No. 09-846

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

TOHONO O'ODHAM NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C. 1500, the Court of Federal Claims (CFC) does not have jurisdiction over "any claim for or in respect to which the plaintiff * * * has * * * any suit or process against the United States" or its agents "pending in any other court." The question presented is:

Whether 28 U.S.C. 1500 deprives the CFC of jurisdiction over a claim seeking monetary relief for the government's alleged violation of fiduciary obligations if the plaintiff has another suit pending in federal district court based on substantially the same operative facts, especially when the plaintiff seeks monetary relief or other overlapping relief in the two suits.

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 559 F.3d 1284. The opinion of the Court of Federal Claims (App., *infra*, 27a-55a) is reported at 79 Fed. Cl. 645.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2009. A petition for rehearing was denied on August 18, 2009 (App., *infra*, 56a). On November 9, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including

December 16, 2009. On December 4, 2009, the Chief Justice further extended the time to January 15, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1500 of Title 28 of the United States Code provides:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

STATEMENT

1. a. In 1855, Congress established the Court of Claims with limited authority to hear claims against the United States, report its findings to Congress, and, where appropriate, recommend enactment of a private bill to provide the claimant with monetary relief. *United States* v. *Mitchell*, 463 U.S. 206, 212-213 (1983). Because that limited authority did not sufficiently relieve Congress of the burdens of the private-bill process, Congress, in 1863, adopted President Lincoln's recommendation and authorized the Court of Claims to issue final judgments. *Id.* at 213. In 1866, Congress enabled the Court of Claims to exercise full judicial power by repealing a provision that had allowed the Secretary of the Treasury to prevent complete execution of the court's judgments. *Id.* at 213 n.12.

Two years later, in 1868, Congress enacted a provision prohibiting the Court of Claims from exercising jurisdiction over "any claim * * * for or in respect to which" the plaintiff "has pending any suit or process in any other court" against an agent of the United States. See Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77; see *Keene Corp.* v. *United States*, 508 U.S. 200, 205-207 (1993). Congress later reenacted that jurisdiction-limiting statute in 1874 as Section 1067 of the Revised Statutes and in 1911 as Section 154 of the Judicial Code, ch. 231, § 154, 36 Stat. 1138 (28 U.S.C. 260 (1946)). See *Keene*, 508 U.S. at 206-207. In 1948, when Congress again reenacted the statute and moved it to its current location at 28 U.S.C. 1500, Congress expanded the statute's scope to preclude Court of Claims jurisdiction if the plaintiff's related suit in another court is "against [either] the United States" or its agent. See Act of June 25, 1948, ch. 646, § 1, 62 Stat. 942; *Keene*, 508 U.S. at 211 n.5. Every modern-day statute conferring jurisdiction on the Court of Claims and its trial-court successor, the United States Court of Federal Claims (CFC)[1]—including the Tucker Act, 28 U.S.C. 1491(a)(1), and the Indian Tucker Act, 28 U.S.C. 1505, on which respondent rests CFC jurisdiction in this case (App., *infra*, 60a)—has been enacted against the backdrop of the jurisdictional limitation embodied in Section 1500 and its predecessors. See Tucker Act, ch. 359, 24 Stat. 505 (enacted 1887); Indian Claims Commission Act, ch. 959, § 24, 60 Stat. 1055 (enacted 1946).

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[1] In 1982, Congress transferred the appellate and trial functions of the Court of Claims to the Court of Appeals for the Federal Circuit and the United States Claims Court, respectively. In 1992, the Claims Court was renamed as the CFC. See *Keene*, 508 U.S. at 202 n.1; *Mitchell*, 463 U.S. at 228 n.33.

b. Section 1500 provides that the CFC shall not have jurisdiction of "any claim for or in respect to which" the plaintiff has "any suit or process" against the United States or an agent thereof "pending in any other court." 28 U.S.C. 1500. In *Keene*, this Court explained that Section 1500's prohibition on CFC jurisdiction over a claim "for or in respect to which" the plaintiff has a pending suit "requires a comparison between the claims raised in the [CFC] and in the other lawsuit." 508 U.S. at 210. The Court also reasoned that Congress's use of the disjunctive "or" in the phrase "for or in respect to which" demonstrates that Section 1500 bars CFC jurisdiction "not only as to claims 'for . . . which' the plaintiff has sued in another court," but also "as to those [CFC claims] 'in respect to which' he has sued elsewhere." *Id.* at 213. The latter restriction, *Keene* concluded, "make[s] it clear that Congress did not intend the statute to be rendered useless by a narrow concept of identity" of the CFC claim and the other lawsuit, which would mistakenly allow a "liberal opportunity to maintain two suits arising from the same factual foundation." *Ibid.*

Keene ultimately held that Section 1500 requires dismissal of a CFC claim when "the plaintiff's other suit [is] based on substantially the same operative facts as the [CFC] action," "at least" if there is "some overlap in the relief requested." 508 U.S. at 212. Dismissal is required, the Court held, even if the other action is "based on [a] different legal theor[y]" that could not "have been pleaded" in the CFC. *Id.* at 212-214. And although observing that Section 1500 has been criticized as "anachronistic" and acknowledging that Section 1500's jurisdictional restrictions may "deprive plaintiffs of an opportunity to assert rights," the Court in *Keene* concluded that

the courts "enjoy no 'liberty to add an exception . . . to remove apparent hardship.'" *Id.* at 217-218 (quoting *Corona Coal Co.* v. *United States*, 263 U.S. 537, 540 (1924)). Such concerns, *Keene* explained, must be directed to "Congress, for [it is] that branch of the government" that has "the constitutional authority to define the jurisdiction of the lower federal courts" and that has "limited the jurisdiction of the Court of Claims" in Section 1500. *Id.* at 207, 217-218 & n.14 (quoting *Smoot's Case*, 82 U.S. (15 Wall.) 36, 45 (1873)).

Keene reserved two questions concerning "judicially created exceptions" to Section 1500 that are relevant to the present petition. See 508 U.S. at 216 (quoting *UNR Indus., Inc.* v. *United States*, 962 F.2d 1013, 1021 (Fed. Cir. 1992) (en banc), aff'd *sub nom. Keene*, *supra*). Specifically, the Court reserved the questions whether Section 1500's prohibition on CFC jurisdiction is subject to any exception when (1) the action in another court based on the same operative facts seeks "completely different relief," *id.* at 212 n.6, 214 n.9, 216 (discussing *Casman* v. *United States*, 135 Ct. Cl. 647 (1956)), or (2) the plaintiff files his CFC claim first, before filing the related suit in another court. *Id.* at 209 n.4, 216 (discussing *Tecon Eng'rs, Inc.* v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966)). The en banc Federal Circuit had rejected both of those judicially created exceptions when this Court decided *Keene*, see *UNR Indus.*, 962 F.2d at 1020, 1024-1025 (purporting to overrule *Casman*); *id.* at 1020, 1023 (purporting to overrule *Tecon*), but the Federal Circuit has since stated that the pertinent portions of *UNR Industries* were non-binding dicta, and that the exceptions recognized in *Casman* and *Tecon* remain good law. See *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545, 1549, 1551

(Fed. Cir. 1994) (en banc) (*Casman*); App., *infra*, 16a-17a (*Tecon*).

2. On December 28, 2006, the Tohono O'odham Nation (Tribe) filed a complaint against the United States in the District Court for the District of Columbia. App., *infra*, 74a-93a. One day later, it filed a similar complaint against the United States in the CFC. App., *infra*, 58a-73a.

a. The Tribe's district court complaint initiated "an action to seek redress of breaches of trust by the United States * * * in the management and accounting of [the Tribe's] trust assets." App., *infra*, 74a-75a. The complaint states that those assets include the Tribe's reservation lands, mineral resources, and associated income held for it in trust by the United States, as well as funds owed by the United States to the Tribe under court judgments. *Id.* at 79a-80a. The complaint asserts that the United States owes "fiduciary obligations to the [Tribe] with respect to the management and administration of the [Tribe's] trust funds and other trust assets" that are "rooted in and derive from numerous statutes and regulations." *Id.* at 79a, 81a (citing illustrative provisions). "The statutes, regulations, and executive orders giving rise to the United States' fiduciary duties," it asserts, "provide the 'general contours' of those duties" and "specific details are filled in through reference to general trust law." *Id.* at 82a (citation omitted).

More specifically, the district court complaint alleges that the government, *inter alia*, failed "to provide an adequate accounting of the trust assets" and failed both to "collect" and to "invest" trust funds "in compliance with [its] fiduciary responsibilities and other federal statutory and regulatory law." App., *infra*, 76a. It thus alleges numerous "breaches of trust [that] include, but

are not limited to," the failure to preserve records and provide a proper "accounting of trust property" and failures to "deposit trust funds," take reasonable steps "to preserve and protect trust property," and "refrain from self-dealing." *Id.* at 83a-84a. The complaint further alleges that the government breached a duty to manage the property held in trust "to produce a maximum return to the [Tribe]" by "invest[ing]" such funds properly and "maximiz[ing] profits" therefrom. *Id.* at 76a, 84a; see *id.* at 83a (duty to "invest" and "maximize" assets); *id.* at 86a (statutory investment duty).

Count 1 asserts that the government has "failed to fulfill [its] fiduciary obligations," which include, "*inter alia*," the duty to provide a proper "accounting of the [Tribe's] trust assets." App., *infra*, 89a-90a. Count 1 also requests a declaration that both defines "the [government's] fiduciary duties" and finds them to have been breached. *Ibid.* Count 2 asserts a "continuing pattern" of breaches of "fiduciary duties" and seeks an injunction directing both the completion of a proper accounting and compliance with "all other fiduciary duties." *Id.* at 91a. Count 2 clarifies that the Tribe requests a "complete accounting" that is "not limited to" the "funds under the custody and control of the United States," and adds that, based on the results of that "complete accounting," the Tribe seeks "restatement of [its] trust fund account balances" and "any additional equitable relief," such as "disgorgement" and "equitable restitution," that "may be appropriate." *Ibid.*; see *id.* at 92a. Finally, the Tribe's prayer for relief in district court restates the relief requested in Counts 1 and 2 and adds a general plea "[f]or such other and further relief as the Court, * * * sitting in equity, may deem just and proper." *Id.* at 91-93a.

b. The Tribe's CFC complaint initiated "an action for money damages against the United States" for its alleged "mismanagement of the [Tribe's] trust property" through "breaches of statutory, regulatory, and fiduciary duties owed to the [Tribe]." App., *infra*, 58a-59a. The complaint specifies that the asserted duties pertain to the Tribe's reservation lands, mineral resources, and associated income held by the United States, as well as funds owed to the Tribe by the United States under court judgments. *Id.* at 60a-62a. The complaint, like its district court counterpart, contends that the government owes "fiduciary obligations" to the Tribe with respect to its "management and control of the [Tribe's] tribal assets" that are "rooted in and derive from a number of statutes, regulations and executive orders." *Id.* at 62a-63a (citing illustrative provisions). "The statutes, regulations, and executive orders giving rise to the United States' fiduciary duties," it adds, "provide the 'general contours' of those duties," and "the details are filled in through reference to general trust law." *Id.* at 64a (citation omitted).

Like the district court complaint, the CFC complaint alleges several "fiduciary duties" and breaches by the government, including the failure to "[f]urnish complete and accurate information to the [Tribe] as to the nature and amount of trust assets" by "performing a [proper] accounting of all the trust property." App., *infra*, 65a-66a (¶¶ 22.d, 23.d). It further alleges breaches of duties to keep "accurate information," "properly administer the trust," "collect and deposit the trust funds," "preserve the trust assets," and "refrain from self-dealing." *Id.* at 66a-67a. And, like the district court complaint, it alleges the breach of a duty to "invest" funds held by the

government in trust "to maximize [its] productivity" for the Tribe. *Id.* at 67a; see *id.* at 70a-72a.

Counts 1 through 3 each invoke the government's alleged failure to perform a proper accounting, and assert that the Tribe was damaged by the government's alleged failure to properly manage the Tribe's mineral estate (Count 1), non-mineral estate (Count 2), and judgment funds (Count 3). App., *infra*, 67a-71a. Those breaches allegedly include failures, *inter alia*, "to collect" appropriate compensation for leased lands and property rights, "to lease" such assets at fair market value, and "to invest" properly the Tribe's "judgment funds" and other "trust funds." *Ibid.* Count 4 asserts injury caused by alleged governmental failures to properly invest tribal trust funds. *Id.* at 71a-72a. The complaint's prayer for relief seeks, *inter alia*, damages for the government's "breaches of fiduciary duty" and "such other and further relief as the Court deems just and appropriate." *Id.* at 72a-73a.

3. The CFC granted the government's motion to dismiss, holding that it was without jurisdiction under Section 1500. App., *infra*, 27a-55a.

After comparing the district court and CFC complaints with a side-by-side table detailing their allegations, App., *infra*, 33a-38a, the court explained that the "complaints clearly involve the same parties, the same trust corpus, the same asserted trust obligations, and the same asserted breaches of trust over the same period of time." *Id.* at 39a. The CFC added that, although the district court complaint has an "apparent emphasis" on an accounting, it also seeks equitable monetary relief in the form of a restatement of accounts, disgorgement, and restitution. *Id.* at 39a, 42a. The CFC complaint, in turn, "although focusing on money damages," seeks re-

lief that "will require an accounting [by the government] in aid of judgment." *Id.* at 39a, 41a, 55a. And, in both cases, the court explained, "[t]he underlying facts are the same" for "all practical purposes." *Id.* at 48a-49a. In these circumstances, the court found it "obvious that there is virtually 100 percent overlap" between the two cases. *Id.* at 49a. The court accordingly held that, given the "substantial overlap in the operative facts" and "in the relief requested," Section 1500 required dismissal without prejudice for want of jurisdiction. *Id.* at 55a.

In so holding, the court rejected the Tribe's contention that Section 1500 was inapplicable because the Tribe's request for equitable monetary relief in district court was "different" from its request for damages in the CFC. App., *infra*, 49a-54a. The CFC explained that a plaintiff's "legal theory" is immaterial under Section 1500 and, in any event, an Indian breach-of-trust claim in the CFC is in substance "an equitable proceeding that produces a monetary remedy." *Id.* at 49a-50a, 53a-54a. What is "relevant" in this context, the CFC held, "is the form of relief"—that is, "money." *Id.* at 54a.

4. A divided panel of the Federal Circuit reversed and remanded. App., *infra*, 1a-26a.

a. The majority interpreted its post-*Keene* en banc decision in *Loveladies*, as holding that Section 1500's jurisdictional bar applies only if the plaintiff's claim in the CFC both "arise[s] from *the same operative facts*" and "seek[s] *the same relief*" as a "claim pending in another court." App., *infra*, 7a (quoting *Loveladies*, 27 F.3d at 1551); see *id.* at 8a-9a. It accordingly concluded that Section 1500 "does not divest the [CFC] of jurisdiction" if the plaintiff's action in another court seeks "'different' relief," even though the cases may "arise from the same operative facts." *Id.* at 8a-9a. The majority

then found that "the 'same relief' prong is dispositive," and therefore declined to decide whether the Tribe's lawsuits "arise from the same operative facts." *Id.* at 9a & n.1.

The majority reasoned that the two suits do not seek the "same relief" because the Tribe's CFC complaint "seeks damages at law, not equitable relief," whereas its district court complaint "requests only equitable relief and not damages." App., *infra*, 11a-12a. Although the majority recognized that the "equitable" relief sought in district court would, if granted, recover "money * * * in the government's possession," *id.* at 13a, it found "[t]he [Tribe's] careful separation of equitable relief and money damages" to be "critical to the § 1500 analysis in this case." *Id.* at 12a.

The majority disagreed with the CFC's conclusion that the Tribe's lawsuits sought "overlapping relief" in two areas: "money and an accounting." App., *infra*, 12a. First, the majority concluded that the actions do not seek overlapping monetary relief. *Id.* at 12a-15a. It reasoned that the Tribe's district court complaint seeks only what the court labeled "equitable 'old money' relief"—*i.e.*, "money that is already in the government's possession, but that erroneously does not appear in the [Tribe's] accounts" and "balance sheet[s]." *Id.* at 13a-14a. The majority found that the CFC complaint, in contrast, seeks money damages for what the court labeled "'new money' that the [Tribe] should have earned as profit but did not" because the United States allegedly "fail[ed] to properly manage the [Tribe's] assets to obtain the maximum value." *Ibid.*

The majority similarly found that the Tribe sought an "accounting" in district court but not in the CFC. App., *infra*, 15a. The court recognized that "what would

ensue [in the CFC] would amount to an accounting" in aid of the CFC's ability to enter judgment, but noted that the Tribe's "prayer for relief" in its CFC complaint "does not request an accounting." *Ibid.*

Finally, the majority rejected the argument that its ruling would undermine Section 1500's policy and purpose of relieving the United States from the burden of defending the same claims at the same time in different courts. App., *infra*, 15a. It concluded that such arguments "ring[] hollow" because, under Federal Circuit precedent, Section 1500 "does not actually prevent a plaintiff from filing two actions seeking the same relief for the same claims." *Id.* at 16a-17a. Rather, the court reasoned, Section 1500 only prohibits plaintiffs from filing a district court action before a CFC lawsuit, while permitting plaintiffs to proceed with both lawsuits so long as the CFC action is filed first. *Ibid.* On that view, the majority concluded that Section 1500 "functions as nothing more than a 'jurisdictional dance,'" and it accordingly "found [no] purpose that § 1500 serves today." *Id.* at 17a. The majority also expressed the view that it would not be "sound policy" to read Section 1500 to preclude damage actions in the CFC when plaintiffs challenge the same governmental action in other courts because "[t]he nation is served by private litigation which accomplishes public ends" and "relies in significant degree on litigation to control the excesses [of] Government." *Ibid.* (quoting *Loveladies*, 27 F.3d at 1555-1556).

b. Judge Moore, in dissent, explained that the Tribe's suits "were based on substantially the same operative facts and that the two complaints included some overlap in the relief requested." App., *infra*, 19a-20a. She accordingly concluded that this Court's decision in

Keene required that the CFC action be dismissed under Section 1500. *Ibid.*

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision holds that Section 1500, which deprives the CFC of jurisdiction over "any claim for or in respect to which" the plaintiff has "any suit or process" against the United States pending in any other court, permits plaintiffs to maintain simultaneous actions against the United States in two courts arising from the same operative facts so long as the actions do not seek the "same relief." It further holds that parallel requests for monetary relief are sufficiently "different" under that jurisdictional test if the monetary relief is deemed "legal" relief in one action and "equitable" relief in the other. The court's decision finds no support in the broad text of Section 1500's prohibition on CFC jurisdiction; its reasoning is inconsistent with this Court's interpretation of Section 1500 in *Keene Corp.* v. *United States*, 508 U.S. 200 (1993); and it resolves incorrectly important questions on which *Keene* reserved decision.

The Federal Circuit has itself changed course on the key questions concerning the proper interpretation of Section 1500, and its decision in this case will have significant adverse impact. The decision will force the government to litigate simultaneously against the same plaintiff in several fora concerning the same questions, thereby wasting significant judicial and litigation resources and risking inconsistent decisions. Indeed, in the Indian Tucker Act context alone, Tribes have brought more than 30 pairs of so-called tribal-trust lawsuits against the United States and are simultaneously

litigating those paired cases in both the CFC and district court.

The Federal Circuit stated that Section 1500 no longer serves "any purpose" because, under its interpretations, Section 1500 requires only a pointless "jurisdictional dance" and enables plaintiffs suing the federal sovereign to easily circumvent its restrictions. App., *infra*, 17a. In so saying, the court of appeals got one thing right: Its post-*Keene* rulings have indeed reduced Section 1500 to an easily evaded, formal requirement. But that conclusion should have suggested to the Federal Circuit not that it disregard what it had left standing of Section 1500's jurisdictional restrictions, but that it revisit its own interpretations. Since 1868, Section 1500's jurisdictional restrictions have served as part of the legal framework for every waiver by the United States of its sovereign immunity from suit in the CFC. Congress itself *expanded* Section 1500's jurisdictional bar in 1948; efforts to repeal the provision have failed; and, as *Keene* emphasized, Section 1500's "limits upon federal jurisdiction . . . must be neither disregarded nor evaded." *Keene*, 508 U.S. at 207, 211 n.5, 217 & n.14. To the contrary, such express limitations on the scope of Congress's waivers of the United States' immunity from suit in the CFC must be strictly observed, with any ambiguity construed in favor of preserving that immunity.

The Federal Circuit's decision departs from those basic interpretive principles, greatly expands the jurisdiction of the CFC, disregards the basic teachings of this Court in *Keene*, and imposes the burden of duplicative litigation on the parties and the CFC. The Court should grant certiorari to correct the fundamental errors of the court of appeals and restore the jurisdictional limitations Congress enacted.

A. The Federal Circuit's Same-Relief Requirement Is Inconsistent With The Text Of Section 1500 And This Court's Decision In *Keene*

1. Section 1500 precludes CFC jurisdiction when a plaintiff has a second suit pending that is based on substantially the same operative facts as the CFC claim, even if the other suit seeks different relief

The court of appeals erroneously held that Section 1500's jurisdictional bar does not apply when a plaintiff who has sued the United States in the CFC has a related case based on the same operative facts pending in another court, so long as that other suit seeks "different relief." App., *infra*, 7a, 8a-9a.[2] Section 1500, by its terms, bars CFC jurisdiction over "any" claim "in respect to which" the plaintiff has "any suit" pending in another court. 28 U.S.C. 1500. A suit sharing the same operative facts as a CFC claim is such a suit.

a. Congress has broadly proscribed CFC jurisdiction over any claim against the United States for which a plaintiff has a related suit against the government pending in another court, regardless whether that other case seeks the "same relief" as the CFC claim. The phrase "any claim [in the CFC] for or in respect to which the plaintiff * * * has pending * * * any suit or process," 28 U.S.C. 1500, uses the word "which" to refer to the plaintiff's CFC claim. Section 1500's jurisdictional bar therefore is triggered by "any suit or process" "for or in respect to" the plaintiff's CFC claim, when that suit or process is pending against the United

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[2] The court of appeals accepted *arguendo* the CFC's determination that the "operative facts" in the Tribe's two complaints "are the same," App., *infra*, 48a-49a, by concluding that it need not address whether the complaints arise from the "same operative facts." *Id.* at 9a n.1.

States in another court. *Keene* makes clear that that bar prohibits CFC jurisdiction "not only as to claims 'for . . . which' the plaintiff has sued in another court," but also "as to those 'in respect to which' he has sued elsewhere." 508 U.S. at 213. And the expansive text of the latter phrase eschews a "narrow concept of identity." See *ibid.*

A plaintiff's pending suit in another court is "in respect to" a claim in the CFC if it "relate[s] to," is "concern[ed] with," or has some "relation or reference to" that claim. *Webster's Third New Int'l Dictionary* 1934 (1993) (defining "respect" and "in respect to"). That reading is supported by this Court's conclusion that "the plain language" of a similar statutory phrase ("arising in respect of") is "encompassing" language that "sweep[s] within" its scope all related matters "associated in any way." *Kosak* v. *United States*, 465 U.S. 848, 854 (1984) (interpreting 28 U.S.C. 2680(c)); cf. *Union Pac. R.R.* v. *United States*, 313 U.S. 450, 464 (1941) (concluding that concessions "in respect to the transportation" of property include concessions that either "directly or indirectly" affect the cost of such transportation).

Congress further underscored Section 1500's breadth by emphasizing that its jurisdictional bar is triggered by "*any* suit or process." 28 U.S.C. 1500 (emphasis added). "The term 'any' ensures that the [phrase 'any suit or process'] has a wide reach," *Boyle* v. *United States*, 129 S. Ct. 2237, 2243 (2009), and Section 1500 thereby gives "no warrant to limit the class of" related suits that preclude CFC jurisdiction, *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183, 2189 (2009). See *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *United States* v. *Gonzales*,

520 U.S. 1, 5 (1997)). A suit that "aris[es] from the same factual foundation" as a claim in the CFC, *Keene*, 508 U.S. at 213, surely qualifies as a suit that "relate[s] to," is "concern[ed] with," or has some "relation or reference to" that claim, *Webster's Third New Int'l Dictionary* 1934, or as one that is "associated in any way" with the CFC claim, *Kosak*, 465 U.S. at 854.

b. Section 1500's broad gatekeeping function reinforces that conclusion. Before 1948, the predecessor to Section 1500 required only "an election between a suit in the Court of Claims [against the United States] and one brought in another court against an *agent* of the government." *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 356 (1932) (emphasis added). Congress expanded the jurisdictional bar when it enacted Section 1500, which applies when a CFC plaintiff has a related suit in another court against either the United States or one of its agents. See *Keene*, 508 U.S. at 211 n.5. Congress accordingly "close[d] th[e] loophole" that permitted plaintiffs to maintain two related suits brought against the United States directly. *Ibid.*

In both contexts, Section 1500 bars CFC jurisdiction even in circumstances in which the CFC action and another pending suit involve claims that could not have been "joined in a single suit." *Keene*, 508 U.S. at 213. A suit in district court arising from the same factual foundation can therefore qualify as a suit "in respect to" the plaintiff's CFC claim even though its request for district court relief "rest[s] on a legal theory that could [not] have been pleaded" in or that lies "beyond the jurisdiction of the [CFC]." See *id.* at 213-214. It follows that Congress required plaintiffs to elect between fora in which they can have different prospects of successfully securing relief. The Court in *Keene* did not need to de-

cide whether Section 1500 applies when two suits seek "completely different relief" because "at least" some overlapping relief was sought in that case. *Id.* at 212 & n.6. But the Federal Circuit's holding that CFC jurisdiction is displaced only when another suit seeks the "same relief" in another forum ultimately cannot be reconciled with the logic of *Keene*'s holding that Section 1500 applies even when the plaintiff's legal theories in the two cases are so different that the theory relied upon in district court could not appropriately be advanced in the CFC.

c. The Federal Circuit's extra-textual "same relief" exception to Section 1500's categorical bar likewise finds no sound basis in *Casman* v. *United States*, 135 Ct. Cl. 647 (1956), which the en banc Federal Circuit initially repudiated in considered dicta in *UNR Industries, Inc.* v. *United States*, 962 F.2d 1013, 1020, 1024-1025 (1992), aff'd *sub nom. Keene*, *supra*, but later reaffirmed, see *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545, 1549, 1551 (Fed. Cir. 1994) (en banc). *Casman* reasoned that Section 1500's purpose was "to require an election between a suit in the Court of Claims and one brought in another court," and concluded that the statute therefore should not apply if the "plaintiff has no right to elect between two courts." 135 Ct. Cl. at 649-650. Because Casman's request for back pay fell "exclusively within the [Court of Claims'] jurisdiction," and because the Court of Claims (at the time) lacked "jurisdiction to" grant Casman's request for specific relief "restor[ing] [him] to his [federal] position," the Court of Claims held in *Casman* that Section 1500 did not apply when such

"entirely different" relief must be sought in different courts. *Ibid.*[3]

Casman's focus on the type of relief sought by the plaintiff in a suit in another court finds no textual foundation. A suit seeking specific relief rather than monetary relief is nevertheless a "suit or process." And although the suit may not be "for" the CFC claim under Section 1500, it qualifies as a suit "in respect to" that claim if it arises from substantially the same operative facts. A leading commentary on Section 1500 has thus concluded that the court in *Casman* "overr[ode] the words of the section." David Schwartz, *Section 1500 of the Judicial Code And Duplicate Suits Against the Government and its Agents*, 55 Geo. L.J. 573, 587 (1967).

And although *Keene* reserved the question whether *Casman*'s "'judicially created exception[]' to § 1500" for suits seeking "completely different" or "distinctly different" relief was valid, 508 U.S. at 212 n.6, 215-216 (citation omitted), the Court's reasoning demonstrates that *Casman* relied on a fundamentally flawed rationale and incorrectly restricted Section 1500. As noted above, *Keene* holds that Section 1500 requires plaintiffs to elect between suing in the CFC and suing in another court even when the legal theories that could be raised in such suits are distinct. See 508 U.S. at 213-214. Those differences in legal theory typically would result in differences in the judicial relief that the plaintiff would ultimately be able to secure. Requiring a plaintiff to elect between a CFC claim and a factually related suit seeking "different relief" therefore is not materially differ-

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[3] In 1982, Congress eliminated the problem that concerned the *Casman* court by authorizing federal employees to seek both back pay and reinstatement in the CFC. See 28 U.S.C. 1491(a)(2).

ent from requiring the plaintiff to make the election at issue in *Keene*.

Keene recognized that Section 1500's restrictions may "deprive plaintiffs of an opportunity to assert rights that Congress has generally made available" and emphasized that only Congress—not the courts—may remove such "apparent hardship" through new legislation. *Id.* at 217-218 (quoting *Corona Coal Co.* v. *United States*, 263 U.S. 537, 540 (1924)). At the time, the en banc Federal Circuit, in the very decision under review, had "announced that it was overruling" *Casman*. See *Keene*, 508 U.S. at 212 n.6, 215-216 (citation omitted) (discussing *UNR Indus.*, *supra*). Now that the Federal Circuit has reinstated the *Casman* holding, *Loveladies*, 27 F.3d at 1549, 1551, and applied it in this case, see App., *infra*, 7a, this Court's review is again necessary.

2. The Tribe did not seek "different relief" in district court because both cases sought monetary relief and other overlapping relief

Even if *Casman* were correct in concluding that Section 1500 does not preclude simultaneous suits if they seek "entirely different" relief, *Casman*, 135 Ct. Cl. at 650, the Federal Circuit erred in holding that the Tribe's requests for monetary relief in the CFC and district court qualify as different relief. The court of appeals' conclusion that identifying and distinguishing the legal or equitable bases for such relief is "critical to the § 1500 analysis," App., *infra*, 12a, is both incorrect and inconsistent with *Keene*.

a. *Keene* held that Section 1500 requires dismissal of a CFC claim if "the plaintiff's other suit [is] based on substantially the same operative facts as the [CFC] action, at least if there [is] some overlap in the relief re-

quested." 508 U.S. at 212. The Court thereby acknowledged the *Casman*-based argument that suits based on substantially the same facts might not trigger Section 1500 if they seek "completely different relief"—*i.e.*, "distinctly different types of relief." *Id.* at 212 n.6, 216; *id.* at 214 n.9 (emphasizing that *Casman* is "limited to that situation"). *Casman*, as noted, concluded that the specific (injunctive) relief of reinstatement available in district court and the monetary relief available in the Court of Claims were "entirely different." 135 Ct. Cl. at 650. *Keene* accordingly held that *Casman*'s exception, even if valid, was inapplicable because Keene sought "monetary relief" in both the CFC and the district court actions. 508 U.S. at 216.

The Federal Circuit nevertheless concluded that monetary relief in the CFC and monetary relief in district court are "completely different" for purposes of Section 1500. The court found it dispositive that the Tribe styled its requests as for "damages at law, not equitable relief," in the CFC and for "equitable relief and not damages" in district court. App., *infra*, 11a-12a. The technical law-equity distinction the court found "critical to the § 1500 analysis," *id.* at 12a, strays even further afield from Section 1500's text than does the holding in *Casman*. A suit involving equitable monetary relief might not be a suit "for" a CFC claim involving money damages in the technical sense, but if it arises from substantially the same operative facts, it is a suit "in respect to" that claim because it is related to the claim and has "at least * * * some overlap" with it, *Keene*, 508 U.S. at 212. The Federal Circuit's narrow attention on the doctrinal source for relief, relevant in the days of a divided bench, disregards *Keene*'s teaching that Congress eschewed "a narrow concept of identity"

in Section 1500 and so denied plaintiffs a "liberal opportunity to maintain two suits arising from the same factual foundation." *Id.* at 213.

If the law-equity distinction were relevant to *Casman*'s exception, *Keene* would have had to address it. But the Court did not do so. Without inquiring whether the "monetary relief" sought in Keene's CFC and district court cases constituted relief at law or at equity, the Court held that the exception for "distinctly different types of relief" did not apply because both actions sought "monetary relief" from the government. 508 U.S. at 216.

Indeed, the Court likely would have reversed rather than affirmed in *Keene* if the Federal Circuit's distinction were correct. The Court affirmed dismissal of a CFC contract claim (*Keene I*) because, in a separate district court tort action in which Keene was the defendant, Keene had pending a third-party complaint "seeking indemnification or contribution from the Government" for any damages that might be awarded against it. See 508 U.S. at 203-204, 216. Indemnification and contribution are understood to be equitable relief.[4] Thus, if the Federal Circuit were correct, Section 1500 would not have applied in *Keene* because such equitable monetary relief would have been "different relief" than

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[4] See, *e.g.*, *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 141 (2007) (ruling that "traditional rules of equity" governs statutory contribution claim); Restatement (Second) of Torts § 866A cmt. c (1979) ("Contribution is a remedy that developed in equity" and is governed by "equity rules" in the tort context.); *id.* § 866B cmt. c and f (explaining that "[t]he basis for indemnity" is the equitable concept of unjust enrichment and restitution; discussing relationship to contribution); Joseph Story, 2 *Commentaries on Equity Jurisprudence* § 648 (1918) (surveying the "equitable doctrine of contribution").

legal contract damages. *Keene*, of course, held otherwise.

b. The Federal Circuit's approach led it into a thicket of elusive and technical distinctions, largely based on respondent's characterization of its complaints. That result is in derogation of the principle that "jurisdictional rules should be clear," especially in the sovereign immunity context. See *Lapides* v. *Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002); *Heckler* v. *Edwards*, 465 U.S. 870, 877 (1984) (explaining that "litigants ought to be able to apply a clear test to determine" which federal court has jurisdiction).

The court first reasoned that the Tribe's actions do not seek overlapping relief because the Tribe's district court complaint seeks so-called "old money" (*i.e.*, "money that is already in the government's possession, but that erroneously does not appear in the [Tribe's] accounts"), whereas its CFC complaint seeks so-called "new money" (*i.e.*, "profits that the [Tribe] would have made but for the United States' mismanagement"). App., *infra*, 13a. As the dissenting judge explained, the majority's distinction is untenable. *Id.* at 22a-25a.

In fact, as the dissenting judge noted, the Tribe's CFC complaint—not just its district court complaint—seeks so-called "old money" (money already in the government's possession) by challenging the government's trust-account record-keeping. See App., *infra*, 23a-25a; pp. 8-9, *supra* (discussing CFC complaint). The majority reiterated its law-equity distinction in arguing that the Tribe's CFC complaint seeks "*damages* alone" and not "equitable relief of any type," App., *infra*, 14a, but it provided no reasoned response—let alone one consistent with liberal notice-pleading rules—to the simple

observation that the Tribe's complaints seek overlapping monetary relief.

Conversely, the Tribe's district court complaint—not just its CFC complaint—seeks so-called "new money" (money not already in the government's possession). It does so by requesting monetary relief under equitable doctrines for any injuries resulting from the government's alleged violation of fiduciary duties to "invest" the Tribe's trust assets properly and "maximiz[e] profits" therefrom. See p. 7, *supra* (quoting complaint). Indeed, the complaint specifically states that its request for a trust-fund accounting extends beyond "funds under the custody and control of the United States" so as to capture such unrealized profits, see *ibid.*, and, in both stating its claims and articulating its prayer for relief, the Tribe requests "equitable restitution" and "any additional equitable relief" that may be appropriate. *Ibid.*; App., *infra*, 92a (prayer for relief).

The Federal Circuit's conclusion that the Tribe does not seek an "accounting" in both courts because it does not include an express request for an accounting in its "prayer for relief" to the CFC, App., *infra*, 15a, further underscores the error in its approach to Section 1500. Even if the Tribe only sought to recover profits lost because of mismanagement (so-called "new money") in the CFC, an accounting would be necessary to determine the principal that should have been invested after the Tribe establishes a pertinent governmental investment-related violation. Without knowing that initial investment, there is no way to determine the proper amount of investment profits. The court of appeals accordingly acknowledged that "what would ensue [in the CFC] would amount to an accounting," *ibid.*, but found that result irrelevant to the application of Section 1500.

The court's technicality-laden analysis finds no support in the text of Section 1500. That provision does not refer to "legal" or "equitable" relief—or indeed to the type of relief sought at all—and therefore provides no basis for the Federal Circuit to hinge Section 1500's application on an assessment of the historical and jurisprudential roots for the relief. Compare *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 253 (1993) (construing the term "appropriate equitable relief" under ERISA, 29 U.S.C. 1132(a)(5)). And the court's approach inevitably creates incentives for counsel to generate novel and intricate distinctions in order to pursue the duplicative litigation that Section 1500 was intended to foreclose, thereby opening the door to inconsistent decisions. Section 1500, properly read, prevents that result where, as here, a plaintiff's district court suit against the United States has some "relation or reference to," or "is concerned with," the plaintiff's claim against the government in the CFC. See p. 16, *supra*.

3. The Federal Circuit's interpretation of Section 1500 disregards established jurisdictional and sovereign immunity principles

The Federal Circuit's rationale for its interpretation of Section 1500 contravenes established principles governing the interpretation of statutes restricting federal jurisdiction and waivers of sovereign immunity in actions for monetary relief against the United States. The court reasoned that its decision does not improperly "undermine the policy and purpose of § 1500" of preventing plaintiffs from pursuing two simultaneous actions against the United States in different courts because "[i]n practice, § 1500 does not actually prevent a plaintiff from filing two actions seeking the same relief

for the same claims." App., *infra*, 15a-16a. The court explained that its precedent in *Tecon Eng'rs, Inc.* v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), created an "anomalous rule" under which a plaintiff may evade Section 1500 by strategically "order[ing]" his actions—that is, by filing his CFC claim prior to filing a related suit in another court. App., *infra*, at 16a-17a. Observing that Section 1500 "would never have even come into play" if the Tribe had "simply filed its complaints in reverse order," the court declared that it found no "purpose that § 1500 serves today," that Section 1500 requires "nothing more than a 'jurisdictional dance,'" and that concerns about undermining Section 1500 therefore are "of no real consequence." *Id.* at 17a. On that basis, the court chose to disregard the statute's terms and dismantle its protections.

a. This Court in *Keene*, as noted above, emphasized that Section 1500's "limits upon federal jurisdiction . . . must be neither disregarded nor evaded" because it is "Congress [that] has the constitutional authority to define the jurisdiction of the lower federal courts." *Keene*, 508 U.S. at 207, 217. Yet the Federal Circuit blithely adopted an unduly narrow interpretation of Section 1500 based in part on the premise that it had previously succeeded in rendering Section 1500 a formality. Nothing could be further from the teachings of this Court than this seemingly purposeful attempt to progressively erode a jurisdictional restriction.

Moreover, the court erred in relying on *Tecon*'s limitation of Section 1500, App., *infra*, 16a, because (as the en banc Federal Circuit previously declared) that order-of-filing rule is incorrect. See *UNR Indus.*, 962 F.2d at

1020, 1023.[5] Section 1500 applies regardless whether a plaintiff files its CFC claim first or second because it precludes CFC "jurisdiction" whenever the plaintiff has "pending" in another court a suit that is related to his claim in the CFC. See 28 U.S.C. 1500. The only two decisions of this Court prior to *Keene* that found the statute applicable confirm that conclusion. Both held that the jurisdictional bar in Section 1500's direct predecessor applied when the CFC action is filed first.[6] To be sure, the relevant text was even clearer before 1948, when plaintiffs were expressly prohibited from "fil[ing] or *prosecut[ing]*" any CFC claim if they had a related suit "pending in any other court." 28 U.S.C. 260 (1946) (emphasis added). But as *Keene* makes clear, Congress's enactment of Section 1500 made no change to the "underlying substantive law" with its "deletion of the 'file or prosecute' language in favor of the current reference to 'jurisdiction.'" 508 U.S. at 209; cf. *id.* at 212 (observing that Congress presumably was aware of similar decisions and adopted them in its 1948 codification). Thus, while *Keene* reserved the question whether *Tecon*

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[5] Although *Tecon*'s rule does not directly apply to this case because the Tribe filed suit in district court (one day) before filing in the CFC, the court of appeals incorporated *Tecon*'s interpretation of Section 1500 into its *ratio decidendi* by concluding that the outcome in this case comports with the narrow and self-defeating purpose *Tecon* had attributed to Section 1500.

[6] See *In re Skinner & Eddy Corp.*, 265 U.S. 86, 92, 95 (1924) (Court of Claims erred in vacating voluntary dismissal of petition because the plaintiff filed a district court action immediately after the dismissal); *Corona Coal*, 263 U.S. at 539-540 (dismissing appeal from Court of Claims decision because related district court action was filed while the appeal was pending).

was properly decided, *id.* at 209 n.4, *Keene*'s rationale compels the conclusion that it was not.[7]

b. The Federal Circuit's departure from the text, history, and purpose of Section 1500 cannot be justified by its view of "sound policy"—that "[t]he nation is served by private litigation" against the sovereign that can "control the excesses to which Government may from time to time be prone." App., *infra*, 17a-18a (quoting *Loveladies*, 27 F.3d at 1555-1556). That rationale not only disregards *Keene*'s admonition about the proper role of the courts in this sphere, see 508 U.S. at 217-218,

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[7] The court in *Tecon* was likely motivated to retain jurisdiction because the plaintiffs before it, after conducting a significant amount of litigation in the Court of Claims, "filed the same claims in a district court and then moved the Court of Claims to dismiss [their] case under Section 1500." *UNR Indus.*, 962 F.2d at 1020. The government and the Court of Claims viewed the plaintiff's effort to force the Court of Claims to release jurisdiction as unacceptable conduct and the court, at the government's urging, "retained jurisdiction so it could dismiss the [plaintiff's] case with prejudice." See *ibid.* Although the government supported that result at the time, it subsequently concluded, based on further experience, that Section 1500 should be enforced by its terms and that similar conduct by plaintiffs "should be addressed by imposing sanctions for abuse of process and vexatious litigation." U.S. Br. at 39 n.19, *Keene*, *supra* (No. 92-166); see *UNR Indus.*, 962 F.2d at 1020.

The bizarre litigation spawned by *Tecon*'s order-of-filing rule confirms this judgment. Plaintiffs have filed several related cases on the same day, see, *e.g.*, Pet. App. 94a-98a, requiring evidentiary hearings to determine what *time* a messenger delivered (and court clerks filed) the relevant complaints. In such cases, *Tecon* makes federal jurisdiction turn on whether a CFC judge finds sufficiently credible the testimony of the plaintiff's messenger (perhaps years after the fact) regarding the specific times that the plaintiff's complaints arrived at each court. See, *e.g.*, *Passamaquoddy Tribe* v. *United States*, 82 Fed. Cl. 256, 274-280 (2008) (finding such testimony neither "persuasive [n]or credible" after evidentiary hearings).

but also contravenes fundamental tenets of federal sovereign immunity.

As the Tribe's own complaint reflects (App., *infra*, 60a), Congress enacted limited waivers of sovereign immunity in the Tucker Act and Indian Tucker Act by conferring jurisdiction on the CFC to hear certain claims against the United States. See *United States* v. *Navajo Nation*, 129 S. Ct. 1547, 1551 (2009); *Mitchell*, 463 U.S. at 212, 215; *Tempel* v. *United States*, 248 U.S. 121, 129 (1918). Congress enacted those waivers to precisely the extent it wished, against the well-understood backdrop of Section 1500's longstanding limits on CFC (and Court of Claims) jurisdiction. Such "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981) (citation omitted); see *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941) ("[T]he terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit."). By invoking policy rationales to insist that Congress provide "a clear expression of [its] intent" to preserve sovereign immunity and limit CFC jurisdiction, App., *infra*, 18a, the Federal Circuit had it precisely backwards: It is the waiver, not the recognition, of federal sovereign immunity that must be "'unequivocally expressed' in the statutory text" and "strictly construed, in terms of its scope." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (quoting *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)); see *United States* v. *Williams*, 514 U.S. 527, 531 (1995) (Statutory "ambiguities [must be construed] in favor of immunity."); *Library of Cong.* v. *Shaw*, 478 U.S. 310, 321 (1986) ("[P]olicy, no matter how compelling, is insufficient" in this context.).

B. The Federal Circuit's Decision Threatens Significant Adverse Consequences

By holding that Section 1500 permits a plaintiff to maintain two simultaneous actions based on substantially the same operative facts so long as the two suits seek different relief—and by adopting a test that uses technical pleading concepts to discover differences in relief where none appear to the naked eye—the Federal Circuit has eviscerated Section 1500's limitation on CFC jurisdiction. Since this Court in *Keene* returned Section 1500 to the court of appeals' interpretive domain, the Federal Circuit has reinstated its flawed decisions in *Casman* and *Tecon*, and now has used those decisions to support a holding that would allow two suits, one in the CFC and one in district court, to go forward simultaneously against the government, even when based on the same operative facts and seeking similar relief. The court of appeals' decision is plainly incorrect. And because the Federal Circuit exercises exclusive appellate authority over the CFC, 28 U.S.C. 1292(c)(1), 1295(a)(3), this is not a context in which this Court could await for a circuit conflict to develop.[8]

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[8] Regional courts of appeals previously could have construed Section 1500 in an appeal from a Little Tucker Act action for which district courts have concurrent jurisdiction with the CFC. 28 U.S.C. 1346(a)(2); see *Shapiro* v. *United States*, 168 F. 2d 625, 626 (3d Cir. 1948) (finding district court jurisdiction governed by Section 1500). But the Federal Circuit now has exclusive appellate jurisdiction over district court cases based "in whole or in part" on the Little Tucker Act unless the relevant claim is founded on an internal revenue statute or regulation. 28 U.S.C. 1295(a), (a)(2). The potential for Section 1500 to arise in the context of a case concerning an internal revenue provision and falling within the Little Tucker Act's $10,000 threshold is vanishingly remote, and we have identified no such appellate decision.

The implications of the court of appeals' evisceration of Section 1500 are substantial. In the Indian Tucker Act context alone, we have identified at least 31 other pairs of pending cases that Indian Tribes have brought against the United States in the CFC and district court. See App., *infra*, 94a-99a (listing cases). As is true here, the cases in each pair are based on substantially the same operative facts. While the Tribes are entitled to pursue an action against the government, the Federal Circuit's approval of their double-barreled strategy imposes a substantial litigation burden on the United States and the courts and threatens inconsistent judicial rulings. Section 1500 was intended to prevent just such duplicative litigation. Certiorari is therefore warranted to restore that provision's limitations on CFC jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NO. 2008-5043

TOHONO O'ODHAM NATION, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Mar. 16, 2009

Before NEWMAN, LINN, and MOORE, Circuit Judges.

Opinion for the court filed by Circuit Judge LINN. Dissenting opinion filed by Circuit Judge MOORE.

LINN, Circuit Judge.

This case concerns the application of 28 U.S.C. § 1500, the statute that divests the United States Court of Federal Claims of jurisdiction over "any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States." Applying § 1500, the Court of Federal Claims dismissed an action brought by the Tohono O'odham Nation (the "Nation") alleging that the United States breached certain fiduciary duties as trustee of funds and property owned by the Nation. *Tohono O'odham Nation v. United States,* 79 Fed. Cl. 645, 646 (2007). Because we conclude that the Nation's complaint in the Court of Federal Claims seeks relief that is differ-

ent from the relief sought in its earlier-filed district court action, we reverse.

I. BACKGROUND

The Nation is a federally recognized Indian tribe of approximately 26,000 members, located in Arizona. *Tohono O'odham Nation*, 79 Fed. Cl. at 646. Collectively, the Nation's reservations consist of nearly three million acres of land. *Id.* The United States manages the Nation's land and holds income derived from that land in trust, including income from the sale of natural resources and income from leases and other conveyances to third parties. *Id.* Additionally, the United States holds in trust money awarded to the Nation as a result of legal judgments, including $26 million that the United States paid to the Nation to settle a takings and trespass action in 1976. *Id.*

On December 28, 2006, the Nation brought an action in the United States District Court for the District of Columbia against the Secretary of the Interior, the Special Trustee for American Indians, and the Secretary of the Treasury, alleging that the United States had breached certain fiduciary duties in connection with its management of the Nation's trust assets. *See Tohono O'odham Nation v. Kempthorne,* No. 1:06-CV-02236, Doc. 1, at 1 (D.D.C. Dec. 28, 2006) ("*District Court Complaint*"). Specifically, the Nation presented in two counts "an action to seek redress of breaches of trust by the United States, acting by and through the defendants, in the management and accounting of trust assets, including funds and lands, belonging to the plaintiff . . . and to compel the defendants to provide a full and complete accounting of all trust assets belonging to the Nation and to correct the balances of the Nation's trust

fund accounts to reflect accurate balances." *Id.* at 1-2. The Nation's prayer for relief requested nine remedies:

> 1. For a decree construing the trust obligations of the defendants to the Nation, including, but not limited to, the duty to provide a complete, accurate, and adequate accounting of all trust assets belonging to the Nation and held in trust by the defendants.
>
> 2. For a decree that the United States, acting through the defendants, has been in breach of its trust obligations since the inception of this trust and continues to be in breach of those duties today, specifically including, *inter alia*, its fiduciary duty to provide a complete, accurate, and adequate accounting of all trust assets belonging to the Nation and held in trust by the United States.
>
> 3. For a decree that the AA Reports do not constitute the complete, accurate, and adequate accounting that the defendants are obligated to provide to the Nation.
>
> 4. For a decree delineating the fiduciary duties owed by the defendants to the Nation with respect to the management and administration of the trust assets belonging to the Nation.
>
> 5. For a decree directing the defendants (1) to provide a complete, accurate, and adequate accounting of the Nation's trust assets, including, but not limited to, funds under the custody and control of the United States and (2) to comply with all other fiduciary duties as determined by this Court.

> 6. For a decree providing for the restatement of the Nation's trust fund account balances in conformity with this accounting, as well as any additional equitable relief that may be appropriate (e.g., disgorgement, equitable restitution, or an injunction directing the trustee to take action against third parties).
>
> 7. For a decree requiring the defendants to provide to the Nation all material information regarding the management and administration of the trust assets belonging to the Nation and held in trust for its benefit by the defendants.
>
> 8. For an award of the Nation's costs of suit, including, without limitation, attorneys' fees under the Equal Access to Justice Act and other statutes as well as general equitable principles, and the fees and costs of expert assistance.
>
> 9. For such other and further relief as the Court, as a Chancellor sitting in equity, may deem just and proper.

Id. at 18-19.

On December 29, 2006—one day after it filed its district court complaint—the Nation brought a second action in the Court of Federal Claims. The complaint characterized that second action as "an action for money damages against the United States, brought to redress gross breaches of trust by the United States . . . as trustees and trustee-delegates of land, mineral resources and other assets held by them for the benefit of the Tohono O'odham Nation." *Tohono O'odham Nation v. United States,* No. 06-CV-944, Doc. 1, at 1 (Ct. Fed.

Cl. Dec. 29, 2006) ("*Court of Federal Claims Complaint*"). In its Court of Federal Claims action, the Nation asserted four counts, entitled "Damages Resulting from the United States' Breach of Fiduciary Duty with Respect to the Management of the Nation's Mineral Estate," "Damages Arising from the United States' Breach of Fiduciary Duty with Respect to the Management of the Nation's Non-Mineral Estate," "Damages Arising from the United States' Breach of Fiduciary Duty with Respect to the Management of Judgment Funds," and "Damages Arising from the United States' Breach of Fiduciary Duty with Respect to Deposit and Investment of Trust Funds." *Id.* at 9-12. In its prayer for relief, the Nation asked:

> 1. For a determination that the Defendant is liable to the Nation in damages for the injuries and losses caused as a result of Defendant's breaches of fiduciary duty;
>
> 2. For a determination of the amount of damages due the Nation plus interest as allowed by law;
>
> 3. That the costs of this action, including reasonable attorneys fees, be awarded to the Nation;
>
> 4. For such other and further relief as the Court deems just and appropriate.

Id. at 13.

The United States moved to dismiss the Nation's action in the Court of Federal Claims for lack of jurisdiction in light of 28 U.S.C. § 1500. *Tohono O'odhom Nation*, 79 Fed. Cl. at 646. The Court of Federal Claims concluded that the Nation's claim "arises from the same

operative facts and seeks the same relief as the claim in district court." *Id.* at 659. As a result, the Court of Federal Claims held that it lacked jurisdiction under § 1500, and it granted the United States' motion to dismiss. *Id.*

The Nation timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) (2006). "We review the Court of Federal Claims's dismissal for lack of jurisdiction *de novo*." *Sacco v. United States,* 452 F.3d 1305, 1308 (Fed. Cir. 2006).

II. DISCUSSION

Section 1500 provides:

> The United States Court of Federal Claims shall not have jurisdiction of any *claim* for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. § 1500 (emphasis added).

Following a series of cases in which this court interpreted the meaning of "claim" in § 1500, see, e.g., *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed. Cir. 1988); *UNR Indus., Inc. v. United States,* 962 F.2d 1013 (Fed. Cir. 1992) (en banc), the Supreme Court addressed the issue in *Keene Corp. v. United States,* 508 U.S. 200 (1993), *aff'g UNR,* 962 F.2d 1013. The Supreme Court remarked that § 1500 "requires a comparison between the claims raised in the Court of Federal Claims and in the other lawsuit." *Keene,* 508 U.S. at 210. The

Supreme Court also recognized, however, that § 1500 does not define the critical term "claim" and that "[t]he exact nature of the things to be compared is not illuminated . . . by the awkward formulation of § 1500." *Id.*

In *Keene,* the Supreme Court held that "the comparison of the two cases for purposes of possible dismissal would turn on whether the plaintiff's other suit was based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested." *Id.* at 212. The Supreme Court expressly left open "whether two actions based on the same operative facts, but seeking completely different relief, would implicate § 1500." *Id.* at 213 n.6.

The dissent treats the Supreme Court's analysis in *Keene* as the final word on the matter. *See* Dissenting Op. at 1, 3-7. However, shortly after *Keene,* this court, sitting en banc, interpreted and applied the *Keene* opinion and expressly addressed the question that *Keene* left open. In *Loveladies Harbor, Inc. v. United States,* after reviewing this court's earlier tests for the same claim in § 1500 cases in light of the Supreme Court's holding in *Keene,* we held:

> Taken together, these tests produce a working definition of "claims" for the purpose of applying § 1500. For the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from ***the same operative facts,*** and must seek ***the same relief***.

27 F.3d 1545, 1551 (Fed. Cir. 1994) (en banc).

It is the *Loveladies* court's interpretation of *Keene* that is binding on this panel. *See, e.g., Barclay v. United States,* 443 F.3d 1368, 1373 (Fed. Cir. 2006) ("Panels of

this court are bound by previous precedential decisions until overturned by the Supreme Court or by this court *en banc*"); *Foster v. Hallco Mfg. Co.,* 947 F.2d 469, 475 n.5 (Fed. Cir. 1991) (remarking that district court committed legal error by reinterpreting an earlier Supreme Court case, rather than applying this court's subsequent interpretation of that case); *see also Walton v. Bisco Indus., Inc.,* 119 F.3d 368, 371 n.4 (5th Cir. 1997) ("To the extent that [the appellant] believes that we have construed [an earlier Supreme Court decision] incorrectly, we note that absent an intervening Supreme Court decision or a decision by this court sitting en banc, we are bound by a prior panel's interpretation."); *Tucker v. Phyfer*, 819 F.2d 1030, 1035 n.7 (11th Cir. 1987) ("[H]ad the [earlier] panel expressly considered [two Supreme Court decisions], we would be bound by its interpretation and application of those decisions."); *Diamond Shamrock Co. v. N.L.R.B.,* 443 F.2d 52, 60 n.27 (3d Cir. 1971) (holding that court is bound by prior panel's interpretation of Supreme Court decision); *cf. United States v. Rapanos,* 376 F.3d 629, 642 (6th Cir. 2004), *vacated on other grounds*, 547 U.S. 715 (2006) (rejecting appellee's argument concerning interpretation of a Supreme Court decision because it had "previously been adjudicated by this court, in a published disposition, and its conclusion is entitled to *stare decisis*"). The dissent errs by interpreting and applying *Keene* de novo and ignoring the interpretation of *Keene* set forth in *Loveladies*.

Under the test set forth in *Loveladies,* § 1500 is applicable only if two claims "arise from the same operative facts" and "seek the same relief." *Loveladies,* 27 F.3d at 1551. Conversely, if an action in the Court of Federal Claims *either* arises from different operative

facts *or* seeks completely different relief than the earlier-filed action, then § 1500 does not divest the Court of Federal Claims of jurisdiction. In this case, the "same relief" prong is dispositive.[1]

Drawing on the "distinctly different" language in *Loveladies*, the United States argues for a sweeping rule that "it is the *form* of the relief that matters—here, money." Br. of Def.-Appellee United States at 43; *see also id.* at 43 n.10 (arguing for "[a] rule that it is the form of relief sought in the two courts that matters for purposes of Section 1500"). In the United States' view, the "same relief" prong is always satisfied whenever two complaints both seek *any* relief in the form of money—irrespective of any differences in the amounts requested, the basis for the calculation of those amounts, the alleged injuries giving rise to those amounts, or the court's authority for awarding the requested money (i.e., as damages, as an equitable remedy, or under some other authority).

We disagree that the "distinctly different" language in *Loveladies* compels such a sweeping rule. To the contrary, *Loveladies* refers interchangeably to "distinctly different" relief and simply "different" relief. *See, e.g.*, *Loveladies*, 27 F.3d at 1549 ("distinctly different relief"); *id.* at 1550 ("different form of relief"); *id.* at 1551 ("relief distinctly different"); *id.* at 1552 ("distinctly different relief"); *id.* at 1552-53 ("different relief"); *id.* at 1553 ("relief different"). We see no meaningful difference —distinct or otherwise—between "different" and "distinctly different." Either the relief requested in two

[1] Because we conclude that the "same relief" prong of the *Loveladies* test is not met, we do not address whether the Nation's complaints arise from the same operative facts.

complaints is the same, or it is different. An award of back wages for a particular time period under the Equal Pay Act is the same as—not "different" or "distinctly different" from—an award of back wages for that same time period under Title VII. *See Harbuck v. United States,* 378 F.3d 1324, 1329 (Fed. Cir. 2004). By contrast, injunctive relief is "different"—or "distinctly different"—from money damages. *See, e.g., Johns-Manville,* 855 F.2d at 1566. There is no requirement of any heightened showing of "difference." Rather, we must determine simply whether the relief that the Nation requested in its Court of Federal Claims complaint is the same as the relief that it requested in its district court complaint.

To answer that question, we look to each complaint's prayer for relief. *See Loveladies,* 27 F.3d at 1553 (focusing on prayers for relief). In its district court complaint, the Nation requested relief that falls into seven categories:

(i) a declaration that the United States has certain specific trust obligations (requests 1 and 4);

(ii) a declaration that the United States is in breach of those obligations (requests 2 and 3);

(iii) an accounting (requests 5(1) and 7);

(iv) an order directing the United States to comply with its other trust obligations going forward (request 5(2));

(v) restatement of trust account balances in conformity with the accounting "as well as any

additional equitable relief that may be appropriate (e.g., disgorgement, equitable restitution, or an injunction directing the trustee to take action against third parties)" (request 6);

(vi) costs and attorneys' fees (request 8); and

(vii) "other and further relief as the Court, as a Chancellor sitting in equity, may deem just and proper" (request 9).

District Court Complaint, at 18-19. In essence, the Nation requested that the district court declare that the United States was in breach of its duties as a trustee and order specific performance of those duties. Notably, all of the requested relief is equitable relief, not damages. *See Johns-Manville*, 855 F.2d at 1566 (distinguishing "money" damages and "equitable" relief as "different type[s] of relief" for purposes of § 1500); *Loveladies,* 27 F.3d at 1550 (same). The Nation, in fact, was careful to limit its request for "other and further relief" in the district court to relief "as the Court, as a Chancellor sitting in equity, may deem just and proper." *District Court Complaint,* at 19.

By contrast, the Nation's complaint in the Court of Federal Claims seeks damages at law, not equitable relief. In its prayer for relief in the Court of Federal Claims, the Nation requested only damages (requests 1 and 2), attorneys' fees and costs (request 3), and "such other and further relief as the Court deems just and appropriate" (request 4). *Court of Federal Claims Complaint,* at 13. Moreover, the word "Damages" appears in the title of all four of the Nation's counts. *Id.* at 9-12. Nowhere in its prayer for relief in the Court of Federal

Claims does the Nation seek specific performance, an injunction, or any other type of equitable relief.

The Nation's careful separation of equitable relief and money damages is critical to the § 1500 analysis in this case, just as it was in *Loveladies.* In concluding that the two complaints at issue requested different relief, the court in *Loveladies* reasoned that "[i]t is important to note that the prayer in the Court of Claims complaint contained an express request for damages. Significantly, that request was missing from the complaint in the district court." *Loveladies,* 27 F.3d at 1553. Likewise, in this case, the Nation's complaint in the district court requests only equitable relief and not damages, while the Nation's complaint in the Court of Federal Claims requests only damages and not equitable relief.

The Court of Federal Claims identified two areas of "what looks like overlapping relief (money and an accounting in both courts)." *Tohono O'odham Nation,* 79 Fed. Cl. at 656. As for "money," the court reasoned that the Nation's "district court complaint specifically seeks money (disgorgement, restatement of accounts, and restitution)," and that this request overlaps with its request for money damages in the Court of Federal Claims. *Id.* at 652. As far as an accounting, the court concluded that an accounting in aid of judgment in the Court of Federal Claims would overlap with the request for an accounting in the district court.

We disagree. The Nation's district court complaint requests an accounting and a "restatement of the Nation's trust fund account balances in conformity with this accounting, as well as any additional equitable relief that may be appropriate" including disgorgement or equitable restitution. *District Court Complaint,* at 18. In

other words, the Nation is requesting that, following the accounting, its account balances be adjusted to reflect the correct amounts to correct any errors discovered in the accounting. The Nation refers to this as a request for "old money"—namely, money that is already in the government's possession, but that erroneously does not appear in the Nation's accounts. In the course of making an adjustment of account balances, it may be necessary for the court to order other "equitable relief that may be appropriate," including disgorgement or equitable restitution, if it is discovered that the United States has misappropriated funds from the Nation's trust and/or improperly profited from the Nation's "old money."

This equitable relief as "appropriate" in connection with the accounting is not the same as the "damages for the injuries and losses" that the Nation has requested in the Court of Federal Claims. *Court of Federal Claims Complaint,* at 13. Notably, each of the "injuries" that the Nation alleges in the Court of Federal Claims is an injury resulting from the United States' failure to properly manage the Nation's assets to obtain the maximum value. *See id.* at 9 (count 1 alleging mismanagement of mineral estate); *id.* at 10 (count 2 alleging mismanagement of non-mineral estate); *id.* at 11 (count 3 alleging mismanagement of judgment funds); *id.* at 12 (count 4 alleging mismanagement in deposit and investment of funds). The "injuries and losses" for which the Nation seeks relief are essentially consequential damages —profits that the Nation would have made but for the United States' mismanagement. The Nation refers to these profits as "new money." Thus, the Court of Federal Claims complaint seeks damages in the form of "new money" that the Nation should have earned as

profit but did not, while the district court complaint seeks return of "old money" that belongs to the Nation but erroneously does not appear on its balance sheet. These are not the same types of relief .

The dissent acknowledges that it would be possible to craft two complaints to avoid § 1500 by requesting "old money" in one, and "new money" in the other. Dissenting Op. at 5. However, the dissent concludes that the Nation's complaint in the Court of Federal Claims is not limited to "new money." *Id.*.[*sic*] Specifically, the dissent reasons that the Court of Federal Claims complaint "alleges fiduciary breaches related to [']old money'" and then "broadly asks for money for breaches of the fiduciary duty." *Id.* at 5-6. But the Nation's Court of Federal Claims complaint does not "broadly ask[ ] for money" as the dissent suggests. To the contrary, the Court of Federal Claims complaint expressly asks for *damages* alone—not any other form of monetary relief, and not equitable relief of any type. *See, e.g.*, *Court of Federal Claims Complaint* at 1 (entitled "COMPLAINT FOR DAMAGES FOR BREACH OF TRUST OBLIGATIONS"); *id.* ("This is an action *for money damages* . . . ." (emphasis added)); *id.* ("[The] Nation seeks *damages for Defendant's mismanagement* of the Nation's trust property." (emphasis added)). Nowhere in the Court of Federal Claims complaint does the Nation make any broad request for "money for breaches of fiduciary duty." Moreover, the very language that the dissent quotes from the Nation's prayer for relief makes clear that the Nation is requesting only consequential damages—i.e., "new money"—not restitution, disgorgement, or other equitable "old money" relief in the Court of Federal Claims: "For a determination that the Defendant is liable to the Nation *in damages* for the inju-

ries and losses caused *as a result* of Defendant's breaches of fiduciary duty." *Court of Federal Claims Complaint* at 13 (emphases added). We therefore disagree with the dissent that the Nation made any request for "old money" in the Court of Federal Claims.

As to the second area of "what looks like overlapping relief" identified by the Court of Federal Claims, the Nation did not—as the Court of Federal Claims suggests—"ask[ ] for . . . an accounting in both courts." *Tohono O'odham Nation,* 79 Fed. Cl. at 656. As the Court of Federal Claims pointed out, it is the relief that the plaintiff *requests* that is relevant under § 1500. *Id.* at 654 (citing *Keene*, 508 U.S. at 212; *Frantz Equip. Co. v. United States*, 98 F. Supp. 579, 580 (Ct. Cl. 1951)). The Nation's prayer for relief in the Court of Federal Claims does not request an accounting. The fact that, "assuming this action were to proceed in [the Court of Federal Claims], and plaintiff satisfied its burdens of proof, what would ensue would amount to an accounting, albeit in aid of judgment," *id.* at 653, does not transform the Nation's unambiguous request for damages into a request for an accounting.

Finally, we address the United States' argument that permitting the Nation's claims to go forward in the Court of Federal Claims would undermine the policy and purpose of § 1500. The United States argues that "the policy and purpose underlying Section 1500 is that the United States not be required to defend the same claims at the same time in two different courts; that is exactly what the Nation seeks to do here." Br. of Defendant-Appellee United States at 11-12; *see also Tohono O'odham,* 79 Fed. Cl. at 654 (noting that the "purpose of section 1500 was to force plaintiffs to elect between the

Court of Claims and another court in which to pursue its whole claim against the government" (citing *Casman v. United States,* 135 Ct. Cl. 647, 654 (1956))). The dissent similarly argues that § 1500 allows the government to avoid duplicative litigation. Dissenting Op. at 1 n.1.

In practice, § 1500 does not actually prevent a plaintiff from filing two actions seeking the same relief for the same claims. It merely requires that the plaintiff file its action in the Court of Federal Claims *before* it files its district court complaint. This anomalous rule is the result of a series of decisions by this court, our predecessor court, and the Supreme Court. In *Tecon Engineers, Inc. v. United States,* our predecessor court held that "the only reasonable interpretation of [§ 1500] is that it serves to deprive [the Court of Federal Claims] of jurisdiction of any claim for or in respect to which plaintiff has pending in any other court any suit against the United States, only when the suit shall have been commenced in the other court before the claim was filed in [the Court of Federal Claims]." 343 F.2d 943, 949 (Ct. Cl. 1965). Later, this court, sitting en banc, overruled *Tecon. UNR,* 962 F.2d at 1022-23. The Supreme Court granted certiorari in *UNR* (then re-named *Keene*), and held that it was "unnecessary to consider, much less repudiate, the 'judicially created exceptions' to § 1500 found in *Tecon Engineers"* and other cases. *Keene,* 508 U.S. at 216. We have since recognized that *Tecon* is still good law, because the aspect of *UNR* that had overruled it was undone by the Supreme Court. *See, e.g., Hardwick Bros. Co. II v. United States,* 72 F.3d 883, 886 (1995) ("[T]he Supreme Court expressly declined to overturn *Tecon Engineers,* and this court in *Loveladies I* acknowledged the continuing vitality of Tecon as an established precedent."); *id.* ("After *UNR*/*Keene* and

Loveladies I, Tecon Engineers remains good law and binding on this court."). Therefore, in this case, had the Nation simply filed its complaints in reverse order, § 1500 would never have even come into play.

The Supreme Court has discussed at length the post-Civil War origins of § 1500. *See, e.g., Keene,* 508 U.S. at 206 (remarking that the lineage of § 1500 "runs back more than a century" and that its original purpose was to preclude duplicative actions seeking compensation for seized cotton by parties who had given aid to Confederate soldiers). However, neither the Supreme Court nor this court has found any purpose that § 1500 serves today. Because a party can simply file its Court of Federal Claims action first and avoid § 1500 entirely, it functions as nothing more than a "jurisdictional dance." *Loveladies,* 27 F.3d at 1549. Thus, the government's and the dissent's argument about the policy and purpose of the statute rings hollow and, moreover, is of no real consequence in this appeal. As we explained in *Loveladies:*

> Litigation can serve public interests as well as the particular interests of the parties. The nation is served by private litigation which accomplishes public ends, for example, by checking the power of the Government through suits brought under the APA or under the takings clause of the Fifth Amendment. Because this nation relies in significant degree on litigation to control the excesses to which Government may from time to time be prone, it would not be sound policy to force plaintiffs to forego monetary claims in order to challenge the validity of Government action, or to preclude challenges to the validity of Government action in order to protect a Constitu-

> tional claim for compensation. Section 1500 was enacted to preclude duplicate cotton claims—claims for money damages—at a time when *res judicata* principles did not provide the Government with protection against such "duplicative lawsuits." Whatever viability remains in § 1500, absent a clear expression of Congressional intent we ought not extend the statute to allow the Government to foreclose non-duplicative suits, and to deny remedies the Constitution and statutes otherwise provide.

Id. at 1555-56 (citations omitted).

Although our decision in this case will require the government to litigate in multiple fora, we note that there is no risk of double recovery. The Nation's complaint in the Court of Federal Claims seeks only "new money" damages—relief that the Nation has not requested in district court, and which the district court is, in any event, powerless to award. *See* 5 U.S.C. § 702 (excluding district court actions seeking "money damages" from waiver of sovereign immunity). Conversely, the Nation's complaint in district court seeks only separate equitable relief, which the Court of Federal Claims is powerless to award. *See, e.g., Nat'l Air Traffic Controllers Ass'n v. United States,* 160 F.3d 714, 716 (Fed. Cir. 1998) ("Although the Tucker Act has been amended to permit the Court of Federal Claims to grant equitable relief ancillary to claims for monetary relief over which it has jurisdiction, there is no provision giving the Court of Federal Claims jurisdiction to grant equitable relief when it is unrelated to a claim for monetary relief pending before the court." (citations omitted)). Our decision therefore will not permit the Nation to obtain double recovery.

Because the relief requested in the Nation's district court complaint is different from the relief requested in its Court of Federal Claims complaint, § 1500 does not divest the Court of Federal Claims of jurisdiction. The Court of Federal Claims therefore erred by dismissing the Nation's action for lack of subject matter jurisdiction.

III. CONCLUSION

For the foregoing reasons, the Court of Federal Claims's order dismissing the Nation's complaint is *reversed.* We *remand* for proceedings consistent with this opinion.

REVERSED AND REMANDED.

MOORE, Circuit Judge, dissenting.

In *Keene v. United States*, the Supreme Court held that § 1500 deprives the Court of Federal Claims of jurisdiction when "plaintiff's other suit was based on *substantially the same operative facts* . . . at least if there was *some overlap in the relief requested.* . . . Congress did not intend the statute to be rendered useless by a narrow concept of identity." 508 U.S. 200, 212-13 (1993) (emphasis added).[1] Because I conclude that the Tohono

[1] Because monetary suits in excess of $10,000 must be filed in the Court of Federal Claims, *Gonzales & Gonzales Bonds & Insurance Agency, Inc. v. Department of Homeland Security,* 490 F.3d 940, 943 (Fed. Cir. 2007), but absent special exceptions not applicable here, equitable relief must be obtained from the federal district courts, *id.,* many plaintiffs are required to file two separate suits to obtain all the relief to which they are entitled. Plaintiffs must file their separate complaints with precision to avoid seeking overlapping relief and thereby implicating § 1500. Under principles of sovereign immunity,

O'Odham Nation's (Nation) suits were based on substantially the same operative facts and that the two complaints included some overlap in the relief requested, I respectfully dissent.

I.

The two complaints were based on substantially the same operative facts. The Nation acknowledges that "[i]n each case it is the trust relationship between the United States as trustee and the Nation as beneficiary that underlies the Nation's claims" and that "the Nation's claims involve the same plaintiff, the same defendant, and perhaps even some of the same property." Further, as the Court of Federal Claims illustrated in great detail, the complaints' recitations of the facts are nearly identical. The Nation argues that because the district court action is based on the duty of accounting and the Court of Federal Claims action is based on the duty of good management, the facts necessary to win its case on each cause of action are different.

The legal theories underlying the claims at issue are irrelevant in a § 1500 analysis. *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1564 (Fed. Cir. 1988) ("Since the legal theory is not relevant, neither are the elements of proof necessary to present a prima facie case under that theory."). Although we have not set forth a full and complete definition for the term "opera-

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the government can dictate the permissible circumstances of suits against it. Section 1500 prevents multiple simultaneous litigations against the government. The fact that the statute's scope was reduced by *Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 949 (Ct. Cl. 1965), does not mean that it no longer serves a purpose. Moreover, it is not necessary for a court to justify a particular statute's purpose in order to give effect to that statute.

tive facts,"[2] it is clear that the operative facts are not the "elements of proof necessary" to prove the theory. *See Harbuck v. United States,* 378 F.3d 1324 (Fed. Cir. 2004). In *Harbuck,* the district court complaint alleged sex discrimination in the plaintiff's employment with the Air Force and the Court of Federal Claims complaint alleged a violation of the Equal Pay Act. We held that the operative facts were the same in both complaints and characterized them as follows: "the Air Force's alleged sexual discrimination by payment of lesser compensation to women than to men for the same or substantially equal work." *Id.* at 1328. To be sure, different facts are needed to prove a claim under Title VII (failing to promote) and a claim under the Equal Pay Act (paying less). Nevertheless, we held that "[t]he difference between the two theories upon which she relies are but different manifestations of the same underlying claim that the Air Force discriminated against women by paying them less than men." *Id.* at 1329. Similarly, although the Nation puts forth two different legal theories, the operative facts underlying these theories are "substantially the same." *Keene,* 508 U.S. at 212. The majority does not hold otherwise.

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[2] As we commented in *Loveladies Harbor, Inc. v. United States* 27 F.3d 1545, 1551, n. 17 (Fed. Cir.1994) (en banc):

> Despite its lineage, it can be argued that there is a basic epistemological difficulty with the notion of legally operative facts independent of a legal theory. Insofar as a fact is "operative"—i.e., relevant to a judicially imposed remedy—it is necessarily associated with an underlying legal theory, that is, the cause of action. For example, without legal underpinning, words in a contract are no different from casual correspondence. Because it is unnecessary for our decision in this case, we need not further refine the meaning of "operative facts."

II.

The two complaints included "some overlap in the relief requested."[3] *Keene*, 508 U.S. at 212. In both courts, the Nation is asking for monetary compensation for the government's alleged failures to fulfill its duties.[4] The Nation admits this, but argues that it is seeking different money in each court: "old money" from the district court and "new money" from the Court of Federal Claims. The "old money," the Nation argues, would effect a "restatement of the Nation's trust fund account balances in conformity with [the] accounting." Appellant Br. at 50. The "old money" is therefore the result of a breach in fiduciary duty related to the actual trans-

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[3] I do not understand the majority's assertion that *Loveladies* is an "interpretation" of the standard set forth in *Keene*. *Keene* held that § 1500 deprives the Court of Federal Claims of jurisdiction when "plaintiff's other suit was based on substantially the same operative facts . . . at least if there was some overlap in the relief requested." 508 U.S. at 212. *Loveladies* held that "the claims in the two courts are for distinctly different and not the same or even overlapping relief-this case presents the straightforward issue of plaintiffs who seek distinctly different types of relief in the two courts." 27 F.3d at 1554. Ultimately, the majority and I both analyze the complaints to see if there is some overlap in the relief requested, and it is on this point that we disagree.

[4] The government also argues that the Nation's request for damages in the Court of Federal Claims would require an accounting in aid of judgment. According to the government, this accounting would overlap with the general accounting that the Nation requested in the district court. Because I believe that the Nation has requested overlapping monetary relief in the two complaints, I do not express an opinion on whether it requested overlapping equitable relief. Because the majority held that there is no overlapping relief at all between the two complaints, it must have concluded that for the purposes of § 1500, an accounting in aid of judgment for monetary damages arising from a duty to manage funds does not overlap with a general equitable accounting arising from a duty to provide an adequate accounting.

actions that took place—errors that would be revealed by an accounting. The "new money," in contrast, is "to compensate it for the pecuniary losses it suffered as a result of the government's imprudent management and investment actions." Appellant Reply Br. at 21; Appellant Br. at 51-52 (explaining that the Nation seeks "pecuniary losses suffered as a result of the government's failure prudently to manage and invest trust assets").

It seems plausible that carefully drafted complaints could distinguish particular pots of money as different relief, but these complaints nowhere discuss this concept. For purposes of § 1500, we look at the relief *requested* in the complaint. *Keene,* 508 U.S. at 212; *Dico v. United States,* 48 F.3d 1199, 1203 (Fed. Cir. 1995). In *Dico*, the plaintiff attempted to overcome the plain language of its two complaints and distinguish a takings claim and a due process claim by arguing that they related to different property interests. We disagreed, holding that it was "too late for Dico to attempt at this stage to recast . . . the relief sought by" the two counts. *Id.* Rather, "the plain language" of the complaint controls the outcome. *Id.* Here, the plain language of the complaints repudiates the Nation's argument.

The complaint in the Court of Federal Claims is not limited to "new money" as the Nation argues now. The complaint clearly alleges fiduciary breaches related to "old money:"

- Count 1 states: "The United States, as trustee, has never provided the Nation a complete and accurate accounting of the revenue the United States collected or was required to collect under mineral leases and permits. Nor has it provided

the Nation complete records of such leases and permits it is required to maintain as trustee."

- Count 2 states: "The United States, as trustee, has never provided the Nation a complete and accurate accounting of the revenue the United States collected or was required to collect, in granting easements and rights of way and leasing tribal properties. Nor has it provided the Nation complete records of such transactions which it is required to maintain as trustee."
- Count 3 states: "At no time has the United States provided the Nation a complete and accurate accounting of judgment funds held in trust for its benefit."

In the prayer for relief in the Court of Federal Claims complaint, the Nation asks for monetary damages in this way: "For a determination that the Defendant is liable to the Nation in damages for injuries and losses caused as a result of Defendant's breaches of fiduciary duty." *Court of Federal Claims Complaint,* Prayer for Relief ¶ 1. Given that the counts clearly allege breaches of fiduciary duty related to the "old money" and the prayer for relief broadly asks for money for breaches of the fiduciary duty, the Nation has clearly asked for "old money" and therefore overlapping relief.

Contrary to the view of the majority, the Nation's requests for restitution and disgorgement (money) in the district court overlap with its request for "damages for injuries and losses caused as a result of Defendant's breaches of fiduciary duty" (money) in the Court of Federal Claims. While it may be true that money damages is a different technical legal theory than equitable restitution or disgorgement, nonetheless the claim for money damages can access the same pot of "old money" that

the equitable claims in the district court can access. The Nation can ask for restitution for the errors revealed in an accounting and damages for errors revealed in an accounting. While these remedies have different legal names, they are both the same "old money." Simply by invoking the word "damages," the Nation cannot disclaim its allegations that the government violated its accounting duties. *See Dico*, 48 F.3d at 1203 ("That the legal theories are different does not mean that the relief is different."); *Johns-Manville,* 855 F.2d at 1566 ("ln the present case, however, the relief sought from both courts is money, but under different theories."). Rather, it is clear that the Nation requests money damages to make it whole for harms that it suffered, and a loss of "old money" for breach of accounting duties is one of the harms it repeatedly alleges in the Court of Federal Claims complaint. I am bound by § 1500 and where, as here, overlapping relief is sought, the action in the Court of Federal Claims must be dismissed.[5]

The Nation further reasons that because of the jurisdictional limitations of the two courts, we must construe

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[5] The Nation argues that the district court complaint seeks only "old money" for breach of accounting duties. While the district court complaint does ask for an equitable accounting and alleges breaches of fiduciary duties related to the "old money," it also alleges breaches which are related only to "new money." *See, e.g., District Court Complaint* at ¶ 20(f) ("failure to use reasonable skill and care to invest and deposit trust funds in such a way as to maximize the productivity of trust property"). The government, however, does not have to establish complete overlap in the relief sought in the two actions. Since the complaint in the Court of Federal Claims asks for money for failure to properly keep account of the revenue and collections ("old money") and failure to properly manage and invest ("new money"), there is overlap. We need not reach the issue therefore of whether the district court complaint likewise seeks both.

the complaints so that they do not ask for relief that is jurisdictionally precluded. The Nation asks us to cure its pleading defect by construing the complaints consistent with the court's jurisdiction which would then avoid overlapping relief. We should decline to do so.[6] Rather, we must again focus on the relief requested, and here, the complaints give no indication whatsoever that the claims are jurisdictionally bounded.

It is the Nation's responsibility, not ours, to draft two complaints requesting relief with no overlap. *See Dico,* 48 F.3d at 1204 ("[I]t is the responsibility of the plaintiff to allege, clearly and with specificity, that different claims are involved in its two actions."). If we are obligated in every case to parse the complaints based not on what the parties requested, but rather what jurisdiction entitled them to, then § 1500 would never apply. Had the Nation articulated its requests in its complaints with the subtlety that it has done on appeal, this might have been a different case. As it stands, I am compelled to conclude that the Nation's suits were based on substantially the same operative facts and that the two complaints included some overlap in the relief requested. Therefore, I respectfully dissent.

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[6] As an initial matter, the jurisdiction of the district court is irrelevant:

> The applicability of Sec. 1500 to the first claim of plaintiff, asserted in its petition herein, is not conditioned upon the question of whether the District Court had jurisdiction of the claim asserted by the plaintiff therein; and it is not necessary to the decision, upon the defendant's plea to the jurisdiction of this court, for us to discuss the question of whether or not the District Court does or does not have jurisdiction of the counterclaim filed by plaintiff therein.

Frantz Equip. Co. v. United States, 98 F. Supp. 579, 580 (Ct. Cl. 1951).

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 06-944L

THE TOHONO O'ODHAM NATION, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Dec. 19, 2007

OPINION

BRUGGINK, Judge.

This is one of numerous actions pending in this court and the federal district courts brought by Indian tribes against the United States for breach of trust. Plaintiff, the Tohono O'odham Nation ("Nation or "plaintiff"), a federally recognized Indian tribe, alleges that the United States, acting by and through the Secretary of the Interior, the Special Trustee for American Indians, and the Secretary of the Treasury, breached its fiduciary duties as trustee of various funds and property owned by the Nation. Accordingly, plaintiff, as beneficiary, seeks damages for losses resulting from defendant's alleged mismanagement of the trust funds and property. The day before filing this action, plaintiff filed a suit in district court against the United States similarly seeking to redress breaches of trust with respect

to the accounting and management of the same trust assets. Pending now is defendant's motion to dismiss pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC") for lack of jurisdiction because of the operation of 28 U.S.C. § 1500 (2000) ("section 1500"), a statutory provision that divests this court of jurisdiction to hear claims that are already pending in another court. The matter is fully briefed. Oral argument was heard on October 3, 2007. For the reasons discussed below, we grant defendant's motion to dismiss.

BACKGROUND[1]

The United States has long maintained a unique relationship with various Native American tribes, acting as trustee of tribal lands and funds for the benefit of the individual tribes. Such is the case with the lands and funds of the Tohono O'odham Nation, a tribe of approximately 26,000 members located in southern Arizona. Between 1874 and 1955, a series of executive orders and Acts of Congress established various areas of non-contiguous land as the Nation's tribal reservations. Collectively, the land is the second largest Indian reservation in the United States, consisting of nearly three million acres. The United States manages both the Nation's tribal land and any income derived therefrom. Sources of income include the sale of valuable natural resources, such as copper, sand and gravel, and the conveyance of partial interests in tribal land to third parties, such as leases, easements, and rights-of-way. In addition, the United States holds in trust money awarded from legal

[1] The facts are drawn from the two complaints, and, for purposes of this motion, are assumed to be correct.

judgments ("judgment fund") against the federal government on various claims brought by the Nation before the Indian Claims Commission. The judgment fund includes an award of $26 million to the Nation in 1976 as settlement for a takings and trespass claim against the United States.

On December 28, 2006, the Nation filed suit in the United States District Court for the District of Columbia, setting forth a variety of allegations of breach of fiduciary duties with respect to the United States' management and administration of the Nation's trust assets. The Nation's principal complaint is that the United States, as trustee, has "grossly mismanaged and continue[s] to grossly mismanage the trust and [has] failed for over a century to carry out the most basic and fundamental trust duties owed to the Nation." District Compl. ¶ 4. The district court complaint describes various examples of mismanagement, including the United States' failure to provide an adequate accounting of trust assets; failure to maintain an adequate accounting system and adequate trust records; failure to ensure that the trust assets are managed so as to yield a maximum return to the Nation; failure to collect, invest, and disburse trust funds; and improper conversion of trust funds for use by the United States.

As a result of the alleged mismanagement of the trust assets, the Nation argues that it is unable to determine the "true state of its trust assets." *Id.* ¶ 21. Specifically, the Nation is unable to determine the accurate account balances of trust funds, how much money should have been credited to the funds or paid directly to the Nation, how much of the trust property has been converted to the use of the United States, and whether the

United States obtained fair market value for the various leases and sales of trust assets. The Nation believes such instances of mismanagement constitute breaches of the United States' fiduciary duties as trustee of the Nation's assets.

The Nation characterizes its district court complaint as "an action to compel federal officials to perform a duty owed to the Nation." *Id.* ¶ 9. The Nation asks the district court for a decree delineating the fiduciary duties owed to the Nation; a decree that the United States has breached those duties; a decree directing the United States to provide a complete, accurate, and adequate accounting of all of the trust assets and to comply with its fiduciary duties; a decree "providing for the restatement of the nation's trust fund account balances in conformity with this accounting;" and "any additional equitable relief that may be appropriate (e.g. disgorgement, equitable restitution, or an injunction . . .)."[2] *Id.* Prayer for Relief ¶ 6.

On December 29, 2006, the Nation filed suit in this court. In the complaint, the Nation similarly maintains that, for over a century, the United States has owed, and continues to owe, fiduciary duties and responsibilities to the Nation as trust beneficiary. These duties include, *inter alia*, the proper management and administration of the trust; maintaining accurate accounts and adequate records; performing a complete, accurate, and adequate

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[2] The Nation also requests a declaration with respect to an accounting report prepared by Arthur Andersen LLP, an accounting firm contracted by the United States in the 1990s to reconcile the Nation's trust accounts. The Nation requests that the district court declare that the Andersen report is not a "complete, accurate, and adequate accounting" of the trust accounts. District Compl. Prayer for Relief ¶ 3.

accounting of all trust property for the Nation; maximizing the productivity of the trust assets through reasonably skillful investments; and generally exercising the highest responsibility, care, and skill in the administration of the trust.

The Nation alleges that the United States has "consistently and egregiously failed to comply with these and other fiduciary duties incumbent on a trustee and imposed on the United States." CFC Compl. ¶ 23. The alleged instances of breach include the United States' failure to administer the trust in the interest and for the benefit of the Nation, failure to keep and maintain accurate accounts with respect to the trust assets, failure to preserve the trust assets from loss, failure to collect and deposit trust funds, failure to invest trust assets so as to maximize returns, and failure to refrain from self-dealing with trust assets.

The Nation explains that its action in this court is "for money damages . . . brought to redress gross breaches of trust by the United States . . . as trustee[] of land, mineral resources and other assets." *Id.* ¶ 1. Alleged damages include losses resulting from the United States' failure to obtain fair market value or otherwise compensate the Nation with respect to the removal of natural resources from tribal lands by third parties or the use of tribal lands by third parties in the form of easements, permits, or rights-of-way. The Nation also alleges that it suffered losses from the United States' mismanagement of tribal funds, including the loss of potential investment returns. Accordingly, the Nation requests that the court determine that the United States is liable for the injuries and losses caused

by the breaches of fiduciary duty and for a determination of the amount of damages due.

The complaints closely resemble one another. The following table is a side by side comparison of portions of the allegations presented in each complaint.

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The two complaints clearly involve the same parties, the same trust corpus, the same asserted trust obligations, and the same asserted breaches of trust over the same period of time. The only apparent difference in the complaints is the focus in the district court on the equitable remedy of a trust accounting and, in this court, on money damages. We use the term "focus" advisedly. Despite its apparent emphasis on an accounting, the district court complaint specifically seeks money (disgorgement, restatement of accounts, and restitution). The complaint here, although focusing on money damages, alleges a breach through failure to provide an adequate trust accounting and it seeks relief which, as explained below, will require an accounting in aid of judgment. Whether the differences in focus are sufficient, under section 1500 jurisprudence, to prevent the overwhelming similarities from triggering the jurisdictional bar is discussed below.

DISCUSSION

The Jurisdiction of the Two Courts

This court has jurisdiction under the Indian Tucker Act, 28 U.S.C. § 1505 (2000), to allow Native American tribes the right to bring suit in the Court of Claims like any other plaintiff. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) ("the Indian Tucker Act, confers a like waiver for Indian tribal claims that 'otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe'"). This is only a jurisdictional grant to the court, however. Like the general Tucker Act, 28 U.S.C. § 1491 (2000), it is not the substance of the cause of action; that must be

found elsewhere in law.[3] In Indian trust accounting cases, absent a special jurisdictional statute, a common device in the past century, the substantive right must be found in statutes from which a trust relationship can be inferred, and one which can reasonably be construed to imply a money remedy for breach. *See United States v. Mitchell*, 463 U.S. 206 (1983).

Under none of its broader jurisdictional grants does this court have general equitable powers. This means, as plaintiff correctly points out, that the court cannot simply order an accounting as stand-alone relief. Instead, "the court has the power to require an accounting in aid of its jurisdiction to render a money judgment on that claim." *Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483, 490-91 (1966); *see also The American Indians Residing on Maricopa-Ak Chin Reservation v. United States,* 229 Ct. Cl. 167, 169 (1981). It is presumably this power which plaintiff invokes in its complaint here, when, for example it recites that,

> the United States, as trustee, has never provided the Nation a complete and accurate accounting of the revenue the United States collected . . . under mineral leases and permits. . . . Defendant breached its fiduciary duty by failing to lease such property interest for fair market value. . . . The Nation is entitled to a money damage award against the United States arising from its mismanagement of the Nation's mineral resources in an amount to be proven at trial.

CFC Compl. ¶¶ 28-30.

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[3] "It is enough, then, that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages." *White Mountain Apache*, 537 U.S. at 473.

Assuming that the plaintiff persuades this court that the statutory framework gives rise to a trust, the breach of which is remediable by the payment of money, the court then will have to hear detailed evidence from both sides about how the United States performed as trustee. The United States, as trustee, would have to meet plaintiff's prima facie case of breach with a full accounting for its conduct. In short, assuming this action were to proceed in this court, and plaintiff satisfied its burdens of proof, what would ensue would amount to an accounting, albeit in aid of judgment.

As to the district courts, Congress enacted a statute in 1966 giving them jurisdiction to hear suits brought by tribes arising under the Constitution, laws or treaties of the United States. *See* 28 U.S.C. § 1362 (2000) ("section 1362"). Native American tribes thus may bring suit in district court like any other plaintiff. *See Sac & Fox Nation of Okla. v. Cuomo*, 193 F.3d 1162, 1165 n.3 (10th Cir. 1999) ("[28 U.S.C. § 1362] affords jurisdiction of suits by Indian Tribes that involve federal questions"). Like the Tucker Act and the Indian Tucker Act, section 1362 has been treated as waiving sovereign immunity but not creating a cause of action. The cause of action must come from some other provision in law that is within the jurisdiction of the district court. In this case, plaintiff cites 28 U.S.C. § 1331 ("section 1331") (federal question jurisdiction) and 5 U.S.C. § 706 (actions under the Administrative Procedures Act).

Judicial review under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 500 *et seq.* (2000), is available "when there is no other adequate remedy in a court." *Id.* § 704. Jurisdiction is unavailable, however, under the APA when the action seeks "money damages." *See*

id. § 702. Presumably, this is what prompts plaintiff to urge us to ignore as "non-operative" those portions of the district court complaint that appear to seek money. It is unclear, however, whether plaintiff genuinely does not seek any monetary relief from the district court, or if plaintiff wants monetary relief but views it as different than what is available here and thus not problematic under the APA. During oral argument, the court asked plaintiff's counsel if plaintiff would be willing to disavow monetary relief in the district court. Counsel declined to do so:

> [T]he government says that equitable remedies, like disgorgement and restitution, are monetary relief. We think that's dead wrong, but if that's what they mean by "monetary relief," then I can't agree that we're not seeking those equitable—what we view as equitable and they view as monetary—then I certainly can't agree that we're not seeking that in District Court. We are entitled to the full panoply of remedies that a court of equity has.

Tr. 37-38, Oct. 3, 2007. This is consistent with the district court prayer for relief, in which plaintiff asks for a decree providing for a restatement of account balances in conformity with the accounting balances and for "any additional equitable relief that may be appropriate (e.g. disgorgement, equitable restitution, or an injunction . . .)." District Compl. Prayer for Relief ¶ 6. There is thus nothing "inoperative" about this request, or the allegations of mismanagement and self-dealing that lead up to it.

In any event, for purposes of section 1500, even if the district court does not have jurisdiction over the monetary relief sought, it is the "relief requested," *Keene*

Corp. v. United States, 508 U.S. 200, 212 (1993), not the "relief available" that is relevant. *See Frantz Equip. Co. v. United States*, 120 Ct. Cl. 312, 314 (1951) ("The applicability of [section 1500] . . . is not conditioned upon the question of whether the District Court had jurisdiction of the claim asserted by the plaintiff therein"). Indeed, even if the district court action had been dismissed in the interim, the inquiry would still be whether, assuming section 1500 is a bar, the district court proceeding was pending at the time the action in this court was initiated.[4]

Section 1500

Section 1500 deprives the court of jurisdiction "of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States. . . . " 28 U.S.C. § 1500. Section 1500 thus protects the United States from being forced to defend against duplicative suits.

The history of section 1500 is nearly as long and storied as that of this court and its predecessor, the United States Court of Claims. Following the Civil War, owners of seized southern cotton brought suit under The Captured and Abandoned Property Act of 1863 for the

[4] Even if any misgivings we had about the district court's jurisdiction to grant monetary relief, *see The Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 139 n.10 (2004), were relevant under section 1500, as plaintiff points out, under *Bowen v. Massachusetts*, 487 U.S. 879 (1988), it is not inconceivable that the district court could construe the request for monetary relief as not "money damages" under the APA. While this might persuade the district court to retain jurisdiction, it does not mean that the plaintiff does not seek money. As we discuss below, we view the concerns of section 1500 to be the overlap in the ultimate relief, however characterized in terms of legal theory.

value of the seized cotton upon a showing that the claimant had not given aide to the Confederacy. *See* Paul F. Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 Am. U. L. Rev. 301, 303 (1997). Many claimants also brought suit in the local district courts against the Treasury officers who had seized the property. *Id.* In response, Congress in 1868 adopted the predecessor to what is now codified as section 1500.[5]

The feature of section 1500 that is controverted here is the question of whether the complaints involve the same "claim." The first reported decision of the modern era dealing with the meaning of the term "claim" in section 1500 was *British American Tobacco v. United States*, 89 Ct. Cl. 438 (1939).[6] The Court of Claims there held that the contract suit was barred when another action in district court sought monetary recovery in tort based on the same set of operative facts. *Id.* at 440. "[T]he word 'claim,' as used in [the statute] has no reference to the legal theory upon which a claimant seeks to enforce his demand if it appears, as it does here, that the defendant in a suit in another court was, in respect of the subject matter or property in respect of which the claim was made . . . . " *Id.* The "operative facts" or "subject matter" of the claim were thus the determinative factor rather than the legal theory asserted.

In *Casman v. United States*, 135 Ct. Cl. 647 (1956), the court held that the plaintiff's claim for back pay was not barred by section 1500 even when a suit based on the identical set of facts for employment reinstatement was

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[5] 15 Stat. 75, 77 (June 25, 1868).

[6] The statute applied in *British American* was a predecessor to section 1500 and was the same in substance as 28 U.S.C. § 1500.

pending in district court. *Id.* at 650. The court noted that the purpose of section 1500 was to force plaintiffs to elect between the Court of Claims and another court in which to pursue its whole claim against the government. *Id.* at 649 (citing *Matson Navigation Co. v. United States*, 284 U.S. 352, 355-56 (1932)). The plaintiff's suit in the Court of Claims was not barred because the equitable relief requested in district court was not available in the Court of Claims. *Id.* at 650. The court stated that section 1500 did not require plaintiffs to elect between monetary and equitable relief. *Id.*

In *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed. Cir. 1988), the Federal Circuit upheld the dismissal of plaintiff's suit for contractual indemnification in the United States Claims Court[7] because plaintiff had pending a claim based on the identical facts brought under the Federal Tort Claims Act[8] in district court. *Id.* at 1567-68. Both complaints sought recovery of costs and expenses. The Federal Circuit revisited section 1500 in *The Boston Five Cents Sav. Bank, FSB v. United States*, 864 F.2d 137 (1988). There, the Federal Circuit allowed a suit for money damages in the Claims Court while a similar suit seeking declaratory judgment was pending in the district court. *Id.* at 139-40 (citing *Casman*, 135 Cl. Ct. [*sic*] at 649-50). The court held that although the complaints were identical, *Johns-Manville* did not apply because monetary damages were only available in the Claims Court. *Id.* at 140.

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[7] Prior to 1992, this court was known as the United States Claims Court. We refer to the court as it was called at the time of decision cited.

[8] Codified at 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-80 (2000).

The issue reached the Supreme Court in *Keene Corp. v. United States*.[9] The Court held that "dismissal would turn on whether the plaintiff's other suit was based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested. That the two actions were based on different legal theories did not matter." 508 U.S. at 212 (citing *British American*, 89 Ct. Cl. at 440) (internal citations omitted). Because the issue was not before it, the Court declined to "decide whether two actions based on the same operative facts, but seeking completely different relief, would implicate § 1500." *Id.* at 213 n.6. The Court limited *Casman* to situations in which the relief was completely different in both suits. *Id.* at 214 n.9, 216 (citing *Johns-Manville*, 855 F.2d at 1566-67; *Boston Five Cents*, 864 F.2d at 139).

The Court also addressed the concern that section 1500's anachronistic character prevented some claimants from asserting rights that Congress had otherwise granted them.[10] The Court dismissed this argument,

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[9] In *Keene*, the plaintiff had been sued in district court by various individuals for asbestos related injuries. Plaintiff filed a third-party complaint against the United States seeking indemnification because it used the asbestos pursuant to government specifications. It subsequently filed two complaints in the Court of Claims (eventually transferred here) seeking damages from the cost of litigating and settling the asbestos litigation. The Court held that claims in this court were barred by the application of section 1500. 508 U.S. at 202.

[10] The court stated that the trial judge in *Keene* was not the first to call the statute "anachronistic" and even noted that some have argued that the statute has never really performed its intended function. 508 U.S. at 217 (citing *A.C. Seeman, Inc. v. United States*, 5 Cl. Ct. 386, 389 (1984)); *see also* Gregory Schwartz, Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents, 55 Geo. L.J. 573, 579 (1967).

stating that, "the 'proper theater' for such arguments, as we told another disappointed claimant many years ago, 'is the halls of Congress, for that branch of the government has limited the jurisdiction of the Court of Claims.'" *Id.* at 217 (quoting *Smoot's Case*, 82 U.S. 36, 45 (1873)).

The Federal Circuit subsequently addressed section 1500 in light of the *Keene* decision in *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (1994). In *Loveladies*, the plaintiff was denied a wetlands development permit and filed suit in the District Court for the District of New Jersey, challenging the denial under the APA. While an appeal was pending before the Third Circuit, the owner brought suit in the Claims Court under a theory of regulatory taking.[11] This court heard the case, ruled for plaintiff, and awarded damages. The government appealed on the basis of section 1500. The Federal Circuit articulated a two-part test for the application of section 1500. "For the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from the same operative facts, and must seek the same relief." 27 F.3d at 1551. Applying the test, the Federal Circuit upheld the judgment in plaintiff's favor, holding that the two complaints sought entirely different relief. *Id.* at 1554.

Plaintiff seizes on the use of the term, "same relief" in *Loveladies*, arguing, in effect, that the relief must be identical before section 1500 is triggered. Plaintiff ignores, however, other language in *Loveladies*. The court described the issue as "whether § 1500 denies jurisdiction to the Court of Federal Claims if, at the time a com-

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[11] *See* 21 Cl. Ct. 153 (1990).

plaint for money damages is filed, there is a pending action in another court that seeks *distinctly different relief*." *Id.* at 1549 (emphasis supplied). Elsewhere the court iterates the inquiry: "If the claims are distinctly different, Loveladies are excused from the jurisdictional dance required by § 1500." *Id.* The two suits, were, of course, distinctly different. The district court proceeding was a routine suit for injunctive and declaratory relief under section 1331 and the APA; the suit here sought compensation for a taking.

In short, we have to assume that the Federal Circuit intended by "same relief" to mean that two complaints seek relief that is not "distinctly different." That reading of *Loveladies* is, in any event, compelled by the controlling language of *Keene*. The Court viewed the precedent as dictating dismissal when "plaintiff's other suit was based on substantially the same operative facts . . . at least if *there was some overlap in the relief requested*. . . . Congress did not intend the statute to be rendered useless by a narrow concept of identity. . . . " 508 U.S. at 212-13 (emphasis supplied). Later, the Court noted that the *Casman* exception applied when a plaintiff sought "distinctly different types of relief" in the two courts. *Id.* at 214 n.9.

In sum, we believe that the inquiry is whether there is meaningful overlap both in the underlying facts and in the relief sought in the two actions. A perfect symmetry of demands for relief is not necessary.

As we indicated above, there can be no meaningful dispute about the first prong of the claim test: the operative facts asserted in the complaint are, for all practical purposed, identical. Plaintiff has included language in both complaints alleging mismanagement and lack of

prudent investment. *Compare* District Compl. ¶¶ 1-4, 20 *with* CFC Compl. ¶¶ 1, 23 (both complaints include the duties to account, keep adequate records, refrain from self-dealing, preserve trust assets, and invest prudently as to maximize return). Both complaints allege breaches of the same previously listed duties. *Compare* District Compl. ¶ 20 *with* CFC Compl. ¶ 23. It is also undisputed that plaintiff is alleging these breaches in relation to the same trust corpus (lands, buildings, mineral resources, rights in property, and tribal funds). The underlying facts are the same.

We view plaintiff's real argument to be that, because, traditionally, district courts do equity and this court gives monetary relief, whatever relief the district court grants is *per se* not duplicative of what this court can do. The fact that the plaintiff has asked for what looks like overlapping relief (money and an accounting in both courts) thus becomes immaterial. As a matter of law, the powers of the courts are different so there cannot be the same "claim" pending for purposes of section 1500.

There are at least two major problems with that approach. The first we have already discussed. Under section 1500, the courts is not obligated to parse the complaint to eliminate allegations or requests for relief that are jurisdictionally unsound. The language of the complaints controls. Moreover, for section 1500 purposes, the legal theory behind the allegations or the characterizations of the requests for relief are not controlling. As a practical matter, will the same background facts be relevant, and will the relief, in substance, be the same? Here, we think it is obvious that there is virtually 100 percent overlap.

The more principled reason that this literal application of section 1500 is appropriate has to do with the unique character of Indian trust claims. Unlike regulatory disputes, suits brought by Indian tribes, claiming a breach of trust, do not neatly separate between the exclusively injunctive relief typical in a district court APA review of agency action on the one hand, and, on the other hand, a suit here for money damages flowing from the consequences of that agency action. In substance, the action for breach of trust in this court is an equitable proceeding that produces a monetary remedy. Thus while the court has jurisdiction because of the demand for money, the process for getting to that relief is fundamentally equitable, meaning that there is potential overlap of both the accounting and money aspects of the two complaints.

Even though a traditional common law breach of trust claim is an action in equity, *see Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990), equitable remedies for breach of trust include the recovery of money. As is explained in the Restatement (Second) of Trusts, in addition to seeking purely injunctive or declaratory relief, the beneficiary can recover any loss or depreciation in value of the trust estate resulting from the breach of trust, any profit made by the trustee, or any profit which would have accrued to the trust estate if there had been no breach of trust. Restatement (Second) of Trusts § 205 (1959).[12]

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[12] *See* Comments to § 205:

a. Alternative remedies for breach of trust. If the trustee commits a breach of trust, the beneficiary may have the option of pursuing a remedy which will put him in the position in which he was before the trustee committed the breach of trust; or of pursuing a remedy which

Section 205 of the Restatement's revision of the Prudent Investor Rule makes clear that a trustee can be held responsible to the beneficiary for "the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered." Restatement (Third) of Trusts, Prudent Investor Rule § 205(b) (1992). The comments to that section support our holding that the equitable relief available for a breach of trust includes profits lost due to mismanagement and improper investment:

> will give him any profit which the trustee has made by committing the breach of trust; or of pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust.
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> . . . .
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> Comment on Clause (c):
>
> *i. Failure to make a profit.* If the trustee commits a breach of trust, he is chargeable with any profit which would have accrued to the trust estate if he had not committed such a breach of trust.
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> This rule is applicable to income as well as principal. Thus, if the trustee in breach of trust fails to make the trust property productive he is liable for the amount of income which he would have received if he had not committed the breach of trust (see § 207).

The same point is stated in Pomeroys Equity Jurisdiction § 158:

> A court of equity will always by its decree declare the rights, interests, or estate of the *cestui que trust*, and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the *final* relief to be obtained by the *cestui que trust* consists in a recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confied to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust. . . .

John N. Pomeroy, A Treatise on Equity Jurisprudence § 158 (Spencer Symons ed., 5th ed. 2002).

> If the breach of trust causes a loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration, the beneficiaries may surcharge the trustee for the amount necessary to compensate fully for the consequences of the breach. Thus, the recovery for an improper investment by a trustee would ordinarily be the difference between (1) the value of the investment and its income and other product at the time of surcharge and (2) the amount of the funds expended in making the investment, increased (or decreased) by the amount of the total return (or negative total return) that would have accrued to the trust and its beneficiaries if the funds had been properly invested.

Id. § 205 cmt. i.

Sections 208-211 of the Restatement (Second) deal specifically with liability of the trustee for selling property it was his duty to retain, liability for failing to sell trust property that he had a duty to sell, liability for purchasing property it was not his duty to purchase, and liability for failing to purchase property it was his duty to purchase.[13] *See also* Restatement (First) of Restitu

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[13] Section 207, Liability for Interest, presupposes a monetary recovery for breach of trust:

> (1) Where the trustee commits a breach of trust and thereby incurs a liability for a certain amount of money with interest thereon, he is chargeable with interest . . . .
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> (2) Where the trustee is chargeable with interest, he is chargeable with simple and not compound interest, unless
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> (a) he has received compound interest, or
>
> (b) he has received a profit . . . , or
>
> (c) it was his duty to accumulate the income.

tion § 49(f) (1937) (stating that a person entitled to restitution may received a number of remedies including "decree in equity for the payment of money").

In short, not only can the trustee be forced to return money to the trust account, the trustee can also be compelled to put new money into the account.[14] Thus the aspects of the district court request for relief, which plaintiff characterizes as unique because they arise in equity, are nevertheless the same requests for relief which give this court jurisdiction. The fact that the money comes from a cause of action in equity is immaterial. This is a critical part of the holding in *White Mountain Apache*, where Justice Souter wrote that, once a specific fiduciary duty is established, "general trust law [is to be] considered in drawing the inference that Congress intended damages to remedy a breach of obligation." 537 U.S. at 477. *See also Mitchell*, 463 U.S. at 225-26 (holding that the fiduciary obligations at issue could be fairly interpreted as mandating compensation, given that the existence of a trust exposes the trustee to liability for damages should it breach its obligations)

Restatement (Second) of Trusts § 207 (1959).

[14] At oral argument, plaintiff's counsel attempted to assure the court that monetary relief in district court would consist only of money already somewhere in the government's possession (old money), and that the money damages in this court would consist entirely of "new money," *i.e.*, money that should have been earned but never was. Regardless of plaintiff's intent, it is without question that equitable remedies for breach of trust, as shown by the above quoted authorities, are concerned with far more than just "old money." Similarly, in this court, no distinction is to be found between money "old" and "new." Rather, if successful, a plaintiff is made whole, to the extent possible, by the payment of money for the government's breaches of trust. That remedy is sought in both courts and thus section 1500 is implicated.

(citing Restatement (Second) of Trusts §§ 205-212 (1959)); *The Navajo Nation v. United States*, 501 F.3d 1327, 1343 (Fed. Cir. 2007) ("Where the government exercises actual control within its authority neither Congress nor the agency needs to codify such actual control for a fiduciary trust relationship that is enforceable by money damages to arise") (citing *White Mountain Apache*, 537 U.S. at 475); *The Shoshone Indian Tribe of the Wind River Reservation v. United States*, 58 Fed. Cl. 77, 82 (2003) (holding that plaintiff had established the existence of fiduciary duties and that it could thus recover money damages for any breach of those duties).

Plaintiff's argument, that, under *Bowen*, the transfer of money does not change equitable relief into money damages, *see* 487 U.S. at 893-94, is thus irrelevant. Although the Court held that the term "money damages" found in 5 U.S.C. § 702 was distinct from the more general meaning of "monetary relief," 487 U.S. at 896-901, section 1500 makes no such distinction.

As this court has held, and the Supreme Court has acknowledged, it is the form of the relief (money) that is relevant. *Harbuck v. United States*, 58 Fed. Cl. 266, 269 (2003) (citing *Keene*, 508 U.S. at 212), *aff'd*, 378 F.3d 1324 (2004). However characterized, the calculus involved in determining how much money the plaintiff is owed would be the same in both courts. Although plaintiff refers to the money requested here as "damages," the action here is for a breach of trust, and the means for proving breach and financial injury would be the same as in the district court.[15]

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[15] "The inclusion of other and different requested relief in the two complaints does not avoid the application of [section 1500]. As long as the same relief is sought in both cases—here money damages—the sec-

In addition, as we discussed above, although a preliability, stand-alone general accounting is unavailable in this court, after a presentation of sufficient evidence, an accounting is unavoidable here and will be coextensive with all the plaintiff's claims of breach. The accounting is necessary to establish the quantum of damages. Independent, therefore, of the monetary relief aspects of the two complaints, there is overlap in the request for an accounting. Both actions, in sum, seek a restatement of accounts, restitution, and disgorgement and both will require an accounting. There is plainly substantial overlap in the operative facts as well as in the relief requested. That being the case, unfortunately for plaintiff, section 1500 is a bar.[16]

CONCLUSION

Section 1500 divests this court of jurisdiction over plaintiff's claim because it arises from the same operative facts and seeks the same relief as the claim in district court. Accordingly, defendant's motion to dismiss is granted. The clerk is directed to dismiss the complaint without prejudice for lack of jurisdiction pursuant to RCFC 12(b)(1). No costs.

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ond prong of the [section 1500] requirement . . . is satisfied." *Harbuck v. United States*, 378 F.3d 1324, 1329 (Fed. Cir. 2004) (citing *Keene*, 508 U.S. at 212) (internal citations omitted).

[16] We recognize that, if the filing dates of the complaints had been reversed, section 1500 would not be a problem and the two courts would use traditional principles of comity, collateral estoppel, and res judicata to sort out any duplication. While this illustrates the lack of need for section 1500 and its arbitrariness, we can do no more than make this observation and suggest that plaintiff attempt a legislative solution through a congressional reference or a new jurisdictional statute.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2008-5043

TOHONO O'ODHAM NATION, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

[Filed Aug. 18, 2009]

Appeal from the United States Court of Federal Claims in 06-CV-944, Senior Judge Eric G. Bruggink

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ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellee, and a response thereto having been invited by the court and filed by the Appellant, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on August 25, 2009.

FOR THE COURT,

JAN HORBALY
JAN HORBALY
Clerk

Dated: 08/18/2009

cc: Keith M. Harper
Aaron P. Avila

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS

NO. 06-944 L

THE TOHONO O'ODHAM NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Dec. 29, 2006]

COMPLAINT FOR DAMAGES FOR BREACH OF TRUST OBLIGATIONS

I. GENERAL NATURE OF THE ACTION

1. This action is an action for money damages against the United States, brought to redress gross breaches of trust by the United States, acting by and through Dirk Kempthorne, Secretary of the Interior ("Kempthorne"), Ross Swimmer, Special Trustee for American Indians ("Swimmer"), and Henry M. Paulson, Secretary of the Treasure ("Paulson"), and their predecessors in office and subordinates, as trustees and trustee-delegates of land, mineral resources and other assets held by them for the benefit of the Tohono O'odham Nation ("Nation"). As set forth more fully below, this case arises out of Defendant's continuing material breaches of statutory, regulatory, and fiduciary duties owed to the Nation and the Nation seeks damages

for Defendant's mismanagement of the Nation's trust property.

II. THE PARTIES

2. Plaintiff, the Nation, formerly known as the Papago Tribe, is a federally recognized Indian tribe with over 26,000 members. It is the beneficiary of real property, and the proceeds therefrom, held by the United States as trustee.

3. Defendant United States acts as trustee for certain tribal lands, monies, and other assets belonging to the Nation. The United States has principally delegated its trust responsibilities to the Secretary of the Interior and the Secretary of the Treasury.

4. Mr. Kempthorne is the Secretary of the Interior, and chief officer of the Department of the Interior. As such, Secretary Kempthorne is charged by law with, *inter alia*, carrying out the duties and responsibilities of the United States as trustee for the plaintiff.

5. Mr. Swimmer is the Special Trustee for American Indians, a sub-cabinet level officer appointed by the President of the United States with the advice and consent of the Senate, who reports directly to the Secretary of the Interior. Some of Mr. Swimmer's duties are delineated in the Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4041-46 (2000).

6. Mr. Paulson is the Secretary of the Treasury, and as such is the custodian of trust funds. Secretary Paulson is, *inter alia*, responsible for maintaining records in connection with such funds.

III. JURISDICTION

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1491 and 1505.

8. The United States has waived its sovereign immunity under 28 U.S.C. §§ 1491 and 1505. *See United States v. Mitchell*, 463 U.S. 206, 228 (1983) (*"Mitchell II"*).

IV. THE TRUST OBLIGATIONS OF THE UNITED STATES WITH RESPECT TO THE NATION

9. The tribal lands of the Nation were established by several Executive Orders and Acts of Congress issued between 1874 and 1955. These tribal lands are composed of non-contiguous areas in Southern Arizona, including the San Lucy District, the San Xavier District, and the Papago Reservation (collectively the "Nation Reservation"). The Nation Reservation is the second largest Indian reservation in the Untied States.

10. The Papago Reservation, also known as the Sells Reservation, is the largest segment of the Nation Reservation, and it occupies portions of Maricopa, Pinal, and Pima Counties in Arizona. This segment of the Nation Reservation was initially established by Executive Order of January 14, 1916 by President Woodrow Wilson, and its boundaries were subsequently modified by additional Executive Orders and Acts of Congress. It currently consists of approximately 2,800,000 acres of land and is considered the "main reservation."

11. The San Lucy District, also known as the Gila Bend Indian Reservation, is a non-contiguous segment of the Nation Reservation, and is separated from the main reservation. This portion of the Nation Reservation lies near Gila Bend, Arizona. It was initially formed

by Executive Order of December 12, 1882 by President Chester A. Arthur and reduced in size by Executive Order of June 17, 1909, by President William Howard Taft. It currently consists of approximately 3,800 acres of land.

12. The San Xavier District is a non-contiguous segment of the Nation Reservation and is separated from the main reservation. This portion of the Nation Reservation, originally formed through Executive Order of July 1, 1874 by President Ulysses S. Grant, is west of Tucson, Arizona, and consists of approximately 69,189 acres of land.

13. The Nation Reservation is held in trust by the United States for the benefit of the Nation, and it is managed by the Department of the Interior.

14. Pursuant to Act of Congress of May 27, 1955, Pub. L. No. 106-47, 69 Stat. 67 (repealing 25 U.S.C. § 463(b)(1)-(2)), Congress clarified that the mineral estate of the Nation's lands belong to the Nation. Consequently, the mineral rights on the Nation Reservation are managed by the Defendant as trustee for the benefit of Nation.

15. A substantial portion of the funds held by the United States in trust for the Nation is derived from income from tribal lands. Title to the land comprising the Nation Reservation is held in trust by the United States, with the Nation as beneficial owner of the land and associated natural resources, which include, *inter alia*, valuable mineral reserves, such as copper, other minerals, sand, and gravel.

16. Income is derived from, *inter alia*, the sale of the natural resources and the conveyance of certain inter-

ests in the Nation's tribal trust land, including leases, easements, and rights of ways. These assets, and the income they produce, form the core of the Nation's tribal trust assets.

17. Additional assets held in trust by the United States for the Nation's benefit are derived from a judgment on various claims brought by the Nation against the United States. This includes claims brought under the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049 (1946). On July 21, 1976, the Indian Claims Commission approved a settlement award of $26 million ($26,000,000) on behalf of the Nation as compensation for 6.3 million acres of aboriginal tribal lands that were taken by the United States. *See Papago Tribe of Ariz. v. United States*, Docket Nos. 102, 345, 38 Ind. Cl. Comm. 542, 542-43 (1976). Funds to cover the award were appropriated on September 30, 1976. Act of Sept. 30, 1976, 90 Stat. 1416 (1976). The United States undertook to manage, invest, and distribute these judgment funds as trust assets for the benefit of the Nation. On January 3, 1983, Congress enacted legislation requiring that fifty percent (50%) of the judgment funds be held in trust by the Secretary of Interior for the benefit of the Nation and be "administered or invested by the Secretary for the best interest of the tribe under existing law." Act of Jan. 3, 1983, Pub. L. No. 97-408, § 8, 96 Stat. 2035, 2035 (1983). The remaining fifty percent of such funds were to be held and administered by the Secretary for per capita distribution. *Id.*

18. Because the United States engages in pervasive management and control of the Nation's tribal assets pursuant to federal statutes and regulations, as more fully described below, the government has assumed the

fiduciary obligations of a trustee. *Mitchell II*, 463 U.S. at 225. As a trustee, the United States is charged with "'moral obligations of the highest responsibility and trust' . . . and its conduct 'should therefore be judged by the most exacting fiduciary standards.'" *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)) ("*Cobell VI*").

19. The century-long trust relationship between the United States and the Nation, and the resultant fiduciary responsibilities incumbent on the United States, are rooted in and derived from a number of statutes, regulations and executive orders. *See, e.g.*, Indian Nonintercourse Act, 25 U.S.C. § 177; Indian Long-Term Leasing Act, 25 U.S.C. § 396; Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-96g; Federal Oil & Gas Royalty Management Act, 30 U.S.C. § 1701, *et seq.*; Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-08; Indian Trust Fund Managment Reform Act of 1994, 25 U.S.C. §§ 161a, 162a, 4001-61; 25 U.S.C. § 152; 25 U.S.C. §§ 157-58, 160; 25 U.S.C.§§ 155-55b; 25 U.S.C. §§ 161a, 161b, 162a, 413; 25 U.S.C. §§ 311-12, 318a, 319, 321, 323-28; 25 U.S.C. § 397; 25 U.S.C. § 398, 398a-98e; 25 U.S.C. § 399; 25 U.S.C. §§ 415-16j; 31 U.S.C. § 1321(a); 25 C.F.R. pt. 87; 25 C.F.R. pts. 150-51; 25 C.F.R. pt. 162; 25 C.F.R. pt. 166; 25 C.F.R. pt. 169; 25 C.F.R. pt. 211; 25 C.F.R. pt. 216; 25 C.F.R. pt. 225; 30 C.F.R. pt. 206; and 43 C.F.R. § 3590.2. The foregoing list is representative only, and does not exhaust the potential sources of fiduciary duties owed to the Nation by the United States, as trustee for the Nation's tribal resources.

20. Among other things, the Indian Trust Fund Management Reform Act of 1994 ("Trust Reform Act") created the Office of the Special Trustee for American Indians and reaffirmed and clarified the United States' preexisting fiduciary duties as derived from the relevant statutes and treaties. *Cobell VI*, 240 F.3d at 1090, 1096. The Trust Reform Act was implemented to "'provide more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities,' and [to] ensure proper reform measures are implemented." *Id.* at 1090 (quoting 25 U.S.C. § 4042(b)(1)). It was "a remedial statute designed to ensure more diligent fulfillment of the government's obligations. It recognized and reaffirmed what should be beyond dispute—that the government has longstanding and substantial trust obligations to Indians. . . . " *Id.* at 1098. The Trust Reform Act did not create the United States' fiduciary duties, and it does not, and was not intended to, serve as the sole source of those duties or of the Nation's rights. *Id.* at 1100.

21. The statutes, regulations, and executive orders giving rise to the United States' fiduciary duties provide the "general contours" of those duties, but the details are filled in through reference to general trust law. *Id.* at 1098-99; *Mitchell II*, 463 U.S. at 226. Where Congress, as here, has used terms of art in defining the federal government's responsibilities with respect to tribal trust funds, "[c]ourts 'must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequicocally expressed an intent to the contrary.'" *Cobell VI*, 240 F.3d at 1099 (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981)).

22. As trustee of the Nation's tribal trust assets, the Defendant owes, and has owed, since the inception of the tribal trust program, certain traditional fiduciary duties and responsibilities to Indian tribes as trust beneficiaries. The duties Defendant owes to the Nation, include, but are not limited to, the duty to:

a. Properly administer the trust;

b. Administer the trust solely in the interest of the Nation;

c. Keep and render clear and accurate accounts with respect to the administration of the trust, by maintaining adequate books and records with respect to the trust property, including, but not limited to, records of leases and other contractual arrangements giving rise to income from the trust property and records of the investment of tribal trust assets;

d. Furnish complete and accurate information to the Nation as to the nature and amount of trust assets, by performing a complete, accurate, and adequate historical accounting of all the trust property, with such accounting containing sufficient information to enable the Nation to readily ascertain whether the trust has been and is being faithfully carried out;

e. Exercise the "highest responsibility," care, and skill in the administration of the trust;

f. Preserve the trust assets and protect them from loss, theft, or damage;

g. Keep the trust assets of the Nation separate from other property not subject to the trust;

h. Properly collect and deposit the trust funds of the Nation;

i. Make the assets of the trust productive for the benefit of the Nation, by using reasonable skill and care to invest and deposit trust funds in such a way as to maximize the productivity of trust property within the constraints of law; and

j. Refrain from self-dealing or otherwise benefitting from management of trust property.

V. BREACHES OF TRUST BY THE DEFENDANT

23. The United States has consistently and egregiously failed to comply with these and other fiduciary duties incumbent on a trustee and imposed on the Untied States by statute, and it continues to violate the Nation's rights as beneficiary of the trust. These breaches of trust include, but are not limited to:

a. Failure to properly administer the trust for the benefit of the Nation;

b. Failure to administer the trust solely in the interest of the Nation;

c. Failure to keep and render clear and accurate accounts with respect to the administration of the trust;

d. Failure to furnish complete and accurate information to the Nation as to the nature and amount of trust assets;

e. Failure to exercise the "highest responsibility," care, and skill in the administration of the trust;

f. Failure to preserve the trust assets and protect them from loss, theft, or damage;

g. Failure to keep the trust assets of the Nation separate from other property not subject to the trust;

h. Failure to properly collect and deposit the trust funds of the Nation;

i. Failure to make the assets of the trust productive for the benefit of the Nation;

j. Failure to invest and deposit trust funds in such a way as to maximize the productivity of trust property within the constraints of law; and

k. Failure to refrain from self-dealing or otherwise benefiting from management of trust property.

24. By reason of the Defendant's egregious breaches of its fiduciary duties owed to the Nation, the Plaintiff has been damaged in such amounts as may be proven at trial plus interest as allowed by law.

COUNT I

Damages Resulting from the United States' Breach of Fiduciary Duty with Respect to the Management of the Nation's Mineral Estate.

25. All allegations set forth in paragraphs 1 through 24 of this Complaint are incorporated by reference as if fully set forth herein.

26. The United States has maintained a comprehensive regulatory framework for the pervasive control over the management of the natural resources, including mineral rights, on the Nation's land held in trust by Defen-

dant. This includes, but is not limited to, management of copper, sand, and gravel resources.

27. As trustee, the United States has entered into and approved leases and issued permits to third parties for the removal of mineral resources from the Nation's trust property. Compensation for the lease interests and payments for the removal of such resources are to be paid to the United States as trustee for the Nation. Such funds are required to be collected and deposited in the United States Treasury in trust for the benefit of the Nation. The United States continues to hold funds belonging to the Nation, including funds derived from the lease and removal of mineral estates, in trust for the benefit of the Nation.

28. The United States, as trustee, has never provided the Nation a complete and accurate accounting of the revenue the United States collected or was required to collect, under mineral leases and permits. Nor has it provided the Nation complete records of such leases and permits it is required to maintain as trustee.

29. As trustee, the United States was required to enter into and approve leases and issue permits for interests in mineral rights for not less than fair market value. However, upon information and belief, Defendant breached its fiduciary duty by failing to lease such property interest for fair market value and failing to collect fair and reasonable compensation for the benefit of the Nation. The Nation has been damaged by the failure of Defendant to obtain for the benefit of the Nation fair and reasonable compensation for its mineral resources.

30. The Nation is entitled to a money damage award against the United States arising from its mismanage-

ment of the Nation's mineral resources in an amount to be proven at trial.

COUNT II

Damages Arising from the United States' Breach of Fiduciary Duty with Respect to the Management of the Nation's Non-Mineral Estate.

31. All allegations set forth in Paragraphs 1 through 30 of this Complaint are incorporated by reference as if full [*sic*] set forth herein.

32. The United States has maintained a comprehensive regulatory framework for the pervasive control over the management of non-mineral leases and agreements for interests in land on the Nation Reservation held in trust by Defendant. This includes, but is not limited to, the negotiation of easements, rights of way, and land and building leases. *See Mitchell II*, 463 U.S. at 223.

33. The United States, as trustee, has never provided the Nation a complete and accurate accounting of the revenue the United States collected or was required to collect, in granting easements and rights of way and leasing tribal properties. Nor has it provided the Nation complete records of such transactions which it is required to maintain as trustee.

34. As trustee, the United States was required to enter into and approve leases and grant easements and rights of way for not less than fair market value. However, upon information and belief, Defendant breached its fiduciary duty by failing to lease such property interests and grant easements and rights of way for fair market value, and to collect fair and reasonable compensation for the benefit of the Nation. The Nation has been damaged by the failure of Defendant to obtain for the

benefit of the Nation fair and reasonable compensation for the use of its land.

35. The Nation is entitled to a money damage award against the United States arising from its mismanagement of the non-mineral interests in the Nation's trust land in an amount to be proven at trial plus interest as allowed by law.

COUNT III

Damages Arising from the United States' Breach of Fiduciary Duty with Respect to the Management of Judgment Funds.

36. All allegations set forth in paragraphs 1 through 35 of this Complaint are incorporated by reference as if fully set forth herein.

37. Judgments obtained against the United States have been held in trust by the United States for the benefit of the Nation. The United States, through statutes and regulations, maintains pervasive control over the management, distribution and investment of those funds. The United States is charged with exercising the highest fiduciary duty in managing these trust assets. *See Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States*, 69 Fed. Cl. 639, 656 (2006).

38. At no time has the United States provided the Nation a complete and accurate accounting of judgment funds held in trust for its benefit.

39. In breach of its fiduciary duty owed to the Nation, the United States has failed to invest, and continues to fail to invest, the principal and earnings of judgment funds held in trust, in a timely manner. In addition, the United States has failed to invest trust funds to

obtain the maximum investment returns possible, consistent with its obligations as a fiduciary.

40. These breaches of fiduciary duty owed by the United States to the Nation has caused and continues to cause damage to the Nation in an amount to be proven at trial plus interest as allowed by law.

COUNT IV

Damages Arising from the United States' Breach of Fiduciary Duty with Respect to Deposit and Investment of Trust Funds.

41. All allegations set forth in paragraphs 1 through 40 of this Complaint are incorporated by reference as if fully set forth herein.

42. The United States, as trustee, maintains pervasive control over the management and investment of funds held in trust for the benefit of the Nation, including proceeds from leases, permits, easements and rights of way, judgement funds and general tribal funds as well as "Indian Moneys Proceeds of Labor" (IMPL) funds. The United States, accordingly, has undertaken the highest fiduciary obligations to invest trust funds with the care, skill, and caution that a prudent investor would exercise under the circumstances. In addition, it is and has been under an obligation to comply with federal statutes governing the investment of tribal trust assets, *see* 25 U.S.C. §§ 161a, 161b and 162a, applicable regulations, case law and the common law. *See Osage Tribes of Okla. v. United States*, 72 Fed. Cl. 629, 662 (2006).

43. The United States breached its fiduciary duty to the Nation by holding amounts of trust funds in cash, in excess of liquidity needs. As a result of that breach, the

Nation has been damaged by reason of the loss of investment of trust funds at a higher rate of return.

44. The United States breached its fiduciary duty to the Nation by failing to maximize trust income by prudent investment. *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390, 1394 (1975). The United States has, at times relevant herein, invested the Nation's trust funds at a low rate of interest. There were other investment vehicles available as permitted under 25 U.S.C. §§ 161a and 162a, including public-debt obligations of the United States and bonds, notes and other unconditionally guaranteed obligations, paying a higher rate of return. The United States was under a strict fiduciary duty to place trust funds in eligible investments maintaining higher yields. By reason of this breach of fiduciary duty, the Nation has been damaged in an amount representing the difference between what interest the United States paid for such funds and the maximum the funds could have legally and practically earned if properly invested.

45. By reason of the United States' breach of fiduciary duties in its management and investment of trust funds, the Nation is entitled to recover from the United States such damages as may be proven at trial plus interest as allowed by law.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the Nation, prays the Court as follows:

1. For a determination that the Defendant is liable to the Nation in damages for the injuries and losses caused as a result of Defendant's breaches of fiduciary duty;

2. For a determination of the amount of damages due the Nation plus interest as allowed by law;

3. That the cost of this action, including reasonable attorneys [*sic*] fees, be awarded to the Nation;

4. For such other and further relief as the Court deems just and appropriate.

This the [29th] day of December, 2006.

Respectfully submitted,

[ILLEGIBLE]

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Tohono O'odham Nation

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 06-2236-JR

TOHONO O'ODHAM NATION,
P.O. BOX 837, SELLS, ARIZONA 85634, PLAINTIFF

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR,
1849 C STREET N.W. ,WASHINGTON, D.C. 20240,

ROSS O. SWIMMER, SPECIAL TRUSTEE, OFFICE OF
THE SPECIAL TRUSTEE FOR AMERICAN INDIANS,
DEPARTMENT OF THE INTERIOR,
1849 C STREET N.W., WASHINGTON, D.C. 20240,

HENRY M. PAULSON, SECRETARY OF THE TREASURY,
1500 PENNSYLVANIA AVENUE N.W.,
WASHINGTON D.C. 20220, DEFENDANTS

[Filed: Dec. 28, 2006]

COMPLAINT

I. GENERAL NATURE OF THE ACTION

1. This is an action to seek redress of breaches of trust by the United States, acting by and through the defendants, in the management and accounting of trust assets, including funds and lands, belonging to the plain-

tiff, the Tohono O'odham Nation ("the Nation"), and to compel the defendants to provide a full and complete accounting of all trust assets belonging to the Nation and to correct the balances of the Nation's trust fund accounts to reflect accurate balances.

2. Involved in this action are funds and other assets, including approximately 2,9000,000 acres of land, held in trust by the United States for the benefit of the Nation. As is more fully set forth herein below, the trust funds are comprised of both judgment funds held in trust pursuant to federal law and funds that receive their trust character as proceeds of trust property, specifically the lease and sale of resources or lands that are held in trust. The trust funds involved are substantial; by its own estimates, as provided by government contractor Arthur Andersen LLP, the United States handled $2.1 billion ($2,100,000,000.00) in transactions for the Nation between 1972 and 1992. The United States has never fulfilled its duty to provide a full and adequate accounting of the trust funds belonging to the Nation. Accordingly, the true balances of the Nation's trust accounts are unknown and on information and belief would be far greater but for the breaches of trust complained of herein.

3. Pursuant to federal law, the defendants also have substantial fiduciary responsibilities with respect to and are charged with managing and accounting for the 2.9 million acres of land held in trust and the resources from such trust lands. These lands comprise a reservation located in the southern most part of the State of Arizona, and the Nation shares a seventy mile border with Mexico. Over the years, these lands have produced, *inter alia*, copper, other minerals, sand, and

gravel, and such trust lands have been leased to third parties and to the government for rights-of-way, business uses, and other purposes. Despite the longstanding fiduciary responsibilities owed, the United States has never provided an accounting of its management of these trust assets as required by law.

4. The defendants are government officers and trustee-delegates charged with carrying out the trust obligations of the United States. The record indicates that they have grossly mismanaged and continue to grossly mismanage the trust and have failed for over a century to carry out the most basic and fundamental trust duties owed to the Nation. The trust has been mismanaged in the following aspects, among others:

(a) The defendants have failed to provide an adequate accounting of the trust assets, including funds, lands, and resources belonging to and beneficially owned by the Nation;

(b) The defendants have breached their trust obligation to maintain adequate records and to put in place adequate accounting systems in order to properly carry out their fiduciary obligations, including their duty to account;

(c) The defendants have failed to fulfill their duty to ensure that tribal trust property and trust funds are protected, preserved, and managed so as to produce a maximum return to the Nation consistent with the trust character of the property;

(d) The defendants have failed to properly collect, invest, and disburse trust funds belonging to the Nation in compliance with their fiduciary responsibilities and other federal statutory and regulatory law;

(e) The defendants have breached their trust responsibility to preserve and protect adequate records of the trust and have spoliated irreplaceable trust records bearing upon their breaches of trust complained of herein; and

(f) The defendants have failed to properly state the Nation's account balances and have converted to their own use trust funds belonging to the Nation, including, but not limited to, Indian moneys, proceeds of labor, 25 U.S.C. § 155.

II. THE PARTIES

5. The Plaintiff is the Tohono O'odham Nation, a federally recognized Indian tribe that is the beneficial owner of funds and other assets that are held in trust on the Nation's behalf by the United States and for which the Nation has never received an adequate accounting as required by law.

6. Defendant Dirk Kempthorne is the Secretary of the Interior and chief officer of the Department of the Interior, and as such is charged by law with carrying out the duties and responsibilities of the United States as trustee for the Nation. He and his subordinates have custody and control of trust assets, including trust funds, belonging to the Nation.

7. Defendant Ross O. Swimmer is the Special Trustee for American Indians, a sub-cabinet level officer appointed by the President of the United States with the advice and consent of the Senate and reporting directly to the Secretary of the Interior. A number of Defendant Swimmer's duties are delineated in the Indian Trust Fund Management Reform Act of October 25, 1994,

Pub. L. No. 103-412, 25 U.S.C. §§ 4042, *et seq.* ("the 1994 Act").

8. Defendant Henry M. Paulson is the Secretary of the Treasury, and as such is the custodian of the tribal trust funds and is responsible for administering those funds and for preparing and maintaining certain records in connection therewith.

III. JURISDICTION AND VENUE

9. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1362, as the Nation is a federally recognized Indian tribe and its claims arise under the Constitution and laws of the United States, including, but not limited to, the numerous statutes and regulations giving rise to the trust relationship between the United States and the Nation. This Court also has jurisdiction over this action under 28 U.S.C. § 1361 and 5 U.S.C. § 706, as this is an action to compel federal officials to perform a duty owed to the Nation.

10. The United States has waived its immunity from suit under § 702 of the Administrative Procedure Act ("the APA"), 5 U.S.C. § 702. Section 702 waives sovereign immunity for all claims for relief other than money damages, including all forms of equitable relief, involving a federal official's action or failure to act. *See, e.g.*, *Bowen v. Mass.*, 487 U.S. 879, 893-95, 108 S. Ct. 2722 (1988); *Schnapper v. Foley*, 667 F.2d 102, 107-08 (D.C. Cir. 1981) (noting that § 702 is "intended to eliminate the defense of sovereign immunity with respect to any action . . . seeking relief other than money damages and based on the assertion of unlawful action by a federal officer"). The APA's waiver of sovereign immunity applies to any such suit, regardless of whether the suit is

brought under the APA. *See, e.g., Cobell v. Norton* ("*Cobell VI*"), 240 F.3d 1081, 1095-96 (D.C. Cir. 2001); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996).

11. Venue in this Court is proper under 28 U.S.C. § 1391(e), as the defendants are officers and employees of the United States acting in an official capacity and a substantial part of the acts or omissions giving rise to the Nation's claims occurred within this judicial district.

IV. THE TRUST OBLIGATIONS OF THE UNITED STATES AND OF THE DEFENDANTS WITH RESPECT TO TRIBAL TRUST ASSETS

12. The United States unquestionably owes substantial fiduciary obligations to the Nation with respect to the management and administration of the Nation's trust funds and other trust assets. *See Cobell VI*, 240 F.3d at 1098 (citing numerous cases).

13. Tribal lands, associated resources, and the income derived therefrom constitute a substantial portion of the assets held by the United States in trust for the Nation's benefit. Title to the land constituting the Nation's reservation is held in trust by the United States, with the Nation as the beneficial owner of the land and associated natural resources. Income is derived from, *inter alia*, the scale of these natural resources and the conveyance of certain interests in the Nation's tribal trust land, including leases, easements, and rights of way. These assets and the income they produce form the core of the Nation's tribal trust assets.

14. Additional assets held in trust by the United States for the Nation's benefit are derived from judgments entered by federal courts on various claims

brought by the Nation against the United States. This includes claims brought under the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049 (covering claims accruing before August 13, 1946). Specifically, the Nation's claims for (1) aboriginal title to, loss of subsurface rights within, and trespass upon some 6,338,113 acres of tribal land in the present-day State of Arizona and (2) a general accounting resulted in a $26 million ($26,000,000.00) judgment from the Indian Claims Commission. 38 Ind. Cl. Comm. 542, 542-43 (July 21, 1976). According to government records, of this amount, $11,698,253.28 was retained in trust by the United States for the benefit of the Nation. *See* Pub. L. No. 97-408; Letter from the Area Director, Phoenix Area Office, Bureau of Indian Affairs, U.S. Department of the Interior to Sylvester Listo and Kate Hoover, Tohono O'odham Nation (July 23, 1993). As trustee, the United States undertook to manage, invest, and distribute these judgment funds as trust assets for the benefit of the Nation.

15. Because the United States holds the Nation's tribal lands and other assets in trust, it has assumed the fiduciary obligations of a trustee. As a trustee, the United States is charged with "'moral obligations of the highest responsibility and trust' . . . and its conduct 'should therefore be judged by the most exacting fiduciary standards.'" *Cobell VI*, 240 F.3d at 1099 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S. Ct 1049 (1942)). Because Congress established this trust by statute, "[c]ourts 'must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress unequivocally expressed an intent to the contrary.'" *Cobell VI*, 240 F.3d at 1099 (quoting

NLRB v. Amax Coal Co., 453 U.S. 322, 330, 101 S. Ct. 2789 (1981)).

16. The longstanding trust relationship between the United States and the Nation and the United States' resulting fiduciary duties are rooted in and derived from numerous statutes and regulations. *See, e.g.,* Indian Nonintercourse Act, 25 U.S.C. § 177; Indian Long-Term Leasing Act, 25 U.S.C. § 396; Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g; Federal Oil & Gas Royalty Management Act, 30 U.S.C. §§ 1701, *et seq.*; Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101, *et seq.*; Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4001, *et seq.*, 25 U.S.C. § 152; 25 U.S.C. §§ 157-58, 160; 25 U.S.C. §§ 155, 155b; 25 U.S.C. §§ 161a, 161b, 162 (repealed in 1938), 162a, 413; 25 U.S.C. §§ 311, 312, 318a, 319, 321, 323-28; 25 U.S.C. § 397; 25 U.S.C. §§ 398, *et seq.*; 25 U.S.C. § 399; 25 U.S.C. §§ 415-415d; 31 U.S.C. § 1321(a); 25 C.F.R. pt. 87; 25 C.F.R. pts. 150-51; 25 C.F.R. pt. 162; 25 C.F.R. pt. 166; 25 C.F.R. pt. 169; 25 C.F.R. pt. 211; 25 C.F.R. pt. 216; 25 C.F.R. pt. 225; 30 C.F.R. pt. 206; 43 C.F.R. § 3590.2(i).

17. The 1994 Act, which, among other things, created the Office of the Special Trustee for American Indians, served to recognize, reaffirm, and clarify the United States' preexisting fiduciary duties as derived from the relevant statutes and regulations, including the duty to account. *Cobell VI*, 240 F.3d at 1090, 1096. It was designed to "help rectify the government's longstanding failure" to fulfill its trust obligations. *Id.* The 1994 Act did not create the United States' fiduciary duties, nor did it "define and limit the extent of [the defendants'] obligations.[*sic*] *Id.* at 1100. Moreover, the 1994 Act

does not, and was not intended to, serve as the sole source of those duties or of the Nation's attendant rights. *Id.* at 1099.

18. The statutes, regulations, and executive orders giving rise to the United States' fiduciary duties provide the "general contours" of those duties, but the specific details are filled in through reference to general trust law and "defined in traditional equitable terms." *Id.* Accordingly, the defendants' "actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary." *Id.* (citations and internal quotations omitted).

19. As trustee of the Nation's tribal trust assets, the United States owes, and continuously since the inception of the tribal trust program has owed, certain traditional fiduciary duties and responsibilities to the Nation as a trust beneficiary. These duties include, but are not limited to, the duty to:

(a) Perform a complete, accurate, and adequate historical accounting of all the trust property, with such accounting containing sufficient information to enable the Nation to readily ascertain whether the trust has been and is being faithfully carried out;

(b) Maintain adequate books and records with respect to the trust property, including, but not limited to, records of leases and other contractual arrangements giving rise to income from the trust property and records of the investment of tribal trust assets;

(c) Refrain from self-dealing or otherwise benefitting from management of the trust property;

(d) Take reasonable steps to preserve and protect trust property;

(e) Take reasonable steps to bring and enforce claims held by the trust;

(f) Use reasonable skill and care to invest and deposit trust funds in such a way as to maximize the productivity of trust property within the constraints of law and prudence; and

(g) Take reasonable steps to ensure that trust property is used for its highest and best use.

V. BREACHES OF TRUST BY THE DEFENDANTS

20. The United States, acting by and through the defendants, has consistently and egregiously failed to comply with these and other fiduciary obligations and continues to do so. Its breaches of trust include, but are not limited to:

(a) Failure to provide and unconscionably delaying the performance of a complete, accurate, and adequate accounting of trust property;

(b) Failure to maintain adequate books and records with respect to the trust property, including, but not limited to, records of leases and other contractual arrangements giving rise to income from the trust property and records of the investment of tribal trust assets;

(c) Failure to refrain from self-dealing or otherwise benefitting from management of the trust property.

(d) Failure to take reasonable steps to preserve and protect trust property;

(e) Failure to take reasonable steps to bring and enforce claims held by the trust;

(f) Failure to use reasonable skill and care to invest and deposit trust funds in such a way as to maximize the productivity of trust property within the constraints of law and prudence; and

(g) Failure to ensure that trust assets are used for their highest and best use.

21. Due to these and other breaches of the fiduciary duties owed by the United States, the Nation does not know, and has no way of ascertaining, the true state of its trust assets, including funds and related accounts holding such funds; what amounts should have been credited to the Nation and deposited in these accounts; what amounts should have been paid to the Nation; how much of the Nation's property has been diverted or converted to other uses; to what extent the United States failed to maximize profits; or whether the Untied States has attained fair market value for leases and sale of trust assets.

22. The United States' breaches of its fiduciary obligations with respect to Indian trust assets have been repeatedly and routinely condemned by the United States General Accounting Office, the United States Inspector General for the Interior Department, and the United States Office of Management and Budget, among others. *See Cobell VI*, 240 F.3d at 1090-91 (citing reports criticizing the mismanagement of Indian trust assets).

23. The United States' breaches of its fiduciary obligations with respect to Indian trust assets have also been recognized and condemned by Congress. After a

series of oversight hearings, Congress issued a report entitled "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund," H.R. Rep. No. 102-499 (1992). In this report, Congress noted "significant, habitual problems in BIA's ability to fully and accurately account for trust fund moneys, to properly discharge its fiduciary responsibilities, and to prudently manage the trust funds." *Id.* at 2. Congress further concluded that the defendants had "utterly failed to grasp the human impact of [their] financial mismanagement of the Indian trust fund." *Id.* at 5. While the Interior Department pledged reforms in response to this report, it did little to improve its mismanagement of Indian trust assets. *Cobell VI*, 240 F.3d at 1090.

24. The 1994 Act sought to remedy the United States' long-standing failure to discharge its trust obligations. It "reaffirmed and clarified preexisting [trust] duties; it did not create them." *Id.* at 1100. Nor did it alter the nature or the scope of the fiduciary duties that the defendants owe to the Nation and to other tribal trust beneficiaries. *Id.*

25. Among the duties enumerated in the 1994 Act, section 102 makes clear that the Nation and other tribal trust beneficiaries are owed an accounting for "all funds held in trust by the United States for the benefit of an Indian tribe . . . which are deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C. § 4011(a). The 1994 Act thus "reaffirms the government's preexisting fiduciary duty to perform a complete historical accounting of trust funds accounts." *Cobell VI*, 240 F.3d at 1102.

26. The 1994 Act also created the Office of Special Trustee for American Indians. 25 U.S.C. § 4042. Cong-

ress' stated purposes in creating this office were, *inter alia*, "to provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities," and to "ensure the implementation of all reforms necessary for the proper discharge of the Secretary's trust responsibilities. . . . " 25 U.S.C. § 4041.

27. The statutory responsibilities of the Special Trustee conferred under the 1994 Act include, *inter alia*:

(a) To "oversee all reform efforts . . . to ensure the establishment of policies, proecdures, systems and practices to allow the [Interior] Secretary to dischrge his trust responsibilities. . . . " 25 U.S.C. § 4043(b)(1);

(b) To "monitor the reconciliation of tribal trust accounts . . . to ensure that the Bureau [of Indian Affairs] provides the account holders with a fair and accurate accounting of all trust accounts," 25 U.S.C. § 4043(b)(2)(A); and

(c) To "ensure that the Bureau establishes appropriate policies and procedures, and develops necessary systems, that will allow it . . . properly to account for and invest, as well as maximize," subject to requirements of law, "the return on the investment of all trust fund monies," and "to prepare accurate and timely reports to account holders . . . on a periodic basis regarding all collections, disbursements, investments and returns on investments related to their accounts." 25 U.S.C. § 4043(b)(2)(B).

28. Notwithstanding the remedial purpose of the foregoing legislation, the mandates of the 1994 Act—like the government's longstanding fiduciary duties—have

not been carried out, and the defendants remain in violation of their accounting and other fiduciary obligations. In addition to the breaches of trust duties recited in paragraphs 4 and 19-23 above, the defendants have failed to comply with the enumerated duties listed in the 1994 Act. Furthermore, Defendant Swimmer has failed to discharge his responsibilities as Special Trustee or to take any meaningful steps to fix a trust management system that remains broken after more than a century of defendants' malfeasance, recalcitrance, and neglect.

29. The defendants also have failed to comply with other statutory directives intended to address their ongoing breaches of preexisting trust duties. By the Act of December 22, 1987, Pub. L. No. 100-202 (101 Stat. 1329), Congress directed that the defendants (1) audit and reconcile tribal trust funds and (2) provide the tribal trust beneficiaries with an accounting of such funds. Congress reaffirmed the mandates of the 1987 Act in subsequent statutes, namely, the Act of October 23, 1989, Pub. L. No. 101-121, 103 Stat. 701; the Act of November 5, 1990, Pub. L. No. 101-512, 104 Stat. 1915, and the Act of November 3, 1991, Pub. L. No. 102-154, 105 Stat. 990. These acts, like the 1994 Act, are reaffirmations of preexisting obligations rather than sources of new obligations. Even after nearly twenty years, these statutory requirements have never been met, and the defendants remain in derogation of their trust duties.

30. The reports produced by government contractor Arthur Andersen LLP (the "AA Reports") and provided to the Nation and other tribal trust beneficiaries fall far short of satisfying the defendants' fiduciary duty to provide a complete, accurate, and adequate accounting. Even the Bureau of Indian Affairs ("BIA") within the

Interior Department has admitted that the AA Reports were not full and complete accountings. *See* Bureau of Indian Affairs' Proposed Legislative Options in Response to Tribal Trust Fund Reconciliation Project Results at 12 (Dec. 1996) ("Despite five years of effort and the expenditure of $21 million, the [AA] Project provides a less than complete accounting of the state of the Tribal trust funds."). Shortcomings of the AA Reports include, but are not limited to, the fact that the Reports:

(a) Analyzed trust fund accounts only for the limited time period of Fiscal Years 1973-1991;

(b) Were not based on or prepared in accordance with generally accepted accounting and auditing standards;

(c) Were premised on the erroneous assumption that complete, accurate, and adequate accountings could be conducted based on unverified information provided by the BIA; and

(d) Were based on accounts for which records and information were non-existent or could not be located.

See, e.g., U.S. General Accounting Office, Report to the Committee on Indian Affairs, U.S. Senate, Financial Management, BIA's Tribal Trust Fund Account Reconciliation Results, GAO/AIMD-96-63 (May 1996); U.S. General Accounting Office, Testimony before the Committee on Indian Affairs, U.S. Senate, Indian Trust Funds, Tribal Account Balances, GAO-02-420T at 2 (Feb. 7, 2002).

31. Congressional recognition of the defendants' continued and ongoing failure to satisfy their fiduciary duty to render a complete, accurate, and adequate ac-

counting is evidenced by the inclusion, in each Interior Department Appropriations Act since 1990, of a provision stating that "the statute of limitations shall not commence to run on any claim concerning losses to or mismanagement of trust funds until the affected tribe . . . has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss." *See, e.g.*, Act of November 5, 1990, Pub. L. No. 101-512, 104 Stat. 1915; Act of November 13, 1991, Pub. L. No. 102-154, 105 Stat. 990; Act of October 5, 1992, Pub. L. No. 102-381, 106 Stat. 1374; Act of November 11, 1993, Pub. L. No. 103-138, 107 Stat. 1379; Act of September 30, 1994, Pub. L. No. 103-332, 108 Stat. 2499; Act of April 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321; Act of September 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009; Act of November 14, 1997, Pub. L. No. 105-83, 111 Stat. 1543; Act of October 21, 1998, Pub. L. No. 105-277, 112 Stat. 2681; Act of November 29, 1999, Pub. L. No. 106-114, 113 Stat. 1501; Act of October 11, 2000, Pub. L. No. 106-291, 114 Stat. 922; Act of November 5, 2001, Pub. L. No. 107-63.

COUNT ONE

32. The Nation restates and incorporates herein the allegations of paragraphs 1 through 31 above.

33. The United States, acting through the defendants, owes to the Nation fiduciary duties of the highest responsibility and trust with respect to property that it holds in trust for the Nation's benefit. These statutorily-derived duties, which may be either express or implied in law, are akin to those stated under the common law of trusts.

34. Among the duties that defendants owe is the duty to provide the Nation with a complete, accurate, and

adequate accounting of all property held in trust by the Untied States for the Nation's benefit. The accounting obligation that the defendants owe to the Nation requires, *inter alia*, an accounting report that "contain[s] sufficient information for the [Nation] readily to ascertain whether the trust has been faithfully carried out." *Cobell VI*, 240 F.3d at 1103 (internal quotation omitted).

35. The defendants have, from the inception of the trust to the present, failed to fulfill these fiduciary obligations, and this failure constitutes a breach of the defendants' fiduciary duties to the Nation and a violation of federal law.

36. Specifically, the defendants have, *inter alia*, failed to provide the Nation with a complete, accurate, and adequate accounting of the Nation's trust assets, and this failure constitutes a breach of the defendants' fiduciary duties to the Nation and a violation of federal law.

37. The Nation is entitled to a declaration that the AA Report prepared by the defendants' contractors does not constitute the complete, accurate, and adequate accounting required by federal law.

38. The Nation is entitled to a further declaration that the defendants have breached the fiduciary duties they owe to the Nation by, *inter alia*, failing to provide the Nation with a complete, accurate, and adequate accounting of the Nation's trust assets as required by law.

39. The Nation is entitled to a further declaration (1) delineating the defendants' fiduciary duties to, among other things, enable proper discharge of their accounting obligation and (2) finding that the defendants have breached their duties so declared.

COUNT TWO

40. The Nation restates and incorporates herein the allegations of paragraphs 1 through 39 above.

41. There is no indication that the defendants will, of their own accord, depart from their longstanding and continuing pattern of failure to comply with their fiduciary duties to the Nation.

42. The Nation is entitled to injunctive relief directing the defendants to provide a complete, accurate, and adequate accounting of the Nation's trust assets, including, but not limited to, funds under the custody and control of the United States, and to comply with all other fiduciary duties as determined by this Court.

43. The Nation is further entitled to make exceptions and objections to the accounting provided, to a restatement of their trust fund account balances in conformity with the ultimate and complete accounting, and to any additional equitable relief that may be appropriate (e.g., disgorgement, equitable restitution, or an injunction directing the trustee to take action against third parties).

44. The Nation is entitled to further injunctive relief directing the defendants to bring themselves into conformity with their fiduciary obligations and otherwise address breaches of trust found by the Court.

WHEREFORE, THESE PREMISES CONSIDERED, THE PLAINTIFF PRAYS:

1. For a decree construing the trust obligations of the defendants to the Nation, including, but not limited to, the duty to provide a complete, accurate, and ade-

quate accounting of all trust assets belonging to the Nation and held in trust by the defendants.

2. For a decree that the United States, acting through the defendants, has been in breach of its trust obligations since the inception of this trust and continues to be in breach of those duties today, specifically including, *inter alia*, its fiduciary duty to provide a complete, accurate, and adequate accounting of all trust assets belonging to the Nation and held in trust by the United States.

3. For a decree that the AA Reports do not constitute the complete, accurate, and adequate accounting that the defendants are obligated to provide to the Nation.

4. For a decree delineating the fiduciary duties owed by the defendants to the Nation with respect to the management and administration of the trust assets belonging to the Nation.

5. For a decree directing the defendants (1) to provide a complete, accurate, and adequate accounting of the Nation's trust assets, including, but not limited to, funds under the custody and control of the United States and (2) to comply with all other fiduciary duties as determined by this Court.

6. For a decree providing for the restatement of the Nation's trust fund account balances in conformity with this accounting, as well as any additional equitable relief that may be appropriate (e.g., disgorgement, equitable restitution, or an injunction directing the trustee to take action against third parties).

7. For a decree requiring the defendants to provide to the Nation all material information regarding the

management and administration of the trust assets belonging to the Nation and held in trust for its benefit by the defendants.

8. For an award of the Nation's costs of suit, including, without limitation, attorneys' fees under the Equal Access to Justice Act and other statutes as well as general equitable principles, and the fees and costs of expert assistance.

9. For such other and further relief as the Court, as a Chancellor sitting in equity, may deem just and proper.

December 28, 2006

Respectfully submitted,

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APPENDIX F

The following pairs of pending lawsuits have been filed by Indian Tribes against the United States in both the Court of Federal Claims and in federal district court:

(1) *Ak-Chin Indian Cmty.* v. *United States*, No. 1:06-cv-932 (Fed. Cl. filed Dec. 29, 2006), and

Ak-Chin Indian Cmty. v. *Salazar*, No. 1:06-cv-2245 (D.D.C. filed Dec. 29, 2006).

(2) *Cheyenne River Sioux Tribe* v. *United States*, No. 1:06-cv-915 (Fed. Cl. filed Dec. 28, 2006), and

Cheyenne River Sioux Tribe v. *Salazar*, No. 1:06-cv-1897 (D.D.C. filed Nov. 7, 2006).

(3) *Coeur d'Alene Tribe* v. *United States*, No. 1:06-cv-940 (Fed. Cl. filed Dec. 29, 2006), and

Coeur d'Alene Tribe v. *Salazar*, No. 1:06-cv-2242 (D.D.C. filed Dec. 29, 2006).

(4) *Colorado River Indian Tribes* v. *United States*, No. 1:06-cv-901 (Fed. Cl. filed Dec. 27, 2006), and

Colorado River Indian Tribes v. *Salazar*, No. 1:06-cv-2212 (D.D.C. filed Dec. 27, 2006).

(5) *Confederated Tribes* v. *United States*, No. 1:06-cv-912 (Fed. Cl. filed Dec. 28, 2006), and

Confederated Tribes v. *Salazar*, No. 1:06-cv-1902 (D.D.C. filed Nov. 7, 2006).

(6) *Crow Creek Sioux Tribe* v. *United States*, No. 1:05-cv-1383 (Fed. Cl. filed Dec. 29, 2005), and

Crow Creek Sioux Tribe v. *Salazar*, No. 1:04-cv-900 (D.D.C. filed June 2, 2004).

(7) *Eastern Shawnee Tribe* v. *United States*, No. 1:06-cv-917 (Fed. Cl. filed Dec. 28, 2006), and

Eastern Shawnee Tribe v. *Salazar*, No. 1:06-cv-2162 (D.D.C. filed Dec. 20, 2006).

(8) *Haudenosaunee* v. *United States*, No. 1:06-cv-909 (Fed. Cl. filed Dec. 28, 2006), and

Haudenosaunee v. *Salazar*, No. 1:06-cv-2254 (D.D.C. filed Dec. 29, 2006).

(9) *Iowa Tribe* v. *United States*, No. 1:06-cv-920 (Fed. Cl. filed Dec. 28, 2006), and

Iowa Tribe v. *Salazar*, No. 1:06-cv-1899 (D.D.C. filed Nov. 7, 2006).

(10) *Kaw Nation* v. *United States*, No. 1:06-cv-934 (Fed. Cl. filed Dec. 29, 2006), and

Kaw Nation v. *Salazar*, No. 5:06-cv-1437 (W.D. Okla. filed Dec. 29, 2006).

(11) *Lower Brule Sioux Tribe* v. *United States*, No. 1:06-cv-922 (Fed. Cl. filed Dec. 28, 2006), and

Lower Brule Sioux Tribe v. *Salazar*, No. 1:05-cv-2495 (D.D.C. filed Dec. 30, 2005).

(12) *Muscogee (Creek) Nation* v. *United States*, No. 1:06-cv-918 (Fed. Cl. filed Dec. 28, 2006), and

Muscogee (Creek) Nation v. *Salazar*, No. 1:06-cv-2161 (D.D.C. filed Dec. 20, 2006).

(13) *Nez Perce Tribe* v. *United States*, No. 1:06-cv-910 (Fed. Cl. filed Dec. 28, 2006), and

Nez Perce Tribe v. *Salazar*, No. 1:06-cv-2239 (D.D.C. filed Dec. 28, 2006).

(14) *Northwestern Band of Shoshone* v. *United States*, No. 1:06-cv-914 (Fed. Cl. filed Dec. 28, 2006), and

Northwestern Band of Shoshone v. *Salazar*, No. 1:06-cv-2163 (D.D.C. filed Dec. 20, 2006).

(15) *Ogala Sioux Tribe* v. *United States*, No. 1:05-cv-1378 (Fed. Cl. filed Dec. 28, 2005), and

Ogala Sioux Tribe v. *Salazar*, No. 1:04-cv-1126 (D.D.C. filed June 30, 2004).

(16) *Omaha Tribe* v. *United States*, No. 1:06-cv-911 (Fed. Cl. filed Dec. 28, 2006), and

Omaha Tribe v. *Salazar*, No. 1:04-cv-901 (D.D.C. filed June 2, 2004).

(17) *Osage Tribe of Indians* v. *United States*, No. 1:99-cv-550 (Fed. Cl. filed Aug. 2, 1999), and

Osage Tribe of Indians v. *United States*, No. 1:04-cv-283 (D.D.C. filed Feb. 20, 2004).

(18) *Otoe-Missouria Tribe of Indians* v. *United States*, No. 1:06-cv-937 (Fed. Cl. filed Dec. 29, 2006), and

Otoe-Missouria Tribe v. *Salazar*, No. 5:06-cv-1436 (W.D. Okla. filed Dec. 29, 2006).

(19) *Passamaquoddy Tribe* v. *United States*, No. 1:06-cv-942 (Fed. Cl. filed Dec. 29, 2006), and

Passamaquoddy Tribe v. *Salazar*, No. 1:06-cv-2240 (D.D.C. filed Dec. 29, 2006).

(20) *Prairie Band of Potawatomi Indians* v. *United States*, No. 1:06-cv-921 (Fed. Cl. filed Dec. 28, 2006), and

Prairie Band of Potawatomi Nation v. *Salazar*, No. 1:05-cv-2496 (D.D.C. filed Dec. 30, 2005).

(21) *Red Cliff Band of Lake Superior Chippewa Indians* v. *United States*, No. 1:06-cv-923 (Fed. Cl. filed Dec. 28, 2006), and

Red Cliff Band of Lake Superior Indians v. *Salazar*, No. 1:06-cv-2164 (D.D.C. filed Dec. 20, 2006).

(22) *Rosebud Sioux Tribe* v. *United States*, No. 1:06-cv-924 (Fed. Cl. filed Dec. 28, 2006), and

Rosebud Sioux Tribe v. *Salazar*, No. 1:05-cv-2492 (D.D.C. filed Dec. 30, 2005).

(23) *Salt River Pima-Maricopa Indian Cmty.* v. *United States*, No. 1:06-cv-943 (Fed. Cl. filed Dec. 29, 2006), and

Salt River Pima-Maricopa Indian Cmty. v. *Salazar*, No. 1:06-cv-2241 (D.D.C. filed Dec. 29, 2006).

(24) *Seminole Nation* v. *United States*, No. 1:06-cv-935 (Fed. Cl. filed Dec. 29, 2006), and

Seminole Nation v. *Salazar*, No. 6:06-cv-556 (E.D. Okla. filed Dec. 29, 2006).

(25) *Sokaogon Chippewa Cmty.* v. *United States*, No. 1:06-cv-930 (Fed. Cl. filed Dec. 29, 2006), and

Sokaogon Chippewa Cmty. v. *Salazar*, No. 1:06-cv-2247 (D.D.C. filed Dec. 29, 2006).

(26) *Stillaguamish Tribe of Indians* v. *United States*, No. 1:06-cv-916 (Fed. Cl. filed Dec. 28, 2006), and

Stillaguamish Tribe of Indians v. *Salazar*, No. 1:06-cv-1898 (D.D.C. filed Nov. 7, 2006).

(27) *Tonkawa Tribe of Indians* v. *United States*, No. 1:06-cv-938 (Fed. Cl. filed Dec. 29, 2006), and

Tonkawa Tribe of Indians v. *Salazar*, No. 5:06-cv-1435 (W.D. Okla. filed Dec. 29, 2006).

(28) *United Keetoowah Band of Cherokee Indians* v. *United States*, No. 1:06-cv-936 (Fed. Cl. filed Dec. 29, 2006), and

United Keetoowah Band of Cherokee Indians v. *United States*, No. 1:08-cv-1087 (D.D.C. transferred June 24, 2008) (formerly No. 6:06-cv-559 (E.D. Okla. filed Dec. 29, 2006)).

(29) *Winnebago Tribe* v. *United States*, No. 1:06-cv-913 (Fed. Cl. filed Dec. 28, 2006), and

Winnebago Tribe v. *Salazar*, No. 1:05-cv-2493 (D.D.C. filed Dec. 30, 2005).

(30) *Wyandot Nation* v. *United States*, No. 1:06-cv-919 (Fed. Cl. filed Dec. 28, 2006), and

Wyandot Nation v. *Salazar*, No. 1:05-cv-2491 (D.D.C. filed Dec. 30, 2005).

(31) *Yankton Sioux Tribe* v. *United States*, No. 1:05-cv-1291 (Fed. Cl. filed Dec. 14, 2005), and

Yankton Sioux Tribe v. *Salazar*, No. 1:03-cv-1603 (D.D.C. filed July 28, 2003).

APPENDIX G

1. Section 8 of the Act of June 25, 1868, ch. 71, 15 Stat. 77,[1] provided:

And be it further enacted, That no person shall file or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time of the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

2. Section 1067 of the Revised Statutes (1875 and 1878)[2] and Section 154 of the Judicial Code of 1911, ch. 231, 36 Stat. 1138 (28 U.S.C. 260 (1946)),[3] provided:

No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

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[1] Repealed 1874. See Rev. Stat. § 5596 (1875) (enacted 1874).

[2] Repealed 1911. See Judicial Code, ch. 231, § 297, 36 Stat. 1168.

[3] Repealed 1948. See Act of June 25, 1948, ch. 646, § 39, 62 Stat. 996.

3. 28 U.S.C. 1500 (Supp. II 1948) provided:

The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

4. 28 U.S.C. 1500 provides:

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.