Randolph H. Barnhouse
DC Bar No. TX0071
Luebben Johnson & Barnhouse LLP
7424 4th Street NW
Los Ranchos de Albuquerque, New Mexico 87107
Telephone: (505) 842-6123
Facsimile: (505) 842-6124

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YSLETA DEL SUR PUEBLO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 1:10-CV-00760 (ESH)**
	)	
NATIONAL INDIAN GAMING COMMISSION,	)	
	)	
Defendant.	)	
	)	

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

INTRODUCTION

The National Indian Gaming Commission is a federal agency located in this district, at the seat of our Nation's government, and it owes statutory and fiduciary obligations to the Ysleta del Sur Pueblo. Specifically, the defendant agency has a statutory obligation to provide technical assistance and training to the Ysleta del Sur Pueblo in the conduct of gaming activities.

Ignoring these obligations and Congress' specific mandate when it created the defendant federal agency, the agency has refused to provide technical assistance and training to the Tribe. As a result, the Ysleta del Sur Pueblo has sued the agency in the District of Columbia challenging one thing only: defendant agency's interpretation of federal statutes. The defendant

federal agency admits venue is proper in this Court. However, rather than defending its final action to this Court, this federal agency attempts to recast its interpretation of federal statutes as "a local controversy" that should be decided not where the decision at issue was made, not where the decision makers are located, not where the defendant is located, not where all witnesses are located, not where plaintiff chose to bring the action, not in the venue with the less congested docket, and 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. *E.g.*, *Cabazon Band of Mission Indians v. Nat'l Indian Gaming Comm'n*, 827 F. Supp. 26 (D.D.C. 1993). Instead, the defendant seeks to have plaintiff's statutory construction claim heard in West Texas, a venue that has never heard a case involving this federal agency defendant. Contrary to the assertions of the defendant agency, there is no "property" in West Texas at issue in this case, and no ongoing litigation in the Western District of Texas, much less any past or present litigation involving plaintiff's claim against this defendant. Although there is a final judgment in an unrelated proceeding not involving this defendant, and an injunction in place to enforce that judgment, no rulings in that concluded case will be jeopardized in any manner by this case, nor does that case impact the obligation of this federal bureaucracy to meet its congressionally mandated duties to Indian Tribes in general, and this federally recognized Tribe in particular.

ARGUMENT

I. Statutory Requirements Confirm That This Court Is The Appropriate Forum.

The relevant statutory provision, 28 U.S.C. § 1404(a), provides that "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." As the defendant federal agency concedes,[1] as the party seeking transfer, it "bears the burden of establishing: (1) that the plaintiff initially could have brought the action in the proposed transferee district; and (2) that considerations of convenience and the interests of justice weigh in favor of transfer to that district." *Toledano v. O'Connor*, 501 F. Supp. 2d 127, 154 (D.D.C. 2007) (citation omitted) (denying motion to transfer). Moreover, as the moving party, the defendant federal agency "bear[s] a heavy burden of establishing that plaintiffs' choice of forum is inappropriate." *Id.* (internal quotations and citation omitted).

To determine whether the moving party has met its dual burdens, courts first consider whether venue would be proper in the district to which the defendant seeks transfer. As noted below, the defendant agency has not met that burden here and the Court need proceed no further. Nevertheless, had that showing been made, the Court would then determine whether defendant has met its burden of showing that transfer is "justified by particular circumstances that render the transferor forum inappropriate by reference to the considerations specified in that statute." *Starnes v. McGuire*, 512 F.2d 918, 925 (D.C. Cir. 1974) (en banc). Determining whether this District is inappropriate is "an inquiry that involves the weighing of a number of private-interest and public-interest factors." *Toledano*, 501 F. Supp. 2d at 155 (citation omitted).

The private-interest considerations include: (1) the plaintiffs' choice of forum; (2) the defendants' choice of forum; (3) whether the claim arose elsewhere; (4) the convenience of the parties; (5) the convenience of the witnesses; and (6) the ease of access to the sources of proof. *Greater Yellowstone Coalition v. Bosworth*, 180 F. Supp. 2d 124, 127 (D.D.C. 2001) (citation omitted) (denying government agency's motion to transfer).

Relevant 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

[1] Mem. in Supp. at 7 (Dkt. No. 4).

transferor courts; and (3) the local interest in adjudicating local controversies at home. *Id.* at 128.

Defendant has failed to meet its burden of showing that venue exists in the proposed transferee district, and failed to meet its burden of showing that any one of these considerations alone favors transfer, much less that they would make this forum inappropriate when considered together. Instead, both individually and taken together, the applicable considerations confirm that this Court is the appropriate forum to rule on plaintiff's statutory construction claim.

II. Defendant Has Not Met Its Burden Of Showing That Venue Would Be Proper In the Western District of Texas.

A. 28 U.S.C. § 1391(e)(2) does not provide venue in the Western District of Texas.

The defendant federal agency bears the burden of first showing that venue is proper in the Western District of Texas. In attempting to meet its burden, defendant relies entirely on 28 U.S.C. § 1391(e)(2). Mem. in Supp. at 8-9.

28 U.S.C. § 1391(e)(2) provides, in its entirety:

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which . . . (2) 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.

Defendant commits only one paragraph of its brief, consisting of nine lines, to meet its burden of showing venue exists in west Texas under this section. Mem. in Supp. at 9. Yet defendant has not, and cannot, show that the events or omissions giving rise to the Tribe's claim occurred anywhere other than in the District of Columbia. Nor can defendant show that any "property *that is the subject of the action*" is situated in the Western District of Texas.

B. All of the events and omissions giving rise to Plaintiff's claim occurred in the District of Columbia.

This action challenges national policies of an agency headquartered in the District of Columbia, a challenge cognizable at the seat of government where the agency's officers are located and where they, as the only witnesses, will suffer the least amount of inconvenience. The decision was made here, the decision makers are here, and any information the decision makers may have relied upon in making their determinations if their testimony is needed is here as well. *Nat'l Ass'n of Home Builders v. United States EPA*, 675 F. Supp. 2d 173, 179 (D.D.C. 2009) ("In cases brought under the APA, courts generally focus on where the decision making process occurred to determine where the claims arose" (citations omitted)).

C. There is no "property" that is the subject of this action.

The subject of this action is a decision by a federal agency, the National Indian Gaming Commission ("NIGC"), that it has no statutory obligation to provide technical assistance and training to a federally recognized Indian Tribe that has the sovereign right, limited by statute, to engage in gaming. Plaintiff's reservation, held in trust by the federal government, is not the "subject" of the claim. Indeed, defendant concedes as much in its memorandum in support. Nowhere in that memorandum does the defendant argue that the reservation is the "subject of this action." Instead, defendant simply opines that this case "may" affect the status and economic uses of plaintiff's reservation. Mem. in Supp. at 9.

D. Defendant has not met its burden.

The events and omissions giving rise to plaintiff's claim all occurred in this district, and there simply is no real "property" that is the subject of this action. Therefore, defendant's attempted reliance on 28 U.S.C. § 1391(e)(2) to demonstrate the possible existence of venue in the Western District of Texas is, quite simply, misplaced. Defendant has failed to demonstrate

that venue exists in the Western District of Texas and for that reason alone defendant's motion must be denied.

III. Defendant Federal Agency Has Not Met Its Burden Of Showing That Private Factors Require Transfer.

A. Defendant has not met its burden of showing why the Tribe's choice of forum should be disturbed.

This Court has recognized that "[t]he plaintiff's choice of a forum is 'a paramount consideration' in any determination of a transfer request. The choice of forum is ordinarily afforded great deference . . . ." *Thayer/Patricof Educ. Funding, L.L.C. v. Pryor Res.*, 196 F. Supp. 2d 21, 31 (D.D.C. 2002) (citations omitted) (denying motion to transfer). Indeed, "[i]t is almost a truism that a plaintiff's choice of a forum will rarely be disturbed . . . unless the balance of convenience is strongly in favor of the defendant." *Gross v. Owen*, 95 U.S. App. D.C. 222, 221 F.2d 94, 95 (D.C. Cir. 1955) (denying motion to transfer). Although this deference is reduced "if the plaintiff is a foreigner" in the forum (*Thayer/Patricof*, 196 F. Supp. at 31) that is not applicable to the plaintiff in this case.[2]

The Ysleta del Sur Pueblo is a sovereign government, recognized as such by, and having a government-to-government relationship with, the United States.[3] Were it not for its connections to Washington, D.C., this plaintiff could not be federally recognized as an Indian Tribe. Indeed, that the Tribe is not a "foreigner" to this district is confirmed by the status of the United States as the Tribe's trustee, with those obligations running to every federal agency

[2] Because 28 U.S.C. § 1404 "is a revision as well as a codification" of the doctrine of forum non conveniens, a transfer is available "upon a lesser showing of inconvenience" than that required for a forum non conveniens dismissal, yet "[t]his is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader." *SEC v. Savoy Industries, Inc*., 587 F.2d 1149, 1154 (D.C. Cir. 1978) citing *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955).

[3] This is conceded by the defendant. Mem. in Supp. at 2.

including defendant here.[4] *Accord Navarro Sav. Ass'n v. Lee*, 446 U.S. 458 (1980) (the citizenship of a trustee or administrator, as the real party in interest, and not that of the beneficiaries or decedent, is determinative of federal jurisdiction).

Moreover, the plaintiff is not a citizen of the State of Texas nor of any state. *American Vantage Cos., Inc. v. Table Mt. Rancheria*, 292 F. 3d 1091, 1096 (9th Cir. 2002) ("The status of Indian tribes as sovereign entities, and as federal dependents, contradicts conventional notions of citizenship in general and *state* citizenship in particular" (emphasis in original)); *Gaming World Int'l v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 847 (8th Cir. 2003) ("Indian tribes are neither foreign states nor citizens of any state" (citation omitted)); *Auto Owners Co. v. Tribal Court of the Spirit Lake Indian Reservation*, 495 F.3d 1017 (8th Cir. 2007) (same); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 80, n.1 (2d Cir. 2001); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 27 (1st Cir. 2000) ("An Indian tribe, however, is not considered to be a citizen of any state"); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993) ("Indian tribes are not citizens of any state").[5]

As a result, the Ysleta del Sur Pueblo's choice of this forum must be afforded great deference, and indeed must be given 'paramount consideration' in this Court's determination of the defendant's transfer request. *Greater Yellowstone Coalition v. Kempthorne*, 2008 U.S. Dist. LEXIS 33641 (D.D.C. Apr. 24, 2008) ("Ultimately, in all but those cases in which the plaintiffs' chosen forum has 'no meaningful ties to the controversy and no particular interest in the parties

---

[4] *See United States v. Mitchell*, 463 U.S. 206 (1983) (holding that the Department of the Interior was liable for monetary damages for mismanaging timber resources of the Quinault tribe in violation of the agency's fiduciary duty).

[5] It is somewhat of an affront to imply that this federally recognized sovereign Indian Nation does not have "any substantial connection to" the District of Columbia. Mem. in Supp. at 7-8. Tellingly, the defendant does not cite a single Indian law case in support of this misplaced claim.

or subject matter[,]' courts 'must afford substantial deference to the plaintiffs' choice of forum'" (citation omitted)); *Altman v. Central of G. R. Co.*, 363 F.2d 284, 285 (D.C. Cir. 1966) ("unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed").

B. The Defendant's choice of forum should receive no deference here.

1. Defendant's attempt to avoid this forum is not in the interests of justice.

Circumstances suggest that the defendant has chosen to file the motion to transfer because it believes it will receive a more favorable ruling in the Western District of Texas. That preference cannot be honored. As noted in *Greater Yellowstone Coalition v. Bosworth*, 180 F. Supp. 2d 124, 129 (D.D.C. 2001): "On the other hand, public-interest considerations that weigh against a transfer include the possibility that the defendants are forum shopping." Citing *Ferens v. John Deere Company*, 494 U.S. 516, 527, 108 L. Ed. 2d 443, 110 S. Ct. 1274 (1990). The *Greater Yellowstone Coalition* case involved the issuance of cattle grazing permits in Montana, what would seem to be a uniquely local issue. In denying the federal agency's motion to transfer the case to Montana, the *Greater Yellowstone Coalition* Court noted: "The plausible possibility that the defendants are using Section 1404(a) as a means of forum shopping weighs against granting the defendants' motion." *Id.* at 130. Similarly, in *Sierra Club v. Van Antwerp*, 523 F. Supp. 2d 5, 12-13 (D.D.C. 2007), this Court stated:

> However, this Court is well-aware that for each strategic rationale that motivated plaintiffs to file suit in this District, there is likely an equally compelling strategic basis - aside from the statutory standards of convenience and justice - for defendants and Intervenors' strong desire to ensure that this litigation takes place in the Middle District of Florida. In this sense, defendants and Intervenors could be forum-shopping just as plaintiffs are allegedly doing so. This is not to say that this Court endorses the practice of filing suit only to re-file in another district after the original action is assigned to a judge, but rather that in light of this Court's great deference to the plaintiffs' chosen forum and a general lack of other factors

> that would overcome this deference, the plaintiffs' alleged forum shopping will be insufficient to warrant transfer to the Middle District of Florida.

Finally, defendant seeks support for its preference to litigate in West Texas by claiming the Tribe "prefers the caselaw in this Circuit." Mem. in Supp. at 13-14. In making that claim, defendant fails to recognize that if there were case law in the Fifth Circuit that addressed the limited issue in this case (which there is not) it would be binding on the Tribe in this district. *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (once a court has decided an issue of fact or law necessary to its judgment, that decision precludes re-litigation of the issue in a suit on a different cause of action involving a party to the first case); *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 (1999) (party may not re-litigate in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same).

In any event, the issue is not what "circumstances suggest," (Mem. in Supp. at 13) but instead whether the Tribe seeks to resist the transfer on the basis of existing case law, which it does not. *H. L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962) ("if there is a conflict of views among circuits, 'this presents a matter for consideration by the Supreme Court on application for certiorari, not for consideration by a district judge on application for transfer'" (citation omitted).

2. The defendant mischaracterizes the issue decided by the Fifth Circuit in an unrelated case.

Under the caption "Background Facts," defendant spends three pages of its brief arguing that a Fifth Circuit Court of Appeals decision in an unrelated case is dispositive on the venue question here. That argument is simply wrong.

The case to which NIGC gives such great import is *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994). Mem. in Supp. at 3-5. That case involved a suit by the Ysleta del Sur Pueblo against Texas and its governor "pursuant to the Indian Gaming Regulatory Act (IGRA) . . . for refusing to negotiate a compact." *Id*. at 1327. In reviewing the district court's decision in favor of the Tribe, the Fifth Circuit Court of Appeals held "that the Restoration Act, not IGRA, *governs this dispute* and does not give the Tribe the right to sue the State in federal court." *Id.* (emphasis added). The court of appeals ordered the district court to "dismiss the Tribe's suit for lack of jurisdiction." *Id.* at 1336. Tellingly, and contrary to defendant's claim in the pending motion, that decision did *not* result in a ban on gaming on the Ysleta del Sur Pueblo's reservation, much less address the existence or extent of NIGC's obligation to provide technical assistance and training to the Ysleta del Sur Pueblo under IGRA and the Restoration Act. Specifically, and as noted by the defendant here, what the Fifth Circuit Court of Appeals decision did, with respect to gaming activities on the Pueblo, was confirm that "[t]he effect of Section 107 of the Restoration Act was to prohibit certain gaming activities on Plaintiff's lands to the extent that the laws of Texas prohibit such gaming activity." Mem. in Supp. at 4.

3. There are no analogous proceedings pending in the Western District of Texas.

Following entry of the Fifth Circuit decision, there has been an injunction proceeding and subsequent contempt proceeding involving the limited question of what the term "gaming activities" means in the Restoration Act. Those proceedings do not involve, nor have they or any other proceeding ever involved, the question of NIGC's obligation to the Ysleta del Sur Pueblo. *Accord Greater Yellowstone Coalition v. Bosworth* at 129 ("the potentially related case, is very different from the instant case: CMCR focuses on the impact of the Horse Butte Capture Facility on eagles and other birds, whereas this case focuses on the reissuance of the Horse Butte grazing

permit and addresses its effect on the bison" (citation omitted)); *Residex Corp. v. Farrow*, 374 F. Supp. 715, 722 (E.D. Pa. 1974) ("When parties move to transfer an action to another district and rely on the pendency of related actions in that other district, complete and accurate information should be furnished as to those related actions"); *aff'd,* 556 F.2d 567, 568 (3d Cir. 1977).

Indeed, NIGC's decision not to provide technical assistance and training to this Tribe cannot be the issue in the injunction proceeding for one simple reason: the only parties to the injunction proceeding in Texas are the State and the Tribe, and Congress made absolutely clear that the State of Texas cannot provide regulatory oversight of gaming on the Tribe's reservation. 25 U.S.C. § 1300g-6(b).[6] That subsection reads, in its entirety:

> **No State regulatory jurisdiction**. Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

Id. (emphasis added). In addition to specifically eliminating all State regulatory authority, Congress provided only one remedy to the State:

> Jurisdiction over enforcement against members. Notwithstanding section 105(f) [25 USCS § 1300g-4(f)] the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

25 U.S.C. § 1300-g-6(c). It is this single remedial option, seeking an injunction, that the State has pursued in the Western District of Texas. That injunction proceeding, not involving NIGC nor the scope of this federal agency's regulatory mandate, in no way makes this district an inappropriate venue to decide issues involving NIGC's statutory obligations to the plaintiff.

[6] Defendant purports to quote "Section 107" of the Restoration Act in its memorandum in support at 4, but curiously includes only subsections (a) and (c), omitting entirely the critical section (b) which prohibits regulatory jurisdiction from vesting in the State of Texas.

In contrast, IGRA (which established the defendant federal agency and which was enacted approximately one year after the Restoration Act), has as its purposes:

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
> (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702. Only the first of those purposes duplicates provisions of the Restoration Act. The other purposes: A statutory basis for *regulation* of Indian gaming, and establishment of a single federal regulatory authority "for gaming on Indian lands," are conspicuously absent from the Restoration Act. The Restoration Act does not have any language at all similar to the comprehensive regulatory scheme adopted by Congress in IGRA, nor did Congress, in the Restoration Act, identify any separate federal, state or tribal body to oversee gaming on the Ysleta del Sur Pueblo. To the contrary, Congress' only directive regarding regulation of gaming on the Pueblo was to make clear that Texas has no regulatory oversight. 25 U.S.C. § 1300g-6(b) In contrast, in IGRA Congress spoke in sweeping terms, making clear that it applied to all Indian gaming, including gaming on the Ysleta del Sur Pueblo. For example, in 25 U.S.C. § 2701, Findings, Congress confirmed, among other matters:

> (3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

Id. As the Fifth Circuit Court of Appeals has noted, the Restoration Act was "existing Federal law" at the time Congress adopted the language quoted above:

> Congress, when enacting IGRA less than one year after the Restoration Act, explicitly stated in two separate provisions of IGRA that IGRA should be considered in light of other federal law. Congress never indicated in IGRA that it was expressly repealing the Restoration Act. Congress also did not include in IGRA a blanket repealer clause as to other laws in conflict with IGRA.

Ysleta v. Texas at 1335.

Finally, and again contrary to representations of defendant NIGC here, no court, including the Fifth Circuit Court of Appeals, has ever held that gaming is barred on the Ysleta del Sur Pueblo. Indeed, just the opposite is true. As noted by the District Court for the Western District of Texas:

> This Court's own view of proper statutory construction does not permit reliance upon legislative history to change the meaning of the language used in the statute, where the language used is clear and unambiguous, as it is in § 107 [§ 1300g-6] as enacted. But the question is: does the Fifth Circuit's opinion adopt a different view of statutory construction thereby concluding that all gaming as defined by Texas law is prohibited on the reservation. If so, we should stop here. The court acknowledges its uncertainty as to the correct resolution of this issue. Prudence indicates, therefore, that it should go forward. So, assuming that *Ysleta I* does not foreclose such analysis, the Court will now deal with the remaining issues as presently argued by the parties.

Texas v. Ysleta del Sur Pueblo, 220 F. Supp. 2d 668, 688 (W.D. Tex. 2001). Significantly, the Fifth Circuit affirmed this ruling in an unreported order on January 17, 2002. Ex. A.[7]

As a result, cases relied upon by the defendant in arguing that transfer would "avoid duplication of judicial resources and the possibility of inconsistent results" are inapplicable. For example, in *Town of Ledyard v. United States*, 1995 U.S. Dist. LEXIS 21477 (D.D.C. May 31,

[7] *See also* May 14, 2002 Order [No. 165 at 16] ("*the Tribe* may participate in legal gaming activities") (emphasis added); May 14, 2002 Order [No. 165 at 2] ("*the Tribe* is not prohibited from participating in all gaming activities, only those gaming activities that are prohibited to private citizens and organizations under Texas law") (emphasis added).

1995) (cited by defendant in memorandum in support at page 10 as 1995 WL 908244), the claims were not only analogous but exactly the same. There, the plaintiff Towns filed a complaint seeking injunctive and declaratory relief, and "[j]ust over five hours later, the state of Connecticut filed in Connecticut federal court a Complaint for declaratory and injunctive relief against the Secretary. Plaintiffs in both cases seek to enjoin the Secretary [of Interior] from taking the subject land into trust for the benefit of the Tribe." *Id.* at *2 (citation omitted). NIGC was not a party to that case. And in *Shawnee Tribe v. United States*, 298 F. Supp. 2d 21, 22 (D.D.C. 2002) (cited by defendant at page 11 of its memorandum in support) the issue was not regulatory authority, but instead involved disposal of the Sunflower Army Ammunition Plant, a 9,065 acre military reservation located approximately forty miles from Kansas City, Kansas. There was an analogous case pending against the United States and both cases involved "central questions regarding the future of the SFAAP property, the resolution of which by the District Court in Kansas must precede a final decision on the property's disposal." *Id.* at 27. No similar "central questions" exist between the pending litigation and post judgment proceedings in the Western District of Texas.

Review of litigation between the Ysleta del Sur Pueblo and the State of Texas confirms that retaining this action in this district cannot result in "inconsistent results" as no pre judgment litigation is pending in Texas. And there can be no "duplication of judicial resources" because no court has ever considered NIGC's obligations to the Ysleta del Sur Pueblo under IGRA and the Restoration Act, because NIGC has never been a party to any case involving regulatory issues on the Ysleta del Sur Pueblo, and because now concluded litigation in Texas simply did not involve issues similar to those raised by the Tribe in this case. The mere existence of post judgment proceedings in an injunction action in the Western District of Texas does not support a

finding that this Court is an inappropriate venue to hear plaintiff's claims against this federal agency.

C. Whether the claim arose elsewhere.

Plaintiff challenges a decision of a federal agency. The challenged decision was made in this district, by an agency headquartered in this district, through staff members working in this district. It is beyond dispute that plaintiff's claim arose in this district, and not "elsewhere." *Nat'l Ass'n of Home Builders v. United States EPA*, 675 F. Supp. 2d 173, 179 (D.D.C. 2009) ("In cases brought under the APA, courts generally focus on where the decision making process occurred to determine where the claims arose" (citations omitted)).

D. The convenience of the parties

The law is well settled that it is the inconvenience to the moving party, not the inconvenience to the non movant, that must be considered. *Wireless Consumers Alliance, Inc. v. T-Mobile USA, Inc.*, 2003 U.S. Dist. LEXIS 26802, *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). Here, however, defendant has made no claim whatsoever that it would be inconvenienced in any way by having this Court retain the case in this district. Mem. in Supp. at 9. Instead, defendant's only argument is that "Texas is significantly more convenient for Plaintiff and its members" and moreover, according to this federal bureaucracy, transfer would be more "convenient for Plaintiff's counsel." If NIGC's concern for the Tribe's well being were anywhere near as solicitous in relation to the agency's fulfillment of its congressionally mandated duties, then perhaps this litigation would not be necessary at all. *Accord Wilderness Soc'y v. Babbitt*, 104 F. Supp. 2d 10, 13 (D.D.C. 2000) (denying federal

agency's motion to transfer, noting "plaintiffs presumably do not consider the District of Columbia to be an inconvenient forum or else they would not have sued here").

In any event, defendant has not disputed that it will be more convenient for the defendant and its employee witnesses to litigate this matter in Washington D.C., where they live and work. Moreover, 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. *Id.* at 13-14 ("While it would be arguably more convenient for defendants to litigate this suit in Alaska, the defendants have not established any particular hardship in litigating this suit in the District of Columbia, beyond transporting a large administrative record. Defendants are currently represented by Department of Justice counsel in the Environment & Natural Resources Division"). And plaintiff's counsel will be traveling regardless of the location of the trial, with non stop flights from Albuquerque to Baltimore International involving the same amount of airport time as flights to El Paso. Finally, "[t]he location of counsel carries little, if any, weight in an analysis under § 1404(a)." *Vencor Nursing Ctrs, L.P. v. Shalala*, 63 F. Supp. 2d 1, 6 n.4 (D.D.C. 1999) (citation omitted) (denying federal defendant's motion to transfer).

E. The convenience of the witnesses

Defendant has not claimed that there are any witnesses in West Texas who would be inconvenienced in any way by testifying in this district. Indeed, the only witnesses with personal knowledge of the defendant's decision to deny the Tribe technical assistance and training are defendant's own employees working in, and presumably residing in or near, this district. In order to have this consideration weigh in favor of transfer, "[t]he party seeking the transfer must clearly specify the key witnesses to be called and must make a general statement of what their testimony will cover. The emphasis must be on this rather than on numbers." *General Portland*

Cement Co.. v. Perry, 204 F.2d 316, 320 (7th Cir. 1953)(citation and internal quotations omitted). The defendant has not even attempted to make such a showing here.

F. The ease of access to the sources of proof.

Again, defendant has not made any claim that the sources of proof are inaccessible in this district, or that ease of access would be greater in West Texas. It presumably has not done so because just the opposite is true: evidence of the decision making process employed by the defendant when it decided not to provide technical assistance and training to the Tribe is all in this district. *See NAACP v. Levi*, 418 F. Supp. 1109, 1113-1114 (D.D.C. 1976) (denying transfer of case where "the focus is on the official actions and decisions of a Federal government agency -- the Department of Justice and specifically, the Office of the Attorney General and the Federal Bureau of Investigation. The administrators and officials responsible for the final agency action are headquartered in this jurisdiction. The data, reports and memoranda relating to the investigation conducted by the FBI and the Justice Department, if not located here, could certainly be made available with a minimum of delay and difficulty. The final decision of the Department of Justice closing the books on this matter was made in Washington, D.C.").

IV. Defendant Federal Agency Has Not Met Its Burden Of Showing That Public Factors Require Transfer.

A. The transferee court's familiarity with the governing laws.

Defendant NIGC is unable to cite this court to a single ruling, motion, brief or argument in support of its allegation that "the District Court for the Western District of Texas has been actively involved in the subject matter of this litigation for several years." Mem. in Supp. at 3. Although defendant claims, again without citation, that the case pending before this Court is a "dispute between Plaintiff and the State of Texas" it is of note that Texas is not a party to this action, nor has there been any claim it should, or even could be. Indeed, Texas simply has no

standing in a dispute between the plaintiff and this agency over the scope of the agency's statutory obligations. *Accord Otay Mesa Prop., L.P. v. United States DOI,* 584 F. Supp. 2d 122, 127 n.4 (D.D.C. 2008) (denying motion to transfer, noting that "[t]he Federal Defendants cite two other cases in support of their motion to transfer venue, but in each of those cases, the court granted the motion to transfer because *a nearly identical* suit was already pending in the transferee court" (emphasis added)). As discussed in detail above, the only matter pending in the Western District of Texas is post judgment enforcement of in an unrelated injunction proceeding addressing the scope of "gaming activities" permitted in Texas. Specifically, and again as noted above, under the Restoration Act, all "*gaming activities* which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe." 25 U.S.C. § 1300g-6(a) (emphasis supplied). As a result, "gaming activities" which are not prohibited by the laws of the State of Texas are not prohibited on the Ysleta del Sur Pueblo's reservation. *See generally* F. Cohen, *Handbook of Federal Indian Law* § 12.05[4], 878 (Nell Jessup Newton ed., 2005) ("the issue of what [gaming activity] is permitted is a federal law question. However, ascertaining what is 'permitted' and what 'such gaming' means in a given state is not always easy"). Of note to the pending motion, NIGC's regulatory duties are not an issue in the post judgment matters in the Western District of Texas, which are not "litigation" but instead limited post trial proceedings. That is confirmed by Fed. R. Civ. P. 70 (Enforcing a Judgment for a Specific Act) which contains only five limited post judgment enforcement powers, one of which is "Holding in Contempt. The court may also hold the disobedient party in contempt." *Analytical Eng'g, Inc. v. Baldwin Filters, Inc.*, 425 F.3d 443, 451 (7th Cir. 2005) ("the express language of Rule 70 establishes the extent of the district court's limited post-judgment authority". . . . [A] district court's purview under Rule 70 is limited to effectuating its final-

judgment orders, and . . . in granting relief under Rule 70, a district court cannot grant new rights or extinguish previous rights held by either party").

Finally, if NIGC's unsupported claims were true, one would suppose this federal defendant could point the Court to mountains of legal argument in and rulings by the Texas court addressing whether NIGC has statutory obligations to provide technical assistance and training under IGRA to the Ysleta del Sur Pueblo. Instead, defendant cannot direct this court to a single such document, because none exists. Unable to do so, NIGC instead cites to one line in a quarterly status report filed by the Tribe,[8] and to transcript lines from argument by counsel for the State of Texas.[9] The Tribe has notified the Texas court of the Tribe's attempt to have NIGC honor its statutory mandate. The next quarterly report will notify the Texas court of the pendency of this action, as a courtesy to that court and not based on any post judgment expansion of issues. As to defendant's attempted reliance on argument presented by the Attorney General of Texas claiming the State has regulatory authority over the Tribe, that was argument of counsel, not a decision by the court. Nor can the court so hold as Congress, and not opposing legal counsel in disputed litigation, has the power to make that determination and Congress, in exercising that power, has specifically stated that the State of Texas has "no regulatory authority" over gaming activities conducted by the Ysleta del Sur Pueblo. Restoration Act, 25 U.S.C. § 1300g-6(b).

As defendant NIGC's dearth of citation confirms, the issue of NIGC's regulatory obligation to this plaintiff Tribe has never been raised in the Western District of Texas, or anywhere else other than before this Court.

[8] Mem. in Supp. at 5.
[9] Mem. in Supp. at 6.

B. The relative congestion of the calendars of the potential transferee and transferor courts.

It is no surprise that NIGC did not provided any evidence that the congestion of the courts in West Texas is any less severe than the case load of the courts in this district. No doubt it did not do so because just the opposite is true. According to the Judicial Caseload Profile prepared by the Administrative Office of the U.S. Courts, *http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdminsitrativeOffice.aspx* (last visited July 23, 2010), in 2009 the pending case load in this district was 266 actions per judgeship, with weighted filings of 255 per active judgeship. Ex. B. That same year, the pending case load for the Western District of Texas was 438 per judgeship, with weighted filings of 691 per active judgeship, or nearly three times as many per judgeship. Ex. C. The available statistics demonstrate that the relative congestion of the calendars favors retention of this case in this district.

C. The local interest in adjudicating local controversies at home.

Having failed to address many of the private and public interest factors, defendant instead relies heavily on its claim that this district is inappropriate because, according to defendant, "the people of Texas" have some (undefined) interest in the scope of defendant's regulatory authority over the Ysleta del Sur Pueblo. Mem. in Supp. at 11. According to defendant, simply because the regulatory issue here involves gaming, that is sufficient to make this district inappropriate, outweighing somehow all of the other factors to be considered by the Court. Not only is this simply not true, the interest of "the people of Texas" is irrelevant to consideration of the current motion. As defendant itself has recognized, the ONLY gaming that can be conducted by the Ysleta del Sur Pueblo is that which is otherwise permitted by the State of Texas. Mem. in Supp. at 4. In other words, even if this Court agrees that NIGC must provide training and technical assistance to the plaintiff Tribe, under no circumstances can NIGC use that ruling to expand

gaming beyond what is permitted in the State of Texas. Nothing in this litigation can or will change that. Moreover, defendant agency's concern for the interests of the "people of Texas" is remarkable considering that defendant has a solemn fiduciary obligation to the plaintiff and the people of the Ysleta del Sur Pueblo which it has continued to shirk.

This court, in rejecting a similar argument by a defendant federal agency in a motion to transfer, succinctly addressed this "local interest" argument in *Nat'l Ass'n of Home Builders v. United States EPA*, 675 F. Supp. 2d 173 (D.D.C. 2009), stating:

> the mere presence of a local interest, in the form of property located within the proposed transferee district, is not dispositive in the transfer analysis. *See Otay Mesa*, 584 F. Supp. 2d at 126; Akiachak, 502 F. Supp. 2d at 68. By way of illustration, *Otay Mesa* involved the designation of 4000 acres in the San Diego region as a "critical habitat" for an endangered species. *584 F. Supp. 2d at 123-24*. While the location of the property weighed in favor of transfer, the court emphasized that the protection of endangered species is a national concern, not merely a local one, and thus the connection of the controversy was only "somewhat stronger" to the Southern District of California than it was to the District of Columbia. *Id. at 126*. Similarly, in *Akiachak*, the court noted that while the outcome of the case would have an immediate impact on citizens of the proposed transferee district, this factor was outweighed by the other public- and private-interest factors. *502 F. Supp. 2d at 68*; *see also Fund for Animals v. Norton, 352 F. Supp. 2d 1, 2 (D.D.C. 2005)* (identifying a strong local interest in the dispute, but holding that this factor was not dispositive).
>
> Likewise, in the instant case, the defendants are correct in noting that the location of the disputed property in the proposed transferee district implicates some local interest. No aspect of this case, however, compels the court to ascribe significant weight to this factor. There is no indication, for example, that the designation of the relevant reaches of the Santa Cruz River as traditional navigable waters will have a major impact on local economic, political and environmental interests. *Cf. Shawnee Tribe*, 298 F. Supp. 2d at 26. Nor has the court received comments or any other type of communication from the public indicating that there is a high degree of local public interest in the regulation at issue.

Id. at 178.

In any event, the issue now before this Court simply is not local, but instead involves federal issues limited to federal trust responsibility and the intent of Congress. And one thing Congress clearly decided was that "the people of Texas" have no power to regulate gaming on this Tribe's reservation. As this Court has confirmed:

> To determine whether a controversy is local in nature, courts consider a wide variety of factors, including: where the challenged decision was made; whether the decision directly affected the citizens of the transferee state; the location of the controversy, whether the issue involved federal constitutional issues rather than local property laws or statutes; whether the controversy involved issues of state law, whether the controversy has some national significance; and whether there was personal involvement by a District of Columbia official. *Nat'l Wildlife Fed'n v. Harvey*, 437 F. Supp. 2d 42, 49 (D.D.C. 2006); *Sierra Club*, 276 F. Supp. 2d at 70. From these factors, it is easy to see that the issues at stake in this case are not as strongly connected to the local interests of San Diego County and its residents as the Federal Defendants argue, nor is the connection to the District of Columbia as attenuated as they suggest.

Otay Mesa at 126 (denying federal agency's motion to transfer venue).

Cases relied upon by the defendant are not to the contrary. For example, at page 11 of its memorandum in support, the defendant cites *Oil, Chemical & Atomic Workers v. NLRB*, 694 F.2d 1289 (D.C. Cir. 1982) for the proposition that local impact can support transfer, yet the cited material is merely a list of the factors to be considered, and in applying those factors the Court of Appeals for the District of Columbia *denied* the motion to transfer venue. *Id.* at 1301. In *Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 561 F. Supp. 1238, 1240 (D.D.C. 1983) (cited in memorandum in support at 11-12), the court had before it evidence indicating that "[c]itizens and businesses have banded together to fight the highway proposal and the Mayor of Fort Worth has expressed his concern over the resolution of the controversy." No such evidence has been provided by defendant here, nor is it available given that uniform regulation of Indian gaming not only is not controversial, but is in fact critical to shield Indian gaming from

organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players. 25 U.S.C. § 2702.

Finally, and again contrary to defendant's argument, this Court has never adopted a per se rule that "the interests of justice are promoted by transferring cases involving Indian gaming controversies back to the state in which the controversy or enforcement activity is located." Mem. in Supp. at 12.

First, plaintiff reiterates that this is NOT a case "involving Indian gaming controversies." Instead, it is a case involving *regulation of legal gaming activities* – activities permitted by Congress in the Reauthorization Act and permitted by the State of Texas.

Second, the United States Court of Appeals for the District of Columbia has confirmed that case by case analysis, not a per se rule, is required when considering motions to transfer. *Savoy Indus., Inc*., 587 F.2d at 1154 (affirming district court's denial of motion to transfer, noting "the proper technique to be employed is a factually analytical, case-by-case determination of convenience and fairness").

Third, the cases cited by the defendant bear no resemblance to the issues now before this Court other than that an Indian tribe was involved. *See Towns of Ledyard*, 1995 WL 908244 (NIGC not a party, fee into trust case - same claims raised in dual litigation pending in transferee and transferor courts); *Apache Tribe of the Mescalero Reservation v. Reno*, Civil Action No. 96-115 (RMU) at 6 (D.D.C. February 5, 1996) (NIGC not a party; "an action is currently pending in New Mexico which involves the same issues of law as this action; the fundamental issue being the legality of casino gambling in New Mexico and the concomitant ability of ten Indian tribes to conduct gambling operations in that state. The action in New Mexico involves the same

defendants as those in this case. In addition, the two actions present similar factual backgrounds, claims and requests for relief"); *Cheyenne-Arapaho Tribe of Oklahoma v. Reno*, Civil Action No. 98-CV-065 (RMU) at 4 (D.D.C. Sept. 9, 1988) ("a consolidated action involving the same issues in the present action . . . is currently pending in the Northern District of Oklahoma. The DOJ is a party in both the present action and in the current litigation in Oklahoma"); *Santee Sioux Tribe of Nebraska v. NIGC*, Civil Action No. 99-528 (GK) slip op. at 8 (D.D.C. April 19, 1999) (suit to enjoin closure of casino (at 1), same parties in transferor and transferee courts (at 5) and "closely related" litigation was pending in transferee court (at 9)); *Lac Courtes Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, Civil Action No. 01-1042 (HHK/DAR) slip op. at 1, 6-7 (D.D.C. Aug. 16, 2002) (defendants included State of Wisconsin and its Governor (at 1), litigation involving same parties in transferee district (at 3)); *Wyandotte Nation v. National Indian Gaming Commission*, Civil Action No. 04-1727 (RMU) slip op. at 12 (D.D.C. May 2, 2005) (specific tribal land "at issue in this suit" (at 8), "the present controversy has evolved from an ongoing dispute tied exclusively to the state of Kansas" (at 9), "two cases arising out of the same set of transactional facts are currently pending" in transferee district (at 12)).

And finally, this Court has just as consistently NOT transferred cases involving Indian gaming controversies back to the state in which the gaming would take place, particularly when the case involved the regulatory authority of NIGC. For example, in *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 383 F. Supp. 2d 123, 125 (D.D.C. 2005) the Colorado River Indian Tribes sued NIGC claiming it had exceeded its statutory powers in promulgating minimum internal control standards for certain gaming. This Court held NIGC had exceeded its statutory authority, and the United States Court of Appeals for the District of Columbia affirmed

that ruling. 466 F.3d 134 (D.C. Cir. 2006). Tellingly, NIGC did not seek a change of venue in that case (see docket attached as Ex. D). Similarly, in *Butte County v. Hogan*, 2010 U.S. App. Lexis 14264 (D.C. Cir. July 13, 2010): "The issue in this appeal from the judgment of the district court arises from efforts of the Mechoopda Indian Tribe of Chico Rancheria in Butte County, California, to obtain federal approval to conduct gaming operations" (at *1). Once again, although NIGC was a defendant, it did not file a motion to transfer venue in that case (see docket attached as Ex. E). *See also Citizens Exposing Truth About Casinos v. Norton*, 2004 U.S. Dist. LEXIS 27498 (D.D.C. 2004) (non-profit Michigan membership corporation brought APA action against federal defendants challenging decision to take 79 acres of farmland in Calhoun County, Michigan into trust for use by Tribe to construct and operate casino); *.MichGO v. Norton*, 477 F. Supp. 2d 1, 4-5 (D.D.C. 2007) (Michigan non-profit corporation that opposes gambling brought action alleging that federal defendants violated IGRA, NEPA and the Constitution's non-delegation doctrine); *Amador County v. Salazar*, 2010 U.S. Dist. LEXIS 69020, 1-2 (D.D.C. 2010) (plaintiff county brought action against federal defendants alleging that Secretary of Department of Interior's approval of a gaming compact amendment entered into between the Buena Vista Rancheria of the Me-Wuk Indians and the state of California was an arbitrary and capricious decision in violation of APA because the amendment violated IGRA)); *St. Croix Chippewa Indians of Wis. v. Kempthorne*, 2008 U.S. Dist. LEXIS 76103 (D.D.C. 2008) (lawsuit stemming from Tribe's application to Department of Interior to have off-reservation land in Wisconsin taken into federal trust for the purpose of establishing a gaming facility).

Not only is the scope of NIGC's regulatory authority not a local issue, this Court and this defendant consistently have recognized that this district is the superior forum for deciding issues involving Indian gaming, even in instances, unlike here, where the local interest is demonstrated

by involvement in the litigation of local governmental subdivisions and non profits. Because there is no local property at issue in this case, because the State of Texas permits gaming and the plaintiff's scope of gaming is limited to those permitted activities, and because the case involves simply whether NIGC must provide technical assistance and training to the plaintiff Tribe, the Court should give no weight to defendant's factually unsupported "local interest" argument.

CONCLUSION

Defendant National Indian Gaming Commission has not met its burden of showing that this Court is an inappropriate forum in which to conduct these proceedings. Specifically, it has not met its burden of showing that plaintiff could have brought this case in the Western District of Texas, and it has not met its burden of showing that considerations of convenience and the interests of justice weigh in favor of transfer to that district. As a result, Defendant NIGC's motion to transfer venue must be denied.

July 26, 2010

Respectfully submitted,

/s/ Randolph H. Barnhouse
Randolph H. Barnhouse
DC Bar No. TX0071
Luebben Johnson & Barnhouse, LLP
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
Telephone: (505) 842-6123
Facsimile: (505) 842-6124

Attorneys for Plaintiff Ysleta del Sur Pueblo