

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

OMAHA TRIBE OF NEBRASKA,)	Case No. : 1:06-cv-00911-NBF
)	[Hon. Nancy B. Firestone]
Plaintiff,)	
)	
vs.)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendants.)	
)	
)	
)	

**SUPPLEMENTAL BRIEF OF PLAINTIFF, OMAHA TRIBE OF NEBRASKA, IN
RESPONSE TO OSC RE APPLICATION OF 28 U.S.C. SECTION 1500 IN LIGHT OF
SUPREME COURT RULING IN TOHONO O’ODHAM NATION**

COMES NOW plaintiff, Omaha Tribe of Nebraska (hereinafter “Omaha Tribe”), in response to the Court’s Order to Show Cause why the present case should not be barred from the CFC pursuant to 28 U.S.C. §1500 in light of the Supreme Court’s recent decision in *Tohono O’odham Nation*, 131 S.Ct. 1723 (U.S., 2011). Plaintiff concludes that the CFC has jurisdiction to hear this matter where the companion case filed in the United States District Court does not present the same claim. The facts on which the United States District Court claim is based are not “substantially the same operative facts” as those at issue here.

1. The Tohono O’odham Ruling

On April 26, 2011, the United States Supreme Court decided the matter of *United States v. Tohono O’odham Nation*. That decision addresses the jurisdictional limitations placed on the CFC

by 28 U.S.C. §1500. Section 1500 limits the subject matter jurisdiction of the CFC by depriving the Court 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. . . .” *Id.*

Since the *en banc* decision in *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1548 (Fed. Cir. 1994), it was well-settled that the two actions do not present the same “claim” unless they ***both*** (1) arise from *the same operative facts* ***and*** (2) seek *the same relief*. See *Loveladies*, 27 F.3d at 1551 (“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***” (emphases in original)); accord *Harbuck v. United States*, 378 F.3d 1324, 1328 (Fed. Cir. 2004).

The Supreme Court’s decision in *Tohono O’odham* departs from that precedent and holds that two pending lawsuits 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. *Tohono O’odham* 131 S.Ct. at 1727 - 1731.

Applying the new standard in the *Tohono O’odham* case, the Supreme Court compared the Tribe’s complaints filed in the District Court and CFC and determined that there was substantial overlap in the operative facts sufficient to preclude jurisdiction in the CFC. *Id.* at 1731. In fact, the Supreme Court found that the two complaints were practically the same noting, “Indeed, it appears that the Nation could have filed two identical complaints, save the caption and prayer for relief, without changing either suit in any significant respect.” *Ibid.* This determination was in accord with the original CFC dismissal on §1500 grounds which was based, in part, on the finding that the Nation’s two suits were, “for all practical purposes, identical.” *Ibid.*

As discussed below, the two complaints filed by plaintiff do not contain the same factual allegations and are based on different operative facts.

2. The Omaha Tribe of Nebraska Complaints

On December 28, 2006, Omaha Tribe filed a complaint in the CFC alleging breach of fiduciary duty against the USA. The Tribe seeks monetary damages, with interest, due it resulting from the USA's past and present mismanagement of the Tribe's monetary and non-monetary trust assets. The CFC complaint delineates the duties owed by USA which include those duties set forth in 25 C.F.R. §§115.01 - 115, 1001 and the duty to administer the trust assets with the greatest skill and care which includes the duty to ensure that the Tribe's trust property and funds are protected, preserved and managed as to produce the highest and best use and monetary return (CFC Comp. ¶¶ 13-25). In the CFC, Omaha Tribe seeks to analyze specific trust transactions to establish that the USA's management fell below the applicable standard of care for a prudent trustee. (A true and correct copy of the Tribe's CFC complaint is attached hereto as Exhibit "A").

Previously, on June 2, 2004, Omaha Tribe filed a separate complaint in the District Court, Case No. 1:04-cv-00901, alleging the government breached its narrowly defined duty to provide a historical accounting of trust activity. At paragraph 18 of the District Court complaint, it is stated that by the Act of December 22, 1987, pub. L. No. 100-202, 101 Stat. 1329, Congress imposed two requirements on defendant: 1) that they audit and reconcile tribal trust funds, and 2) that they provide an accounting of such funds. Thereafter, Count I of the complaint sets forth that defendant's fiduciary duties include the duty to provide the tribe with a full and complete accounting and alleges no accounting has been provided. Count I seeks a declaration that such an accounting has not been provided. Count II demands that defendant provide a full and complete accounting as required by

law. (A true and correct copy of the Omaha Tribe's complaint filed in the District Court is attached hereto as Exhibit "B").

The District Court complaint fundamentally differs from the CFC complaint in that it is based upon substantially different operative facts in that separate trust duties are at issue.

3. The Omaha Tribe's Complaints are not Based on the Same Operative Facts.

As the *en banc* Court recognized in *Loveladies*, "operative facts" do not include every fact in a complaint, but instead require some link between the facts and the elements of the claim to be proved:

"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, this is, the cause of action. For example, without legal underpinning, words in a contract are no different from casual correspondence."

27 F.3d at 1551 n. 17. Although the Court thus explained its general understanding of "operative facts" this issue was not critical to the decision in *Loveladies* and therefore the Court concluded it was unnecessary to "further refine" the term.

Consistent with *Loveladies*, the CFC in other cases has understood that the inquiry requires a comparison of those facts material to the proof of plaintiff's claims and does not extend to "background facts." The "fact that two claims share the same factual background is insufficient to divest [that] Court of jurisdiction when there is a material difference between the operative facts relevant to each claim." *Cooke v. United States*, 77 Fed. Cl. 173, 178; *see also Fire-Trol Holdings, LLC v. United States*, 65 Fed Cl. 32, 34 (2005) (Facts that are "merely background" are "not operative facts directly giving rise to the claims pled."); *Heritage Minerals, Inc. v. United States*, 71 Fed. Cl. 710, 716.

The two Omaha Tribe complaints are based on distinct trust duties which are the operative facts of each case. As such, the link between the facts and the elements of the District Court claim to be proved is whether the government has provided the accounting required by law. The operative facts concern the government's conduct in providing an accounting, as well as the nature, scope, accuracy and completeness of the accounting, assuming one has been performed. Conversely, the claims sought in the CFC complaint do not involve the evaluation of any accounting. Rather, the CFC case concerns the analysis of specific trust related transactions to determine whether the USA, as trustee, breached its fiduciary duty to Omaha Tribe causing it monetary damages. The distinction between the duties is critical where the analysis of each duty naturally involves the analysis of different operative facts.

Here, the operative facts are different where distinct conduct related to distinct duties are at issue in the two complaints. Paragraph numbers 17-30 of the District Court complaint detail the specific allegations concerning the claim to be proved. These allegations concern the duty of government to maintain records of account, render a full, accurate and timely audit or accounting to plaintiff, provide a clear statement as to the origin or use of all of the funds, to provide a clear statement of why payments were being made, provide an effective system for regular or periodic accountings, etc. These are the operative facts in the District Court case.

The operative facts of the CFC complaint are contained in paragraph numbers 15-37 and set forth the factual basis of the CFC claims. These paragraphs identify the source and nature of defendant's fiduciary obligations to manage tribal monetary and non-monetary trust assets. Specifically, paragraph 37A - U identifies the conduct of the USA which breached the fiduciary duty it owed to Omaha Tribe. These are the operative facts of the CFC claims. The CFC claims do not

involve the evaluation of any accounting that may have been performed by the government. This issue is not part of the CFC case.

For the reasons set forth above, the distinct duties on which each case is based are independent of each other and the evaluation of each claim and the proof necessary to prevail in the two cases are entirely different. In fact, the evidence that would be presented during the trial of the two cases will look very different. The trial in the District Court will be dominated by accounting issues presented by forensic accounting and trust accounting experts. Omaha Tribe will establish through admissible evidence that the government has failed to provide an accounting that comports with the standard required of a trustee.

The trial in the CFC will look entirely different and will be dominated by evidence relating to the handling of specific trust transactions and assets, *e.g.*, whether certain specific contracts for the sale of natural resources provided plaintiff with market value, whether certain land leases were collected and provided proper compensation, whether trust funds received the highest interest available, etc. The evidence presented will relate to specific contracts, leases, and similar agreements detailing how trust assets were handled and disposed of. Trust experts as well as experts familiar with the market value of timber, gravel, land leases, rights of way, etc. will offer testimony that the USA breached its fiduciary duties to Omaha Tribe and will offer opinions as to the dollar amount of damages suffered. The trier of fact in the District Court and the CFC will not hear the same evidence nor will there be the same findings of law and fact.

4. Conclusion

Based on the foregoing, plaintiff respectfully asks the Court not to dismiss the present complaint for lack of jurisdiction pursuant to 28 U.S.C. §1500 where the claims at issue are not the

same as those presented in the complaint pending before the United States District Court.

Dated this 17th day of June, 2011.

Respectfully submitted,

/s/ Brian J. Leinbach

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed on June 17, 2011 using the Court's ECF system and that the below-listed counsel are ECF users and will be served via the ECF System:

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This 17th day of June, 2011.

/s/ Linda Stark

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