IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WYANDOTTE NATION, Plaintiff, v. KENNETH L. SALAZAR, in his official capacity as Secretary of the U.S. Department of the Interior, Defendant.	Case No. 1:11-cv-01361-BAH

DEFENDANT'S MOTION TO TRANSFER VENUE

Defendant Kenneth L. Salazar, in his official capacity as Secretary of the Interior, hereby moves to transfer the above-captioned action to the United States District Court for the District of Kansas pursuant to 28 U.S.C. § 1404(a). Support for the motion can be found in the attached memorandum of points and authorities. To avoid uneconomically proceeding with case scheduling before the Court can address Defendant's motion to transfer, Defendant also requests that the current September 26, 2011, deadline to answer or otherwise respond to the Complaint be extended to a date ten days after the Court's decision on the motion to transfer. Defendant's proposed order reflects that relief. Pursuant to Local Civil Rule 7(m), undersigned counsel has conferred with counsel for the Wyandotte Nation, who has stated that the Tribe opposes this motion.

Respectfully submitted on this 9th day of September, 2011,

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s/ Kristofor R. Swanson

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2011, I caused the above motion and its attachments to be filed with the Court's CM/ECF system, which will provide notice to all counsel of record.

s/ Kristofor R. Swanson
Kristofor R. Swanson

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WYANDOTTE NATION, Plaintiff, v. KENNETH L. SALAZAR, in his official capacity as Secretary of the U.S. Department of the Interior, Defendant.	Case No. 1:11-cv-01361-BAH

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO TRANSFER VENUE

The above-captioned action should be transferred to the United States District Court for the District of Kansas. The case involves significant issues of local controversy, which far outweigh any connection that the case may have with the District of Columbia. Further, the District of Kansas and United States Court of Appeals for the Tenth Circuit already have extensive experience with the statute at the center of this action. Defendant's motion to transfer should therefore be granted.

BACKGROUND

Plaintiff Wyandotte Nation ("Wyandotte Nation" or "Tribe") is a federally-recognized Indian Tribe. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40,218, 40,222 (Aug. 11, 2009); Compl. ¶ 4 (ECF No. 1). The Tribe's headquarters are located in Wyandotte, Oklahoma, in the State's northeast corner. *See* Compl. Caption.

In 1984, Congress passed Public Law No. 98-602. *See* 98 Stat. 3149 (1984). The legislation:

> provid[ed] for the appropriation and distribution of money in satisfaction of judgments awarded to the Wyandottes by the Indian Claims Commission and the Court of Claims. The judgments were compensation for lands in Ohio that the Wyandottes had ceded to the United States in the 1800s. Under the 1984 law, Congress directed that 20% of the allocated funds be used and distributed in accordance with a series of directives. Key among those directives . . . was one providing that a sum of $100,000 of such funds shall be used for the purchase of real property which shall be held in trust by the Secretary for the benefit of such Tribe.

Sac & Fox Nation of Mo. v. Norton, 240 F.3d 1250, 1255 (10th Cir. 2001) (footnote and internal quotations omitted).

In the early 1990s, the Wyandotte Nation asked the Secretary of the Interior to accept land in Park City, Kansas ("Park City Land"), into trust under Public Law No. 98-602. *See* Compl. ¶ 17.[1] In 1995, however, the Tribe changed its focus and instead pursued an application to have a tract in Kansas City, Kansas, taken into trust under the Public Law for the purpose of opening a gaming facility. *See Sac & Fox Nation*, 240 F.3d at 1256; Compl. ¶¶ 20–21. This tract became known as the "Shriner Tract." *See Sac & Fox Nation*, 240 F.3d at 1256.[2] The Department of the Interior's potential and eventual trust acquisition of the Shriner Tract became the subject of extensive litigation, all of it findings its way, one way or another, to Kansas.

In 1996, the State of Kansas and several other Indian tribes filed suit in the United States District Court for the District of Kansas, challenging the Secretary's decision to accept the

[1] Given the current stage of proceedings, Defendant references the Wyandotte Nation's complaint for background information. Defendant does not intend to admit any facts alleged in the complaint.

[2] The Wyandotte Nation's complaint refers to the tract as the "Kansas City Land." *See* Compl. ¶ 20.

Shriner Tract into trust. *See Sac & Fox Nation of Mo. v. Babbitt*, 92 F. Supp. 2d 1124 (D. Kan. 2000), *rev'd* 240 F.3d 1250 (10th Cir. 2001). The district court in *Sac & Fox Nation* eventually dismissed the suits, finding that the Wyandotte Nation was a necessary and indispensible party that had not waived its sovereign immunity. *See* 92 F. Supp. 2d at 1125–28. The Tenth Circuit reversed and remanded the Tribe's application to the Department of the Interior for further consideration. *See Sac & Fox Nation*, 240 F.3d at 1258–68. In the interim, however, the Secretary had accepted the Shriner Tract into trust. *See id.* at 1257.

With the Shriner Tract in trust, the Wyandotte Nation began operating its gaming facility. *See Wyandotte Nation v. Sebelius*, 337 F. Supp. 2d 1253, 1261 (D. Kan. 2004), *vacated in part*, 443 F.3d 1247 (10th Cir. 2006). The State of Kansas responded by obtaining from state court a search warrant to seize and remove gaming equipment and other items from the facility. *See id.* at 1261–63. The Wyandotte Nation challenged the State's actions in the United States District Court for the District of Columbia.[3] *See id.* at 1263. The D.C. District Court transferred the action to the District of Kansas, *id.*, noting that "the controversy that lies at the center of this case . . . has a history that involves litigation conducted within the District of Kansas and the Tenth Circuit." *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, No. 04-cv-00513-JR, Order at 2 (D.D.C. Apr. 2, 2004) (attached as Ex. A). The District of Kansas issued a bilateral preliminary injunction, 337 F. Supp. 2d at 1274, which the Tenth Circuit affirmed, in part, but vacated with respect to the Wyandotte Nation.[4] *See Wyandotte Nation v. Sebelius*, 443 F.3d 1247 (10th Cir.

[3] Before an amended complaint added the claims against the State, *Wyandotte Nation v. Sebelius* began as a challenge to a memorandum from the National Indian Gaming Commission. *See* 337 F. Supp. 2d at 1262–63. The federal defendants were later dismissed from the suit. *See id.* at 1255.

[4] The district court later granted judgment on the pleadings in favor of the Tribe. *See Wyandotte Nation v. Sebelius*, No. 04-cv-2140-JAR-GLR (D. Kan. June 26, 2009) (ECF. No. 174).

2006). Simultaneously, the Tribe filed a separate suit in the D.C. District Court, challenging a National Indian Gaming Commission (NIGC) decision related to the Shriner Tract. *See Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193, 1201 (D. Kan. 2000). The D.C. District Court again transferred the suit to the District of Kansas. *See Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, No. 04.cv.1727-RMU, Mem. Op. (D.D.C. May 2, 5005) (attached as Ex. B). The District of Kansas reversed, in part, the NIGC's determination and remanded the decision to the NIGC. *See Wyandotte Nation*, 437 F. Supp. 2d at 1219.

Meanwhile, the State and several Indian tribes filed a new suit in the District of Kansas, this time challenging the Secretary's post-remand affirmance of the decision to accept the Shriner Tract into trust. *See Governor of Kansas v. Norton*, 430 F. Supp. 2d 1204 (D. Kan. 2006). The district court upheld the Secretary's decision. *See id.* at 1217–26. The Tenth Circuit dismissed the plaintiffs' appeals for lack of jurisdiction. *See Governor of Kansas v. Kempthorne*, 516 F.3d 833 (10th Cir. 2008); *Iowa Tribe of Kansas & Nebraska v. Salazar*, 607 F.3d 1225 (10th Cir. 2010).

During the pendency of the more-recent litigation, the Wyandotte Nation renewed its application to have the Park City Land taken into trust under Public Law No. 98-602. *See* Compl. ¶¶ 27–32. The Tribe now seeks an order from the Court compelling the Secretary to take the land into trust. *See* Compl. ¶¶ 33–50. Park City, Kansas, is located north of Wichita, along U.S. Interstate Highway 135. The Tribe plans to open a gaming facility on the property, the operation of which would occur within the jurisdictional boundaries of the District of Kansas. *See* Resolution No. 06-04-13 (Apr. 13, 2006) (attached as Ex. C).[5]

[5] The Tribe's resolution references the Indian Reorganization Act, 25 U.S.C. § 465. But, as the Complaint makes clear, the Tribe requests that the Secretary "accept trust title to the Park City Land as required by [Public Law No. 98-602]." Compl. ¶¶ 39, 44.

STANDARD FOR TRANSFER OF VENUE

Transfer of venue is governed by 28 U.S.C. § 1404(a):

> For the convenience of 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). The statute facilitates the transfer of actions to a more appropriate federal forum, *see Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964), affording district courts wide discretion to transfer venue "according to an individualized, case-by-case consideration of convenience and fairness." *Hawksbill Sea Turtle v. FEMA*, 939 F. Supp. 1, 3 (D.D.C. 1996) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988)).

In exercising its discretion, a court must first determine whether the action could have been brought in the transferee district. *See S. Utah Wilderness Alliance v. Norton (SUWA)*, 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, 44–45 (D.D.C. 2002). The public considerations include: 1) "the local interest in deciding local controversies at home;" 2) the transferee district's familiarity with the governing law; and 3) congestion of the transferor and transferee districts. *Trout Unlimited v. U.S. Dep't of Agric.*, 944 F. Supp. 13, 16 (D.D.C. 1996). 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.*

A plaintiff's choice of forum is normally entitled to deference, and the party seeking to transfer venue bears the burden of showing that the transfer is proper. *Id.* at 16. That deference

and burden, however, are substantially diminished where the plaintiff's chosen forum has only an attenuated connection to the controversy, while the plaintiff and subject matter of the action have a substantial connection with the proposed transferee forum. *DeLoach v. Phillip Morris Cos.*, 132 F. Supp. 2d 22, 24–25 (D.D.C. 2000); *Trout Unlimited*, 944 F. Supp. at 17. Thus, a defendant's necessary showing "is lessened when the 'plaintiff[s'] choice [of forum] has no factual nexus to the case,' and, where . . . transfer is sought to the forum with which plaintiffs have substantial ties and where the subject matter of the lawsuit is connected to that state." *Id.* (quoting *Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 561 F. Supp. 1238, 1240 (D.D.C. 1983)).

ARGUMENT

Defendant's motion to transfer should be granted. Like several related actions that have preceded this one, the Wyandotte Nation could have brought its case in the District of Kansas. The District of Kansas's experience with those cases and the local controversy presented by the underlying facts here all counsel in favor of transfer. None of the other applicable factors demand a different conclusion.

I. The Tribe Could Have Brought Suit in the District of Kansas.

The United States District Court for the District of Kansas constitutes a district where the Wyandotte Nation's suit "might have been brought." *See* 28 U.S.C. § 1404(a). The Tribe's complaint raises questions of federal law, *see* Compl. ¶¶ 33–50, over which all federal district courts have subject matter jurisdiction. *See* 28 U.S.C. § 1331. As to venue, a civil action against a federal government agency or official may be heard in any district where a defendant resides, where the plaintiff resides, or where "a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(e). Here, the property that is the subject of the Tribe's

land-into-trust application and complaint is located entirely within the State of Kansas. Indeed, as many as four separate district court actions involving land acquired in Kansas under Public Law No. 98-602 have been heard in the District of Kansas.

II. Transfer to the District of Kansas is in the Interest of Justice.

The Wyandotte Nation's land-into-trust application directly involves and impacts Kansas lands, citizens, and, potentially, its laws. The Tribe intends to open a gaming facility on the land. If the land is not taken into trust, it is not eligible for gaming under the Indian Gaming Regulatory Act. *See* 25 U.S.C. § 2719. The citizens of Kansas therefore have a significant interest in the case, which seeks to compel that trust acquisition. And the Kansas federal court system already has substantial familiarity with Public Law No. 98-602.

A. Kansas and its Local Communities have a Significant Interest in the Wyandotte Nation's Land-into-Trust Application.

"[J]ustice requires that . . . localized controversies should be decided at home." *Citizen Advocates for Responsible Expansion*, 561 F. Supp. at 1240; *see Armco Steel Co. v. CXS 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, 963 (D.D.C. 1988). The Supreme Court has emphasized the importance of ensuring local issues are decided in their home venue. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947); *Nat'l Wildlife Fed'n v. Harvey*, 437 F. Supp. 2d 42, 49 (D.D.C. 2006). Transfer is also appropriate where a case "concerns a matter of great controversy in" another district, as evidenced by activity from local interest groups and governments. *Citizen Advocates for Responsible Expansion*, 561 F. Supp. at 1240.

The Secretary's ultimate determination on whether to accept the Park City Land into trust will directly impact the economy of Kansas, the local community surrounding the property, and the Tribe's own interests in the State. Acquisition of the property into trust would establish

tribal sovereignty over the land, thereby implicating considerable economic, political, and legal interests. The State of Kansas's actions in response to the Shriner Tract acquisition more than demonstrate a local controversy surrounding the Tribe's acquisitions under Public Law No. 98-602. Conversely, neither the Secretary's action nor the Tribe's planned use for the lands will impact individuals living and working in or near Washington, D.C.

This is not the first time that this Court has been presented with a suit involving Indian lands issues in Kansas. *Shawnee Tribe v. United States*, 298 F. Supp. 2d 21 (D.D.C. 2002), for example, involved the question of whether portions of a military reservation in Kansas were subject to transfer to the Department of the Interior to be held in trust for a tribe. *Id.* at 22. The Court transferred the suit to the District of Kansas, 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 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.* Similar reasoning applies here.

The local concerns here are highlighted by the fact that the Wyandotte Nation intends to use the Park City Land for gaming. *See Cheyenne-Arapaho Tribe of Okla. v. Reno*, No. 98-cv-065, slip op. at 4 (D.D.C. Sept. 9, 1998) (attached as Ex. D); *Apache Tribe of the Mescalero Reservation v. Reno*, No. 96-115, slip op. at 5–6 (D.D.C. Feb. 5, 1996) (attached as Ex. E); *Towns of Ledyard, North Stonington and Preston, Conn. v. United States*, No. 95-cv-0880

(TAF), 1995 WL 908244, at *1, *2 (D.D.C. May 31, 1995). As this Court has previously articulated with respect to Indian gaming:

> [T]here 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. Nat'l Indian Gaming Comm'n, No. 99-528, slip op. at 8–9 (D.D.C. Apr. 19, 1999) (attached as Ex. F); *see Lac Courtes Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, No. 01-1042; slip op. at 1, 6–7 (D.D.C. Aug. 16, 2002) (attached as Ex. G). Indeed, the Court has twice previously transferred to the District of Kansas suits involving lands in Kansas that the Wyandotte Nation intended to use for gaming. *See* Exs. A & B. The circumstances here do not support a different conclusion.

B. The District of Kansas Already is Familiar with Public Law No. 98-602.

The District of Kansas's experience with applicable law also favors transfer. Certainly, each district court sits equally as to issues of federal law. *See Nat'l Wildlife Fed'n*, 437 F. Supp. 2d at 49. But one federal law in particular—Public Law No. 98-602—is directly relevant to the Tribe's present action. *See* Compl. ¶¶ 15, 33–44. As summarized above, the District of Kansas and Tenth Circuit both have significant experience with Wyandotte Nation requests for land to be accepted into trust under the Public Law. Judicial economy and the desire to avoid potentially contradictory rulings therefore counsel in favor of transfer.

C. The Relative Congestion of the Transferor and Transferee Courts is Not a Significant Concern.

Transfer of the Tribe's action to the District of Kansas will not meaningfully impact the time necessary to adjudicate the case. Statistics on federal case loads show that the time necessary to resolve a case in the District of Kansas (8.7 months) is nearly identical to that required in the District of Columbia (8.4 months). *See* 2010 Federal Judicial Caseload Statistics, Table C-5: Median Time Intervals From Filing to Disposition of Civil Cases Terminated *available at* http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx (last visited on Sept. 7, 2011).

III. The Tribe's Choice of Forum is Entitled to Little Deference Because the Subject Matter of the Suit Arose in Kansas and Has No Connection to D.C.

The private factors also favor transfer because the District of Columbia has little to no connection with a potential trust acquisition that would occur in Park City, Kansas. Thus, the Tribe's chosen forum is not entitled to deference.[6]

Any deference to the Tribe's chose of forum is lessened, as its choice has "'no factual nexus to the case,' and . . . transfer is sought to the forum with which [the Tribe] ha[s] substantial ties and where the subject matter of the lawsuit is connected to that state." *Trout Unlimited*, 944

[6] The remaining private factors—convenience of the parties, convenience of the witnesses, and ease of access to sources of proof—have little applicability here. As with the Shriner Tract litigation, Defendant is fully prepared to litigate this matter in Kansas. The Wyandotte Nation also participated in that litigation, seemingly without incident. The fact that one of the Tribe's counsel is located Washington, D.C., is immaterial. *See Kazenercom TOO v. Turan Petrol., Inc.*, 590 F. Supp. 2d 153, 163 (D.D.C. 2008) (citations omitted). Further, as a case brought under the Administrative Procedure Act, judicial review will be based upon the agency's administrative record, rather than live testimony. *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 preliminary or permanent injunctive relief is requested, however, the District of Kansas appears to be a far more convenient forum for any potential witnesses. On September 8, 2011, the Kansas Attorney General's office stated to undersigned counsel that the State will be moving to intervene in this action. Should that motion be granted, Kansas is certainly a more convenient forum for the State.

F. Supp. at 17 (quoting *Citizen Advocates for Responsible Expansion*, 561 F. Supp. at 1240). The Tribe holds substantial ties to Kansas with the Shriner Tract. And the property presently at issue is undoubtedly connected with Kansas. The District of Columbia, by contrast, holds no connection to either the Wyandotte Nation or the Park City Land. The Tribe's choice of forum therefore holds no greater weight than Defendant's. *See Valley Cmty.*, 231 F. Supp. 2d at 44; *see also Hawksbill Sea Turtle*, 939 F. Supp. at 3 (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 plaintiffs 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)).

The Tribe argues that venue is appropriate in D.C. because "Defendant resides in this District and because a substantial part of the events and omissions giving rise to the claim occurred in this District." Compl. ¶ 3. But just because "the [Department of the Interior's] decision [will be] issued in the District of Columbia does not mean that this is where the plaintiff's claims 'arose' for purposes of [transfer]." Ex. B at 9–10 (citing *Shawnee Tribe*, 298 F. Supp. 2d at 25). Further, as the Tribe acknowledges, the Department of the Interior's review of applications for land to be taken into trust does not initiate in Washington, D.C. *See* Compl. ¶ 30. Regardless, the question before the Court is not where venue is proper, but whether transfer is appropriate. Given the prior litigation involving Public Law No. 98-602 and the direct impact that the Park City Land's potential trust acquisition would have on Kansas, the District of Kansas is the more appropriate forum for the Tribe's present suit.

CONCLUSION

Based upon the foregoing, the Wyandotte Nation's current suit should be transferred to the United States District Court for the District of Kansas. To avoid uneconomically proceeding with case scheduling before the Court can address Defendant's motion to transfer, Defendant also requests that the current September 26, 2011, deadline to answer or otherwise respond to the Complaint be extended to a date ten days after the Court's disposition of the motion to transfer.

Respectfully submitted on this 9th day of September, 2011,

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Exhibit A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WYANDOTTE NATION,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 04-0513 (JR)
	:	
NATIONAL INDIAN GAMING COMMISSION, *et al.*,	:	
	:	
Defendants.	:	

ORDER

On the afternoon of April 2, 2004, plaintiff presented by conference call a renewed motion for temporary restraining order, seeking injunctive relief against the National Indian Gaming Commission, federal Justice Department officials, and Kansas state law enforcement officials. The raid by Kansas law enforcement officials on the Wyandotte gaming facility located on the so-called Shriner Tract in Kansas City on the morning of April 2, 2004, appears to have been unlawful, because the Shriner Tract is indisputably Indian land, and because exclusive jurisdiction of gambling on Indian lands is vested in the United States pursuant to 18 U.S.C. § 1166(d). Class II gaming on the Shriner Tract is not only subject to the Indian Gaming Regulatory Act, but is a matter currently and actively before the National Indian Gaming Commission.

This Court is, however, powerless to grant effective relief against Kansas law enforcement officials, because

plaintiffs have been unable to demonstrate that I have personal jurisdiction over any of them. The controversy that lies at the center of this case, moreover, has a history that involves litigation conducted within the District of Kansas and in the Tenth Circuit. The intervention of a District of Columbia court that is neither part of that history nor thoroughly informed of it seems inappropriate.

This case might have been brought in the District of Kansas. For the convenience of the parties and witnesses, and, most importantly, in the interest of justice, it is pursuant to 28 U.S.C. § 1404(a) *sua sponte* **ORDERED** that this action be **transferred forthwith** to the United States District Court for the District of Kansas.

IT IS SO ORDERED.

JAMES ROBERTSON
United States District Judge

Exhibit B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WYANDOTTE NATION,	:		
	:		
Plaintiff,	:	Civil Action No.:	04-1727 (RMU)
	:		
v.	:	Document No.:	7
	:		
NATIONAL INDIAN GAMING COMMISSION *et al*.,	:		
	:		
Defendants.	:		

MEMORANDUM OPINION

GRANTING THE DEFENDANTS' MOTION TO TRANSFER

I. INTRODUCTION

This case comes before the court on the defendants' motion to transfer. Plaintiff Wyandotte Nation (hereinafter "the Tribe") challenges the determination of the National Indian Gaming Commission ("NIGC") that the Tribe may not lawfully conduct gaming on a parcel of land in Kansas held in trust for the benefit of the plaintiff. Because the plaintiff originally could have brought its case in the proposed transferee forum and the considerations of convenience and the interest of justice weigh in favor of transfer, the court grants the defendants' motion.

II. BACKGROUND

A. Factual Background

The plaintiff, a federally recognized Indian tribe, seeks to open a casino on property known as the Shriner Tract, located in downtown Kansas City, Kansas. Compl. ¶¶ 25, 37. While

the plaintiff's main reservation is located in the state of Oklahoma, the Shriner Tract is adjacent to a cemetery that has been held in trust by the United States for the benefit of the plaintiff since 1855. *Id.* ¶¶ 1, 17. In 1996, the plaintiff requested that the Secretary of the Interior take the adjoining Shriner Tract into trust for the Tribe.[1] *Id.* at ¶ 23. That same year, the Department of the Interior determined that because the Shriner Tract had been purchased with Pub. L. 98-602 ("Public Law 602") funds, it was appropriate for the land to be placed into trust by the United States.[2] *Id.* ¶ 24.

Under the Indian Gaming Regulatory Act ("IGRA"), gaming is generally barred on property taken into trust after 1988. *See* 25 U.S.C. § 2719(a). However, this prohibition does not apply to lands that are "taken in trust as part of: (i) a settlement of a land claim, (ii) the initial reservation . . . , or (iii) the restoration of lands for an Indian tribe that is restored to Federal recognition." *Id.* at § 2719(b)(1)(B). Thus, if the Shriner Tract falls within one of the three aforementioned exceptions to the IGRA, the Tribe would be permitted to engage in some limited "Class II" gaming or casino-type "Class III" gaming on that land. *Id.* at §§ 2703(7), (8); *see id.* at § 2710.

In June 2002, the Tribe submitted an amended gaming ordinance, claiming that the Shriner Tract fell within the three exceptions to the IGRA's general prohibition on gaming on lands acquired after 1988. Compl. ¶ 26; Defs.' Mot. at 6. Although the Tribe withdrew its

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[1] The Tribe intended to purchase the Shriner Tract with funds obtained through an appropriation in satisfaction of an Indian Claims Commission decision. By law, property purchased with such funds must be taken into trust by the Secretary. Pub. L. No. 98-602, 98 Stat. 3149, 3151 (1984).

[2] The question of whether the funds used to purchase the land were in fact all Public Law 602 funds, and consequently a mandatory trust acquisition, is currently pending before the Kansas District Court. *Governor v. Norton*, Case No. 03-4140-SAC.

petition in August 2002 to give the NIGC more time to consider whether gaming was lawful on the Shriner Tract, the Tribe resubmitted the petition in September 2003 after the Tribe opened a casino on the tract and began gambling operations on it.

On March 24, 2004, the NIGC's Office of General Counsel ("OGC") issued a preliminary advisory Indian lands opinion stating that gaming is not legal on the Shriner Tract, and gave the Tribe time to respond. Defs.' Mot. at 7. The Tribe immediately brought suit against the NIGC in the U.S. District Court for the District of Columbia, challenging the March 24, 2004, preliminary advisory opinion and requesting a temporary restraining order enjoining the government from taking enforcement actions relating to the Tribe's gaming activities. *Wyandotte Nation v. NIGC*, Case No. CV-04-0513 (D.D.C. March 26, 2004). Subsequently, the State of Kansas raided the Tribe's casino on the Shriner tract pursuant to a warrant issued by a local state court that cited the preliminary advisory opinion. On April 2, 2004, the D.C. District Court transferred the case to the District of Kansas. The NIGC then moved to dismiss the action for lack of a final agency action; the court granted that motion on June 1, 2004. *Wyandotte Nation v. NIGC*, Case No. 04-2140-JAR (D. Kan. June 1, 2004) (Order Granting Motion to Dismiss).[3]

Upon request for reconsideration, the OGC issued an advisory Indian lands opinion on July 19, 2004. The final opinion essentially confirmed the March 24, 2004 preliminary advisory opinion that the Tribe could not lawfully game on the Shriner Tract. On September 10, 2004, at

[3] The suit is still a live action, however, as to the legality of the raid on the casino by the State of Kansas. *See Wyandotte Nation v. Sebelius*, Case No. 04-2140-JAR. On October 6, 2004, the court granted the Tribe's motion for a preliminary injunction, but enjoined the Tribe from conducting any gaming activities on the tract. 337 F. Supp. 2d 1253 (D. Kan. 2004).

the request of the Tribe, the NIGC issued a final decision on the record disapproving the Tribe's amended gaming ordinance, finding that the Shriner Tract did not qualify for any of the three claimed IGRA exceptions.

B. Procedural History

On October 8, 2004, the plaintiff filed suit in this court, seeking review of the NIGC's September 10, 2004 decision pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et. seq*. On December 1, 2004, the defendants filed a motion to transfer this action to the District of Kansas. The court now turns to that motion.

III. ANALYSIS

A. Legal Standard for Venue and Transfer to Another District

When federal jurisdiction is premised on a federal question, 28 U.S.C. § 1391(b) controls venue, establishing three places where venue is proper:

> (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a 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, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b).

Section 1404(a) authorizes a court to transfer a civil action to any other district when it could have been brought "for the convenience of parties and witnesses, in the interest of justice [.]" 28 U.S.C. § 1404(a). Section 1404(a) vests "discretion in the district court to adjudicate motions to transfer according to individualized, case-by-case consideration of convenience and fairness." *Stewart Org., Inc. v. Ricoh Corp*., 487 U.S. 22, 27 (1988) (quoting *Van Dusen v.*

Barrack, 376 U.S. 612, 622 (1964)). Under this statute, the moving party bears the burden of establishing that transfer is proper. *Trout Unlimited v. Dep't of Agric.*, 944 F. Supp. 13, 16 (D.D.C. 1996).

Accordingly, the defendant must make two showings to justify transfer. First, the defendant must establish that the plaintiff originally could have brought the action in the proposed transferee district. *Van Dusen*, 376 U.S. at 622. Second, the defendant must demonstrate that considerations of convenience and the interest of justice weigh in favor of transfer to that district. *Trout Unlimited*, 944 F. Supp. at 16. As to the second showing, the statute calls on the court to weigh a number of case-specific private and public interest factors. *Stewart Org.*, 487 U.S. at 29. The private-interest considerations include: (1) the plaintiff's choice of forum, unless the balance of convenience is strongly in favor of the defendants; (2) the defendant's choice of forum; (3) whether the claim arose elsewhere; (4) the convenience of the parties; (5) the convenience of the witnesses, but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and (6) the ease of access to sources of proof. *Trout Unlimited*, 944 F. Supp. at 16 (citing *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995); *Heller Fin., Inc. v. Riverdale Auto Parts, Inc.*, 713 F. Supp. 1125, 1129 (N.D. Ill. 1989); 15 FED. PRAC. & PROC. § 3848 at 385 (2d ed. 1986)). The public interest considerations include: (1) the transferee's familiarity with the governing laws; (2) the relative congestion of the calendars of the potential transferee and transferor courts; and (3) the local interest in deciding local controversies at home. *Id.*

B. The Court Grants the Defendants' Motion to Transfer

The defendants argue that considerations of convenience and the interest of justice favor

transfer to the District of Kansas because the plaintiff has substantial ties to Kansas, the property that is the subject of the complaint is located in Kansas, and the ramifications of declaring the land to fall within a gaming exception are entirely local in nature. Defs.' Mot. at 3. In addition, the defendants point to the two cases relating to the subject matter of this litigation that are currently pending before the Kansas District Court,[4] and argue that transfer is appropriate to avoid unnecessary expenditure of judicial resources and the possibility of inconsistent results. *Id.*

In response, the plaintiff argues that none of the cases that are currently pending before the Kansas District Court involve the same parties or the same legal question. Pl.'s Opp'n at 2. The plaintiff also contends that there is a substantial connection between this action and the District of Columbia because, among other things, the NIGC's general counsel and staff attorneys are located in Washington, D.C. and the administrative process leading up to the September 10, 2004 agency decision was conducted in this District. *Id.* at 5-6. Finally, the plaintiff argues that the defendants cannot establish that Kansas has a "substantial local interest" in the outcome of this case. *Id.* at 10.

1. The Plaintiff Could Have Brought Suit in the District of Kansas

As noted, section 1404(a) authorizes the court to transfer the action to any district in which the plaintiff could have brought the suit if convenience and the interest of justice weigh in favor of transfer. 28 U.S.C. § 1404(a); *see also Mgmt. Info. Techs., Inc., v. Alyeska Pipeline Serv. Co.*, 1993 WL 219257, at *2 (D.D.C. June 8, 1993) (recognizing that venue may be proper in more than one district). Further, venue is proper in the "judicial district in which . . . a

[4] *Governor v. Norton*, Case No. 03-4140-SAC; *Wyandotte Nation v. Sebelius*, Case No. 04-2140-JAR.

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." 28 U.S.C. § 1391(e)(2). Here, the parties do not dispute that venue is proper in the District of Kansas. Because the property that is the subject of the complaint is located entirely within the State of Kansas, the court determines that venue is proper in the District of Kansas. Compl. ¶ 28; 28 U.S.C. § 1391(e)(2).

2. The Balance of Private and Public Interests Weighs in Favor of Transfer

Because the court has concluded that the plaintiff originally could have brought suit in Kansas, the court must now address whether the defendants have shown that the balance of private and public-interest factors weighs in favor of transfer to that forum. *Van Dusen*, 376 U.S. at 613; *Trout Unlimited*, 944 F. Supp. at 16. The court determines that the defendants have met their burden.

a. Private-Interest Factors

In weighing the private-interest factors, the court takes into consideration: (1) the plaintiff's choice of forum; (2) the defendant's choice of forum; (3) whether the claim arose elsewhere; (4) the convenience of the parties; (5) the convenience of the witnesses; and (6) the ease of access to sources of proof. *Trout Unlimited*, 944 F. Supp. at 16. In aggregate, these factors weigh in favor of transfer to the District of Kansas.

With regard to the first private interest factor, courts 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).

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. *See id.* 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. Compl. ¶¶ 1, 28. In short, the plaintiff's choice of forum does not have meaningful ties to the controversy. *Wilderness Soc'y*, 104 F. Supp. 2d at 13.

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); *Armco Steel Co. v. CSX Corp.*, 790 F. Supp. 311, 324 (D.D.C. 1991) (noting that the location of

counsel carries little weight).

This case is unlike *Wilderness Society*, where the Secretary of Interior's significant involvement in the decision-making process, including a six-day visit to Alaska where the property in question was located, was deemed "far from routine . . . highlight[ing] the significance of [the]issue to the entire nation" and weighed against transfer from the District of Columbia to Alaska. 104 F. Supp. 2d at 14-15. Here, the plaintiff's claim does not involve unusual or substantial personalized involvement by any agency official, nor any issue of nationwide interest. Rather, this case appears to concern a run-of-the-mill agency decision that has predominantly local implications. *See, e.g.*, *Airport Working Group*, 226 F. Supp. 2d at 230 (declining to follow *Wilderness Society* because the agency's role in the case was "limited and administrative"); *Southern Utah Wilderness Alliance v. Norton*, 2002 U.S. Dist. LEXIS 27414, *11 (D.D.C. June 28, 2002) (distinguishing *Wilderness Society* because there was no "substantial personalized involvement" by an agency official, nor any public hearings in D.C., nor issues of nationwide interest to support a finding of "meaningful ties" to this District). 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).

With regard to where the claim arose, the cause of action arises out of Kansas. As described above, the 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*, 298 F. Supp. 2d at 25 (concluding that the claim arose elsewhere even though some decisions were made in Washington, D.C.). As described above, the plaintiff's claim has substantial ties to Kansas. The court concludes that, regardless of where the NIGC's decision was issued, this claim arises out of the state of Kansas.

As to the defendant's choice of forum and the convenience of the parties, the court concludes that transfer of this matter to the District of Kansas is most convenient for all parties concerned. Because the United States Attorney's Office for the District of Kansas has aided Department of Justice attorneys in other cases involving the Wyandotte Tribe and the Shriner Tract, and plans to assist in defending this matter, it makes sense to litigate this matter in the District of Kansas. Defs.' Mot. at 12; Reply at 10. Moreover, because 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.[5] Finally, although there is some contention between the parties as to where the counsel of record are located, the court reiterates that "[t]he location of counsel carries little, if any, weight in an analysis under § 1404(a)." *Reiffin v. Microsoft Corp.*, 104 F. Supp. 2d 48, 52 n.7 (D.D.C. 2000) (internal quotation omitted).

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. *See Valley Cmty. Pres.*

[5] In addition, the court is not moved by the plaintiff's assertion that transferring venue to Kansas would be inconvenient because "the Tribe's attorneys are barred in this Court, but not in federal courts located in the State of Kansas." Pl.'s Opp'n at 8. Given the number of other cases that the plaintiff's attorneys have litigated, and continue to litigate, in the Kansas District Court regarding the Shriner Tract, this does not appear to have presented the plaintiff with difficulties in the past. *See, e.g.*, *Wyandotte Nation v. Sebelius*, Case No. 04-2140-JAR, 337 F. Supp. 2d 1253 (D. Kan. 2004).

Comm'n v. Mineta, 231 F. Supp. 2d 23, 45 (D.D.C. 2002). 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. Although the plaintiff argues that this factor "overwhelmingly weighs against transfer" because the administrative record is located in Washington, D.C., and "must be voluminous," Pl.'s Opp'n at 9, there is no indication that the record in this case is so sizeable as to truly be a consideration. *Cf. Airport Working Group*, 226 F. Supp. 2d at 231 (finding that the location of the administrative record, estimated to be over 100,000 pages, was significant).

In sum, the balance of the private-interest factors weighs heavily in favor of transferring this action to Kansas.

b. Public-Interest Factors

The court determines that the public interest factors also weigh heavily in favor of transfer. 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. *Trout Unlimited*, 944 F. Supp. at 16.

The first 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." *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175 (D.C. Cir. 1987). Second, the relative congestion of the transferor and transferee courts does not enter the court's analysis because the court has no reason to believe that the transferee court is more or less congested than this court, nor have the parties addressed this issue. Because neither of the first two

public-interest factors affects the court's determination, the court determines the weight of the public-sector considerations by analyzing the local interest in deciding local controversies at home.

Here, the court finds the local interest in deciding a sizeable local controversy at home to be the most persuasive factor favoring transfer of this litigation to Kansas. Both the location of the property itself, and the ramifications of declaring the land as falling under one of IGRA's gaming exceptions, are entirely local in nature. Because this dispute will have the greatest impact on the citizens of Kansas, there is a compelling interest in allowing the local government and citizens to attend any court proceedings in person. *Citizen Advocates For Responsible Expansion, Inc., v. Dole*, 561 F. Supp. 1238, 1240 (D.D.C. 1983) (recognizing that the interests of justice are promoted when a localized controversy is resolved locally where concerned citizens may closely follow the proceedings). Since it is the District of Kansas, not Washington, D.C., that will be directly impacted by the resolution of the dispute over the use of the Shriner Tract, the court concludes that the interests of justice will be better served if the resolution of this case occurs in Kansas.

In addition, this action should be transferred to avoid unnecessary expenditure of judicial resources and the possibility of inconsistent results. *See Cont'l Grain Co. v. Barge, FBL-585*, 364 U.S. 19, 26 (1960); *see also Martin Trigona v. Meister*, 668 F. Supp. 1, 3 (D.D.C. 1987) (recognizing that the interests of justice are better served when a case is transferred to the district where related actions are pending). As explained above, two cases arising out of the same set of transactional facts are currently pending before the United States District Court for the District of Kansas. The Kansas court's determination regarding the funds at issue in *Governor v. Norton*,

Case No. 03-4140-SAC, will have a direct effect on the use of the property underlying the present case, since the NIGC decision at issue in this suit assumes that the Shriner Tract was purchased with Public 602 funds. Therefore, this action must be transferred to the District of Kansas to avoid inconsistent judgments or duplicative litigation.

In sum, because this case enjoys a substantial connection to the District of Kansas, where related actions are pending and where the interests of local citizens will be directly impacted by the outcome of this dispute, the court concludes it is in the interest of justice to transfer this matter to the District of Kansas.

IV. CONCLUSION

For the foregoing reasons, the court grants the defendants' motion to transfer. An order consistent with this Memorandum Opinion is separately and contemporaneously issued this 2nd day of May, 2005.

RICARDO M. URBINA
United States District Judge

Exhibit C

Leaford Bearskin
Chief

P.O. Box 250
Wyandotte, OK 74370

WYANDOTTE NATION

Earlene Roskob
2nd Chief

Phone: 918-678-2297
Fax: 918-678-2944

RESOLUTION NUMBER 06-04-13

WHEREAS: the Wyandotte Nation is a federally-recognized Indian Tribe organized consistent with the Oklahoma Indian Welfare Act (Act of June 26, 1936, 49 Stat. 1967) having Indian country in Oklahoma and Kansas; and

WHEREAS: the Wyandotte constitution authorizes the Business Committee to act on behalf of the tribe; and

WHEREAS: the Wyandotte have purchased real property, the legal description of which is set forth below:

A tract of land in the Coliseum Center an addition to Park City, Sedgwick County, Kansas described as: Beginning at a point on the south line and 50 feet west of southeast corner of Lot 3, Block 1 in said Coliseum Center; thence along the south line of said Lot 3 bearing N89°39′26″W a distance of 250 feet to the southwest corner of said Lot 3; thence bearing N90°00′00″W across Athens Court a distance of 70.00 feet to the southeast corner of Lot 1, in said Block 1; thence along the south line of said Lot 1 bearing N89°40′18″W a distance of 180.00 feet; thence bearing S0°00′00″E a distance of 917.75 feet to a point in the south line of Lot 6 in said Block 1; thence along said south line bearing S89°42′56″E a distance of 500.00 feet; thence bearing N0°00′00″E a distance of 917.70 feet to the point of beginning, except that portion of Athens Court (Cul-De-Sac) within the above described tract of land, said tract contains 458,877 SQ. Ft. or 10.5344 acres m/l

WHEREAS: the Wyandotte proposes to request that the Secretary of the United States Department of Interior accept this land in trust for the Wyandotte Nation under the authority of the Indian Reorganization Act of 1934, 25 U.S.C. § 465; and

WHEREAS: the Wyandotte proposes to request that the Secretary of the Interior proclaim that this land would meet the requirement of the Indian Gaming Regulatory Act exception, found at 25 U.S.C. §§ 2719(a)(2)(B) and 2719(b)(1)(A), or any other exception found therein, from the general prohibition on gaming on after acquired land contained in 25 U.S.C. § 2719(A); and

WHEREAS: the real property referenced herein will be used for gaming purposes, or purposes for which the Wyandotte Nation of Oklahoma deems appropriate; and

WHEREAS: the use of the parcel of land for the purpose hereinabove enumerated will be for the betterment of the health and welfare of the Wyandotte and each individual member; and

NOW, THEREFORE, BE IT RESOLVED that the Board of Directors of the Wyandotte Nation hereby authorizes and directs Chief Leaford Bearskin to apply to the federal government (the Bureau of Indian Affairs and/or the Department of Interior) to take title to the tract of land with the legal description as set forth herein, in trust for the use and benefit of the Wyandotte Nation and to request that the Secretary proclaim that the lands meet the requirements of the IGRA exceptions contained in 25 U.S.C. §§ 2719(a)(2)(B) and 2719(b)(1)(A), *inter alia*, from the general prohibition on gaming on after acquired lands contained in 25 U.S.C. § 2719(a).

BE IT FURTHER RESOLVED that Chief Bearskin is authorized to execute documents and take whatever other actions are reasonable and necessary to comply with the directions of this resolution.

WYANDOTTE NATION

BY Leaford Bearskin
CHIEF

CERTIFICATION

The foregoing resolution was duly adopted by the Board of Directors of the Wyandotte Nation on the 13th day of April, 2006, with a quorum being declared. The vote on this resolution was: 5 FOR, 0 AGAINST, 0 ABSTAIN.

Board of Directors
Wyandotte Nation

Leaford Bearskin
Leaford Bearskin, Chief

Barbara Caskey
Attest

4-13-06
Date

Exhibit D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHEYENNE-ARAPAHO TRIBE OF OKLAHOMA, ET AL.,	
Plaintiffs,	Civil Action No.:98-CV-065 (RMU)
v.	
JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, DEPARTMENT OF JUSTICE, ET AL.,	Document Nos.: 2, 6, 15, 17, 18, 19, 21 28, 31 & 32
Defendants.	

ORDER

Granting The Defendants' Motion to Transfer

This matter comes before the court on the defendants' motion to transfer this action to the United States District Court for the Northern District of Oklahoma. Upon consideration of the parties' submissions and the entire record, the court grants the defendants' motion to transfer. The convenience of the parties and potential witnesses in addition to the interests of justice dictate that the action be litigated in Oklahoma.

I. BACKGROUND

The plaintiffs[1] reside in the state of Oklahoma and operate gambling casinos on Indian lands. The plaintiffs operate various types of gambling devices including the MegaMania machine, which is the subject of the present action. On December 30, 1997, the United States

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[1] The plaintiffs in this case include the Cheyene-Arapaho Tribe of Oklahoma Gaming Commission, which filed suit on behalf of the Cheyene-Arapaho Tribe of Oklahoma, the Chickasaw Nation of Oklahoma, and The Choctaw Nation of Oklahoma.

Attorney for the Northern District of Oklahoma ("U.S. Attorney") obtained warrants to seize approximately 285 MegaMania gambling devices and related equipment located on Indian lands in the Northern and Eastern Districts of Oklahoma. The next day, the U.S. Attorney filed a complaint for forfeiture *in rem* against the plaintiffs ("the Enforcement Action") to seize the MegaMania gambling devices and related equipment. The seizure of the equipment was spurred by a finding by Senior District Judge H. Dale Cook and Magistrate Judge Payne in the Northern District of Oklahoma that there is probable cause to believe that the MegaMania machine is an illegal class III gambling device under the Johnson Act, 15 U.S.C. §§ 1171-1178.

On January 5, 1998, Multimedia, the maker of the MegaMania machine, and the Seneca-Cayuga Tribe of Oklahoma filed an action in the U.S. District Court for the Northern District of Oklahoma ("Oklahoma Action") seeking: (1) declaratory judgment that the MegaMania is a permissible Class II gaming device; and (2) a stay of enforcement activity during the pendency of the lawsuit. Subsequently, on January 12, 1998, the plaintiffs filed a declaratory judgment action in this court ("D.C. Action") requesting similar relief as in the Oklahoma Action. Then, on January 15, 1998, Judge Kern consolidated the Oklahoma action into the Enforcement Action. At present, the defendants seek to transfer this action to the Northern District of Oklahoma claiming that the profound public interest in Oklahoma regarding the classification of the MegaMania machine, the convenience of the parties and witnesses, and the interests of justice warrant such a transfer.

II. DISCUSSION

The defendants seek to transfer this case to the Northern District of Oklahoma pursuant to 28 U.S.C. § 1404(a), which provides that a district court may transfer any civil action to any other district or division where it may have been brought for the convenience of the parties and witnesses and for the interests of justice. The defendants bear the burden of establishing that the transfer of the action is proper. See Airline Pilots Ass'n v. Eastern Air Lines, 672 F. Supp. 525, 526 (D.D.C. 1987). Section 1404(a) vests the court broad discretion to adjudicate motions to transfer on a case-by-case basis. See Van Dusen v. Barrack, 376 U.S. 612, 622 (1964). Thus, a threshold determination under § 1404(a) is whether the action may have been brought in Oklahoma.

The venue statute, 28 U.S.C. § 1391(e), states that venue is proper in the judicial district in which a substantial part of the events giving rise to the claim occurred, or where a substantial part of property that is the subject of the action is situated. Here, venue could be proper in Oklahoma because the case involves governmental action that will impact the tribe's gambling operation in that state. See Martin-Trigona v. Meister, 668 F. Supp. 1, 4 (D.D.C. 1987). Furthermore, the events giving rise to this controversy occurred in Oklahoma and the property affected is also located there. Thus, under § 1391, venue is proper in the Northern District of Oklahoma.

Next, the court determines whether the case should be transferred based on the convenience of the parties and witnesses and the interests of justice. Of course, deference should be given to the plaintiffs' choice of forum. See Air Line Pilots Ass'n, 672 F. Supp. at 526. The court, however, may give the plaintiffs' choice of forum significantly less deference if the activities surrounding the controversy have little, if any, contact with the selected forum. See Armco Steel Co., L.P. v. CSX Corp., 790 F. Supp. 311, 324 (D.D.C. 1991); see also Martin-Trigona, 668 F. Supp. at 3. In the instant case, the plaintiffs are citizens domiciled in the State of Oklahoma and the MegaMania machines at issue are similarly located in Oklahoma. The Multimedia corporation, the maker of the MegaMania devices, has its headquarters in Tulsa, Oklahoma. All the individuals associated with the MegaMania machines and the records pertaining thereto are located in Oklahoma. The U.S. Attorney's office that filed the enforcement action is also located in Oklahoma. Moreover, a consolidated case with identical issues as the present action is currently pending in the Northern District of Oklahoma. Thus, these facts compel a determination that a transfer of venue is appropriate.

The plaintiffs, however, argue that this case should be litigated in this jurisdiction because the U.S. Department of Justice ("DOJ") and the National Indian Gaming Commission ("NIGC"), the government agency charged with regulating Indian gaming, both have their headquarters in Washington, D.C. This argument is unpersuasive. Under § 1404(a), the court accords insignificant, if any weight, to the location of federal agencies and counsel. See e.g., Armco Steel Co., 790 F. Supp. at 324. The significance here is the location of potential non-party witnesses and the events that form the basis of this controversy, the majority of which are located in

Oklahoma. Therefore, for the convenience of the parties and the potential witnesses, this action should be transferred to Oklahoma.

The court further concludes that the interests of justice favor the transfer of this case to Oklahoma. The interests of justice are furthered by avoiding unnecessary expense to the public through duplicative use of judicial resources. See Continental Grain Co. v. Barge, FBL-585, 364 U.S. 19, 26 (1960). See Also Martin-Trigona, 668 F. Supp. at 3 (the interests of justice are better served when a case is transferred to the district where related actions are pending). As mentioned above, a consolidated action involving the same issues in the present action, the classification of the MegaMania machines, 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. Therefore, this action must be transferred to the Northern District of Oklahoma in order to avoid inconsistent judgments or duplicative litigation.

In addition, the interests of justice are promoted when a localized controversy is resolved locally where concerned citizens may closely follow the proceedings. See Citizen Advocates For Responsible Expansion, Inc. v. Dole, 561 F. Supp. 1238, 1240 (D.D.C. 1983). In cases that touch the affairs of many people, there are reasons for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. See Gulf Oil v. Gilbert, 330 U.S. 501, 509 (1947). The issues surrounding the classification of the MegaMania machines affect Indian tribes that operate casinos and companies that manufacture gambling devices within the state. Therefore, it is clear that the interests of justice will be better served if the resolution of this case occurs in Oklahoma.

Next, the plaintiffs argue that if the case is litigated in this jurisdiction, where the DOJ has its national headquarters, the DOJ will be bound by the judgment nationwide. This argument is meritless. Under the doctrine of offensive and defensive collateral estoppel, both parties are bound by the final judgment of a case regardless of where the case is tried. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-31 (1979). Therefore, both parties are estopped from resurrecting identical issues in another jurisdiction. See id. In fact, contrary to the plaintiffs' assertion, as discussed above, the interests of justice are better served if the action is litigated in Oklahoma.

Finally, the plaintiffs argue that it would serve the interests of justice to litigate the action before this court because the court has familiarity with the MegaMania gaming device. This argument is similarly without merit. Although the court had exposure to the MegaMania device when it entertained evidentiary presentations in Diamond Game Enterprises v. Janet Reno, - - F. Supp. --, 1998 WL 345041 (D.D.C. June 23, 1998), the court may require additional evidentiary and oral hearings to fashion an informed opinion on the classification of the MegaMania device. Furthermore, the plaintiffs fail to explain why another federal judge in Oklahoma would be unable to determine the classification of the MegaMania gaming device even when that judge does not have previous knowledge of the device. In short, the court finds that the plaintiffs fail to demonstrate the interests of justice are better served by litigating this action in the District of Columbia. Therefore, the court transfers the above-captioned action to the U.S. District Court for the Northern District of Oklahoma.

Accordingly, it is this 8th day of September, 1998,

ORDERED that the defendants' motion to transfer the above-captioned action to the U.S. District Court for the District of Oklahoma be and is hereby **GRANTED**; it is

FURTHER ORDERED that the defendants' motion for leave to file a supplement to the motion to transfer be and is hereby **GRANTED** nunc pro tunc; it is

ORDERED that the defendants' motion for leave to file amended reply in support of defendants' motion to transfer be and is hereby **GRANTED** nunc pro tunc; it is

FURTHER ORDERED that the motion to intervene filed by Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation ("the Viejas Group") be and is hereby **DENIED** without prejudice. The Viejas Group may resurrect its motion to intervene consistent with the order of the transferee court; it is

ORDERED that the Viejas Group's motion for leave to file plaintiffs' supplemental opposition to defendants' motion to dismiss be and is hereby **DENIED** without prejudice; it is

FURTHER ORDERED that the motion to intervene filed by the Cabazon Band of Mission be and is hereby **DENIED** without prejudice. The Cabazon Band may resurrect its motion to intervene consistent without the order of the transferee court; it is

ORDERED that the motion to intervene filed by Shoalwater Indian Tribe be and is hereby **DENIED** without prejudice. The Shoalwater Indian Tribe may resurrect its motion to intervene consistent with the order of the transferred court; it is

FURTHER ORDERED that the Shoalwater Indian Tribe's motion for leave to file memorandum in opposition to defendant's motion to transfer be and is hereby **DENIED** without prejudice; it is

ORDERED that the defendants' motion to stay proceedings be and is hereby **DENIED** as moot; and it is

FURTHER ORDERED that the defendants' motion for a protective order be and is hereby **DENIED** without prejudice. The defendants' may resurrect this motion with the transferee court.

SO ORDERED.

Ricardo M. Urbina
United States District Judge

Exhibit E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The Apache Tribe of the Mescalero Reservation,	:	
Plaintiff,	:	Civil Action No.: 96-115
v.	:	
Janet Reno, Attorney General, Bruce Babbitt, Secretary of the Interior,	:	Document No.:
Defendants.	:	

Order

Denying Plaintiff's Motion for a Temporary Restraining Order and Granting Defendants' Motion to Transfer

This matter comes before the court upon plaintiff's motion for a temporary restraining order and defendants' opposition thereto; defendants' motion to transfer this action to the United States District Court for the District of New Mexico; and plaintiff's opposition thereto. After careful consideration of the pleadings and the entire record herein, the court concludes that a temporary restraining order shall not be imposed because the movant has failed to establish that it will suffer irreparable injury; or that the public interest will be furthered by the granting of injunctive relief. Accordingly, plaintiff's motion for a temporary restraining order is denied.

In addition, the court concludes that defendants' motion to transfer shall be granted because the present action could have been brought in New Mexico and the interests of the parties and of potential witnesses; as well as the interest of justice dictate that the action be heard in that forum.

I. Background

Plaintiff, the Apache Tribe of the Mescalero Reservation ("Tribe"), resides in the state of New Mexico. The tribe operates the Casino Apache, a gambling enterprise located within the reservation. The Tribe owns and operates various types of gambling equipment. The casino and the gambling equipment are the subject of the present action. According to the tribe it is legally conducting gambling activities pursuant to a compact, it and other tribes reached with the Governor of New Mexico, Gary Johnson and subsequently approved by the Secretary of the Interior. This compact, however, was found to have no legal effect as a matter of state law by the New Mexico Supreme Court. State ex rel. Clark v. Johnson, 904 P.2d 11 (1995). That Court also found that all electronic gaming devices, slot machines and casino-style gaming are unlawful in the state of New Mexico. Citation Bingo, Ltd. v. Otten, No. 22,736 (N.M. Nov. 29, 1005). As a result, in December 1995, the United States Attorney for the District of New Mexico, advised ten New Mexico Tribes, that the gambling activities they were conducting were illegal in the state of New Mexico and were not the proper subject of a compact and thus in violation of federal criminal law.

The United States Attorney then advised the tribes, including plaintiff, that if they did not cease their gambling operations withing thirty days, complaints in civil forfeiture would be filed against them. As a result, nine of the tribes filed suit in New Mexico against the present defendants as well as the United States Attorney for the District of New Mexico and the United States. The parties in that suit reached a stipulation in which the Tribes agreed to close their casinos if the court in New Mexico found their enterprises to be illegal. The United States Attorney agreed not to initiate any criminal proceedings or forfeiture actions against the Tribes. Plaintiff, however, is not a party to the suit pending in New Mexico; it decided to proceed in this jurisdiction.

Plaintiff requests that the court issue a temporary restraining order that would prevent the defendants from taking any action which might interfere with plaintiff's gambling operation, including, but not limited to, the institution of any civil action to enjoin or to declare unlawful the Tribe's operation or to cause a forfeiture of any gambling device utilized in said operation.

Furthermore, the Tribe seeks to prevent the initiation of any criminal prosecution of any person associated with the Casino Apache.

II. Discussion

A. Temporary Restraining Order

A party seeking a temporary restraining order must establish that: (1) it has a substantial likelihood of succeeding on the merits; (2) it will suffer irreparable harm if the injunction is not granted; (3) other interested parties will not suffer substantial harm if the injunction is granted; and (4) the public interest will be furthered by the injunction. Sea Containers Ltd. v. Stena AB, 890 F.2d 1205, 1208 (D.C.Cir. 1989); see also Foundation on Economic Trends v. Heckler, 756 F.2d 143, 151 (D.C.Cir. 1985); Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C.Cir. 1977). After balancing the four factors, the court concludes that plaintiff has failed to establish that it will suffer irreparable harm if injunctive relief is not granted; or that the public interest will be furthered by the issuance of the temporary restraining order. The court finds it unnecessary to make explicit findings with respect to the other two elements since irreparable harm and the furtherance of a public interest have not been sufficiently established. The court notes, however, the substantial difficulty the plaintiff must overcome in order to succeed on the underlying merits of this case.

In order to establish irreparable harm justifying injunctive relief, a plaintiff must establish injury that is certain, great, and actual, not theoretical. Wisconsin Gas Co. v. Federal Energy Regulatory Commissions, 758 F.2d 669, 674 (D.C.Cir. 1985). The injury must be imminent, creating a "clear and present" need for equitable relief to prevent irreparable harm. Id. (internal citations omitted). Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time." Connecticut v. Massachusetts, 282 U.S. 660, 674 (1931). Plaintiff must establish that the irreparable injury is likely to occur. The movant must therefore provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Wisconsin Gas. Co., 758

F.2d at 674. Finally, the plaintiff must show that the alleged harm will directly result from the action which he or she seeks to enjoin. Id. Plaintiff has not made the requisite showing.

It is clear from the pleadings submitted by the parties for the court's consideration that the only threatened action is the filing of a civil forfeiture complaint by the government. Thus, plaintiff's reference to the United States Attorney's intention to close the casino and to seek forfeiture of the Tribe's gambling devices is not dispositive since it must be evaluated in light of the fact that in order to carry out the threatened action, the government would have to avail itself of civil forfeiture procedures. There are adequate remedies in civil forfeiture of which the plaintiff can avail itself. "The basis for injunctive relief in the federal courts has always been irreparable harm *and* inadequacy of legal remedies." Sampson v. Murray, 415 U.S. 61, 88 (1974) (emphasis supplied). Moreover, the United States Attorney in New Mexico does not intend the immediate seizure of any gambling equipment machines.[1] Further, the defendants have represented in the pleadings that they do not intend to interfere in any way with the casino's operations prior to the entry of a judgment of forfeiture in the District of New Mexico. Consequently, the court fails to see any imminent and irreparable harm to the interests of the Tribe. Finally, since the court is granting defendant's motion to transfer this action to the United States District Court for the District of New Mexico, plaintiff is free to seek injunctive relief in that forum.[2]

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[1] Plaintiff requests that the court enjoin the defendants from instituting any criminal proceedings against any individual associated with Casino Apache. This is not an appropriate subject for the court to entertain. Newman v. United States, 382 F.2d 479, 480 (D.C.Cir. 1967); see also Shoshone-Bannok Tirbes v. Reno, 56 F.3d 1476, 1480 (D.C.Cir. 1995). Moreover, it is unlikely that any such proceedings will go forward prior to the court in New Mexico resolving the issue of the legality of the gambling operations.

[2] Plaintiff's argument regarding the public interest is premised on its position vis-a-vis the alleged irreparable harm that is to occur if injunctive relief is not granted. Consequently, the court does not credit it for the same reasons that plaintiff's position on the irreparable harm prong of the standard for the granting of a temporary restraining order fails.

B. Transfer

The defendants seek to transfer this case to the state of New Mexico pursuant to 28 U.S.C. § 1404 (a), which provides:

> 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.

The defendants bear the burden of establishing that the transfer of this action is proper. Airline Pilots Ass'n v. Eastern Air Lines, 672 F.Supp. 525, 526 (D.D.C. 1987); Int'l Brotherhood of Painters & Allied Trades Union v. Best Painting & Sandblasting Co., 621 F.Supp. 906, 907 (D.D.C. 1985). Section 1404 (a) vests "discretion in the district court to adjudicate motions to transfer according to 'individualized, case-by-case consideration of convenience and fairness.'" Stewart Organizations, Inc. v. Ricoh Corp., 487 U.S. 22, 27 (1988) (quoting Van Dusen v. Barrack, 376 U.S. 612, 622 (1964)). The threshold determination under § 1404 (a) is whether the action might have been brought in New Mexico.

Plaintiff bases its claims on federal question jurisdiction, and venue is proper in New Mexico because the case involves governmental action that will impact the Tribe's gambling operation which is located there. See Martin-Trigona v. Meister, 668 F.Supp. 1, 4 (D.D.C. 1987). 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 events giving rise to the claim have occurred in New Mexico and that the property being affected is similarly located there.

Accordingly, the court's inquiry proceeds to the issue of whether the case should be transferred based on the convenience of the parties, the convenience of the witnesses, and the interest of justice. The court is aware of the deference that should be given to plaintiff's choice of forum. Air Line Pilots Ass'n, 672 F.Supp. at 526 (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, 668 F.Supp. at 3. Plaintiff and its gambling

operation are located in New Mexico. All the individuals associated with the casino and the records pertaining thereto are located in New Mexico; the United States Attorney who is investigating the casino is also located there and any civil forfeiture actions will be brought in that jurisdiction. Plaintiff's reference to the fact that its lead counsel is located in the District of Columbia is immaterial. Under § 1404 (a), the court accords insignificant, if any, weight to the location of counsel. Armco Steel Co., L.P. v. CSX Corp., 790 F.Supp. 311, 324 (D.D.C. 1991). Consequently, for the convenience of the parties and the potential witnesses, this action should be transferred to New Mexico.

The court further concludes that the interest of justice favors the transfer of this case to New Mexico. As previously referenced above, 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.[3] 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. "A prime factor to be considered is whether the issues in both actions are substantially the same and whether their determination rests upon the same factual matters." National Union Fire Ins. v. R.H. Weber Exploration, 605 F.Supp. 1299, 1303 (S.D.N.Y. 1985). Further, any forfeiture proceeding, which plaintiff presently seeks to enjoin, would be undertaken by the prosecutorial authorities in New Mexico. Finally, the resolution of this dispute will involve, to a large extent, the interpretation of the law of New Mexico. Accordingly, if this case was transferred to New Mexico, it could be consolidated with the one currently pending there, thereby saving judicial resources and costs. See Continental Grain Co. v. FBI-585, 364 U.S. 19,

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[3] The plaintiff points out that in the case pending in New Mexico the plaintiff Tribes and the government entered into a stipulation that would prevent the latter from engaging in any action which would impede the operation of the plaintiffs' operations. Plaintiff refused to enter into this stipulation at its own prerogative. Accordingly, plaintiff's strategic decision to not enter into the agreement cannot serve as a basis for preventing the transfer of the case. Had it entered into the agreement, plaintiff would have been accorded exactly the same relief it now seeks in this jurisdiction.

26 (1960). Consolidation would also avoid the possibility of inconsistent results.

Moreover, the resolution of this controversy, which both sides acknowledge involve issues very important to the local community, will have an exclusively local effect. Thus,

> in cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.

Gulf Oil v. Gilbert, 330 U.S. 501, 509 (1947). The parties have both represented that the issues of gambling in New Mexico has produced intense interest among the people of that state. The citizens of New Mexico will be in a better position to observe the course of litigation which will intimately affect them at a more proximate and convenient forum.

Accordingly, it is this 5th of February 1996,

ORDERED that plaintiff's motion for a temporary restraining order be and is hereby denied; and it is

FURTHER ORDERED that defendants' motion to transfer this action to the United States District Court for the District of New Mexico be and is hereby granted.

SO ORDERED.

Ricardo M. Urbina
United States District Judge

Copies Sent To:

Phyllis A. Dow
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P.O. Box 607
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Exhibit F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SANTEE SIOUX TRIBE OF NEBRASKA,

Plaintiff,

v. : Civil Action No. 99-528 (GK)

NATIONAL INDIAN GAMING COMMISSION,

Defendant.

MEMORANDUM OPINION

Plaintiff, Santee Sioux Tribe of Nebraska ("the Tribe"), has brought suit in this Court challenging the constitutionality of various provisions of the Indian Gaming Regulatory Act ("IGRA" or "the Act"), 25 U.S.C. § 2701-2721 (1994). In addition to seeking a declaratory judgment, the Tribe seeks to enjoin enforcement of a final Order of Closure of the National Indian Gaming Commission ("NIGC or "the Commission") which would close its Ohiya Casino in the State of Nebraska. Defendant, the NIGC, has moved to transfer the case to the United States District Court for the District of Nebraska, where extensive court and appellate proceedings relating to this Casino have already taken place, and where contempt proceedings are ongoing. Plaintiff opposes the transfer.

Upon consideration of Defendant's Motion, Plaintiff's Opposition, Defendant's Reply, the applicable case law, and the entire record herein, for the reasons discussed below, Defendant's

Motion to Transfer is granted.

I. Statutory Background

In 1988, Congress enacted the Indian Gaming Regulatory Act which was designed 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 government." 25 U.S.C. § 2701(5)(1994).

The Act divides gaming into three categories. Class III gaming, which is the category at issue in this case, includes banking card games, dice games, roulette, dog racing, horse racing, lotteries, and electronic and electro-mechanical facsimiles of games of chance. 25 U.S.C. § 2703 (6)-(8)(1994).[1] Under the statute, such Class III gaming activities are lawful on tribal lands only if they are, inter alia, "located in a state that permits such gaming for any purpose by any person, organization, or entity;" and operated in accordance with the provisions of a Tribal-State compact entered into by the Indian tribe and the state in which the tribe is located. 25 U.S.C. § 2710(d)(1)(1994).

When a tribe becomes interested in operating Class III gaming activities, it is required under the statute to initiate the process by requesting the State to enter into negotiations, and the State is required "to negotiate with the Indian tribe in good faith to enter into such a compact". 25 U.S.C. § 2710(d)(3)(A)(1994).

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[1] The Class III gaming operated by the Tribe consisted of video slot, poker, and blackjack machines.

If the State fails to negotiate in good faith, the Act provided that the tribe could sue the State in federal district court; the Act also provided various statutory remedies designed to bring the state and the tribe to a final tribal-state compact so that the tribe could satisfy the requirements of IGRA and conduct lawful gaming activities. 25 U.S.C. §§ 2710(d)(7)(A) and (B)(1994).

In 1997, the Supreme Court ruled that Congress lacked the authority to abrogate a State's Eleventh Amendment immunity from suit and that Section 2710(d)(7)(A) of IGRA was therefore unconstitutional. Seminole Tribe of Florida v. Florida, 517 U.S. 49 (1996). The practical consequence of this ruling was to leave Indian tribes without recourse to the courts if they were unable, because of bad faith negotiations on the part of the State, to conclude the statutorily required Tribal-State compact. Without the existence of such a Tribal-State compact, the tribes would be unable to obtain permission from the Commission to operate gaming facilities.

II. Procedural History

Plaintiff is a federally recognized tribe whose reservation is entirely situated within the State of Nebraska. In February 1993, the Tribe began a long period of negotiations with the State of Nebraska to conclude a Tribal-State compact for the conduct of Class III gaming on the Tribe's reservation. Ultimately, the negotiations failed, and there was evidence before the Commission that would "tend to suggest that the Governor did not negotiate in

good faith". Pl.'s Ex. 1 at 14.[2] In February 1996, the Tribe opened its Ohiya Casino, a gaming facility with Class III gaming devices.

In February 1996, the Tribe also filed an action in the U.S. District Court for the District of Nebraska against the State of Nebraska and its Governor, pursuant to IGRA § 2710(d)(7)(A)(i), alleging bad-faith negotiations by the State. That suit was dismissed on grounds of Eleventh Amendment immunity under Seminole. Santee Sioux Tribe v. State of Nebraska, 121 F.3d 427 (8th Cir. 1997).

Thereafter, the Chairman of the NIGC issued a "Notice of Violation" stating that the Tribe's operation of certain Class III games in the absence of the requisite Tribal-State compact violated 25 U.S.C. § 2710(b). Despite voicing "serious concerns about the fairness" of the Tribal-State negotiation process, and recognizing the Tribe's critical need for revenues generated by operation of the Casino, the Chairman concluded on May 2, 1996, that the "NIGC does not have the authority to address issues related to the process by which tribal-state compacts are negotiated" and that he had "no choice but to order the closure of the Class III gaming activity presently being conducted". 25 C.F.R. §~573.6(11)(1996). The Tribe closed the Casino on May 5, 1996, only to reinitiate gaming activities several months later.

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[2]The Commission did not hold, as Plaintiff misrepresents in its papers, "that the evidence demonstrated" that Nebraska failed to negotiate in good faith". Pl.'s Mem. Opposing Def.'s Mot. to Transfer at 3 n1. The Court does not appreciate such a gross exaggeration, not to say misstatement, of the record.

Thereafter, much procedural maneuvering ensued before the Commission and in federal court, the details of which are set out at great length in the parties' papers. Ultimately, after many proceedings before Chief Judge William G. Cambridge of the United States District Court for the District of Nebraska, on appeal, the Eighth Circuit held that the United States could seek civil injunctive relief against the Tribe under Nebraska's nuisance law, pursuant to 18 U.S.C. § 1166. It also ruled that because the gaming machines in question were illegal under Nebraska law and the State could not therefore compact for them even if it chose to negotiate in good faith, that it need not reach the issue of whether all provisions of the IGRA related to compacting are unconstitutional. The Supreme Court denied Plaintiff's petition for a writ of certiorari. United States v. Santee Sioux Tribe of Nebraska, 135 F.3d 558, 565-566 (1998), cert. denied, 119 S. Ct. 48 (1998).

On October 15, 1998, the Eighth Circuit issued a mandate to the District Court to enter an "order enjoining the Tribe's operation of class III gaming devices and enforcing the Chairman's closure order." On November 24, 1998, the District Court issued the mandated order. Plaintiff did not close the Ohiya Casino. On February 1, 1999, the District Court found the Plaintiff in contempt of court for continuing to operate the Casino, and fined it $3000 per day for each day the gaming facility continued to remain open. The Ohiya Casino remains open.

On March 1, 1999, the Tribe filed the present action which it

styles as an administrative appeal under the Administrative Procedure Act, 5 U.S.C. § 701 et seq., from the Final Order of the NIGC, seeking a declaration that the law upon which that Final Order is predicated, the IGRA, is unconstitutional.

III. Analysis

Defendant has moved to transfer this case to the United States District Court for the District of Nebraska under 28 U.S.C. § 1404(a)(1993), which 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 or division where it may have been brought.

Defendant concedes that it bears the burden of establishing that transfer is proper and serves the purposes of § 1404(a) "to prevent the waste `of time, energy and money' and `to protect litigants, witnesses and the public against unnecessary inconvenience and expense. . . .'" Van Dusen v. Barrack, 376 U.S. 612, 616 (1964); Airline Pilots Ass'n. V. Eastern Air Lines, 672 F. Supp. 525, 526 (D.D.C. 1987).

A threshold question under § 1404(a) is whether the action may have been brought in Nebraska. The Tribe concedes, as it must, that the case could have been brought in the District of Nebraska.

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).

The parties very much dispute whether the convenience of the parties and witnesses will be served by trying this case in the District of Columbia or Nebraska. There is no question that Plaintiff's reservation is located within the District of Nebraska, that all the gaming activities in question are also located there, and that both sides have experienced and knowledgeable counsel in both jurisdictions. Therefore, the Court does not find that the convenience of counsel and parties is a factor that is persuasive one way or the other.

If witnesses are required to testify, then it is clear that the witnesses reside in or near the State of Nebraska and their convenience would be served by litigating the case there. However, Plaintiff maintains that this case is solely an administrative appeal from a final determination of the NIGC pursuant to the APA and, therefore, only the administrative record will be placed in the evidence. On the record as it stands now, this appears to be the case. If so, there would be no inconvenience to Defendant, who is located in Washington, D.C., in litigating the summary judgment motions here rather than in the District Court in Nebraska.

However, there are three compelling reasons which fully justify transferring the case to the District Court in Nebraska.

First, the Defendant is correct that the interests of justice

will best be served by transferring the case to the District Court in Nebraska. As the Supreme Court explained in applying the doctrine of forum non conveniens in Gulf Oil v. Gilbert, 330 U.S. 501, 509 (1947):

> In cases which touch the affairs of many persons, there is reason for holding the trial [or motions hearing] in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.

While there is some truth to Plaintiff's argument that in this day of computers and virtually instantaneous communications, Gilbert is far less persuasive than it was fifty years ago. However, the 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. See Towns of Ledyard, N. Stonington, and Preston, Conn. v. United States, Civ. No. 95-0880, slip op. at 4-5 (D.D.C. May 31, 1995); Apache Tribe of the Mescalero Reservatior v. Reno, Civ. No. 96-115,

slip op. (D.D.C. Feb. 5, 1996); Cheyenne-Arapaho Tribe of Okla. v. Reno, Civ. No. 98-065, slip op. (D.D.C. Sept. 8, 1998); and Citizen Advocates for Responsible Expansion, Inc. v. Dole, 561 F. Supp. 1238, 1240 (D.D.C. 1983).

Second, transfer of this case will avoid the waste of judicial resources and the very real possibility of inconsistent results. There is no question that Chief Judge Cambridge, who has presided over this litigation for close to three years, is intimately familiar with the facts, the extensive procedural history, and the applicable law. Obviously, it would be a waste of the parties' time and energy as well as of precious judicial resources to litigate a closely related case before a newly assigned judge, as opposed to Chief Judge Cambridge.

Third, and most 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. That court squarely rejected these arguments:

> The Tribe argues that because of the Supreme Court's determination in Seminole Tribe that, Congress was not empowered to authorize lawsuits by Indian tribes against states that fail to negotiate in good faith for a tribal-state compact, all provisions of the IGRA are unconstitutional. We decline to address this argument given our conclusion that, under the IGRA, the State is not required to negotiate for gambling that is illegal under Nebraska law. . . . As we already have determined, the class III gambling activities in which the Tribe is engaged are illegal under Nebraska law, ruling out any duty on the part of the State to negotiate a compact with the Tribe for such gambling. United States v. Santee Sioux Tribe of Nebraska, 135 F.2d at 565-566.

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):

> The transfer provisions in the U.S. Code, which grew out of the common law doctrine of forum non conveniens, were in part intended to prevent forum shopping. Cheeseman v. Carey, 485 F. Supp. 203, 214-214 (S.D.N.Y. 1980). This Court cannot find that it is in the interest of justice to encourage, or even allow, a plaintiff to select one district exclusively or primarily to obtain or avoid specific precedents, particularly in circumstances such as these where the relevant law is unsettled and the choice of forum may well dictate the outcome of the case. Schmid Lab., Inc. v. Hartford Accident and Indem. Co., 654 F. Supp. 734, 737 (D.D.C. 1986).

For all the foregoing reasons, the Defendant's Motion to Transfer is granted.

April 16, 1999
Date

Gladys Kessler
Gladys Kessler
United States District Court Judge

Exhibit G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Civil Action No. 01-1042
HHK/DAR

MEMORANDUM ORDER

This matter was referred to the undersigned for determination of federal defendants' and the State of Wisconsin and Governor Scott McCallum's Motions to Transfer (Docket Nos. 8 and 9). Plaintiffs filed their opposition (Docket No. 12) and replies in support of the motions to transfer were filed by the federal defendants (Docket No. 19) and by the State of Wisconsin and Governor Scott McCallum (Docket Nos. 17, 18). After consideration of the motions, the opposition and the replies thereto, and of the relevant case law, the undersigned will grant the motions to transfer.

INTRODUCTION

Plaintiffs, three Wisconsin Indian tribes ("Wisconsin Tribes"), filed the instant action in this Court for a declaratory judgment that the gubernatorial concurrence requirement in §20(b)(1)(A) of the Indian Gaming Regulatory Act, 25 U.S.C. §2719(b)(1)(A), is unconstitutional and a breach of trust by Congress, and seek a remand to the Secretary of the Interior requiring her to complete the trust application for the Wisconsin Tribes. This controversy stems from the administrative process used by the State of Wisconsin in deciding whether certain Indian tribes could open a casino on trust land in the state. In 1993, the Wisconsin Tribes submitted to the Bureau of Indian Affairs-Midwest Regional Office, an

application for the acquisition and fee-to-trust transfer of the St. Croix Meadows Racing Facility located in Hudson, St. Croix County, Wisconsin. Defendant's Motion to Transfer at 3. The Midwest Regional Office reviewed the application and submitted a favorable recommendation to the BIA-Central Office on November 15, 1994. On July 14, 1995, the Deputy Assistant Secretary-Indian Affairs ("Deputy AS-IA") determined that the proposed gaming establishment would be detrimental to the surrounding community and raised additional concerns about the potential impact on the environment. Id. at 4. As a result, the Deputy AS-IA declined to exercise his discretion to take the land into trust. Id.

On September 15, 1995, the Wisconsin Tribes filed suit in the United States District Court for the Western District of Wisconsin challenging the Department's denial. In December, 1999, the parties entered a settlement agreement in which the court retained jurisdiction over the enforcement of the settlement. Id. at 5. Also in 1995, the Department agreed to vacate the denial of the application and resume consideration of the Wisconsin Tribes application. On January 25, 2001, the Deputy Commissioner of Indian Affairs for the BIA transmitted a favorable recommendation on Wisconsin Tribes' application to the Assistant Secretary of Indian Affairs. On February 20, 2001, the acting AS-IA issued a two-part determination and findings of fact which included the finding that the proposed gaming establishment was in the best interests of the Wisconsin Tribes and their members and not detrimental to the surrounding community. The acting AS-IA sought the concurrence of the Governor of Wisconsin ("Governor"); however, the Governor has since refused to concur in the determination. Id. at 6.

For the purposes of deciding the instant motions, it is not necessary to go into great detail about the intersection of the two statutes, 25 U.S.C. § 465 and §20 of 25 U.S.C. § 2719, that are at the heart of this constitutional challenge. The applicable administrative procedure requires that the Tribes obtain the concurrence of both the Secretary and the Governor of the Wisconsin in

order to construct a casino. The Wisconsin Tribes argue that the concurrence requirement is unconstitutional.

The federal defendants request a transfer on the grounds that the Western District of Wisconsin is a forum in which this action could have been brought; that convenience to the parties and witnesses would be served by transferring the case; and that the interests of justice would be served by avoiding the waste of judicial resources and the possibility of conflicting results; and the specific claims brought here are of a local nature. See Federal Defendants' Motion to Transfer at 7, 8,10-13.

The State of Wisconsin and Governor Scott McCallum have also requested that this action be transferred to the Western District of Wisconsin. Their arguments are virtually identical to those asserted by the federal defendants. They argue that the case could have been brought in the Wisconsin; that plaintiffs' case has no nexus to the District of Columbia; that the Western District of Wisconsin is convenient for the parties and the potential witnesses; and that this controversy has a compelling local interest. See Memorandum in Support of Motion to Transfer by the State of Wisconsin and Governor Scott McCallum at 8-10. 15.

Plaintiffs, in their opposition, contend that this suit is merely a facial challenge to a statutory provision having national application; that it will require no witnesses, evidence, or trial; and that this circuit has a unique familiarity with the legal issues at hand. See Plaintiffs' Opposition to Motions to Transfer ("Opposition") at 1-2.

Both the federal defendants, and the State of Wisconsin and Governor Scott McCallum, filed replies in support of the motions to transfer in which they argue that the impact of this case is local in nature; the choice of forum by plaintiffs should be afforded little deference; this district is no more capable of resolving this dispute than the Western District of Wisconsin; and the inconvenience of the Wisconsin defendants of litigating this case in the District of Columbia

is much greater than that of the federal defendants who have already requested a transfer. See Reply Memorandum in Support of Federal Defendants' Motion to Transfer at 1, 3 and 6; Reply Memorandum in Support of Motion to Transfer by the State of Wisconsin and Governor Scott McCallum at 1-2.

DISCUSSION

A district court may transfer any civil action to any other district or division where the action may have been brought if the transfer serves the convenience of the parties and witnesses, and is in the interests of justice. See 28 U.S.C. §1401(a). The moving party bears a heavy burden of establishing that plaintiff's choice of forum is inappropriate. Thayer/Patricof Education Funding v. Pryor Resources, Inc., 196 F.Supp.2d 21, 31 (D.D.C. 2002). Additionally, a court has broad discretion to determine where the proper balance lies and whether a case should be transferred. Id. (citing Rhee Bros., Inc. v. Seoul Shik Poom, Inc., 869 F.Supp. 31, 33-34 (D.D.C. 1994)). Normally, the plaintiff's choice of forum is a paramount consideration in any determination of a transfer request. Sheraton Operating Corp. v. Just Corporate Travel, 984 F.Supp. 22, 25 (D.D.C. 1997). However, the choice of forum is not afforded great deference when the plaintiff is a foreigner to that forum. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-256 (1981); see also Shapiro, Lifschitz & Schram, P.C. v. R.E. Hazard, Jr., 24 F.Supp.2d 66, 71 (D.D.C. 1998).

The parties do not dispute that the Western District of Wisconsin, the location of the land at issue in this constitutional challenge, is a proper forum for the suit to be brought. Consequently, the initial requisite in a motion to transfer is satisfied. 28 U.S.C. §1401(a). The next two considerations require this court assess whether the transfer would serve the convenience of the parties and witnesses and the interests of justice. Id. In making those

assessments, courts in this circuit may consider a number of public and private interests including: (1) the plaintiff's choice of forum, unless the balance of convenience is strongly in favor of the defendants; (2) the defendant's choice of forum; (3) whether the claims arose elsewhere; (4) the convenience of the parties; (5) the convenience of the witnesses, but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; (6) the ease of access to sources of proof; (7) the transferee's familiarity with the governing laws; (8) the relative congestion of the calendars of the potential transferee and transferor courts; and (9) the local interest in deciding local controversies at home. Shapiro, 24 F.Supp. at 71 (citing Trout Unlimited v. Dep't of Agric., 944 F.Supp. 13, 16 (D.D.C. 1996)).

The consideration of the convenience to the parties and witnesses and the availability of evidence does not yield a strong preference for either district. While it is true, as defendants observe, that plaintiffs' home forum is in the State of Wisconsin, it also appears true, at this point in the litigation, that there will be few, if any, witnesses to be called and little evidence to be offered. Since the plaintiffs have chosen the District of Columbia, then their convenience is not an issue. Since the federal defendants have offices within this district, they cannot reasonably assert that this district is overly inconvenient for them. The State of Wisconsin and the Governor will be inconvenienced to some extent if argument is required in this case. However, this inconvenience is somewhat mitigated by their decision to intervene in this matter which had already been filed in this district, and the likelihood that the case will be decided through written motions and limited oral argument. Consequently, the convenience of the parties and witnesses, and the availability of evidence, are not controlling considerations. However, the undersigned must also take into account that if any witnesses are needed, those few witnesses are located in Wisconsin.

The final consideration requires the court to assess the issue of whether the transfer is in "the interests of justice." This concept gives all parties the opportunity to argue the relative benefits of having this litigation proceed in their forum of choice. 28 U.S.C. §1401(a). As previously discussed, it is the practice of the courts to grant great deference to the decision of the plaintiffs in their forum choice. This deference, however, holds less weight in this instance because the plaintiffs lack any connection to their forum of choice; they do not reside here; and the forum has no particular connection to the specific matter at hand. See Greater Yellowstone Coalition v. Bosworth, 180 F.Supp.2d 124, 128 (D.D.C. 2001)(citations omitted). Plaintiffs discuss at length the national significance of the claims presented here; however, federal jurisdiction is limited to cases and controversies, and this case concerns Indian tribes from Wisconsin claiming that the Governor of Wisconsin yields constitutionally impermissible power in deciding what development is permissible on land within the State of Wisconsin. The only connection to this forum happens to be that the law was passed by the United States Congress. This connection, however, is too attenuated to be given any meaningful effect; the consequence would be that all challenges to federal statutes would eventually be brought in the District of Columbia, because that is where the federal laws are passed. This result is clearly untenable.

Having discussed the shortcomings in the traditional analysis of deferring to the choice of the plaintiffs, the Court must also consider whether any considerations counsel for transfer. As has been previously discussed, convenience does not seem to be a persuasive issue; however, since all of the parties either reside in or have offices in the State of Wisconsin, a transfer may be somewhat more convenient. Next, the public interest in having local issues decided locally can not be easily dismissed. See Armco Steel Co. v. CSX Corp., 790 F.Supp. 311, 324 (D.D.C. 1991). This public consideration counsels strongly in favor of transfer, especially when coupled with plaintiffs' lack of ties to their forum of choice. Another public consideration, that plaintiff

may be forum shopping, also counsels for transfer. Although the undersigned makes no finding as to the issue of forum shopping, the court finds unpersuasive plaintiff's argument that this district has developed a particular expertise in this area of the law, or necessarily would be any more or less likely to find a federal statute unconstitutional.

In sum, the undersigned finds the private and public considerations and interests of justice best served by transferring this case to the Western District of Wisconsin. Its local nature, and the parties' ties to that community, dictate such a conclusion. Plaintiffs are unable to establish any real ties to their forum of choice, other than their assumption that the chances of success are greater here. Consequently, in this Court's discretion, the case should be transferred.

CONCLUSION

It is, therefore, this 16th day of August, 2002,

ORDERED that Federal Defendants' Motion to Transfer (Docket No. 8), and the State of Wisconsin and Governor Scott McCallum Motion to Transfer (Docket No. 9), are **GRANTED**, and that this action is hereby transferred to the United States District Court for the Western District of Wisconsin.

DEBORAH A. ROBINSON
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WYANDOTTE NATION,

Plaintiff,

v.

KENNETH L. SALAZAR, in his official capacity as Secretary of the U.S. Department of the Interior,

Defendant.

Case No. 1:11-cv-01361-BAH

ORDER

Before the Court is Defendant's motion to transfer the above-captioned action to the United States District Court for the District of Kansas. Having considered the motion and the memoranda in support thereof and opposition thereto, the motion is GRANTED. The case is hereby transferred to the United States District Court for the District of Kansas. Unless otherwise ordered by the transferee court, Defendant will respond to the Complaint within ten days of this Order.

SO ORDERED.

Date:_____

_____
BERYL A. HOWELL
United States District Judge