IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NEZ PERCE TRIBE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:06-cv-00910-CFL
	)	
THE UNITED STATES OF AMERICA,	)	Judge Charles F. Lettow
	)	
Defendant,	)	E-filed: September 2, 2011
	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS UNDER 28 U.S.C. § 1500

MELODY L. MCCOY
Counsel of Record for Plaintiff
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
Phone: (303) 447-8760
Facsimile: (303) 443-7776
Email: mmccoy@narf.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

On August 22, 2008 this Court held that 28 U.S.C. § 1500 does not deprive it of jurisdiction over this case. (ECF No. 27), *reported at* 83 Fed. Cl. 186 (Fed. Cl. 2008). Now, three years later, Defendant resurrects a Section 1500 argument for dismissal. (ECF No. 48, July 1, 2011). Pursuant to this Court's Order of July 19, 2011 (ECF No. 50) Plaintiff submits this response in opposition to Defendant's latest Section 1500 argument.

STATEMENT OF THE CASE

On December 28, 2006 Plaintiff filed its complaint in this case for money damages regarding its land, natural resources, and accounts and funds held in trust for it by Defendant. (Dkt No. 1). Later that same day, Plaintiff filed a complaint in the U.S. District Court for the District of Columbia for declaratory and injunctive relief including, *inter alia,* accountings of funds held in trust for it by Defendant. *Nez Perce Tribe, et al., v. Salazar,* No. 06-2239 (D.D.C. filed Dec. 26, 2006).[1]

[1]Other relief sought in the district court pertained to class action certification, which was denied by the court there on July 28, 2008. (D.D.C. ECF No. 84). Importantly, at least for purposes of understanding fully the significance of Defendant's Motion to Dismiss in the instant case, as Plaintiff has previously explained to this Court (*see* Plaintiff's Reply to Order to Show Cause why this case should not be dismissed in light of the jurisdictional issue raised by 28 U.S.C. § 1500 (ECF No. 20 at 9-11, July 18, 2008)), on June 16, 2008, Defendant's officials moved to dismiss *Nez Perce Tribe v. Salazar*. (D.D.C. ECF No. 58). Plaintiff has opposed the district court dismissal motion (D.D.C. ECF No. 66), which, though briefed and argued in 2008 (D.D.C. ECF No. 72), ***remains pending.***

Moreover, Defendant's arguments for dismissal of the district court case include "failure to state jurisdictionally valid claims for declaratory and injunctive relief." Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss (D.D.C. ECF No. 59 at 11-50). In support of this argument, Defendant states repeatedly that "the existence and extent of damages that might be owed to Plaintiffs [are issues within] the exclusive jurisdiction of the United States Court of Federal Claims." (D.D.C. ECF No. 59 at 4); "Plaintiffs' proper remedy, if they have a valid breach of trust claim, lies, if anywhere, in the CFC under the Indian Tucker Act . . . ." *Id.* at 48. "The proper court to hear Plaintiffs' claims that their trust accounts have been mishandled . . . is the CFC." *Id.* at 50.

Following an approximately one-year temporary stay of proceedings in this case pursuant to joint motion of the parties to pursue settlement negotiations, in February 2008 the parties requested a continuation of the stay (ECF No. 8, Feb. 26, 2008). This Court, however, lifted the stay and *sua sponte* ordered the parties to file a Joint Status Report Regarding Applicability of 28 U.S.C. § 1500 (ECF No. 9, Feb. 27, 2008). Section 1500 provides that

> 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. The requested Joint Status Report was filed on April 1, 2008 (ECF No. 12). On April 9, 2008, after a telephonic status conference with the parties, the Court issued an Order to Show Cause in which it directed Plaintiff to show why this case should not be dismissed for lack of subject matter jurisdiction under 28 U.S.C. § 1500. (ECF No. 13).

On May 23, 2008, Plaintiff filed its brief arguing that Section 1500 does not preclude this Court from exercising jurisdiction over this case. (ECF No. 15). On July 8, 2008 Defendant filed its response in opposition. (ECF No. 18). The Court held oral argument on this matter on July 22, 2008 and conducted an evidentiary hearing on August 5, 2008. *See* ECF No. 27 at 4 ("to resolve the pertinent jurisdictional issue[] . . . the court first requested and received documentary submissions from the parties, including affidavits and declarations, and then conducted an evidentiary hearing at which percipient witnesses testified about the circumstances involved in filing the complaints in this court and in the district court.").

On August 22, 2008, the Court issued its ruling. The Court held that Plaintiff had filed the complaint in this case before filing its complaint in the district court case, and accordingly, Section 1500 did not divest the Court of jurisdiction over this case.

> In all the circumstances, the court is satisfied that the complaint in this court was filed before the corresponding complaint was filed in district court. Section 1500 accordingly is not applicable to bar jurisdiction over Nez Perce's complaint in this court because the complaint in district court was not pending at the time the complaint in this court was filed.

(ECF No. 27 at 12). The Court concluded that

> For the reasons stated, the court holds that when a complaint is filed in the Court of Federal Claims prior to the filing of an overlapping complaint in another court on the same day, 28 U.S.C. § 1500 does not divest this court of jurisdiction over that first-filed complaint. The Nez Perce Tribe has proved by a preponderance of the evidence that its Court of Federal Claims complaint was filed on December 28, 2006, earlier than its complaint filed the same day in district court. In sum, Nez Perce's complaint in the district court was not "pending' when the Tribe filed its complaint in this court.

Id. Defendant nevertheless now argues again for dismissal of this case under Section 1500.

SUMMARY OF ARGUMENT

Defendant's request for dismissal of this case under 28 U.S.C. § 1500 should be denied. It is based on a recent Supreme Court decision that is inapplicable, ignores a previous Supreme Court decision that is applicable, and disregards the good law of this jurisdiction on the precise Section 1500 inquiry at issue in this case and on which this Court's previous declination of dismissal under Section 1500 was based. Three years ago, this Court made a careful inquiry into the law and facts to determine that Section 1500 operates to divest this Court of jurisdiction only when an action in another court was filed first, and that the Tribe here filed in this Court before it filed in district court. Neither controlling law nor evidence has changed on this point since then. Defendant posits a new Section 1500 rule of law that it would like this Court to establish, but fails to show any pertinent authority requiring dismissal of this case. Accordingly, now, as in 2008, Section 1500 does not bar this Court's jurisdiction over this case.

ARGUMENT

I. DEFENDANT'S RELIANCE ON *TOHONO O'ODHAM* REGARDING THE SECTION 1500 ISSUE IN THIS CASE IS MISPLACED, AND DEFENDANT IGNORES THE SUPERME COURT'S AND THIS JURISDICTION'S CONTROLLING LAW REGARDING THIS CASE'S SECTION 1500 ISSUE

Three years ago, this Court rejected Defendant's arguments to dismiss this case for lack of subject matter jurisdiction under 28 U.S.C. § 1500. (ECF No. 27). Defendant's re-argument for dismissal under Section 1500 is based entirely on a recent Supreme Court decision, *United States v. Tohono O'odham*, 131 S.Ct. 1727 (2011). But Defendant's "renewed motion to dismiss for lack of jurisdiction" *see BLR Group v. United States,* 94 Fed. Cl. 354, 364 n.11 (Fed. Cl. 2010), "makes no new arguments and there is no manifest error of law or mistake of fact which would require a reconsideration of this court's previous opinion or dismissal of this case for lack of jurisdiction." *Mount Sinai Med. Center v. United States,* 23 Cl. Ct. 691, 692 (Cl. Ct. 1991); *see also Froudi v. United States,* 22 Cl. Ct. 647, 647-48 (Cl. Ct. 1991) ("Generally, a motion for reconsideration [even of a denial of a motion to dismiss for lack of subject matter jurisdiction] is not a vehicle for giving an unhappy litigant an additional chance to sway the judge, nor is it intended to allow a party to make arguments already presented to, and rejected by, the court.").

A. *Tohono O'odham* Did Not Address Section 1500's "Has Pending" Inquiry, And Thus *Keene Corp* Remains The Governing Law On This Point

It long has been established that Section 1500 requires this Court to answer two basic questions: 1) whether a plaintiff has pending a case in another court at the time it files an action in this Court (the "has pending" inquiry); and, 2) if so, whether the claims presented in the other action are the same as those in the action in this Court (the "same claim" inquiry). *See Agustin v. United States*, 92 Fed. Appx. 786, 788-89 (Fed. Cir. 2004), *cert. denied,* 543 U.S. 815 (2004). "The Court of Federal Claims lacks jurisdiction to hear the claim before it only if both of these

conditions are met." *United Keetoowah Band of Cherokee Indians v. United States,* 86 Fed. Cl. 183, 187 (Fed. Cl. 2009). The has pending inquiry is conducted first. *See Capelouto v. United States,* No. 10-823, 2011 WL 2441384, at *11 (Fed. Cl. June 17, 2011) (has pending inquiry is "the threshold question"); *accord Breneman v. United States,* 57 Fed. Cl. 571, 575 (Fed. Cl. 2003), *aff'd,* 97 Fed. Appx. 329 (Fed. Cir. 2004) (*per curium*), *cert. denied*, 543 U.S. 1021 (2004) (has pending inquiry is determined first because it is "dispositive of this court's jurisdiction"); *United Keetoowah Band*, 86 Fed. Cl. at 187 (court "must first assess" has pending inquiry and "then evaluate [same] claims" inquiry).

For at least the past fifty-five years, with respect to Section 1500's "same claim" inquiry, this Court was of the view that a suit in another court could not divest this Court's jurisdiction over a claim if the suit in the other court sought different relief. *Casman v. United States,* 135 Ct. Cl. 647 (1956). Similarly, for at least the past fifteen years, the Court of Appeals for the Federal Circuit has been of the view that, for claims to be the same, they "must arise from the same operative facts, and must seek the same relief." *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1551 (Fed. Cir. 1994) (*en banc*). Four months ago, *Tohono O'odham* made clear that for Section 1500 purposes, only the operative facts need be the same; the relief sought does not matter. 131 S.Ct. at 1727-1731 ("Two suits are for or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts, regardless of the relief sought in each suit.").

That is all that *Tohono O'odham* held. Defendant's argument that *Tohono O'odham* holds that the has pending inquiry "is not germane to the determination about whether the Court has jurisdiction over this case" misstates the Court's decision. Def's Memorandum of Points and Authorities in Support of its Motion to Dismiss at 2; *accord* Def's Mem. at 11 (*Tohono O'odham*

has "made clear" that the has pending inquiry "is not good law."). *Tohono O'odham* expressly did not present an issue of or address the Section 1500 has pending inquiry. 131 S.Ct. at 1729-30 (the has pending inquiry "is not presented in this case because the CFC action here was filed after the District Court suit.").

Every reported Section 1500 opinion of this Court since *Tohono O'odham* recognizes that decision's limits and proceeds to conduct a has pending inquiry. *See, e.g., 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; *Low v. United States*, No. 10-811, 2011 WL 2160880, at *5-7 (Fed. Cl. June 1, 2011). Somewhat remarkably, Defendant's Motion to Dismiss in the instant case does not address these opinions, three of which were issued before Defendant filed its Motion. These decisions undermine Defendant's argument that *Tohono O'odham* has "sufficiently undermined" prior Section 1500 has pending inquiry law. *See* Def's Mem. at 11.

The governing law regarding Section 1500's has pending inquiry is *Keene Corp. v. United States,* 508 U.S. 200, 206-09 (1993). *Keene* expressly holds that the has pending inquiry depends upon "the state of things at the time of the [Court of Federal Claims] action brought." 508 U.S. at 207 (citations omitted). This holding comports with the "general rule that subject matter jurisdiction turns on the facts upon filing." *Id.* Thus, Section 1500 bars "jurisdiction over the claim of a plaintiff who, *upon filing* [with the Court of Federal Claims], has an action pending in any other court 'for or in respect to' the same claim." *Id*. at 209 (emphasis added).[2]

[2]In light of *Keene's* express holding, Defendant's statements that *Keene* "makes clear that any" has pending inquiry is "incorrect" and / or "irrelevant" are, at best, curious. *See* Def's Mem. at 12 -13.

The Court of Appeals follows *Keene's* has pending inquiry holding faithfully. *E.g., Agustin v. United States,* 92 Fed. Appx. at 788 (under *Keene*, the determination of whether Section 1500 bars jurisdiction is made at the time the Court of Federal Claims case is filed). On this point, the Court of Appeals has long stated that the phrase "has pending" in Section 1500 is "unambiguous and thus is not susceptible to interpretation." *Shafer v. United States*, No. 08-103, 2008 WL 1992134, at *5 (Fed. Cl. Feb. 27, 2008), *citing Johns-Manville Corp. v. United States,* 855 F.2d 1556, 1567 (Fed. Cir. 1988).

Strict adherence to *Keene* has resulted in a general rule in this Court that "the exact order of plaintiff's filings [is] dispositive" of a Section 1500 has pending inquiry. *Berry v. United States*, 86 Fed. Cl. 750, 751-52 (Fed. Cl. 2009); *accord United Keetoowah Band,* 86 Fed. Cl. at 188 ("Based on the language of Section 1500, its purpose, and relevant case law, the Court concludes that time of filing is dispositive to the pending issue."); *Breneman*, 57 Fed. Cl. at 575-77 ("the timing issue is dispositive of this court's jurisdiction").[3]

[3]As the Court has noted there is some disagreement within the Court regarding Section 1500's has pending inquiry specifically in instances of so-called "same-day filings." (ECF No. 27 at 8 n.6). The majority view adheres to the general rule which recognizes as dispositive the actual sequence of the two complaints' filings notwithstanding that the filings occurred on the same calendar day. *E.g., United Keetoowah Band*, 86 Fed. Cl. at 190. A minority view adopts a *per se* rule that same-day-filings defeat this Court's jurisdiction under Section 1500. *E.g., Passamaquoddy Tribe v. United States,* 82 Fed. Cl. 256 (Fed. Cl. 2008). In the instant case, of course, the Court applied the majority view. (ECF No. 27 at 8-12).

Plaintiff anticipates that in replying to its Motion to Dismiss, Defendant will argue that a recent post-*Tohono O'odham* decision by a panel of the Court of Appeals, *Passamaquoddy Tribe v. United States,* No. 08-5110, 2011 WL 3606840 (Fed. Cir. Aug. 17, 2011), somehow stands for the proposition that that the minority view is now the law. *See Haudenosaunee v. United States,* No. 06-909, Def's Renewed Motion to Dismiss for Lack of Subject Matter Jurisdiction (Fed. Cl. ECF No. 52 at 9-10, Aug. 31, 2011). That is a specious argument, however, since the Tribe in *Passamaquoddy* did not appeal the has pending issue and thus the has pending issue was not before the Court of Appeals.

Indeed, this Court's opinion *in this case* has been cited with acclaim for its rationale for why Section 1500's has pending inquiry requires a determination of the timing or order of filing of complaints. Judge Wheeler has commented that

> The Court notes that the language of Section 1500 is far from plain. However, the language and structure of the statute favor requiring a factual determination of the order in which two claims are filed. In *Nez Perce Tribe*, Judge Lettow explained that the words "has pending" constitute a present participle which 'convey[s] the same meaning' as the present perfect tense and 'indicates action that was started in the past and has recently been completed or is continuing up to the present time.' 83 Fed. Cl. at 189 (quoting William A. Sabin, *The Gregg Reference Manual,* §§ 1033-34, at 272-73 (10th ed. 2005)). This interpretation is consistent with *Keene,* in which the Supreme Court held that Section 1500 presented a jurisdictional bar to a 'claim of a plaintiff who, *upon filing,* has an action pending in any other court. . . .' 508 U.S. at 209 (emphasis added). Accordingly, the text and grammatical structure of Section 1500 indicate Congress's intent to make time of filing dispositive on whether a claim is 'pending' in another court. *See Nez Perce Tribe,* 83 Fed. Cl. at 189.

United Keetoowah Band, 86 Fed. Cl. at 189 (citations and emphasis in original) (Wheeler, J.).

In expressly rejecting the minority view regarding the has pending inquiry to be applied to same-day-filings noted above in fn. 3, Judge Block has stated that "the decisions rejecting a *per se* rule offer the better argument." *Berry v. United States*, 86 Fed. Cl. 24, 28 (Fed. Cl. 2009). Judge Block continued that he was "particularly persuaded by Judge Lettow's textual analysis of § 1500 . . . [i]n *Nez Perce Tribe* . . . [where it was] elaborated:

> Grammatically, the words "has pending" in [§ 1500] constitute a present participle which 'convey[s] the same meaning' as the present perfect tense and 'indicates action that was started in the past and has recently been completed or is continuing up to the present time.' The Supreme Court's opinion in *Keene* is consistent with this grammatical understanding of the statutory usage because it refers to [§] 1500 as interposing a jurisdictional bar to a 'claim of a plaintiff who, *upon filing* [with the Court of Federal Claims], has an action pending in any other court' respecting the same claim. Thus, the natural plain meaning of the words used in [§] 1500 calls for a determination of the order in which two or more suits were filed. If a suit were filed first in this court, [§] 1500 would not apply.

86 Fed. Cl. at 28, *citing Nez Perce Tribe,* 83 Fed. Cl. at 189.

B. *Keene* Did Not Address Whether A Later-Filed Case Pending In Another Court Divests This Court Of Jurisdiction Under Section 1500; But The Law Of This Jurisdiction Is That A Later-Filed Case Does Not So Divest This Court's Jurisdiction

Admittedly, the specific issue underlying the Section 1500 has pending inquiry in *Keene* was whether this Court should apply the inquiry "by focusing on the facts as of the time *Keene* filed its complaints (instead of the time of the trial court's ruling on the motion to dismiss)." 508 U.S. at 207. *Keene* expressly did not address the issue of whether Section 1500 operates to "bar a plaintiff from prosecuting a claim in the Court of Federal Claims while he has pending a later-filed suit in another court 'for or in respect to' the same claim." *Id*. at 209 n.4. This non-addressed-by-the-Supreme-Court "later (or "subsequently")-filed" issue is precisely the sweeping argument that Defendant makes here – ***"the CFC loses 'jurisdiction' whenever the plaintiff has 'pending' in another court a suit that is related to its CFC claim."*** Def's Mem. at 12 (emphasis added); *accord* Def's Mem. at 7 ("under Section 1500, the CFC has no 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 10 n.5 ("the 'order of filing' issue is not relevant for purposes of determining whether the Court has jurisdiction over this case under Section 1500").[4]

But Defendant's broad argument is not the law and indeed it runs counter to controlling precedent and a host of relevant authority in this jurisdiction. In *Tecon Eng'rs v. United States*,

[4]Just how far Defendant stretches its argument is evidenced in another tribal breach of trust case in this Court, *Osage Tribe v. United States,* No. 99-550 (Fed.Cl. filed Aug. 2, 1999). There, Defendant argues that *Tohono O'odham* requires this Court to dismiss an action filed in this Court four years before a tribe filed a breach of trust action -- for declaratory and injunctive relief unavailable in this Court -- in district court, and one year after the parties stipulated to a dismissal of the district court action without prejudice. *Osage Tribe,* Def's Motion to Dismiss (Fed. Cl. ECF No. 646, June 9, 2011). Defendant's argument is that under *Tohono O'odham* the very existence of any "same claim" case in another court, whenever filed, and regardless of dismissal or other resolution of the other case, retroactively defeats this Court's jurisdiction under Section 1500.

170 Ct. Cl. 389, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966), the Court of Claims carefully examined Section 1500's legislative history and evolution and held "that the only reasonable interpretation of [§ 1500] is that it serves to deprive this court 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 this court." 343 F.2d at 949 (emphasis added).

"[T]he Supreme Court, in *Keene*, found it unnecessary to consider *Tecon*." *Griffin v. United States,* 85 Fed. Cl. 179, 184 (Fed. Cl. 2008), *aff'd,* 590 F.3d 1291 (Fed. Cir. 2009). Hence, post-*Keene*, the Court of Appeals has stated that *Tecon's* "later-filed" rule "remains good law and binding on this court." *Hardwick Bros. Co. II v. United States,* 72 F.3d 883, 886 (Fed. Cir. 1995) (expressly holding that later-filed Federal Tort Claims Act action in district court does not divest Court of Federal Claims of earlier properly established jurisdiction over Contract Disputes Act action allegedly involving the same claims). *Hardwick Bros.*' unequivocal view on this point has been noted with approval repeatedly by this Court. *E.g., Berry*, 86 Fed. Cl. at 28-29; *Breneman*, 57 Fed. Cl. at 575-77; *Teegarden v. United States*, 42 Fed. Cl. 252, 255 (Fed. Cl. 1998).

Thus, despite Defendant's persistent arguments to the contrary (and purported "binding" decisional authority from 1924, 1949, and 1964 *see* Def's Mem. at 12-14), Section 1500 is "triggered only where there is a preexisting lawsuit" in another court – not by a "later-filed" lawsuit. *Griffin,* 85 Fed. Cl. at 187. Significantly, in *Griffin,* Judge Allegra came to this conclusion largely based on what he views as this Court's "careful parsing" of Section 1500 *in this case* and in *d'Abrera v. United States,* 78 Fed. Cl. 51 (Fed. Cl. 2007) (Lettow, J.).

> Under [Judge Lettow's construction of Section 1500 in *Nez Perce Tribe*], for a district court case to prime this court's jurisdiction, it must be 'started in the past,'

> and thus be pending ***before*** the case in this court is filed or deemed filed. Reading the "has pending" language in this way comports with the original language of that section, as passed in 1868, [Section 1500] talked in terms of a suit that an individual '***shall have commenced*** and has pending.'' Act of June 25, 1868, ch. 71, 15 Stat. 77. If there were any doubt that the action priming jurisdiction in this court must be filed before a suit is deemed filed here, Congress' use of this second present participle – 'shall have commenced' – would seem to dispel it. And this earlier version of the statute remains relevant because, as outlined below, the subsequent modification of the statute eliminating that language was not intended to change its meaning.

Griffin, 85 Fed. Cl. at 186 (citations and emphasis in original). Judge Lettow has "revealed" "that Congress did not intend to bar a lawsuit from proceeding in this court as long as a similar claim was no longer pending before another court." *Id*. at 188. "To the contrary, as noted in *Tecon,* the statute's 'legal evolution in the Congress' makes clear that it was intended only to bar this court from litigating the claims of those who elected to filed suit in another court prior to filing suit in this court." *Id.* at 190 (citations omitted).

"Following [*Tecon* and] *Hardwick,* this court recently stated that . . . the same action filed in district court prior to being filed in the Court of Federal Claims divests the latter of jurisdiction, as do actions filed simultaneously, but actions filed in district court subsequent to the Court of Federal Claims filing are not considered 'pending' in the language of Section 1500, and thus do not divest this court of jurisdiction." *Breneman,* 57 Fed. Cl. at 576 (citation omitted). "Cases in this court that have involved later-filed district court actions have not been dismissed for lack of jurisdiction under § 1500 even if both claims were the same." *Id.* at 577 n.11 (citation omitted). "These cases instruct that the court retains jurisdiction because plaintiffs filed their complaint here before filing in the district court. " *Id.* "Once the court finds that plaintiffs' claim was first filed in this court, defendant's motion to dismiss for lack of subject matter jurisdiction must be denied, regardless of whether plaintiffs' later-filed action involved the same claim as defined for purposes of § 1500." *Id.* (citation omitted); *accord Teegarden,* 42

Fed. Cl. at 255 (where defendant asserted that Section 1500 divested this Court of its jurisdiction upon plaintiff's filing of a suit in federal district court based on the same operative facts, court holds that under *Tecon* and *Hardwick Bros.* the subsequently filed federal district court case does not divest this Court's jurisdiction under Section 1500).

Indeed, Defendant knows well the order of filing rule's vitality. While arguing as here against the rule *"*post-*Tohono O'odham"* in other tribal trust fund cases, Defendant nevertheless is careful to protect itself regarding the application and merits of the rule. *See, e.g., Coeur D'Alene Tribe v. United States,* No. 06-940 (Fed. Cl. ECF No. 37 at 10 fn. 4, July 28, 2011) (stating that "[i]f this Court were to apply the so-called 'order of filing' rule . . ." a factual determination of the order of filing is appropriate); *Crow Creek Sioux Tribe v. United States,* No. 05-1383, (Fed. Cl. ECF No. 50 at 11 fn. 11, July 27, 2011) ("The United States notes that, because Plaintiff filed its district court case before it filed this case, the parties and the Court do not have to address any issues about the applicability of the so-called 'order of filing' rule articulated in *Tecon*"); *Kaw Nation v. United States,* No. 06-934 (Fed. Cl. ECF No. 84, July 27, 2011) (Joint Stipulation Relating to the United States' Motion to Dismiss under Section 1500 regarding the facts related to the order of filing of complaints filed by tribe in this Court and district court on same day).

C. *Tohono O'odham* Does Not Require This Court To Reach The Section 1500 Same Claim Inquiry Where, As Here, The Has Pending Inquiry Is Resolved In Favor Of Plaintiff

Tohono O'odham does provide a new interpretation of Section 1500's same claim inquiry. That development, however, has no bearing on the status of the same claim inquiry in this case. "[I]f the court determines that plaintiffs did not have a suit 'pending,' 28 U.S.C. § 1500, against the United States when they filed in this court, the court need not address the 'same

claim' issue because the timing issue is dispositive of this court's jurisdiction." *Breneman,* 57 Fed. Cl. at 575 (citations omitted); *accord Salt River Pima Maricopa Indian Community v. United States,* No. 06-943, 2008 WL 1883170, at *28 (Fed. Cl. Apr. 24, 2008) ("Having resolved the 'pending' issue in favor of the Plaintiff, we need not consider whether the Plaintiff asserted the 'same claims' in both complaints.") (citation omitted).

Such was Plaintiff's position back in 2008. *See* Joint Status Report at 2 (ECF No. 12, Apr. 1, 2008); Plaintiff's Response to Order to Show Cause at 7 (ECF No. 15, May 23, 2008). Despite Defendant's express argument to the contrary, *see* Def's Response in Support of Order to Show Cause Why Case Should be Dismissed Pursuant to 28 U.S.C. § 1500 (ECF No. 18 at 18-27, July 8, 2008), this Court agreed with Plaintiff regarding this rule of law. In its 2008 Opinion, the Court found in favor of Plaintiff on the Section 1500 has pending inquiry, and did not reach the same claim inquiry. (ECF No. 27). Nothing in *Tohono O'odham* changes this rule and Defendant does not even attempt to argue otherwise.

II. SHOULD THIS COURT DETERMINE THAT IT MUST DISMISS THIS CASE UNDER SECTION 1500, THE COURT SHOULD REFRAIN FROM DOING SO WHILE SETTLEMENT DISCUSSIONS ARE ACTIVE

Plaintiff maintains that, as before *Tohono O'odham,* there is no need post-*Tohono O'odham* to dismiss this case under Section 1500. Should this Court disagree, however, Plaintiff respectfully requests that this Court refrain from dismissing the case while the parties continue to pursue actively on-going settlement discussions. Such a result is consistent with Defendant's statement in its Memorandum in Support of its Motion to Dismiss:

> At the behest of the parties, the Court stayed the litigation on October 30, 2009, and referred the case to Senior Judge Eric Bruggink for alternative dispute resolution ("ADR"). Dkt 38. Since that time, the parties have been working with each other cooperatively and with Judge Bruggink to resolve Plaintiff's trust accounting and trust mismanagement claims through mediation, without the need for protracted litigation. On May 27, 2011 the United States informed Judge

> Bruggink and Plaintiff's counsel of its intention to bring this motion in light of Tohono O'odham, and further the United States reaffirmed the United States' commitment to continuing the ADR process with Plaintiff and Judge Bruggink, if possible.

Def's Mem. at 3-4.

It is possible and routine for courts to defer ruling on motions to dismiss in light of settlement discussions. *See, e.g., B.M. ex rel. Moore v. Missouri,* No. 09-459, 2009 WL 3461378, at *1 n.2 (E.D. Mo. Oct. 21, 2009) (holding defendant's motion to dismiss temporarily in abeyance "in view of reported efforts of plaintiff and [defendant] to finalize a settlement"); *In re IBP, Inc. Sec. Litig.* 328 F. Supp.2d 1056, 1064 (D.S.D. 2004) (court was preparing its second draft of opinion on motion to dismiss when parties requested that court hold its ruling in abeyance pending the outcome of settlement negotiations); *Galgay v. Gangloff,* 677 F.Supp. 295, 296 (M.D.Pa. 1987) (court had held defendant's motion to dismiss in abeyance where parties had requested deferment of any ruling on the motion due to serious settlement negotiations, but court found motion ripe for disposition as soon as it was informed that negotiations had failed).

Similar requests regarding Section 1500 issues in other tribal trust cases in this Court have been granted or made. *E.g., Seminole Nation v. United States*, No. 06-935 (Fed. Cl. ECF No. 93, July 7, 2011) (Order granting Plaintiff's unopposed motion to enlarge briefing schedule on Defendant's post-*Tohono O'odham* Section 1500 dismissal motion until March 27, 2012, where parties have reached agreement in principle for settlement and requesting that in the event that a settlement agreement is executed before March 12, 2012, the parties shall file as soon as practicable the appropriate stipulation of dismissal pursuant to RCFC 41); *Colorado River Indian Tribes v. United States,* No. 06-901 (Fed. Cl. ECF No. 51 and ECF No. 52, July 12, 2011) (where Defendant moved post-*Tohono O'odham* for Section 1500 dismissal, Plaintiff Tribe has

moved for enlargement of time to respond to the dismissal motion until January 9, 2012, due to negotiated settlement discussions).

To be sure, refraining from reaching the issue in this case will not deprive Defendant of an opportunity for resolution of its Section 1500 issues. As it did in *Tohono O'odham,* Defendant has made and will continue to make Section 1500 arguments in other tribal trust cases. *See, e.g., Eastern Shawnee Tribe of Oklahoma v. United States,* No. 06-917, 82 Fed. Cl. 322 (Fed. Cl. 2008) (dismissed without prejudice under Section 1500), *rev'd*, 582 F.3d 1306 (Fed. Cir. 2009), *cert. granted, vacated and remanded*, 131 S.Ct. 2872 (S.Ct. May 2, 2011), *remanded to*, No. 08-5102 (Fed Cir. July 29, 2011) (post-*Tohono O'odham* oral argument on Section 1500); *see also Haudenosaunee,* No. 06-909 (Fed. Cl. ECF No. 52 at 7-12, Aug. 31, 2011) ("Plaintiffs' Order of Filing is Irrelevant for the Purposes of Section 1500") *Kaw Nation v. United States*, No. 06-934 (Fed. Cl. ECF No. 80-1 at 8, July 1, 2011) ("Section 1500 Divests this Court of Jurisdiction, Regardless of the Order of Filing"); *see also Colorado River Indian Tribes*, No. 06-901 (ECF No. 52 at 1, July 12, 2011) (in moving to enlarge briefing schedule for Defendant's post-*Tohono O'odham* dismissal motion, Plaintiff notes that Defendant's Section 1500 dismissal arguments are "not unique to this case; [they] will also be raised and adjudicated in some of the 31 other pending cases that are potentially affected by the *Tohono* decision.").

Conversely, a quick dismissal of this case could severely affect Plaintiff's ability to have its historical breach of trust claims heard or resolved, especially given Defendant's officials' pending Motion to Dismiss Plaintiff's later-filed district court case.[5] Notwithstanding the

[5]Given the significance of this matter, Plaintiff respectfully submits that, if it would be of assistance to the Court in addressing Defendant's Motion to Dismiss this case, oral argument on the Motion would be appropriate. Plaintiff notes that to date in at least three other tribal trust cases involving Section 1500, oral arguments have been scheduled. *See Red Cliff Band of Lake Superior Chippewa v. United States,* No. 06-923 (Fed. Cl. ECF No. 46, Aug. 15, 2011) (oral

motions to dismiss in both cases, Plaintiff assumes that Defendant is pursuing settlement discussions of Plaintiff's claims in good faith, and thus respectfully requests that the parties be given a continued reasonable opportunity to determine if settlement is possible. As one court has aptly concluded

> In short, some tactical maneuvering occurs in the litigation of most . . . disputes. Within the rather broad and ill-defined boundaries such maneuvering is permissible as an inevitable part of the process. As long as those boundaries are not crossed, the Court should refrain from taking drastic action, such as dismissal of a case based upon 'fine line' subjective judgments with respect to the tactics employed or their possible effect on ephemeral possibilities of settlement. Rather, the Court should reserve such action for situations where an injustice would be created or realistic prospects of settlement are undermined. This case does not present one of those situations.

Comtec Info. Sys. v. Monarch Marking Sys., 962 F. Supp. 15, 19 (D.R.I. 1997). Similar refrainment is called for here at least at this time.

CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss for lack of subject matter jurisdiction under 28 U.S.C. § 1500 should be denied.

Respectfully submitted this 2nd day of September, 2011,

/s/ Melody L. McCoy

MELODY L. MCCOY
Attorney of Record for Plaintiff
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
Telephone: (303) 408-5596
Facsimile: (303) 443-7776
Email: mmccoy@narf.org

---

argument scheduled for Sept. 13, 2011); *Oglala Sioux Tribe v. United States,* No. 05-1378 (Fed. Cl. ECF No. 53, July 28, 2011): (oral argument scheduled for Sept. 20, 2011); *Confederated Tribes of the Goshute Reservation v. United States,* No. 06-912 (Fed. Cl. ECF No. 40, Aug. 18, 2011) (oral argument scheduled for Oct. 26, 2011).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of September, 2011, I filed the foregoing **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS UNDER 28 U.S.C. § 1500** electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

Michael D. Thorp
U.S. Department of Justice – ENRD
601 D Street, NW
Washington, D.C. 20044
Phone: (202) 305-0456
Facsimile: (202) 353-2021
Email: michael.thorp@usdoj.gov

/s/ Melody L. McCoy
Melody L. McCoy
Attorney of Record for Plaintiff