UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TOHONO O'ODHAM NATION Plaintiff, v. KENNETH L. SALAZAR, in his official capacity as Secretary of the Interior, Defendant.	Judge John D. Bates No. 1:10-cv-00472-JDB

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION TO TRANSFER

Plaintiff Tohono O'odham Nation is a federally recognized Indian tribe located in southern and central Arizona. It seeks to compel the Secretary of the Interior (the "Secretary") to take somewhere between 53.54 and 134.88 acres of land in Maricopa County, Arizona (the "Property"), into trust for the its benefit. Plaintiff contends that the ultimate disposition of the Property is a "political football in state and local election politics." In fact, there is on-going litigation in Arizona over the very property Plaintiff seeks to have taken into trust.

Plaintiff's claim is based on the Gila Bend Indian Reservation Lands Replacement Act of 1986, Pub. L. No. 99-503, 100 Stat. 1798 (1986) ("P.L. 99-503"), which concerns land in only three counties, all of which are in Arizona. P.L. 99-503, § 6(d). In contrast to the interest expressed by Arizona citizens, governments, and tribal nations in this case, there is no appreciable connection between this case, or the requested relief, and the District of Columbia.

Local interest in significant local controversies compels a change of venue in the overall interest of justice. See Citizen Advocates for Responsible Expansion, Inc. v. Dole, 561 F. Supp. 1238, 1240 (D.D.C. 1983). For these reasons, the United States respectfully requests that this Court transfer venue of this case to the United States District Court for the District of Arizona, pursuant to 28 U.S.C. § 1404(a).

FACTUAL BACKGROUND

This case concerns either 53.54 or 134.88 acres of land in Maricopa County, Arizona. On January 28, 2009, the Tohono O'odham Nation submitted its first fee-to-trust application, requesting that the Department of the Interior ("Department") take 134.88 acres of the Property into trust, pursuant to P.L. 99-503. See Pl.'s Ex. A, tab 4 in Supp. of Pl.'s Mot. for Summ. J (hereinafter, exhibits in support of Plaintiff's motion for summary judgment are referred to as "Pl.'s Ex."). Plaintiff intends to use the land for gaming purposes. Id. Following receipt of the Tohono O'odham Nation's application on January 28, 2009, the Department received letters opposing Plaintiff's application from several Arizona residents, elected officials, and tribal entities: the City Attorney for Glendale, Arizona; the Governor of Arizona; the Gila River Indian Community; Def.'s Ex. A; the Mayor of Phoenix; the President of the Fort McDowell Yavapai Nation; and the Tonto Apache Tribe. Pl.'s Ex. E.

Plaintiff's application is not the only measure of local interest in the Property. In fact, the Property, or at least a portion of it, is currently subject to litigation in the state courts of Arizona. The Arizona Courts, ruling against Plaintiff, determined that a portion of the Property was annexed by the City of Glendale. Tohono O'odham Nation v. City of Glendale, No. 2009-023501, slip op. (Ariz. Superior Ct., Mar. 9, 2010) Pl.'s Ex. M. The matter remains sub judice.

Plaintiff has described the Property as "an unwilling political football in state and local election politics" and a source of "political conflict here in Arizona." Pl.'s Ex. K. The Property's status as a "political football" has received substantial media coverage in Arizona. Def.'s Ex. B. In response to Plaintiff's intent to build a casino, the City of Glendale hired an outside consultant to study the proposed casino development on the Property. Id.

The local dispute over the Property has also impacted Plaintiff's application to have the land taken into trust. On June 3, 2009, the regional director for the Bureau of Indian Affairs ("BIA"), in Phoenix, Arizona, sent Plaintiff a letter stating that the BIA's Western Region intended to "make our recommendation to the Assistant Secretary-Indian Affairs through the Bureau Director, by the end of June." Pl.'s Ex. F. The City of Glendale, however, reiterated by ordinance, its belief that a portion of the Property had already been annexed. Pl.'s Ex. I. Subsequent to Glendale's actions, Plaintiff's submitted a new letter, dated August 18, 2009, requesting that the Department take into trust some 53.54 acres of the Property, land purportedly unaffected by the City of Glendale's annexation claims. Pl.'s Ex. J. Further, Plaintiff requested that if the City of Glendale's claims were resolved in its favor, that they "will wish to work with the Department to reconnect all of the tracts that make up the Settlement Property parcel so that the entirety of the property can be included in the final trust acquisition." Id. In another letter, this one dated September 8, 2009, Plaintiff expressed its "hope that . . . the Department has resolved to its satisfaction that the *entire acreage* identified in the Nation's fee-to-trust request meets the requirements of" P.L. 99-503, notwithstanding the City of Glendale's claims regarding its 2001 annexation. Pl.'s Ex. K (emphasis added). Recently, on March 12, 2010, Plaintiff requested that "the Department accept trust title to approximately 134.88 acres of land" but

added a request that the "**Department immediately agree to accept trust title to Parcel 2, which is unaffected by the state-court litigation**" and the proviso that "[i]f, . . . the [state court's] decision is overturned on appeal, the Nation will ask the Secretary to hold the entirety of the Settlement Property in trust as a single, contiguous area . . . ." Pl.'s Ex. O (emphasis in original).

STATUTORY BACKGROUND

I. Change of Venue, 28 U.S.C. § 1404(a)

Transfer of venue is governed by 28 U.S.C. § 1404(a). The statute affords the Court wide discretion to determine the appropriate venue of a case based upon a plaintiff's claims and the issues to be litigated. Section 1404(a) states:

> (a) For 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.

28 U.S.C. § 1404(a).

Section 1404(a) facilitates the transfer of actions to a more appropriate federal forum. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981); Van Dusen v. Barrack, 376 U.S. 612, 616 (1964). The party seeking to transfer venue bears the burden of showing that the transfer is proper. Trout Unlimited v. U.S. Dep't of Agric., 944 F. Supp. 13, 16 (D.D.C. 1996). That burden, however, is substantially diminished when, as here, Defendants seek to transfer the action to the forum where Plaintiff resides. Citizen Advocates, 561 F. Supp. at 1239. The burden is also lessened when the plaintiff's chosen forum has no factual connection to the case, and Plaintiff and subject matter of the action have a substantial connection with the proposed transferee forum. DeLoach v. Philip Morris Cos., 132 F. Supp. 2d 22, 24 (D.D.C. 2000); Trout

Unlimited, 944 F. Supp. at 17.

This Court has broad discretion when considering a motion under Section 1404(a) and should adjudicate such motion "according to individualized, case-by-case consideration of convenience and fairness." Hawksbill Sea Turtle (Eretmochelys Imbricata) v. Fed. Emergency Mgmt. Agency, 939 F. Supp. 1, 3 (D.D.C. 1996) (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988)). In exercising that discretion, the Court must first answer the threshold question of whether the action could have been brought in the transferee district. See S. Utah Wilderness Alliance v. Norton, 315 F. Supp. 2d 82, 86 (D.D.C. 2004). If this threshold issue is answered in the affirmative, courts then consider the other principal factors—convenience of the parties, convenience of witnesses, and the interest of justice—through a balancing of public and private interests. See Valley Cmty. Pres. Comm'n v. Mineta, 231 F. Supp. 2d 23, 44-5 (D.D.C. 2002). The public considerations include: 1) the transferee district's familiarity with the governing law; 2) congestion of the transferor and transferee districts; and 3) "the local interest in deciding local controversies at home." Trout Unlimited, 944 F. Supp. at 16. The private considerations include: 1) the plaintiff's choice of forum; 2) the defendant's choice of forum; 3) where the claims arose; 4) convenience of the parties; 5) convenience of the witnesses; and 6) ease of access to sources of proof. Id.

II. The Gila Bend Indian Reservation Lands Replacement Act (P.L. 99-503)

The substance of Plaintiff's underlying case is the Gila Bend Indian Reservation Lands Replacement Act, P.L. 99-503. Congress enacted P.L. 99-503 in 1986, authorizing the Secretary to exchange Plaintiff's Gila Bend Indian Reservation lands for $30,000,000. P.L. 99-503 § 4(a). In turn, P.L. 99-503 authorized Plaintiff "to acquire by purchase private lands in an amount not

to exceed, in the aggregate," 9,880 acres. § 6(c). At the request of Plaintiff, the Secretary "shall hold in trust for the benefit of the Tribe any land which the Tribe acquires" so long as the land is not "outside the counties of Maricopa, Pinal, and Pima, Arizona or within the corporate limits of any city or town." § 6(d). Further, P.L. 99-503 states that "[l]and meets the requirements of this subsection only if it constitutes not more than three separate areas consisting of contiguous tracts, at least one of which shall be contiguous to San Lucy Village. The Secretary may waive the requirements set forth in the preceding sentence if he determines that additional areas are appropriate." Id.

ARGUMENT

I. TRANSFER OF THIS CASE IS APPROPRIATE AND THE INTEREST OF JUSTICE IS BEST SERVED BY TRANSFERRING THIS CASE TO THE DISTRICT OF ARIZONA

The public interest factors weigh heavily in favor of transfer to the District of Arizona. Plaintiff's land-into-trust request directly involves and impacts Arizona lands, citizens, and laws. The citizens of Arizona therefore have a significant interest in having Plaintiff's claims resolved in Arizona.

A. The underlying controversy in this case is one of significant local interest in Arizona

This case should be transferred to Arizona because "justice requires that such localized controversies be decided at home." Citizen Advocates, 561 F. Supp. at 1240; Armco Steel Co., L.P. v. CSX Corp., 790 F. Supp. 311, 324 (D.D.C. 1991) (the interest in having local controversies decided locally is compelling); Harris v. Republic Airlines, 699 F. Supp. 961, 962-63 (D.D.C. 1988). The Supreme Court has emphasized the importance of ensuring local issues are decided in their home venue. See Nat'l Wildlife Fed'n v. Harvey, 437 F. Supp. 2d 42, 49

(D.D.C. 2006) (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947)). Here, the Secretary's ultimate determination will directly impact the economy of Arizona and Plaintiff's own interests in Arizona. Acquisition of land in trust, in this case, establishes tribal sovereignty over the land, and thereby implicates considerable economic and political interests. Conversely, neither the Secretary's action nor Plaintiff's planned use for the Property will impact the daily lives of individuals living and working in or near Washington, D.C.

Local interests specifically weigh in favor of transfer where a case implicates significant economic and political interests—including Indian lands issues—in the transferee forum. See Shawnee Tribe v. United States, 298 F. Supp. 2d 21, 26 (D.D.C. 2002). At issue in Shawnee Tribe was whether portions of a military reservation, designated as surplus property by the General Services Administration, were reservation lands and subject to transfer to the Department to be held in trust for the Tribe. Id. at 24. The Court decided that the lawsuit's transfer from the District of Columbia to Kansas was appropriate, stating that "the most persuasive factor favoring transfer . . . is the local interest in deciding a sizable local controversy at home." Id. at 26. Central to the Court's opinion was that judicial allocation of the subject property would directly impact counties and neighborhoods in Kansas and implicate considerable local economic, political, and environmental interests. Id. The Shawnee Tribe Court expressed particular concern "about exercising jurisdiction over a case that will affect the development of a massive area in Kansas in a venue with which Kansas citizens have little to no connection." Id.

More specifically, transferring cases related concerning Indian gaming to the federal district where the controversy is located promotes the interests of justice. Towns of Ledyard, N.

Stonington and Preston, Conn. v. United States, 1995 WL 908244, No. 95-0880, slip. op. at 4-6 (D.D.C. May 31, 1995); Apache Tribe of the Mescalero Reservation v. Reno and Babbitt, No. 96-115; slip op. at 5-6 (D.D.C. Feb. 5, 1996) (Def.'s Ex. C-1); Cheyenne-Arapaho Tribe of Oklahoma v. Reno, No. 98-065, slip op. (D.D.C. Sept. 9, 1998) (Def.'s Ex. C-2). This Court articulated the considerations in favor of transfer in a case involving the Santee Sioux Tribe of Nebraska:

> ". . . [t]he federal courts do not allow cameras or tape recorders in courtrooms, there is intense local interest in this controversy, and there is a significant benefit to allowing those whose lives will be most immediately affected by the outcome of litigation, as well as the local media, to physically attend the proceedings which will determine that outcome. There is no substitute for personally observing, watching and evaluating the judge who presides, hearing the quality of the arguments, and getting a first-hand impression of whether the proceeding is being handled with the appropriate fairness and seriousness. Furthermore, the members of this District Court have repeatedly honored this principle by transferring cases involving Indian gaming controversies back to the state in which the controversy and the gaming were located.

Santee Sioux Tribe of Nebraska v. National Indian Gaming Commission, No. 99-528, slip op. at 8-9 (D.D.C. April 19, 1999) (collecting cases) (Def.'s Ex. C-3); see also Lac Courtes Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States, No. 01-1042, Slip op. at 1, 6-7 (D.D.C. Aug. 16, 2002).

The principle of deciding local controversies at home also extends beyond issues involving Indian lands. In another case originally filed in the District of Columbia, Southern Utah Wilderness Alliance v. Norton, 315 F. Supp. 2d 82 (D.D.C. 2004), the plainitff sought to resolve a dispute involving 21 parcels of land in Utah. This Court concluded that National Environmental Policy Act considerations were localized interests which "directly touch[ed] local

citizens." Id. at 88. The Court granted the Government's transfer motion stating that "[i]t makes sense that these alleged consequences would be most particularly felt in Utah, and thus that the courts of Utah would have a clear interest in resolving the dispute." Id. at 89 (citing Trout Unlimited, 944 F. Supp. at 20).

Transfer is likewise proper where a case "concerns a matter of great controversy in" another district, as evidenced by activity from local interest groups and governments, transfer is proper. Citizen Advocates, 561 F. Supp. at 1240. Here, the very statute at issue in Plaintiff's complaint is linked to local issues. Public Law 99-503 states that lands "within the corporate limits of any city or town" may not be taken into trust. P.L. 99-503, § 6(d). Plaintiff has described the disposition of their Property as a "political football," and numerous local groups, tribal governments, and cities have commented on the application. Def.'s Ex. A. This matter presents a contentious issue of intense local concern because Plaintiff intends to use the Property for the purpose of gaming. Def.'s Ex. B. Such a controversy favors deciding the merits of Plaintiff's case in Arizona.

B. The District of Arizona is the best forum to resolve issues that may potentially arise under the laws of Arizona

Plaintiff's complaint also involves tangential issues of Arizona state law, which further tips the balance in favor of transfer. Transfer is appropriate where the reviewing court may be required to consider laws and regulations that are unique in relation to others concerning Indian tribes and are specific in their application to the transferee forum. See Shawnee Tribe 298 F. Supp. 2d at 27, S. Utah Wilderness Alliance, 315 F.Supp. 2d at 82. In fact, there is already a pending state court case involving the corporate limits of Glendale, Tohono O'odham Nation v. City of Glendale, No. 2009-023501, slip op. (Ariz. Superior Ct. Mar. 9, 2010), discussed in

Plaintiff's motion for summary judgment. Pl.'s Mot. for Summ. J. at 14, 16-17. In the present case, where it may be necessary to consider local law to determine whether the Property is "within the corporate limits," P.L. 99-503, "the benefit of having a local court construe its own law is a relevant factor in considering a transfer motion." Schmid Labs., Inc. v. Hartford Acc. and Indem. Co., 654 F. Supp. 734, 737 n.11 (D.D.C. 1986). Beyond state law, each district court holds equal familiarity with the issues of federal law raised in Plaintiff's complaint, and therefore, this factor favors transfer to the District of Arizona. S. Utah Wilderness Alliance v. Norton, No. 01-2518, 2002 WL 32617198 at *4-5 (D.D.C. June 28, 2002); Nat'l Wildlife Fedn, 437 F. Supp. 2d at 49.

C. The case will not take longer to resolve in the District of Arizona

The statistics on federal case loads show that the time necessary to resolve a case in the District of Arizona is nearly equal to the time necessary in the District of Columbia. In 2009, the median time between filing and disposition of all cases was 8.9 months in the District of Columbia. It was 8.4 months in the District of Arizona.[1/]

II. TRANSFER TO THE DISTRICT OF ARIZONA WILL SERVE THE CONVENIENCE OF THE PARTIES AND POTENTIAL WITNESSES

Defendant is fully prepared to litigate this matter in Arizona. Plaintiff's home forum is Arizona and all of the relevant events occurred in Arizona, where the application to take the land

---

[1/] Federal Judicial Caseload Statistics, tbl. C-5: U.S. District Courts- Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending March 31, 2009 (showing average time intervals from the filing of a lawsuit to the disposition of the case by court action or without court action), available at http://www.uscourts.gov/caseload2009/contents.html (last visited March 26, 2010).

into trust was submitted and analyzed. The mere fact that Plaintiff's counsel is located in Washington, D.C., is immaterial. Kazenercom Too v. Turan Petro., Inc., 590 F. Supp. 2d 153, 163 (D.D.C. 2008) (citations omitted). Because this case involves judicial review of an agency's potential obligations, it is unlikely that any witnesses will be necessary. See Otay Mesa Prop. L. P. v. U.S. Dep't of lnterior, 584 F. Supp. 2d 122, 125 (D.D.C. 2008). To the extent that Plaintiff seeks preliminary or permanent injunctive relief, however, the District of Arizona appears to be far more convenient forum for any potential witness who may appear in this case. Thus, here also, the convenience of the parties and the interests of justice are advanced by transfer of this case to the District of Arizona.

III. PLAINTIFF'S CHOICE OF FORUM IS ENTITLED TO LITTLE, IF ANY, DEFERENCE

While the movant bears the burden of demonstrating that transfer is warranted, when a plaintiff chooses a forum that is not its home — as is the case here — the plaintiff's choice of forum is entitled to far less deference than the choice of a home forum. See Piper Aircraft Co., 454 U.S. 235, 255-56; Shawnee Tribe, 298 F. Supp. 2d at 24-25 (the deference that may ordinarily be due a plaintiff's choice of forum is substantially lessened where suit was brought in the plaintiff's non-home forum and transfer is sought to the forum where the plaintiff resides).

Plaintiff's decision to file the action in the District of Columbia is entitled to little, if any, deference. Plaintiff is located in Arizona and, as discussed above, the subject matter of this litigation is significantly connected to Arizona. The District of Columbia has no meaningful ties to, or interest in, the factual and policy issues underlying this litigation. Valley Cmty. Pres. Comm'n v. Mineta, 231 F. Supp. 2d 23, 44 (D.D.C. 2002); see also Hawksbill Sea Turtle, 939 F. Supp. at 3-4 (transferring venue where the case had no connection with the District of

Columbia); Trout Unlimited, 944 F. Supp. at 17 ("[T]his deference is mitigated where the plaintiff's choice of forum has 'no meaningful ties to the controversy and no particular interest in the parties or subject matter.'") (quoting Chung v. Chrsler Corp., 903 F. Supp. 160, 165 (D.D.C. 1995)). Federal agencies, like the Department, make policy decisions in the District of Columbia every workday. Here, however, the decision at issue relates only to Arizona, its citizens, and its State and local governments.

IV. PLAINTIFF COULD HAVE BROUGHT ITS CLAIMS IN ARIZONA

Plaintiff could have also filed its complaint in the District of Arizona because its complaint raises questions of federal law, see Compl. ¶¶ 4, 27-46, and all federal district courts therefore have subject matter jurisdiction over the claim. See 28 U.S.C. § 1331. As to venue, a civil action against a federal government agency may be heard in any district where a defendant resides, where "a substantial part of the events or omissions giving rise to the claim occurred," or where plaintiff resides. 28 U.S.C. § 1391(e). Here, Plaintiff resides in Arizona (see Compl. ¶ 2) and the property that is the subject of Plaintiff's complaint is located entirely within Maricopa County, Arizona. Further, P.L. 99-503 only authorizes the Secretary to hold land in trust for Plaintiff if it is located in Maricopa, Pinal, or Pima Counties, Arizona. § 6(d). Each of those counties is included in the District of Arizona. 28 U.S.C. § 82.

CONCLUSION

WHEREFORE, on the basis of the foregoing, Defendant requests that the motion to transfer venue be granted. This case should be transferred to a more appropriate forum, the United States District Court for Arizona.

Respectfully submitted this 29th day of March, 2010,

IGNACIA S. MORENO
Assistant Attorney General

/s/ J. Nathanael Watson

EDWARD J. PASSARELLI
Assistant Section Chief

KRISTOFOR R. SWANSON
Trial Attorney
Tel: (202) 305-0248
kristofor.swanson@usdoj.gov

J. NATHANAEL WATSON
Trial Attorney
Tel: (202) 305-0475
joseph.watson@usdoj.gov

Natural Resources Section
Environment & Natural Resources Division
U.S. Department of Justice
P.O. Box 663
Washington, DC 20044
Fax: (202) 305-0506