IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Forest County Potawatomi Community, Plaintiff, v. The United States of America, et al., Defendants.	Case No. 1:15-cv-00105-CKK Judge Colleen Kollar-Kotelly

DEFENDANTS' REPLY IN SUPPORT OF
THEIR MOTION TO TRANSFER VENUE

JOHN C. CRUDEN
Assistant Attorney General
U.S. Department of Justice
Environment & Natural Resources Division

JODY H. SCHWARZ
(DC No. 493998)
Natural Resources Section
P.O. Box 7611
Washington, DC 20044-7611
Tel: 202-305-0245
Fax: 202-305-0506
Email: jody.schwarz@usdoj.gov

Overnight delivery:
PHB Mail Room 2121
601 D Street, N.W.
Washington, D.C. 20004

Of Counsel:
ANDREW S. CAULUM
Office of the Solicitor – Div. of Indian Affairs
U.S. Department of the Interior
(WI No. 1023019)

Table of Contents

Table of Authorities

Cases

Statutes

Treatises

I. INTRODUCTION

This case is a dispute about Indian gaming in Wisconsin, not the District of Columbia. The parties agree that this action could have been brought in the Eastern District of Wisconsin. The parties also agree that the Eastern District of Wisconsin's familiarity with the governing law and the congestion of the District of Columbia and the Eastern District of Wisconsin are neutral factors for purposes of transfer of venue. The parties disagree on the weight the Court should accord to its consideration of the other private and public-interest factors, namely: (1) the parties' choice of forums; (2) the convenience of the parties and ease of access to sources of proof; (3) the local interest in deciding local controversies at home; and (4) the Eastern District of Wisconsin's familiarity with the specific controversy in this case. Although FCPC argues that these factors weigh against transfer, closer examination of FCPC's arguments demonstrate that these remaining factors are neutral or weigh in favor of transferring the case.

II. ARGUMENT

A. The Parties' Choice of Forum Weighs in Favor of Transfer or Is a Neutral Factor.

One of the private interest factors the Court considers is plaintiff's and defendant's choice of forum. A party seeking to transfer venue bears the burden of showing that the transfer is proper. *Trout Unlimited v. U.S. Dep't of Arig.*, 944 F. Supp. 13, 16 (D.D.C. 1996). Although a plaintiff's choice of forum is generally given deference in determining whether a transfer of venue is justified, that deference is substantially diminished where, as here, transfer is sought to the plaintiff's resident forum. *Thayer/Patricof Educ. Funding v. Pryor Res.*, 196 F. Supp. 2d 21, 31 (D.D.C. 2002) ("The choice of forum is ordinarily afforded great deference, except when the plaintiff is a foreigner in that forum); *Citizen Advocates for Responsible Expansion, Inc. (I-Care) v. Dole*, 561 F. Supp. 1238, 1239 (D.D.C. 1983). The court's decision in *Associate Producer*s,

Ltd. v. Vanderbilt University, No. 14-397, 2014 WL 7335213 (D.D.C. Dec. 23, 2014) did not alter this standard. *See* Pl.'s Br. 4 (ECF No. 20). In *Associated Producers*, the court set forth the well-known factors considered by a court in deciding a motion to transfer venue, including (1) the plaintiff's choice of forum, unless the balance of convenience is strongly in favor of defendants, and (2) the defendant's choice of forum. *Assoc. Producers*, 2014 WL 7335213, at *8.

Washington, D.C. is not FCPC's home forum. The fact that FCPC routinely travels to Washington, D.C. to conduct business and has agents who reside in Washington, D.C. does not impact this factor.[1] *See* Pl.'s Br. 13-14. This case is not, as FCPC suggests, like *Wilderness Society v. Babbitt*, 104 F. Supp. 2d 10 (D.D.C. 2000), where six of the eight plaintiffs were national organizations with members across the United States, four were headquartered in Washington, D.C., and two had offices in the city. *Id.*, 104 F. Supp. 2d at 14. Here, there is no dispute that FCPC is not a resident of this district. It is a federally-recognized Indian tribe whose lands, seat of tribal government, and gaming facilities are located near Crandon, within the Eastern District of Wisconsin.[2] It does not allege that it has offices in the District of Columbia. FCPC's situation is more akin with the plaintiffs in *Preservation Society of Charleston v. U.S. Army Corps of Engineers*, 893 F. Supp. 2d 49 (D.D.C. 2012), where the court, in considering the plaintiffs' resident forum, granted only limited deference to plaintiffs' choice of the District of Columbia because plaintiffs were based in Charleston, had significant ties to that city, and did

[1] That two of FCPC's attorneys are located in the District of Columbia and one resides in Arizona, is immaterial. *See Kazenercom TOO v. Turan Petroleum, Inc.*, 590 F. Supp. 2d 153, 163 (D.D.C. 2008) (citing *Reiffin v. Microsoft Corp.*, 104 F. Supp. 2d 48, 52 n.7 (D.D.C. 2000) ("[t]he location of counsel 'carries little, if any, weight in an analysis under § 1404(a).'") (citation omitted)).

[2] *See* https://www.fcpotawatomi.com/government/departments/. For reference, the location of FCPC's government headquarters is available on Google Maps by following this link: FCPC Gov't HQ.

not have any offices in the District of Columbia or members who lived there. *Id.*, 893 F. Supp. 2d at 54.

Although the defendant's choice of forum is not ordinarily entitled to deference in the manner that plaintiff's is, a defendant's choice is a consideration for the court when deciding a section 1404(a) motion. *Assoc. Producer*s, 2014 WL 7335213, at *8 (citing *Sheffer v. Novartis Pharm. Corp.*, 873 F. Supp. 2d 371, 376 (D.D.C. 2012)). Indeed, as this Court has found, when a defendant has legitimate reasons for preferring transfer to a certain forum, the defendant's choice must be accorded some weight. *See Nat'l Wildlife Fed'n v. Harvey*, 437 F. Supp. 2d 42, 48 (D.D.C. 2006). As explained in Defendants memorandum in support of their motion, transferring cases involving Indian gaming controversies back to the state in which the controversy is located promotes the interests of justice and is a valid reason for transferring to plaintiff's home forum. Defs.' Br. 10-11 (ECF No. 19-1).

FCPC's choice is entitled to minimal deference because the District of Columbia is not its home forum. *Kazenercom*, 590 F. Supp. 2d at 163 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981)). The Court instead considers whether Defendants demonstrate that the interests of justice, including Defendants' choice of forum, weigh in favor of transfer. In the specific facts of this case, giving minimal deference to FCPC's choice of forum and considering and according weight to Defendants' choice of forum, the interests of justice weigh in favor of transfer or, at a minimum, are a neutral consideration.

B. This Case is an APA Case and the Private Interest Factors of the Parties' Convenience and Access to Sources of Proof Are Neutral.

FCPC's challenge to Interior's disapproval of its gaming compact amendment with the State of Wisconsin is a normal APA case. As an APA case, the convenience of witnesses and the ease of access to sources of proof play little to no role in the court's consideration of the

private interest factors. *See Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 584 F. Supp. 2d 122, 125 (D.D.C. 2008). Judicial review is based on the administrative record rather than de novo fact-finding. Although FCPC anticipates that it may have to file a motion to supplement the administrative record or seek to include extra record evidence in the future, that belief does not make this particular case unique. The convenience of potential future witnesses for depositions is not a consideration for the Court, and the potential supplementation of an administrative record with documents or extra-record evidence does not impact access to sources of proof for an APA case. Therefore, the private factors concerning witness convenience and access to sources of proof are neutral factors in the Court's consideration.

The convenience of the witnesses has been described as the most critical factor to examine when deciding a motion to transfer. *Pyrocap Int'l Corp. v. Ford Motor Co.*, 259 F. Supp. 2d 92, 97 (D.D.C. 2003). However, convenience of witnesses should be considered "'only to the extent that the witnesses may actually be unavailable for trial in one of the fora.'" *Wilderness Soc'y*, 104 F. Supp. 2d at 15 (quoting *Trout Unlimited*, 944 F. Supp. at 13) (citing 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3851 (2d ed. 1986)). FCPC does not argue that witnesses will be unavailable for trial in the Eastern District of Wisconsin, only that it may seek to depose witnesses in the future. Pl.'s Br. 8-9. As an APA case, judicial review is generally limited to the administrative record before the agency at the time it rendered the challenged decision. *Wilderness Soc'y*, 104 F. Supp. 2d at 15. There will be no witnesses at all in this matter. Accordingly, this factor is neutral. *Id.* (citing *Vencor Nursing Ctrs., L.P. v. Shalala*, 63 F. Supp. 2d 1, 7 (D.D.C. 1999) (noting that convenience of witnesses was of little relevance because no evidentiary hearing or trial was foreseeable)).

FCPC further argues that the private considerations of convenience and access to sources of proof weighs in favor of its choice because it believes it may have to file a motion to supplement the administrative record or seek extra-record evidence, which, it asserts, would make this a unique case. Pl.'s Br. 7-8. FCPC also cites to a FOIA request lawsuit as evidence that the administrative record will be faulty in some way. *See Id.* FCPC overestimates the impact of any future motion to supplement the administrative record on how this case is characterized. Setting aside the fact that Defendants have not yet produced the administrative record for the challenged decision, but did invite FCPC to provide an initial list of those documents it believes should be included, FCPC's premature determination that it may move to supplement the record simply does not make this case atypical. Many plaintiffs file motions seeking to supplement an administrative record for all sorts of reasons. What actions FCPC may pursue in the future in this regard do not change the nature of the lawsuit it filed, a routine APA challenge.

As an APA case, the Court's review of Interior's action is based upon the materials that were before the agency at the time its decision was made. *Stand Up for California! v. U.S. Dep't of Interior*, No. 12-2039, 2014 WL 526 1940, at *3 (D.D.C. Oct. 15, 2014) (citations omitted). Under the APA, judicial review of agency action is generally limited to the administrative record compiled by the agency, 5 U.S.C. § 706; *see Camp v. Pitts*, 411 U.S. 138, 142 (1973), and discovery is not allowed. An administrative record that is sufficient to explain the basis of the agency's decisions and to allow for meaningful judicial review is all the APA requires. *See TOMAC v. Norton*, 193 F. Supp. 2d 182, 195 (D.D.C. 2002), *aff'd* 433 F.3d 852 (D.C. Cir. 2006) (noting that while a FOIA request may require the government to turn over "every scrap of paper that could or might have been created," an administrative record does not). Thus, the

convenience of witnesses and the ease of access to proof "has less relevance because this case involves judicial review of an administrative decision . . . ." *Trout Unlimited*, 944 F. Supp. at 18; *see also Southern Utah Wilderness Alliance v. Norton*, 315 F. Supp. 2d 82, 88 (D.D.C. 2004); *Sierra Club v. Flowers*, 276 F. Supp. 2d 62, 69 (D.D.C. 2003) (because the case involved review of an administrative record, "the location of witnesses is not a significant factors").

FCPC would face a high burden in any motion to supplement the record or submit extra-record evidence. Supplementation of the administrative record is only appropriate in exceptional or "unusual" circumstances. *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010) ("[W]e do not allow parties to supplement the record 'unless they can demonstrate unusual circumstances justifying a departure from this general rule.'" (quoting *Tex. Rural Legal Aid v. Legal Servs. Corp.*, 940 F.2d 685, 698 (D.C. Cir.1991))); *see also Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 112 (D.D.C. 2009) ("A court that orders an administrative agency to supplement the record of its decision is a rare bird."). The D.C. Circuit has recognized only three narrow instances in which supplementation of an administrative record may be appropriate. *City of Dania Beach*, 628 F.3d at 590 (quotation omitted). And underlying these exceptions is the "strong presumption" that an agency has properly compiled the entire record of materials that it considered, either directly or indirectly, in making its decision. *See Maritel, Inc. v. Collins*, 422 F. Supp. 2d 188, 196 (D.D.C. 2006) ("Although an agency may not unilaterally determine what constitutes the administrative record, the agency enjoys a presumption that it properly designated the administrative record absent clear evidence to the contrary."). For a court to review extra-record evidence, a plaintiff must prove applicable one of the eight recognized exceptions to the general prohibition against extra-

record review.[3] *Pac. Shores Subdivi., v. U.S. Army Corps of Engin'rs*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006) (citations omitted). Thus, FCPC's intentions to potentially seek to supplement the record with additional documents or extra-record evidence do not make the convenience of the parties and sources of proof a critical factor and they are neutral considerations in weighing the private and public-interest factors against the minimal deference given to FCPC's choice.

C. This Controversy is localized in Nature and should be decided in FCPC's Home Forum.

This controversy is localized in nature. The challenged agency action concerns the disapproval of a gaming compact amendment negotiated with the State of Wisconsin that sought to impose upon another Wisconsin-based tribe the obligation to guarantee FCPC's gaming and other profits when the other tribe was not involved in the negotiations and had not consented to the arrangement. It is not a national controversy because the disapproved 2014 Compact Amendment and other provisions of FCPC's existing compact, as amended, are unique to FCPC. Although the statute involved, the Indian Gaming Reorganization Act ("IGRA"), is a federal statute, the controversy will have an indisputably local effect. The interests of justice are best served by transferring a localized matter to its local forum.

The Indian gaming cases cited by Defendants, Defs.' Br. 10-11, are instructive. While the background facts of these cases differ case-by-case, the driving principle behind those decisions is what is important for this Court's consideration of the important local interest presented in the facts of this case. As the Court stated in *Santee Sioux Tribe of Nebraska v. National Indian Gaming Commission*, No. 99-528 (D.D.C. Apr. 19, 1999), the District of Columbia has repeatedly recognized the localized nature of Indian gaming cases by transferring

[3] Even if FCPC could show that supplementation or extra-record evidence was necessary, discovery, particularly with respect to agency decisionmaking, would not be the outcome. *See Amfac Resorts, LLC v. U.S. Dep't of Interior*, 143 F. Supp. 2d 7, 12-13 (D.D.C. 2001).

cases involving Indian gaming controversies back to the state in which the controversy and gaming are located and where the effects would be felt. *Id.* at 8. Here, there is no argument that Indian gaming is at the heart of this controversy. FCPC seeks to set aside the decision disapproving a gaming compact amendment, an amendment that sought to impose significant monetary liabilities on local parties not privy to the amendment's negotiations. FCPC argues that the controversy is national in scope because it challenges the Assistant Secretary's application of IGRA to its compact. This dispute is similar to the dispute in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, No. 01-1042, slip. op. (D.D.C. Aug. 16, 2002) (ECF No. 19-6), where plaintiffs challenged the gubernatorial concurrence requirement in IGRA and sought remand back to the Secretary of the Interior to complete their trust applications. There, plaintiffs argued that the claims were nationally significant because it involved the interpretation of IGRA. FCPC likewise argues that national interests are implicated because it challenges the Assistant Secretary's interpretation of IGRA provisions. At its core, however, this case concerns an Indian tribe from Wisconsin seeking review related to a compact amendment it negotiated with the State of Wisconsin that impacts land use in the State and would impose penalties on other Wisconsin tribes. Because the governing law is federal, it does not convert the local nature of the controversy to a national one.

The issues of tribal compacts, the consideration of a state's interest in the regulation and conduct of Class III gaming activities in that state, and the fairness of inter-tribal gaming competition without the consent of an impacted tribe are important local issues that should be heard locally. The interests of justice are promoted when this type of localized controversy is resolved locally where concerned citizens may closely follow the proceedings. *See Citizen*

Advocates for Responsible Expansion, 561 F. Supp. at 1240. Therefore, the interests of justice will be better served if the resolution of this case occurs in the Eastern District of Wisconsin.

D. The Eastern District of Wisconsin is experienced in this Type of Controversy.

Judges in the Eastern District of Wisconsin are as capable as their colleagues in the District of Columbia to determine issues of compliance with federal law under the APA. *Harvey*, 437 F. Supp. 2d at 49 (finding no reason to break from "the principle that the transferee federal court is competent to decide federal issues correctly") (citation omitted). The District of Columbia's familiarity with this controversy is no greater than the Eastern District of Wisconsin's. The Eastern District of Wisconsin is familiar with gaming compacts entered into between Wisconsin and a Tribe and is familiar with the provisions of IGRA. It is familiar with the parties to this case. Having presided over the cases brought by the Menominee Tribe, it is aware of the status of Indian gaming within its jurisdiction and the State. Even if the Eastern District of Wisconsin does not have a pending suit related to this specific controversy, FCPC fails to explain why it would not be able to adjudicate this dispute. The Eastern District of Wisconsin has familiarity with the law and the issues, and, if this factor does weigh in favor of transfer, it is, at a minimum, neutral.

III. CONCLUSION

Courts "must be especially cautious in allowing [cases] to remain in the District of Columbia." *Trout Unlimited*, 944 F. Supp. at 17 (citing *Cameron v. Thornburgh*, 983 F.2d 253 (D.C.Cir.1993) ("Courts in this circuit must examine challenges to personal jurisdiction and venue carefully to guard against the danger that a plaintiff might manufacture venue in the District of Columbia. By naming high government officials as defendants, a plaintiff could bring a suit here that properly should be pursued elsewhere.")). In this case, the private and public-

interest factors, especially the local interest in having the controversy decided at home, favor transfer when weighed against the nominal deference afforded to FCPC's choice of a non-resident forum. Even if FCPC's choice of forum is entitled to some deference, it is far from dispositive where the case has minimal connection to the District of Columbia and other factors militate strongly in favor of transfer. Therefore, this case should be transferred to the Eastern District of Wisconsin.

Respectfully submitted this 11th day of June, 2015.

JOHN C. CRUDEN
Assistant Attorney General
U.S. Department of Justice
Environment & Natural Resources Division

/s/ Jody H. Schwarz
JODY H. SCHWARZ
(DC No. 493998)
Natural Resources Section
P.O. Box 7611
Washington, DC 20044-7611
Tel: 202-305-0245
Fax: 202-305-0506
Email: jody.schwarz@usdoj.gov

Overnight delivery:
PHB Mail Room 2121
601 D Street, N.W.
Washington, D.C. 20004

Of Counsel:
ANDREW S. CAULUM
Office of the Solicitor – Div. of Indian Affairs
U.S. Department of the Interior
(WI No. 1023019)