IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NEZ PERCE TRIBE, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Case No. 06-910L Judge Charles F. Lettow

UNITED STATES' REPLY BRIEF
IN SUPPORT OF ITS MOTION TO DISMISS

I. INTRODUCTION

The ability to assert claims against the United States for money damages in the Court of Federal Claims ("CFC") is "available by grace and not by right," and 28 U.S.C. § 1500 ("Section 1500") is not "a mere pleading rule, to be circumvented by carving up a single transaction into overlapping pieces seeking different relief." United States v. Tohono O'OdhamNation, ___ U.S. ___, 131 S. Ct. 1723, 1730, 1731 (2011) ("Tohono O'Odham"). Section 1500 "is more straightforward than its complex wording suggests," and it precludes this Court's subject-matter jurisdiction "over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents." Id. at 1727. Section 1500 applies here because Plaintiff has "breach of trust" cases arising from the United States' management of Plaintiff's trust funds and non-monetary trust assets that are pending not only before the United States District Court for the District of Columbia ("District Court") but also this court. Thus, by operation of Section 1500, this Court lacks subject-matter jurisdiction over Plaintiff's claims.

In response to the United States' Motion to Dismiss (the "Motion"), Plaintiff advances essentially one argument: because this Court found that Plaintiff filed its CFC complaint first (on the same day that it filed its District Court complaint), the application of Section 1500 should be precluded. See Docket ("Dkt.") No. 51 at 4-13. ("Plaintiff's Response In Opposition To Defendant's Motion To Dismiss under 28 U.S.C. § 1500," hereinafter the "Opposition"). In support of this argument, Plaintiff relies almost exclusively on pre-Tohono O'Odham court decisions and fails to address the reasons put forth in the Motion as to why, under Tohono O'Odham, the so-called order of filing or "Tecon" rule is not good law. Because Plaintiff does not dispute that both its CFC and District Court complaints are based on the same operative facts, Plaintiff concedes that if the Court finds in favor of the United States on the order of filing

rule, this case must be dismissed.

II. ARGUMENT

A. Plaintiff Cannot Escape Application of Section 1500 Based on the Order In Which Its CFC and District Court Cases Were Filed.

As set forth in the United States' Motion, the Supreme Court in Tohono O'Odham made clear that the only relevant inquiry to Section 1500's applicability here is whether this case and Plaintiff's District Court case are based on substantially the same operative facts. See Dkt. No. 48 at 8, 7-15. In Opposition, Plaintiff does not dispute that the operative facts in this case and in the District Court case are the same. See, generally, Dkt. No. 51. Rather, Plaintiff relies principally on pre-Tohono O'Odham decisions to assert that the so called order of filing rule remains good law. Id. Plaintiff posits that, in considering the applicability of Section 1500, a Court must first determine "whether a plaintiff has pending a case in another court at the time it files an action" in the CFC before turning to whether the two cases are based in the same operative facts. Dkt. No. 51 at 4 (emphasis added). Thus, according to Plaintiff, if a a suit is pending in the CFC before the same plaintiff files a separate suit in another court based on the same operative facts, Section 1500 would not operate to bar the CFC's jurisdiction. Id. This argument is at odds with Tohono O'Odham.

First, acknowledging that no order of filing rule can be reasonably read into Tohono O'Odham, Plaintiff asserts that this rule can be derived from Keene Corp. v. United States, 508 U.S. 200 (1993) ("Keene") and Tecon Engineers v. United States, 343 F.2d 943 (1965) ("Tecon"). See Dkt. No. 51 at 11. But, as admitted by Plaintiff, Keene specifically did not address the order of filing issue, and thus, no such rule can be taken therefrom. Keene, 508 U.S. at 209 n.4. Moreover, as set forth in the United States' Motion, the decision in Tecon cannot be relied upon post Tohono O'Odham. Indeed, the Tohono O'Odham decision, using Tecon as an

example, cautioned courts to apply a narrow construction of the Section 1500's jurisdictional bar whereby the statue should not be deprived of "meaningful force." Tohono O'Odham, 131 S. Ct. at 1729. In Tohono O'Odham, the Supreme Court further found that "the Court of Appeals was wrong to allow its precedent to suppress the statute's aims." Id. at 1730. While it is true that this direct discussion of Tecon was not central to the Supreme Court's opinion in Tohono O'Odham (because there was "no order of filing" issue in Tohono O'Odham), it is also true that the Federal Circuit has held repeatedly that it is bound by Supreme Court dicta. See Ins. Co. of the West v. United States, 243 F.3d 1367, 1372 (Fed. Cir. 2001); Stone Container Corp. v. United States, 229 F.3d 1345, 1349-50 (Fed. Cir. 2000). Plaintiff has not rebutted and cannot rebut this proposition. Thus, Plaintiff's argument that the order of filing rule can be relied upon post-Tohono O'Odham should be rejected.

Second, Plaintiff's argument that all of the Court of Federal Claims' post-Tohono O'Odham decisions included a "has pending" inquiry, citing Lummi Tribe v.United States, No. 08-848, 2011 WL 3417092 at *7 (Fed. Cl. Aug. 4, 2011), Tallacus v. United States, No. 10-311, 2011 WL 2675995 at *2 (Fed. Cl. June 30, 2011), Capelouto v. United States, No. 10-823, 2011 WL 2441384 at *11-12, and Low v. United States, No. 10-811, 2011 WL 2160880 at *5-7 (Fed. Cl. June 1, 2011), is unavailing. This "has pending inquiry" is distinct from the order of filing inquiry the Plaintiff advocates. The order of filing of the complaints was not directly at issue in any of those cases because, in each of these cases, the district court case was filed first. In Lummi Tribe, Tallacus, and Low, Plaintiffs filed complaints in the Court of Federal Claims based upon the same operative facts as district court cases after the District Court had reached a final decision but before the appeal was resolved or before the time for appeal had run. See Lummi Tribe at *7-8; Tallacus at *2; Low at *6. In each of those cases, the Court of Federal

Claims determined that it did not have jurisdiction because the district court case was still pending as long as an appeal was still possible or pending. Id. In Capelouto, the court determined that it lacked jurisdiction because, although two district court cases based upon the same operative facts had been dismissed, they were pending at the time the Court of Federal Claims complaint was filed. Capelouto at *11-12. The Capelouto court did cite Keene for the proposition that whether another case is pending is determined at the time the Court of Federal Claims court is filed, however, the question in Capelouto was whether the Court of Federal Claims gained jurisdiction when the district court case was dismissed, not whether it maintained jurisdiction when the district court case was filed. See id. at *11. Each of these cases cited by Plaintiff for the proposition that the CFC should retain jurisdiction were, in fact, dismissed by the Court of Federal Claims due to lack of jurisdiction.

Additionally, the rationale applied in each of the cases Plaintiff cites supports Federal Defendants' argument here. In Lummi Tribe, the court explained:

> We do not believe, however, that Congress could possibly have intended section 1500's reach to be so easily evaded by a litigant's strategic filing. *UNR Industries, Inc. v. United States*, 962 F.2d 1013, 1022 (Fed. Cir. 1992) (observing that "Congress wanted not to dictate the order in which a claimant files suits in the Claims Court and another court on the same claim, but to discourage him from doing so altogether").

Lummi Tribe at *7; see also Low at *6; Capelouto at *11 (quoting Johns-Manville Corp. v. United States, 855 F.2d 1556, 1562 (Fed. Cir. 1988) ("[T]he purpose of section 1500 is to prohibit the filing and prosecution of the same claims against the United States in two courts at the same time."). Based upon this rationale, Section 1500 requires the dismissal of this case.

Third, Plaintiff's Opposition seeks to side-step the recent Federal Circuit decision in Passamaquoddy Tribe v. United States. See Dkt. No. 51 at n.3. There, the Federal Circuit followed Tohono O'odham in summarily affirming Passamaquoddy Tribe v. United States, 82

Fed. Cl. 256 (2008). See Passamaquoddy Tribe v. United States, No. 2008-5110, 2011 WL 3606840 (Aug. 17, 2011). The Court of Federal Claims found that the purpose of Section 1500 was to "require an election between a suit in [the CFC] against the United States and one brought in the district courts." Passamaquoddy Tribe, 82 Fed. Cl. at 268 (quoting County of Cook v. United States, 170 F.3d 1084, 1090-91 (Fed. Cir. 1999)). The Passamaquoddy decision that was summarily affirmed by the Federal Circuit held that "same-day filings in a district court are per se pending for the purposes of §1500, and the order of filing of the two complaints on the day in question is of no consequence." Id. See also Griffin v. United States, 590 F.3d 1291, 1295 (Fed. Cir. 2009) (relying on County of Cook to holding that presumptive same-day filing effectuated by court transfers does not impact the 1500 analysis). Although the order of filing issue was not raised on appeal, the Federal Circuit summarily affirmed, finding that in Tohono O'Odham, the Supreme Court concluded "that under § 1500, the Court of Federal Claims lacked jurisdiction over a suit when a suit based on substantially the same operative facts, regardless of the relief sought, is pending in a district court." Passamaquoddy Tribe, 2011 WL 3606840 at *1 (emphasis added) (citing Tohono O'Odham, 131 S. Ct. 1723 (2011)). The United States submits that this Court should reconsider its August 22, 2008, decision, Dkt. No. 27, regarding the same day filing issue in light of this decision and hold, as the Federal Circuit affirmed in Passamaquoddy Tribe, that same day filings in a district court are per se pending for the purposes of § 1500.

At bottom, Plaintiff fails to rebut the fact that continued application of the so-called "order of filing" rule would "suppress [Section 1500's] aims" and "render [Section 1500] nugatory through construction." Tohono O' Odham, 131 S. Ct. at 1730. Accordingly, Plaintiff's case must be dismissed.

B. The Court Should Not Refrain From Deciding Whether It Has Jurisdiction.

Should this Court determine that it does not have jurisdiction, "Plaintiff respectfully requests that this Court refrain from dismissing the case while the parties continue to pursue actively on-going settlement discussions." Dkt. No. 51 at 18. Plaintiff notes that the United States confirmed in its Motion that it is committed to continuing the parties' ADR process with Judge Bruggink, if possible. Id. While the United States indeed expressed its commitment to continuing the ADR process, if possible, the on-going ADR should not preclude a decision on the Motion. Although Plaintiff cites a several examples of where cases have been stayed or held in abeyance under varying circumstances, Dtk. No. 51 at 13-15, if this Court determines that it does not have jurisdiction, any stay would be improper. See Medina Constr. Ltd. v. United States, 43 Fed. Cl. 537 (Fed. Cl. 1999). As stated by the court in Medina, "[e]xercise of the power to stay an action is tantamount to exercising the Court's jurisdiction." Id. at 561; see also RCFC 12(h)(3). Simply, while the United States is presently committed to continuing settlement discussions with Plaintiff (discussions which include Plaintiff's claims in the District Court), such discussions should not preclude the Court from determining such a threshold and fundamental issue as its subject matter jurisdiction.

III. CONCLUSION

Plaintiff has two cases pending against the United States, one in the District Court and one in this Court, that are based on substantially the same operative facts. By operation of Section 1500, this Court lacks subject-matter jurisdiction over this case and thus the case should be dismissed. For the reasons set forth in the United States' Motion and in this reply, this Court should reject Plaintiff's opposition, grant the United States' Motion, and dismiss the case.

Respectfully submitted this 19th day of September, 2011,

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