IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE STOCKBRIDGE-MUNSEE COMMUNITY, BAND OF MOHICAN INDIANS, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR; DIRK KEMPTHORNE, in his official capacity as SECRETARY OF THE INTERIOR; and JAMES E. CASON, in his official capacity as ASSOCIATE DEPUTY SECRETARY OF THE INTERIOR, Defendants.	)	Civil Action No. 1:08-CV-01031 (EGS)

PLAINTIFF STOCKBRIDGE-MUNSEE COMMUNITY'S MEMORANDUM OF LAW IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION TO TRANSFER VENUE

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SUMMARY OF ARGUMENT

Plaintiff Stockbridge-Munsee Community, Band of Mohican Indians (Stockbridge) opposes the United States' motion to transfer venue to the United States District Court for the Northern District of New York. The motion should be denied because disposition of this action turns exclusively on issues relating to the Government's exercise of its trust responsibilities to a beneficiary Indian tribe which, as they are presented in this case, are unrelated to the local issues raised by the land-to-trust application. This action results from a dispute between a tribe and its federal trustee, and the fact that the land that is the subject of the dispute is situated in New York is of no moment—the resolution of the issues in this action would be the same regardless of where the land were located and their resolution will not be determinative of whether the land will ultimately be placed into trust status.

Defendant has no field offices or staff in New York and the review and decision-making process resulting in the decision challenged in this action occurred in the central office in Washington, DC. None occurred in New York. It is probable that this case will be decided on the administrative record, which is located in Washington, and that no witnesses will be called. But should the Tribe decide to pursue extra-record discovery, those witnesses would be located in Washington or locales other than New York. The decision at issue was signed only by Washington-based officials, Deputy Secretary P. Lynn Scarlet and Associate Deputy Secretary James E. Cason. The Deputy Secretary is the second-highest ranking official in the Department who, except with regard to certain matters specifically reserved to the Secretary, has the full authority of the Secretary.[1]

[1] *See* Part 109 §1.2 (B) of the Department Manual, http://elips.doi.gov./app_DM.

Stockbridge's choice of forum is entitled to great deference, and the Government has not met its heavy burden of showing this forum to be inappropriate. One of the central inquiries upon a motion to transfer venue is convenience. While a choice of venue outside plaintiff's home forum generally subjects that choice to heightened scrutiny, in this case it is not a factor because the federal district court in Wisconsin, plaintiff's home, is not a forum where this action might have been brought and this district is more convenient for plaintiff than the Northern District of New York in Albany. This district is also advantageous for the federal defendants, as they are resident here, their administrative record is located here and their attorneys are here.

Most importantly, this action has strong ties to this district. The exclusive control of the agency's decision-making process that was assumed by high-ranking officials in DC central headquarters justifies keeping this case in this district.

In addition, this district has considerable familiarity with the governing law in this case, *i.e.*, the law governing the enforcement of the federal-tribal trust relationship. This action, unlike the six challenges brought in New York, does not implicate those issues of local concern raised by the challenged trust application. Nor does it implicate, except by way of context and backdrop, any of the issues raised in the Tribe's pending land-claim action. Thus, with respect to one of the central issues in this transfer inquiry–whether the issues raised in the New York cases or the Stockbridge land-claim case are the same or so related to the issues raised here that the same court should decide both for the sake of judicial efficiency and to avoid inconsistent judicial rulings–the balance weighs heavily in favor of keeping the case in this district.

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STATEMENT OF THE CASE

A. Historical Background

Stockbridge is a federally recognized Indian tribe presently residing on a federal Indian reservation in Wisconsin. The Tribe is comprised of Mohican and Munsee Delaware Indians, whose forebears occupied ancestral homelands in New York's Hudson River Valley and nearby regions for thousands of years. The Tribe now resides in Wisconsin because, in the early 1800s, the State of New York purchased the Tribe's reservation in New York in a series of unconscionable land transactions that violated federal law, forcing the Tribe to migrate to Wisconsin. *See generally* Complaint at 12-16. Before the Tribe migrated to Wisconsin, it was an ally and neighbor of the historical Oneida Indian Nation, a tribe which suffered a very similar fate at the hands of New York. Its adjacent reservation in New York was also illegally acquired by the State, resulting in most of the Tribe migrating to either Wisconsin or Canada. A small number of Oneidas remained in New York.

Beginning in the 1950s, the Oneidas (by then comprised of three separate successor tribes) and the Stockbridge began pursuing legal remedies for the illegal dispossession of their New York reservations, first for damages against the Government in the Indian Claims Commission and later for actual possession of the land in the federal district courts. Compl. ¶¶ 37-44. The Oneida tribes filed their possessory land claims in the 1970s and Stockbridge filed its land claim in 1986. The claims were for separate lands and do not overlap, but the next year, one of the Oneida tribes, the Oneida Indian Nation of New York (Nation), intervened as a defendant in Stockbridge's land-claim action claiming the lands of the Stockbridge treaty reservation as its own. Both the Oneida and Stockbridge land claims are still pending.

In the 1990s, the Nation decided to take unilateral action to expand its land base. It purchased over 17,000 acres from willing sellers and declared those lands to be part of its treaty reservation. After the Supreme Court ruled in 2005 that it could not unilaterally reconstitute its reservation, the Nation applied to Interior to have the land taken into trust to be held for the exclusive use and benefit of the Nation. Compl. ¶¶ 61-62.

B. This Action Raises Only Breach-of-Trust Issues Between an Indian Tribe and its Trustee which are Procedural and Exclusively Federal in Nature and Will Not Determine Whether Any Land in New York is Placed into Trust Status.

The Department of the Interior is charged with administering the Government's trust duties arising from federal common law and various treaties and statues to both the Nation and to Stockbridge. From Stockbridge's perspective, the only problem with the Nation/Interior approach to expanding the Nation's land base is that over 3,300 of the acres purchased by the Nation and sought to be placed in trust lie not within the historical Oneida treaty reservation, but rather are located within the adjacent historical Stockbridge treaty reservation.

This fact gives rise to serious concerns about the impact of Interior's decision on Stockbridge's treaty property rights and legal claims. For example, will Stockbridge be able to maintain its money-damages claim based on an unextinguished possessory Indian title and/or the State's unjust enrichment if Interior accepts the lands within the historical Stockbridge reservation in trust for the Nation? *See* Compl. ¶ 80. In addition, Stockbridge is concerned that its claim to current possession of lands now possessed by the Nation, which Stockbridge asserts in its pending land-claim action, might be extinguished or impaired if the Government takes title to those lands and holds them in trust for Nation. Compl. ¶ 83. Stockbridge also contends that Interior erred in failing to consider whether 25 CFR § 151.8, which requires the consent of the

governing tribe when Interior wants to take land within one tribe's reservation into trust for another tribe, should apply in light of the fact that the regulation was promulgated before the Supreme Court held that it was possible for a tribe to loose its jurisdictional governance rights in its reservation while still retaining its recognized Indian title to the same lands. Compl. ¶¶ 84-85.

In this action, Stockbridge is not asking this Court to decide these issues. Rather, it is asking this Court to remand only that portion of Interior's final decision relating to the acquisition of the Stockbridge parcels with directions that Interior reconsider these issues in full and provide adequate justification for its decision. Stockbridge does not seek, as the United States mistakenly states, U.S. Mem. at 1, a ruling that Interior cannot take the land into trust for the Oneidas. Rather, Stockbridge asserts in this action that Interior, in violation of its duties as Stockbridge's trustee, summarily dismissed Stockbridge's arguments and did not fully and adequately address the issues raised by Stockbridge. The only relief sought in this action is an order declaring that Interior's trust duties require it to fully and fairly consider the various Stockbridge issues, that its failure to do so was arbitrary and capricious, and, as a result, Interior is directed to reconsider particular issues raised by Stockbridge and make specific determinations on those issues.

Thus, even if Stockbridge were to prevail in this action and the issues concerning the Stockbridge lands were consequently remanded to Interior with directions to reconsider and make specific determinations on those issues, Interior might still reach the same result. Of course, Stockbridge hopes that if Interior fully reconsiders these issues in light of its trust responsibilities to protect Stockbridge property rights, it will reach different conclusions. But that result is by no means guaranteed by granting the relief sought in this action.

C. The Six Cases Pending in the Northern District of New York Share No Common Issues or Remedies with this Action: They are Substantive Challenges to Interior's Authority to Accept Lands in Trust that Seek to Permanently Enjoin the Trust Acquisition Based on Local Impacts.

a. *City of Oneida v. Kempthorne*, No. 5: 08-cv-00648. This action seeks numerous declarations and to permanently enjoin the United States from accepting any Nation lands in trust. City of Oneida's Complaint (Exhibit A) at 1. It seeks rulings that:

- 25 U.S.C. § 465, the provision of the Indian Reorganization Act (IRA) that authorizes Interior to take lands in trust for tribes and is the authority for 25 C.F.R. Part 151, is unconstitutional on its face and as applied, Ex. A at 5-6;
- 25 U.S.C. § 465 cannot apply to the Nation's trust application because any diminishment of the Oneida reservation in New York was not due to the general Allotment Act of 1887, Ex. A at 7;
- the trust-application parcels cannot constitute an Indian reservation as that term is defined by the IRA, Ex. A at 9;
- Interior's balancing of the cost to various municipalities in taking the land into trust against the benefit of the Nation was arbitrary, capricious, an abuse of discretion and not in accordance with law, Ex. A, ¶ 56;
- Interior misjudged the tax impact of the trust acquisition because it used actual receipts, Ex. A, ¶¶ 62-66;
- Interior failed to consider or analyze the tax impacts on the City of removing land from the tax rolls, Ex. A, ¶¶ 70-74;
- Interior failed to analyze the quantitative and qualitative impacts of the trust

acquisition on the City's water and sewer systems, Ex. A, ¶¶ 93-98;

- Interior failed to analyze the impacts of the trust acquisition on easements and rights of way for water transmission mains and waste water, Ex. A at 16;
- Interior failed to address the regulatory difficulties (law enforcement, fire protection, community development and planning services and land use and zoning) that will arise from taking numerous, non-contiguous, checkerboarded parcels into trust.

b. *Central New York Fair Business Association v. Kempthorne*, No. 6: 08-cv-00660.

This action seeks numerous declarations, to permanently enjoin the United States from accepting any Nation lands in trust, and alleges civil rights violations. *See* Association's Complaint (Exhibit B) at 1. It seeks, among others, rulings that:

- Interior's acceptance of land in trust for the Nation will result in environmental harm and is in violation of the National Environmental Policy Act (NEPA), Ex. B at 23, ¶¶ 118-130;
- Interior's acceptance of land in trust for the Nation will violate the Property Clause of the United States Constitution, Art. V sec. 3, cl. 2, and therefore Interior lacks authority to take any land in trust in New York State. Ex. B at 15, ¶ 59;
- Interior's decision violates the 10th Amendment to the United States Constitution, Ex. B at 4, ¶ 11;
- Interior's acceptance of land on which the Nation's Turning Stone Casino sits in trust for the Nation will violate the Indian Gaming Regulatory Act (IGRA), Ex. B at12, ¶ 44;

- Interior's acceptance of land in trust for the Nation will result in civil rights violations in that it will violate 42 U.S.C. § 1981 (Ex. B at 28, ¶ 134), § 1983 (Ex. B at 29, ¶ 143), and § 1985 (Ex. B at 32, ¶ 165).

c. *New York v.Kempthorne*, No. 6: 08-cv-00644. In this action, the State of New York and Madison and Oneida Counties seek numerous declarations and to permanently enjoin the United States from accepting any Nation lands in trust. *See* State of New York's Complaint (Exhibit C). The State and the Counties seek rulings that:

- The IRA, 25 U.S.C. § 465, is an unconstitutional delegation of legislative authority, Ex. C at 23, ¶¶ 98-102;
- The IRA, § 465, violates the 10th Amendment to the United States Constitution, Ex. C at 24, ¶¶ 103-110;
- The IRA, § 465, does not apply to the Nation because the Nation did not vote to accept the IRA and was not a recognized Tribe when the IRA was enacted, Ex. C at 25, ¶¶ 111-122;
- Interior's decision to accept land in trust for the Nation violates prior Departmental policy in that the purpose of § 465 of the IRA is to help landless tribes or tribes with an inadequate land base become economically self-sufficient and Interior has historically taken the position that it will not accept land in trust for well off tribes that can manage their own affairs, Ex. C at 28, ¶¶ 123-128;
- Interior's decision violates the Due Process Clause of the United States Constitution because Interior was biased in the Nation's favor, Ex. C at 28, ¶¶ 129-142;

- Interior's decision violates 25 U.S.C. Part 151 because none of the subject lands, that is, lands within the Oneida treaty reservation, are "on-reservation" lands under a recent Supreme Court ruling. Ex. C at 31, ¶¶ 143-150;
- Interior's decision was made without regard to 25 C.F.R. § 151.10 (b), which requires a demonstration of tribal need for the land and Interior made no findings to support a finding of need, Ex. C at 32, ¶¶ 151-156;
- Interior's decision was made without regard to 25 C.F.R. § 151.10 (e), which requires analysis of the decision's impact on the state and its subdivisions, in particular the impact of removal of land from the tax rolls and the loss of tax revenue, and Interior drew unwarranted conclusions with regard to mitigation, Ex. C at 33, ¶¶ 157-175;
- Interior's decision was made without regard to 25 C.F.R. § 151.10 (f), which requires the Secretary to consider jurisdictional problems and potential conflicts of land use that may arise from checkerboarding and inconsistencies with the state's comprehensive environmental protection program, its health and safety laws, including health, building, fire and safety codes, Ex. C at 37, ¶ 176-191;
- Interior's decision was made without regard to 25 C.F.R. § 151.10 (g), which requires the Secretary to consider whether the Bureau of Indian Affairs (BIA) is equipped to discharge the additional management responsibilities associated with the trust acquisition, Ex. C at 41, ¶¶ 192-197;
- Interior's decision failed to take into account existing easements and rights of way and the history of state and local governments' inability to enforce their laws in

those rights of way and the resulting major public safety hazards, and the decision impairs those property rights evidenced by the easements and rights of way, Ex. C at 42, ¶¶ 198-206;

- Interior's decision violated 25 C.F.R. § 151.13, which requires the Nation to satisfy outstanding tax liens, Ex. C at 45, ¶¶ 207-216;
- Interior's decision failed to account for potential environmental consequences and cumulative impacts in violation of NEPA, Ex. C at 46, ¶¶ 217-239;
- Interior violated the Freedom of Information Act (FOIA), Ex. C at 52, ¶¶ 240-255;
- Interior's decision violates IGRA, § 2719 (b) by deciding to take land into trust for gaming purposes without the Governor's consent, Ex. C at 55, ¶¶261-269.

d. *Niagara Mohawk Power Corporation v. Kempthorne*, No. 5: 08-cv-00649. This actions seeks numerous declarations and a permanent injunction prohibiting Interior from acquiring lands in trust for the Nation. *See* Niagara Mohawk Complaint (Exhibit D). It seeks, among others, rulings that:

- The IRA, § 465, is an unconstitutional delegation of legislative authority. Ex. D at 5, and is unconstitutional as applied by Interior;
- the IRA, § 465, does not apply to the Nation because any diminishment of its reservation did not occur pursuant to the General Allotment Act of 1887, Ex. D at 7, ¶¶ 37-43;
- Interior's decision violates 25 U.S.C. Part 151 because none of the subject lands, that is, lands within the Oneida treaty reservation, are "on-reservation" lands under a recent Supreme Court ruling. Ex. D at 8, ¶¶ 46-54;

- Interior's decision violates the APA because it arbitrarily and capriciously jeopardizes the Company's ability to operate and maintain its existing utility infrastructure and provide ongoing utility service, Ex. D at 11, ¶¶ 62-63, and fails to impose conditions to insure adequate regulation over, and operation and maintenance of, the Company's gas and electric facilities, Ex. D at 15, ¶¶ 87-97;
- Interior's decision violates Company property rights guaranteed by the 5th Amendment to the United States Constitution because it will result in the loss of beneficial use of easements and rights of way. Ex. D at 16, ¶¶ 94-98.

e. *Upstate Citizens for Equality, Inc. v. United States*, No. 5: 08-cv-00633. This action seeks declaratory, permanent injunctive and mandamus relief. *See* UCE complaint, Exhibit E. It seeks rulings:

- Declaring that the IRA is an unconstitutional delegation of legislative authority,
- Declaring that the IRA does not apply in New York State,
- that the United States has not held any land in trust for the Nation,
- That the Nation is not an Indian tribe under 25 U.S.C. § 2201, the Indian Land Consolidation Act of 1983 (ILCA),
- That the IRA does not apply to the Nation because it voted to reject it,
- That the Nation's gaming compact is invalid under the IGRA,
- Setting aside Interior's June 13, 2007 decision that the Nation's gaming compact is still in effect,
- Declaring the National Indian Gaming Commission's (NIGC) decision of January 3, 1994 invalid,

- Setting aside NIGC's approval of the Nation's gaming compact,
- Setting aside any decision by the Secretary to take any land in trust for the Nation,
- Directing the NIGC and the U.S. Attorney to investigate violations of IGRA, and
- Enjoining the Nation's conduct of Class III gaming.

f. *Town of Verona v. Kempthorne*, 6: 08-cv-00647. This is an action for declaratory and permanent injunctive relief alleging violations of the APA, IRA, the United States Constitution and the IGRA to declare Interior's land-to-trust decision illegal, null and void and to permanently enjoin its implementation. *See* Town of Verona Complaint (Exhibit F) at 1. This action seeks rulings that:

- The IRA, 25 U.S.C. § 465, is unconstitutional in that violates the 10th Amendment to the U.S. Constitution. Ex. F. at 19, ¶ 70,
- the IRA, § 465, does not apply to the Nation because any diminishment of its reservation did not occur pursuant to the General Allotment Act of 1887, Ex. F at 20-23, ¶¶ 72-95,
- Interior's decision to accept Nation land into trust is arbitrary, capricious and an abuse of discretion because it hinges on the erroneous assumption that the Nation's operation of Turning Stone Casino is legal under IGRA, because it would create a jurisdictional nightmare, because it is predicated on the assumption and/or assurances of the Nation that it will not seek to engage in further ground-disturbing activities or other activities incompatible with local land use and local governmental controls. Ex. F at 23-25, ¶¶ 97- 109.

A comparison of the issues raised in the above-described New York cases with those

raised in this action reveals that, other than the procedural similarity that all challenges to Interior's decision are brought under the APA, this case shares no issues in common with the New York cases and seeks none of the same remedies.

Stockbridge's Complaint raises six causes of action. The first five allege that Interior violated the APA and breached its common law, treaty, and statutory-based trust duties to Stockbridge through its decision to acquire land in trust for the Nation within the New Stockbridge Reservation based on its summarily stated view, and without any legal analysis, that such acquisition would have no impact on Stockbridge's property rights or the viability of its pending land-claim action. *See* Compl. ¶¶ 88 -102. The sixth cause of action alleges that 25 C.F.R. §151.8, which requires that Interior obtain the consent of the governing tribe before it acquires land in trust within its reservation for another tribe, is unlawful as applied to this situation, where Stockbridge retains recognized title to its reservation even though it may have lost its jurisdictional governance rights to the same land. *See* Compl. ¶¶ 103-105.

The relief sought includes declarations that Interior's action violated the APA and its federal trust duties arising out of common law, treaty, and statute and a declaration that 25 C.F.R. §151.8 is unlawful as applied. *See* Prayer for Relief ¶¶ 1-4. Finally, and most importantly, the ultimate relief sought is strictly procedural in nature, *i.e.*, a remand to Interior of that part of its decision pertaining to the acquisition in trust of the 3,312.475 acres that are situated within the New Stockbridge Reservation so that Interior can reconsider and make specific determinations as to whether its acquisition would impair Stockbridge's property rights and claims and whether it should have sought Stockbridge's consent to the acquisition pursuant to 25 C.F.R. §151.8.

In contrast to the actions filed in New York, Stockbridge does not challenge the constitutional validity of 25 U.S.C. §465, the Nation's eligibility to acquire land under its authority, or whether the proposed acquisition violates IGRA or civil rights laws. Neither does it challenge Interior's decision on the basis of environmental concerns, land-use conflicts, tax revenue losses, or state and local jurisdictional issues. Most importantly, and unlike all six of the other complaints, Stockbridge's complaint does not seek to permanently enjoin Interior from accepting land into trust for the Nation. In short, Stockbridge's Complaint is fundamentally different than the six complaints filed in the Northern District of New York: none of the substantive issues raised in the New York actions are raised in this action.

LEGAL STANDARD

Venue in this Court is proper under 28 U.S.C. § 1391(e)(1) & (2), which provides that a civil action in which an officer or agency of the United States is a defendant may be brought in any judicial district in which a defendant resides or a substantial part of the events or omissions giving rise to the claim occurred. Defendants reside in this district. In arriving at the decision challenged herein, a substantial portion of the agency's analysis and deliberations occurred in Interior headquarters in Washington, D.C., with the remainder occurring in the Bureau of Indian Affairs' Regional Office in Nashville, Tennessee. All of the agency's significant final decisions leading up to the Record of Decision occurred in Washington. The Government does not challenge that venue properly lies in this Court, but argues that venue more appropriately lies in the United States District Court for the Northern District of New York.

The statute controlling the United States' motion for a change of venue is 28 U.S.C. § 1404(a), which provides that "[f]or the convenience of the parties and witnesses, in the interest of

justice, a district court may transfer any civil action to any other district or division where it might have been brought." Courts will generally give substantial deference to the plaintiff's choice of forum.[2] To prevail on a change of venue motion, the defendant "must demonstrate that the plaintiff's choice of forum was significantly inappropriate, notwithstanding the existence of satisfactory jurisdiction and venue."[3] The moving party "bear[s] a heavy burden of establishing that plaintiffs' choice of forum is inappropriate."[4]

The decision to transfer venue is within the discretion of the district court and, because it is impossible to develop any fixed general rules on when a case should be transferred, courts employ an individualized, fact-based, case-by-case approach to determine convenience and fairness.[5]

Once the threshold requirement of an adequate alternative forum is met, the district court must then "weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the

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[2]*Gulf Oil v. Gilbert*, 330 U.S. 501, 508 (1947) ("[U]nless the balance is strongly in favor the defendant, the plaintiff's choice of forum should rarely be disturbed."); *Akiachak Native Community v. Department of the Interior*, 502 F.Supp.2d 64, 67 (D.D.C. 2007) ("A plaintiff's choice of forum is usually accorded great deference, unless the plaintiff chooses a forum that is not his home and that has no substantial connection to the subject matter of the action.").

[3]Steven Baicker-McKee, Wm. Janssen & John Corr, Federal Rules Civil Handbook 2008 (Thomson/West 2007).

[4]*Southern Utah Wilderness Alliance v. Norton*, 315 F.Supp.2d 82, 86 (D.D.C. 2004) (*quoting Pain v. United Tech. Corp.*, 637 F.2d 775, 784 (D.C.Cir. 1980).

[5]*Akiachak Native Community v. Department of the Interior*, 502 F.Supp.2d 64, 67 (D.D.C. 2007) (*quoting Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1964); *Robinson v. Eli Lilly and Company*, 535 F.Supp. 2d 49, 51 (D.D.C. 2008) (*quoting SEC v. Savoy Indus. Inc.*, 587 F.2d 1149, 1154 (D.C.Cir. 1978).

heading of 'the interest of justice.'" *Akiachak*, 502 F.Supp.2d at 67 (*quoting Stewart Org., Inc.*, 487 U.S. at 29).

> The private-interest considerations include: (1) the plaintiff's choice of forum, unless the balance of convenience is strongly in favor the defendants; (2) the defendant's choice of forum; (3) whether the claim arose elsewhere; (4) the convenience of the parties; (5) the convenience of the witnesses, but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and (6) the ease of access to sources of proof. . . . . The public-interest considerations include: (1) the [transferee court's] familiarity with the governing laws; (2) the relative congestion of the calendars of the potential transferee and transferor courts; and (3) the local interest in deciding local controversies at home.

Id. (*quoting Schmidt v. Am. Inst. of Physics*, 332 F.Supp2d 28, 31 (D.D.C. 2004) (citation omitted).

ARGUMENT

Because the land that is the subject of the agency decision challenged in this action is located in New York, Stockbridge does not dispute that this action could properly have been brought in the Northern District of New York. Stockbridge does dispute, however, the Government's assertion that New York is the more appropriate forum.

The District of Columbia is more convenient to Stockbridge and, because keeping this action here will not, as the Government asserts, result in additional expense to the public, the duplicative use of judicial resources, or the risk of inconsistent judicial decisions, the interests of justice would not be better served by transferring the case. Nor, as the Government mistakenly asserts, would the interests of justice be served by transfer because this action involves a localized controversy. It does not. This case raises only issues related to enforcement of fiduciary duties between a beneficiary Indian tribe and its federal trustee and seeks only procedural remedies: it does not raise any issues associated with local concerns that arise when

land is proposed to be taken into trust, such as, *e.g.*, environmental or tax issues, nor does it raise any issue that is involved in deciding the Tribe's land-claim action.[6]

Thus, the only issue related to this action that even arguably might be characterized as local is the ultimate question whether the 3,300 acres of Stockbridge reservation land in New York will be taken into trust. But no decision by a court in this action is going to decide that question. Rather, that question will be resolved either by the Department of the Interior or by the outcome of the six New York actions.

The ultimate decision whether Stockbridge lands are taken into trust will be made by Interior if all of the following happen: 1) Stockbridge prevails in this action; 2) on remand, Interior decides not to take the Stockbridge lands in trust; and 3) the state and local interests do not prevail in the six New York actions. If all three of the above do not occur, the outcome of the New York cases will determine whether Stockbridge lands are taken into trust. But whether made here or in New York, resolution of the issues in this action will not decide the question.

A. Private Interest Considerations

The controlling principle here was succinctly set forth by the court in *Akiachak*: "[a] plaintiff's choice of forum is usually accorded great deference, unless the plaintiff chooses a forum that is not his home and that has no substantial connection to the subject matter of the

[6]Of course, a portion of the land that is the subject of Interior's land-to-trust decision is also the subject matter of the Stockbridge land-claim action, so the matters are not entirely unrelated. As the Government notes, Mem. at 11 and n. 2, shortly after it filed this action, Stockbridge filed a motion for a temporary (preliminary) injunction in the land-claim action in the Northern District of New York asking that court to protect its jurisdiction over the subject matter of the land claim from Interior's proposed action. After discussions with counsel for the United States, Stockbridge withdrew its motion. That motion arguably would have had local impact, in that, unlike this case, it sought to (temporarily) prevent Interior from taking land into trust. Notably, it was filed in New York.

action." 502 F.Supp.2d at 67 (emphasis added). There, in an action similar to this one, plaintiff challenged the Interior regulations under 25 C.F.R. Part 151 which, for the most part, preclude the Department from acquiring land in trust for tribes in Alaska under the authority of the IRA. As in this case, the federal defendants moved under 28 U.S.C. § 1404(a) to transfer the case to Alaska, contending that Alaska was a more appropriate forum because the land that is the subject of the dispute was located there and the impact of any decision would be felt there.

The court concluded however, that the private interests involved favored retaining the matter in the District of Columbia. Applying the guiding principle of according great weight to the plaintiff's choice of forum, the court ruled that the case presented a sufficiently substantial nexus to the District of Columbia because the national rule-making process Interior engaged in when formulating the regulation took place there.[7] The court also noted that plaintiff had chosen a forum that was advantageous for the federal defendants because they were located in the district, the documentation from Interior's decision-making process was likewise located there, and that it was unlikely that witnesses would have to be called in an APA case where the court is limited to reviewing the administrative record.

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[7]The United States, Mem. at 9, relies on *Southern Utah Wilderness Alliance v. Norton*, 315 F.Supp.2d 82 (D.D.C. 2004), where the district court reached a different result. There, environmental organizations challenged Interior's decision to permit the sale of 21 oil and gas leases on 25,000 acres of BLM-managed lands in Utah. The court rejected plaintiffs' contentions that the controversy was substantially tied to Washington as a result of policy decisions made by DC-based officials which plaintiff asserted had a direct impact on the lease sales in Utah. The court stated that the issue in the case was not the policy changes, but rather the Utah BLM office's decision to conduct the sale and the procedures it followed, *id.* at 87, and headquarters officials were not actively involved in the leasing decision and the process employed. Thus the agency's decision-making process was not sufficiently tied to Washington and *Southern Utah Wilderness Alliance* is distinguishable from the instant case and *Akiachak* on that very important issue.

Here, the United States mistakenly contends that Stockbridge's choice of forum is entitled to "little, if any, deference," Mem. at 12, because the suit was brought in plaintiff's "non-home" forum and the District of Columbia has no meaningful ties to the factual and policy issues underlying this litigation. Mem. at 13.

Initially, it should be noted that, under the circumstances of this case, the fact that Stockbridge brought this action in a "non-home" forum is a non-issue. Stockbridge's home is in Wisconsin, and venue does not lie in Wisconsin. 28 U.S.C. § 1391(e). The choices were the District of Columbia and New York, and, of the two, Washington is the more appropriate forum.[8] Washington is a more convenient forum for plaintiff because travel to Albany, as a result of airline schedules and the lack of non-stop flights to and from major cities outside the region, generally requires an additional one or two nights' stay as compared with travel to the District of Columbia, which has numerous non-stop flights from cities throughout the country.

Washington is also an advantageous forum for defendants. Interior is resident in this

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[8]The Government relies on *Shawnee Tribe v. United States*, 298 F.Supp.2d 21 (D.D.C. 2002) for the proposition that a plaintiff's choice of forum is to be accorded less deference when it has not chosen its home forum. In *Shawnee*, a Kansas tribe sued Interior, the Department of Defense, and the General Services Administration in the District of Columbia challenging the Government's decision not to transfer a 9,065-acre military reservation to Interior to be held in trust for the Shawnee Tribe. Because local political, economic and governmental interests in Kansas were substantial, and Kansas was the Tribe's home forum, the court ordered the case transferred to the Federal District Court in Kansas. *Shawnee* does not provide particularly relevant guidance in this instance, however, because here Stockbridge could not have brought this action in its home forum. In addition, the *Shawnee* court found that, unlike in this case, the Government's actions and its decision-making process were not centered in the District of Columbia. The standard applicable in this case was articulated in the *Akiachak* decision, where the court held that "a plaintiff's choice of forum is usually accorded great deference, unless the plaintiff chooses a forum that is not his home and that has no substantial connection to the subject matter of the action." 502 F.Supp.2d at 67 (emphasis added). If there is a substantial connection between the chosen forum and the subject matter of the action, as there is in this case, the plaintiff's choice of forum must be accorded great deference.

district, the administrative record is here, the Justice Department attorneys handling the case are here (their offices are just a few blocks from the courthouse),[9] and, while it is unlikely, if any witnesses should be called in this APA case, they will not be from New York. These factors weigh in favor of Stockbridge's choice of this district. The Court in *Akiachak Native Community* looked to many of these same factors in holding that private interest considerations favored this district as the proper forum for that action. *Id*. at 68.

Most importantly, and contrary to federal defendants' contention, this action has strong and meaningful ties to Washington. The challenged decision proposes to acquire over 13,000 acres in trust for the Nation. *See* ROD at 7. Out of that, only one 225-acre parcel is being used for gaming purposes. *See* ROD at 6 & 7. This is significant because in ordinary cases, Part 151 trust-land-acquisition decisions are made by the Regional Directors of the Bureau of Indian Affairs (BIA) rather than by the central office in Washington. In contrast, decisions to acquire land in trust for gaming purposes must be made in the central office in Washington by the Assistant Secretary of the Interior for Indian Affairs. *See* September, 2007 "Checklist for Gaming Acquisitions, Gaming-Related Acquisitions and IGRA Section 20 Determinations" at 1, Section A ("The authority to approve or disapprove land acquisitions for gaming and gaming-related purposes is vested with the Assistant Secretary - Indian Affairs (AS-IA)"). Attached as Exhibit G.

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[9]The Government makes much of the fact that it will be defending six related cases on the same administrative record in New York. However, whatever concerns it professes about efficiency and convenience are undercut by the fact that the Department of Justice, Environment and Natural Resource Division, assigned this case and the six New York cases to different attorneys and different sections. The New York cases are being handled by the Indian Resources Section, whereas this case is assigned to the Natural Resources Section.

The fact that this decision, involving only one parcel to be used for gaming purposes, was made in the central office in Washington by the second-ranking official in the Department demonstrates the significance of the decision and its nationwide implications for the Secretary's authority to acquire land in trust status for Indian tribes pursuant to section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. §465, and its implementing regulations at 25 C.F.R. Part 151. *See Sierra Club v. Van Antwerp*, 523 F.Supp.2d 5, 13 (D.D.C. (2007). Although the lands in question are in New York, most of the significant deliberations and all of the significant decisions regarding the proposed acquisition took place in this district. Those deliberations, and the fact that the decision was made, and the ROD signed, by such a high-ranking Department official as the Deputy Secretary provides a significant nexus to this district. *See Akiachak Native Community v Department of Interior*, 502 F.Supp.2d 64, 68 (D.D.C. 2007) (although Interior "made the more compelling showing that the ramifications of any decision here [regarding the applicability of 25 U.S.C. §465 and 25 C.F.R. Part 151 to Alaska] will affect principally Alaska," the fact that Interior engaged in a national rule making process and subsequent public discussions about the proposed rule in Washington, D.C. presented "a sufficiently substantial nexus to this district to warrant deference to [the plaintiff's] choice of forum").

In this case, Stockbridge's choice of forum is entitled to great weight. While this forum is not Stockbridge's home, it has substantial connections to the subject matter of the action and the balance of convenience likewise tips in favor of this district. This satisfies the standard set forth in *Akiachak* and the private interest considerations therefore favor this district as the more appropriate forum. The United States has not met its "heavy burden" of establishing that this forum is inappropriate. "Unless the balance is strongly in favor of the defendant, the plaintiff's

choice of forum should rarely be disturbed." *Gulf oil Corp. v. Gilbert*, 330 U.S. at 508. *See also Sierra Club v. Van Antwerp*, 523 F.Supp.2d at 12-13.

B. Public Interest Considerations

The public interest considerations set forth in *Akiachak* include the transferee court's familiarity with the governing laws and the local interest in deciding local controversies at home. 502 F.Supp.2d at 67. The Government cites both of these considerations, arguing that the Northern District of New York is the more appropriate forum because it is more familiar with the land-claim disputes between the Nation and Stockbridge, Mem. at 11, and because this case involves claims that are local to New York. Mem. at 8.

The United States is mistaken in its assertion that venue more properly lies in New York because that forum is more familiar with the pending land-claim disputes. While it is true that New York's Northern District is more familiar with the pending land claims, that is beside the point at issue here. This action does not raise any of the issues presented in the pending land-claim action. While those issues form the backdrop against which the issues presented here arise, this action involves only the discrete and narrow questions whether Interior's trust duties (duties grounded in the federal-common law, treaties and statutes), together with its duties under the APA, require it to fully consider and analyze whether its actions will impair or extinguish Stockbridge property rights. If the governing trust-doctrine and administrative law does so mandate, did Interior breach this duty by only briefly and summarily addressing one issue and failing altogether to even mention two others, and, if it did, should the decision be remanded to the agency for a more complete determination? To answer these questions, a court requires not familiarity with Indian land claims, but familiarity with the law governing the exercise and

enforcement of the United States' fiduciary duties to Indian tribes and the requirements of the APA. Thus, the familiarity-with-the-governing-law consideration favors retaining the case in this district, as it possesses expertise in both the APA and the enforcement of the federal-tribal trust relationship. *See, e.g., Osage Nation v. United States*, 66 Fed. Cl. 244 (2005); *Cobell v. Norton*, 212 F.R.D. 24 (D.D.C. 2002) (*Cobell I*), and *Cobell v. Norton*, 213 F.R.D. 1 (D.D.C. 2003) (*Cobell II*).

The Government is likewise mistaken when it urges that this action involves localized controversies that need to be decided at home. Mem. at 8. While it is true that Interior's decision to take over 13,000 acres in trust for the benefit of the Nation involves numerous localized controversies, it is wrong to imply that those local issues are raised by or are in any way involved in this case. As discussed *supra* at 6-13, the six cases filed by state and local interests in the Northern District of New York involve numerous localized controversies relating to, *e.g.*, tax jurisdiction and revenues, the application and enforcement of state and local environmental, safety, building, fire, law enforcement and comprehensive planning codes, property rights and rights of way, utility services and governance problems created by non-contiguity and checkerboarding. In addition, a number of national federal Indian policies and statutes whose application have local impacts are attacked, including the constitutionality of the IRA and its applicability to tribes east of the Mississippi, the Indian Gaming Regulatory Act and the legality of the Nation's Turning Stone Casino. There are alleged violations of the 5th and 10th Amendments to the Constitution, as well as violations of NEPA, FOIA, the Indian Land Consolidation Act of 1938, and three civil rights statutes (42 U.S.C. §§ 1981, 1983 and 1985). And the list goes on.

Plainly, these New York cases have little in common with this action. None of the issues raised in these cases are present in this action nor is the relief sought in the New York cases similar to that sought here. Each of the New York actions seeks to permanently enjoin Interior from taking any land into trust for the Nation. In contrast, this action seeks no injunctive relief, but instead asks only that Interior be required to reconsider its decision with regard to 3,300 out of more than 13,000 acres. If, following such reconsideration, Interior were to decide to proceed with the trust acquisition, no relief sought in this action would prevent it from doing so.

Because the New York cases and this case present no issues in common and seek completely different relief, the Government's assertion that this case should be transferred "to avoid a duplicative waste of judicial resources and the possibility of inconsistent results," Mem. at 10, is without merit. Its transfer motion relies heavily on the fact that this action and the six New York actions seek review of the same administrative decision, but ignores that the claims and demands for relief share nothing in common. In fact, the decision quoted by the Government in support of its argument, *Towns of Ledyard, et al. v. United States*, Civ. No. 95-0880, slip op. at 4 (Ex. E to U.S. Mem.), makes it clear that the presentation of similar claims and demands for relief are critical factors in a transfer inquiry based on the pendancy of related cases in another district. In *Towns of Ledyard*, the court found that the interests of justice favored transfer because "[t]he action here and that in Connecticut seek review of the same administrative decision and present similar claims and demands for relief." (Emphasis added). The fact that actions pending in a different district seek review of the same administrative decision, standing alone, is insufficient to support a motion for transfer. There must be at least some similarity of issues presented and relief sought, and here there is none.

Similarly, the critical factor in the court's decision to transfer *State of Alaska v. Norton*, Civ. No. 1: 105-cv-00012 (D.D.C., Order filed June 9, 2005) (Exhibit H), to the Alaska district was the similarity of issues in a pending case in Alaska:

> The critical issue in determining whether this case should stay here or go to Alaska is whether this case and *Katie John III* raise the same issues or issues so related that a single jurist should decide both for the sake of efficiency and to avoid conflicting orders.

Id., slip opinion at 7. (Ex. H). There, Alaska had sued Interior because its regulations represented an over-reaching by the United States that interfered with State sovereignty, while in the Alaska action, Alaskan Natives had sued Interior because the same regulations did not go far enough to protect Native Alaskan interests. Thus, while the Alaska and DC actions presented different challenges to the same departmental regulations, they were closely related because each required an interpretation of the reserved-waters doctrine, the same provisions of the Alaska National Interest Lands Conservation Act, and applicable Ninth Circuit precedent. *Id.*, at 9. There consequently was "a very real possibility of inconsistent and conflicting decisions if this matter is not transferred to the District of Alaska." *Id.* at 10.

Here, the same provisions of Part 151 are not challenged. There is no risk of an inefficient use of judicial resources or inconsistent and conflicting decisions if this case remains here, and the rationale and reasoning applied by Judge Collyer in *State of Alaska* requires that the Government's motion to transfer this action to New York be denied.

Nor does the local-issues-should-be-decided-locally argument support the motion to transfer. Because this action raises none of the local issues raised in the six New York cases and discussed previously, the only arguable localized impact, and the only one referenced by the

United States, is the general proposition that "the consequences of placing the land in trust status directly affects local New York interests." Mem. at 8. While this assertion, like the same-administrative-decision argument discussed above, is superficially appealing, it does not withstand scrutiny in light of the claims asserted and relief sought by Stockbridge. This is because nothing decided in this action will determine whether any land in New York may or may not be taken into trust by Interior.

As we discussed previously, should Stockbridge prevail in this suit, a portion of Interior's decision would be remanded with directions to reconsider and explain fully the reasons for its decision. Upon reconsideration, Interior would either: a) change its mind and rule that it cannot, consistently with its fiduciary duties, take Stockbridge reservation lands in trust for the Nation; or, b) reaffirm its previous decision, finding the trust acquisition consistent with its fiduciary responsibilities to Stockbridge. In either event, it would be Interior and not this Court that determined whether the land will be taken into trust. Should Interior reaffirm its decision to take the land into trust, any final trust acquisition by Interior would still be subject to the outcome of the six lawsuits filed in the Northern District of New York that actually do raise local issues.

On the other hand, if Stockbridge does not prevail in this action, the same result would obtain. The decision whether Stockbridge reservation land is taken into trust in the State of New York would be controlled by the results in the New York cases.

Therefore, the public interest considerations, like the private interest considerations, favor this district as the more appropriate venue.

CONCLUSION

For all of the foregoing reasons, the Government's motion to transfer this action to the

United States District Court for the Northern District of New York should be denied.

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Respectfully submitted,

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