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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YSLETA DEL SUR PUEBLO,	
Plaintiff,	
v.	**CIVIL ACTION NO. 1:10-cv-00760 (ESH)**
NATIONAL INDIAN GAMING COMMISSION,	**JUDGE HUVELLE**
	U.S. DISTRICT JUDGE
Defendant.	

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO TRANSFER

Defendant, National Indian Gaming Commission ("Defendant" or "NIGC"), by and through its undersigned counsel, in support of its motion to transfer ("Transfer Motion") hereby respectfully replies to the Plaintiff's Ysleta del Sur Pueblo Tribe ("Plaintiff" or the "Tribe") Response in Opposition to Defendant's Motion to Transfer ("Opposition"). As shown below, Plaintiff's opposition does not rebut Defendant's showing that venue is proper in the United States District Court for the Western District of Texas, and that transfer of this action to the

Western District of Texas would serve both the convenience of the parties and witnesses and the interests of justice. 28 U.S.C. § 1404.

ARGUMENT

A. Plaintiff has failed to rebut Defendant's showing that this action could have been brought in the Western District of Texas.

In its July 9, 2010 transfer Motion Defendant noted that "a substantial part of property that is the subject of the action is situated" in the Western District of Texas. See 28 U.S.C. § 1391(e)(2). In response, Plaintiff asserts that its "reservation, held in trust by the federal government, is not the 'subject' of the claim." Opposition at 5; see also at 2 ("[T]here is no 'property' in West Texas at issue in this case…"). Plaintiff's point appears to be that its Texas reservation is not the core issue in this case, as in an *in rem* or quiet title action. But that is not the standard for determining whether property "is the subject of the action" under § 1391(e)(2). Instead, and as several decisions from this Court have held, property "is the subject of the action" if the effects of a regulatory decision being challenged will be visited primarily upon property in the transferee district. See, e.g., Apache Tribe of the Mescalero Reservation v. Reno, No. 96-115 (RMU) (D.D.C.), (February 5, 1996) (Exh. F to Transfer Motion), Slip Op. at 5("[V]enue is proper in New Mexico because the case involves governmental action that will impact the Tribe's gambling operation which is located there, (citation omitted). The venue statute, 28 U.S.C. § 1391(e), holds that venue is proper in the 'judicial district in which … a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.' It is clear that … the property being affected is … located [in New Mexico]"). Cheyenne-Arapaho Tribe of Oklahoma v. Reno, No. 98-CV-065 (RMU)(D.D.C.) (Sept. 9 1988) (Exh. G to Transfer Motion), Slip Op. at 3 ("Here, venue could

be proper in Oklahoma because the case involves governmental action that will impact the tribe's gambling operation in that state" (citation omitted); Towns of Ledyard, N. Stonington, and Preston, Conn. v. United States, No. 95-0880 (TAF)1995 WL 908244 at *1 ("[V]enue is proper in Connecticut because the case involves agency action impacting [Tribal] land located there.").

In addition, Plaintiff stresses that Defendant's decisions it seeks to challenge were made in the District of Columbia. See Opposition at 2 (the Western District of Texas is "not where the decision at issue was made.") However, as mentioned above and as is the case in the instant action, if the impact of those regulatory decisions will be primarily felt elsewhere, the fact that those decisions were made in Washington D.C. is of no consequence in applying §§ 1391 and 1404.

> [T]he present controversy has evolved from an ongoing dispute tied exclusively to the state of Kansas, regarding a parcel of property located squarely within that community. Contrary to the plaintiff's assertions, just because the NIGC's decision was issued in the District of Columbia does not mean that this is where the plaintiff's claim "arose" for purposes of the third factor. Shawnee Tribe [v. United States], 298 F. Supp. 2d [21,] 25 [D.D.C. 2002] (concluding that the claim arose elsewhere even though some decisions were made in Washington, D.C.).

Wyandotte Nation v. NIGC et al., No. 04-1727 (RMU) (D.D.C.) (May 2, 2005) (Exh. J to Transfer Motion), Slip Op. at 9-10.

It is also true, of course, that Plaintiff's Tribal government is located in the Western District of Texas, and that § 1391(e) specifically provides that venue is proper where "the plaintiff resides if no real property is involved in the action." 28 U.S.C. § 1391(e)(3). Plaintiff seeks to discount the significance of its residence by citing several cases for the proposition that a sovereign tribe is not a "citizen" of any state (Opposition at 7), and by stressing that the Federal Government's recognition of the Tribe, and trust responsibilities to the Tribe, create a nexus between the Tribe and Washington D.C. Id. at 6-7. But none of these propositions alters the fact

that the Tribe is a resident of Western Texas, and that venue is, as a result, proper there. See Apache Tribe (Exh. F to Transfer Motion), Slip Op. at 5-6 ("Plaintiff and its gambling operation are located in New Mexico"); Cheyenne-Arapaho Tribe of Oklahoma, (Exh. G to Transfer Motion), Slip Op. at 3 ("[T]he plaintiffs are citizens domiciled in the State of Oklahoma"); Santee Sioux Tribe of Nebraska v. NIGC, No. 99-528 (GK) (D.D.C.) (April 19, 1999) (Exh. H to Transfer Motion), Slip Op. at 3 ("Plaintiff is a federally recognized tribe whose reservation is entirely situated within the State of Nebraska"); Wyandotte Nation (Exh. J to Transfer Motion), Slip Op. at 8 ("The court determines that the plaintiff's choice of forum merits little deference for the purposes of the transfer analysis because the plaintiff neither resides in, nor has a connection to, this forum. (citation omitted) The land at issue in this suit is located in Kansas and the plaintiff is a federally-recognized Indian tribe whose seat of tribal government and majority of tribal members are located in nearby Oklahoma.")

B. The convenience of the parties will be served by transferring this action.

Once it is determined that the action could have been brought in the transferee forum, § 1404 directs the court to consider the convenience of the parties. On this point Plaintiff first argues that "[t]he law is well settled that it is the inconvenience to the moving party, not the inconvenience to the non movant, that must be considered." Opposition at 15 (citing Wireless Consumers Alliance, Inc. v. T-Mobile USA, Inc., No. C 03-3711 (MHP) 2003 U.S. Dist. LEXIS 26802, at *11 (N.D. Cal. Oct. 14, 2003) ("Defendant cannot assert plaintiff's inconvenience in support of a motion to transfer under 28 U.S.C. § 1404(a)") (citations omitted). Plaintiff next argues that the Western District of Texas is "not where the decision makers are located, not where the defendant is located, not where all witnesses are located." Opposition at 2. Third, Plaintiff stresses that "defendant's legal counsel is in Washington D.C., making it much easier

for counsel to litigate there than if forced to travel to west Texas." Opposition at 16. Finally, Plaintiff argues that its choice of forum is entitled to great deference. Opposition at 2, 7.

On Plaintiff's first point, the proposition that Plaintiff's convenience may not be considered appears not to be as "well settled" as Plaintiff suggests – at least not in this court. See, e.g., Wyandotte Nation (Exh. J to Transfer Motion) Slip Op. at 10 ("[B]ecause Kansas is in close proximity to the Tribe's domicile in Oklahoma, *it would be more convenient and less expensive for the plaintiff to travel to Kansas than to Washington,* D.C.") (emphasis added) (footnote omitted). The fact that Plaintiff's seat of government is domiciled in Western Texas is indeed relevant, and militates in favor of transfer. Id.

On the second point, Defendant notes, initially, that Plaintiff's reference to the locus of "the decision makers … the defendant …[and the] witnesses" -- constitutes a bit of rhetorical overkill, because these are simply three different ways of referring to one entity -- the NIGC. Regardless, the courts generally give little if any weight to the location of Federal agencies and officials in suits challenging governmental action.

> The plaintiff, however, argues that its claim does have meaningful ties to the District of Columbia because 'the federal officials whom issued the Decision are located solely in Washington, D.C.; . . . the entire administrative process . . . was conducted in Washington, D.C.;. . . the Tribe submitted all correspondence regarding this issue to the NIGC's headquarters located in Washington, D.C.; and the Tribe and its representatives traveled to Washington, D.C.to meet with the NIGC regarding the Decision." Pl.'s Opp'n at 6. This argument is unpersuasive. Under § 1404(a), the court generally accords little weight to the location of federal agencies and counsel. See, e.g., Shawnee Tribe v. United States, 298 F. Supp. 2d. 21, 25-26 (D.D.C. 2002) (recognizing that "mere involvement on the part of federal agencies, or some federal officials who are located in Washington, D.C., is not determinative" for venue purposes) …
>
> Because there is no identifiable connection between the District of Columbia and this litigation other than the presence of federal agencies in this forum, the court concludes that the plaintiff's claim does not have meaningful ties to the District of Columbia. DeLoach v. Phillip Morris Co., Inc., 132 F. Supp. 2d 22, 25 (D.D.C. 2000).

Wyandotte Nation, (Exh. J to Transfer Motion) Slip Op. at 8-9. That is particularly true where, as

here, the case is likely to be resolved "through written motions and limited oral argument"; in such cases the convenience of the parties is not a major factor either way. Lac Courtes Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States, Civil Action No. 01-1042 (HHK/DAR) (D.D.C.) (Aug. 16, 2002) (Exh. I to Transfer Motion) Slip Op. at 5; see also Wyandotte Nation, (Exh. J to Transfer Motion) Slip Op. at 10-11 ("The fifth factor, convenience to the witnesses, is of little or no relevance since this is a review of an administrative decision that will be limited to the record. (citation omitted). Similarly, the sixth factor, ease of access to sources of proof, also is not of great importance in this case, as the record does not seem to be of the magnitude that would require the court to consider access to it in determining venue.")

Plaintiff's third point – concerning the location of NIGC counsel – carries little if any weight. See, e.g., Apache Tribe, (Exh. F to Transfer Motion) Slip Op. at 6 ("Under § 1404(a), the court accords insignificant, if any, weight to the location of counsel") citing Armco Steel Co, v. CSX Corp., 790 F. Supp. 311, 324 (D.D.C. 1991).

Finally, Plaintiff's insistence that its choice of forum is entitled to "great weight" is simply wrong: the courts have repeatedly stressed that, where a plaintiff has filed suit in a court far from home, little if any weight should be given that forum choice. Defendant quotes here a few examples:

> The court is aware of the deference that should be given to plaintiffs choice of forum, Air Line Pilots Ass'n. [v. E. Airlines] 672 F. Supp.[525,] 526 [(D.D.C. 1987)] (internal citations omitted), however, the court is to give this factor significantly less deference when plaintiff files a law suit in a foreign forum, as plaintiff itself concedes. Martin-Trigona [v. Meister], 668 F. Supp. [1,] 3 [(D.D.C. 1987)].

Apache Tribe, (Exh. F to Transfer Motion), Slip Op. at 5;

> The Court is well aware that, ordinarily, a plaintiff's choice of forum is entitled to substantial weight and deference. Environmental Crimes Project v. EPA, 928 F. Supp. 1, 2 (D.D.C. 1995). However, where, as here, the Plaintiff does not reside in the chosen jurisdiction, and Defendant seeks to transfer the case to Plaintiff's

> home forum, the traditional deference to a plaintiff's choice of forum is substantially lessened. Citizen Advocates for Responsible Expansion v. Dole, 561 F. Supp. 1238, 1239 (D. D.C. 1983).

Santee Sioux (Exh. H to Transfer Motion), Slip Op. at 6-7;

> However, the choice of forum is not afforded great deference when the plaintiff is a foreigner to that forum. Piper Aircraft Co. v. Revno, 454 U.S. 235, 255-256 (1981); see a1so Shapiro, Lifschitz & Schram, P.C. v. R.E. Hazard, Jr., 24 F. Supp. 2d 66, 71(D.D.C. 1998).

Lac Courtes Oreilles (Exh. I to Transfer Motion) Slip Op. at 4;

> [C]ourts generally must afford substantial deference to the plaintiff's choice of forum. *Greater Yellowstone Coalition v. Bosworth*, 180 F. Supp. 2d 124, 128 (D.D.C. 2001). But this deference is weakened when the plaintiff is not a resident of the chosen forum. *Piper Aircraft Co. v. Reno*, 454 U.S. 235, 255-56 (1981). This deference is further weakened if a plaintiff's choice of forum has "no meaningful ties to the controversy and no particular interest in the parties or subject matter." *Airport Working Group of Orange County, Inc. v. Dep't of Defense*, 226 F. Supp. 2d 227, 231 (D.D.C. 2002) (noting that when the connection between the controversy, the plaintiff, and the chosen forum is attenuated, the court gives less deference to the plaintiff's choice of forum); *Wilderness Soc'y v. Babbit*, 104 F. Supp. 2d 10, 13 (D.D.C. 2000).

Wyandotte Nation (Exh. J to Transfer Motion) Slip Op. at 7-8;

> Finally, the plaintiffs argue that a plaintiff's choice of forum is ordinarily accorded substantial deference, and for that reason, the case should remain in this Court. See [Int'l Bhd. Of Painters v.] Best Painting [& Sandblasting Co.], 621 F.Supp. [906,] 907 [(D.D.C. 1985)]. See also Air Line Pilots Ass'n v. Eastern Air Lines, 672 F.Supp. 525, 526 (D.D.C.1987) (plaintiff's choice of forum to be given "paramount consideration"). However, as defendants point out, such deference is not owed where, as here, plaintiffs file suit in a foreign forum. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981); Martin-Trigona, 668 F.Supp. 1; Oudes v. Block, 516 F.Supp. 13 (D.D.C.1981).

Ledyard, 1995 WL 908244 at *3.

The bottom line is that the convenience of the parties is not a major factor in a case such as this, but that, to the extent it bears on the § 1404 question, the parties' convenience tilts towards transfer.

C. The interests of justice will be best served by transferring this action.

Plaintiff's Opposition addresses three "public interest" factors, which are indeed relevant. See Wyandotte Nation (Exh. J to Transfer Motion) Slip Op. at 11 ("The public-interest factors include: (1) the transferee's familiarity with the governing laws; (2) the relative congestion of the calendars of the potential transferor and transferee courts; and (3) the local interest in deciding local controversies at home") (citing Trout Unlimited [v. Dep't of Agric.], 944 F. Supp. [13,] 16 [(D.D.C. 1996)]. In addition, Plaintiff's Opposition offers arguments relevant to the risk of duplicative or inconsistent proceedings, and the "forum-shopping" issue. None of Plaintiff's public interest arguments provides a sound reason for denying the requested transfer.

1. The argument that this court has more expertise than the Western District of Texas is factually and legally incorrect.

Plaintiff argues that the Western District of Texas is "not where the courts have overwhelming expertise in reviewing federal inaction, substantial expertise reviewing federal obligations to Indian tribes and nearly two decades of experience reviewing statutory interpretation by this defendant federal agency." In addition, Plaintiff argues that the Western District of Texas is "a venue that has never heard a case involving this federal agency defendant." Opposition at 2 (citation omitted). Thus Plaintiff raises two issues: (i) the relevant courts' relative expertise in hearing administrative appeals, and (ii) the courts' relative expertise in the subject matter of this lawsuit.

On the first point, relative expertise in APA cases is unmeaningful in the context of § 1404. See Wyandotte Nation (Exh. J to Transfer Motion) Slip Op. at 11 citing In re Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1175 (D.C. Cir. 1987) ("The first [public interest] factor is of little significance here because the plaintiff brings suit under the APA and

'[a] transferee federal court is competent to decide federal issues correctly.'")

The second point that Plaintiff raises – relative expertise in the application of relevant Indian law, actually points to the Western District of Texas, and dramatically so. The issue framed by the Fifth Circuit in Ysleta del Sur Pueblo v. Texas, 36 F.3d 1325, 1335 (5th Cir. 1994), and an issue that will likely stand front and center as this case goes forward, is whether the Ysleta (and Alabama Coushatta) Restoration Act -- 25 U.S.C. § 1300g et seq. (the "Restoration Act") -- governs Plaintiff's gaming activities to the exclusion of the Indian Gaming Regulatory Act. 25 U.S.C. § 2701 et seq. ("IGRA"). But this court boasts no particular expertise in interpreting the Restoration Act. On the contrary, research on Westlaw has located a total of nine published decisions dealing with the Restoration Act, and every single one of them was decided in the federal courts of Texas (or the Fifth Circuit).[1]

In addition, Westlaw reports two unpublished decisions dealing with the Restoration Act – again, both from Texas.[2]

Finally, Defendant notes one decision from the District Court of Maine that, while not involving the Restoration Act directly, did present facts analogous to those in the Fifth Circuit's Ysleta del Sur Pueblo decision, and that relied upon the analysis in the Fifth Circuit's decision. See Passamaquoddy Tribe v. Maine, 897 F. Supp. 632, (D. Me., 1995).

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[1] (i) Alabama Coushatta Tribe of Tex. v. Texas, 66 Fed. Appx. 525 (5th Cir. 2003) (not for publication) ; (ii) Comstock Oil & Gas Inc. v. Alabama and Coushatta Indian Tribes of Texas, 261 F.3d 567 (5th Cir. 2001); (iii) TTEA v. Ysleta del Sur Pueblo, 181 F.3d 676, (5th Cir. 1999); (iv) Ysleta del Sur Pueblo v. Texas, 36 F.3d 1325 (5th Cir. 1994); (v) Apodaca v. Silvas, 19 F.3d 1015(5th Cir. 1994); (vi) U.S. ex rel. Kennard v. Comstock Resources, Inc., No. 9:98-CV-266-TH, 2010 WL 2813529 (E.D. Tex. July 16, 2010); (vii) Alabama-Coushatta Tribes of Texas v. Texas, 208 F. Supp. 2d 670 (E.D.Tex., 2002); (viii) Texas v. del Sur Pueblo, 220 F. Supp. 2d 668 (W.D.Tex., 2001); (ix) Texas v. Ysleta del Sur Pueblo, 79 F.Supp.2d 708 (W.D.Tex., 1999)

[2] See Apodaca v. Silvas, No. EP-93-2508, 1993 WL 653044 (W.D.Tex., 1993); Pais v. Sinclair, No. EP-06-CV-137-PRM, 2006 WL 3230035, (W.D.Tex., Nov. 2, 2006).

The role that the Restoration Act played in these cases ranged from a passing reference to lengthy analysis. But according to Westlaw, compared with theses eleven Texas (and Fifth Circuit) decisions, there is not one District of Columbia court decision that so much as cites the Restoration Act. If relative subject matter expertise governs the § 1404 Transfer motion decision, this factor tilts towards transfer.

2. The relative congestion of this and the transferee court strongly militates *in favor* of transfer

Plaintiff cites total caseload statistics from this Court and the Western District of Texas to support the assertion that "relative congestion of the calendars favors retention of this case in this district." Opposition at 20. The data in fact supports transfer to the Western District of Texas.

Specifically, Plaintiff cites data reflecting total cases pending per judge, and "weighted filings" per judge, as follows:

	DC District Court	Western District of Texas
Pending cases per judge	266	438
Weighted filings per judge	255	691

These figures, standing alone, do indeed suggest greater congestion in Texas. But they are not the whole story, or even the most important part.

In Speed Trac Technologies, Inc. v. Estes Express Lines, Inc., 567 F. Supp. 2d 799, 803 (M.D.N.C., 2008) the court noted that "[w]hen evaluating the administrative difficulties of court congestion, the most relevant statistics are the median time from filing to disposition, median time from filing to trial, caseload per judge, and number of civil cases over three years old." (citing Triad Int'l Maint. Corp. v. Aim Aviation, Inc., 473 F. Supp. 2d 666, 671 (M.D.N.C.2006); Datasouth Computer Corp. v. Three Dimensional Techs., Inc., 719 F. Supp. 446, 453 (W.D.N.C. 1989)). As shown below (data taken from Plaintiff's Opposition Exhibits B-

C), the median time from filing to disposition in the District of Columbia and the Western District of Texas is, for civil cases, quite similar (9 months versus 8.3 months) with a modest advantage in the Western District of Texas. But the median time from filing to trial (40 months versus 17.5 months) and the number of civil cases over three years old (410 versus 42) (14.6% versus 1.8%) strongly favor the Western District of Texas.

	DC District Court	Western District of Texas
Median time from filing to disposition (civil)	9 months	8.3 months
Median time from filing to trial	**40 months**	**17.5 months**
Number of civil cases over three years old.	**410 (14.6%)**	**42 (1.8%)**

District of Columbia precedent suggests that median time from filing to disposition, and median time from filing to trial, are the key factors to be considered in transfer decisions. See Parkridge 6, LLC v. U.S. Dep't of Transp. --- F.Supp.2d ----, No. 09-cv-01478 (GK), 2009 WL 3720060 at *3 (D.D.C.,2009) ("For the twelve-month period ending March 31, 2008, the median time from filing to disposition in the District Court for the District of Columbia was 8.9 months. … By contrast, the median time for the Eastern District of Virginia was only 5.1 months. Id. Furthermore, the median disposition time of cases proceeding to trial in this District is thirty-six months, while the median time in the Eastern District of Virginia is 10.6 months, nearly two years less. … Accordingly, this factor weighs in favor of transfer") (footnote and citations omitted).

The "congestion factors" that the courts deem most relevant thus militate in favor of transfer of this matter.

3. The local interest in deciding local controversies at home militates in favor of transfer.

Plaintiff argues that "the interest of 'the people of Texas' is irrelevant to consideration of the current motion." Opposition at 20. Plaintiff's reasoning is that because the NIGC cannot authorize gaming that the State of Texas prohibits, the people of Texas will necessarily be indifferent to the NIGC's "provision of training and technical assistance to the plaintiff Tribe" as Plaintiff has requested. But even if this were true – which defendant believes unlikely – Plaintiff's formulation of the issue is crabbed. The larger issue, as Plaintiff's Complaint makes plain, is whether or not Plaintiff falls under the NIGC's regulatory jurisdiction. Complaint ¶¶ 1, 18-19, 26 & Relief Requested ¶¶ (a-b). Because the terms of the Restoration Act reflect a legislative compromise between the Tribe, Congress and the State of Texas, see Ysleta del Sur Pueblo, 36 F.3d at 1333, the people of Texas will presumably have a keen interest in the maintenance of that compromise.

Plaintiff's citations to the contrary are not on point. Plaintiff asserts that "this Court has just as consistently NOT transferred cases involving Indian gaming controversies back to the state in which the gaming would take place", arguing that the common thread in cases NOT transferred is that they "involved the regulatory authority of NIGC." Opposition at 25 (emphasis original). In truth, however, the common thread in the cases Plaintiff cites[3] is the fact that transfer under Section 1404 was not sought in a single one of them. As a result they are of no precedential value in deciding Defendant's § 1404 motion.

[3] Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n, 383 F. Supp. 2d 123, 125 (D.D.C. 2005); Butte County v. Hogan, 2010 U.S. App. Lexis 14264 (D.C. Cir. July 13, 2010); Citizens Exposing Truth About Casinos v. Norton, 2004 U.S. Dist. LEXIS 27498 (D.D.C. 2004); MichGO v. Norton, 477 F. Supp. 2d 1, 4-5 (D.D.C. 2007); Amador County v. Salazar, 2010 U.S. Dist. LEXIS 69020, 1-2 (D.D.C. 2010); St. Croix Chippewa Indians of Wis. v. Kempthorne, 2008 U.S. Dist. LEXIS 76103 (D.D.C. 2008).

4. This action should be transferred to avoid duplication of judicial resources and the possibility of inconsistent results.

Plaintiff argues at some length that the question presented by the Complaint in this case – the NIGC's jurisdiction to provide training and regulate the Tribe's gaming activities – has not been at issue in any of its several suits in Texas federal courts. Opposition at 9-15. Plaintiff uses this argument, in part, to challenge Defendant's understanding of the Restoration Act and of the Fifth Circuit's interpretation of that Act in Ysleta Del Sur Pueblo. We will not take up the invitation to stray into the merits of Plaintiff's claim, but we will respond to the inaccurate assertion that this case is unrelated to Plaintiff's Texas suits.

The Fifth Circuit in Ysleta Del Sur Pueblo held that plaintiff could not invoke the provisions of the IGRA because the Restoration Act, rather than the IGRA, governs the legality of Plaintiff's gaming activities. 36 F. 3d at 1335. Because the NIGC derives its authority from the IGRA, the Fifth Circuit's decision in Ysleta Del Sur Pueblo would appear to bear directly, if not dispositively, on Plaintiff's claim in this case that the NIGC should assume jurisdiction over Plaintiff's gaming.

Ongoing litigation is also implicated by Plaintiff's Complaint in this case. As Defendant noted in the Transfer Motion, Plaintiff has specifically argued in the ongoing contempt case that the NIGC can and should assume regulatory authority over the Tribe's gaming activities, and in so doing relieve the Western District of Texas of the burden of overseeing the Tribe's activities. Defendant's Third Report to the Court in Response to Memorandum and Opinion and Order Granting Motion for Contempt, Case No. EP-99-CA-320-H (April 21, 2010) (Exh. D to Transfer Motion) at 6-7, ¶ 3. Plaintiff's only response is to note that, in its April 21, 2010 filing, Plaintiff was simply appraising the District Court in Texas of its initiation of proceedings in this Court. But that does not alter the fact that the relief sought here – assumption of regulatory jurisdiction

by the NIGC – is precisely the same relief that Plaintiff suggested to the court in the ongoing Texas proceeding. That the two matters are related cannot be gainsaid.

5. An attempt to avoid Fifth Circuit precedent is not in the interests of justice.

Defendant seeks to have this case transferred to the district where Plaintiff is domiciled, where the relevant land and gaming activities are located, and where related litigation has occurred and is ongoing. Undaunted, Plaintiff insists that it is Defendant, not Plaintiff, who is engaging in forum-shopping. Opposition at 8-9. Given the potentially dispositive effect of the Fifth Circuit's Ysleta del Sur Pueblo decision, Defendant submits that the following observations of the court in Santee Sioux resolve the issue.

> [M]ost persuasive of all, it is perfectly clear that Plaintiff is attempting to forum-shop and avoid the consequences of having lost its case before the Eighth Circuit after having raised the same Constitutional arguments which it raises here … Thus, Plaintiff is asking this Court to render a ruling which would squarely conflict with the ruling of the Eighth Circuit. That was not the intent of the drafters of Section 1404(a).

Santee Sioux (Exh. H to Transfer Motion), Slip Op. at 9, citing Schmid Lab. Inc. v, Hartford Accident and Indem. Co., 654 F. Supp. 734, 737 (D.D.C. 1986) (quotation omitted).

CONCLUSION

Plaintiff's Opposition has failed to refute the facts that this case could have been filed in the Western District of Texas, and that both private convenience and the interests of justice strongly argue for transferring the case to that court under 28 U.S.C. 1404(a).

Dated: August 5, 2010

Respectfully submitted,

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