, "Listed
21 Species"). Through the adoption and enforcement of the striped
22 bass fishing regulations, which include bag and size limitations,
23 CFGC and CDFG have allegedly allowed and encouraged the
24 population of the non-native striped bass to thrive in Delta.
25 According to the Complaint, the striped bass prey upon and
26 consume the Listed Species, and this is one of several causes of
27 the population declines of the Listed Species. The striped bass
28 regulations encourage that species' population growth, which

1 will, in turn, cause further decline of the population of the
2 Listed Species.

3 The *Kempthorne* (1:05-cv-01207-OWW-GSA) and *Gutierrez*
4 (1:06-cv-00245-OWW-GSA) cases are pending before this court.
5 *Kempthorne* involves the threatened Delta smelt species. The
6 Coalition's Complaint contains numerous references to the
7 *Kempthorne* case, and this court's order denying the *Kempthorne*
8 plaintiffs' motion for a temporary restraining order after entry
9 of summary judgment. At a remedies hearing held in *Kempthorne* in
10 the latter part of August 2007, following a seven-day evidentiary
11 hearing focused on the causes of the decline of the Delta smelt
12 population, all parties in the *Kempthorne* case agreed that one of
13 the causes of the Delta smelt's decline was the introduction of
14 non-native species, including the striped bass at issue in this
15 case. The Coalition's Complaint focuses on one aspect of the
16 Delta smelt's decline, which is the subject of the remedies
17 hearing, the remedial order now in place, and the overall decline
18 of the Delta smelt at issue in the *Kempthorne* case.

19 The alleged decline of the winter-run Chinook, the spring-
20 run Chinook, and the CV steelhead species are at issue in the
21 *Gutierrez* case. Cross-motions for summary judgment regarding the
22 effects of Central Valley Project and California Department of
23 Water Resources project operations on the populations of these
24 species are under submission for decision. The parties in the
25 *Gutierrez* case agree that depending on the outcome of the court's
26 decision, a remedies hearing similar to that held in the
27 *Kempthorne* case may be necessary. Any remedies hearing will
28 address other causes, including the Central Valley Project and

1 California Department of Water Resources joint project operations
2 as responsible for population decreases of these species,
3 including predation by other species.

4 Local Rule 83-123 (a copy of which may be obtained at the
5 court's website www.caed.uscourts.gov) provides:

6 An action is related to another action within the
7 meaning of this Rule when

- 8 (1) both actions involve the same parties and are
based on the same or a similar claim;
- 9 (2) both actions involve the same property,
10 transaction or event;
- 11 (3) both actions involve similar questions of
12 fact and the same question of law and their
13 assignment to the same Judge or Magistrate
14 Judge is likely to effect a substantial
savings of judicial effort, either because
15 the same result should follow in both actions
16 or otherwise; or
- (4) for any other reasons, it would entail
substantial duplication of labor if the
actions were heard by different Judges or
Magistrate Judges.

17 E.D. Local Rule 83-123(a) (emphasis added). Additionally, the
18 Local Rule provides that counsel has a duty to file a Notice of
19 Related Cases when counsel "has reason to believe that an action
20 on file or about to be filed is related to another action on file
21 (whether or not dismissed or otherwise terminated)" E.D.
22 Local Rule 83-123(b).

23 *Kempthorne, Gutierrez*, and this case all involve ESA claims
24 regarding the same Listed Species. All three cases address the
25 causes of the population declines of the Listed Species in the
26 Delta. The governing law is substantially the same. Facts about
27 predatory species' effects on the Listed Species are before this
28 court. The Complaint also alleges the Coalition has been injured

1 by this court's December 2007 injunctive relief awarded to the
2 plaintiffs in the *Kemphorne* case. Compl. ¶¶ 40, 41, 42, 43, and
3 44.

4 The parties shall, within fifteen (15) days, show cause, if
5 any, why the above-captioned case should not be transferred to
6 this court as related to the *Kemphorne* and *Gutierrez* cases to
7 avoid needless expenditures of judicial resources. All three
8 actions involve similar questions of fact and law. Assignment to
9 a single judge will effect a substantial savings of judicial
10 effort preventing both a duplication of labor by different judges
11 and potentially inconsistent decisional results.

12 The Coalition shall serve a copy of this Notice of Intent to
13 Transfer Case ("Notice") on the named defendants within five (5)
14 days after service by the clerk of this Notice. The Coalition
15 shall also file a proof of service indicating the named
16 defendants were served with a copy of this Notice.

17
18 **IT IS SO ORDERED.**

19 Dated: February 14, 2008

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE