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.	)	
	)	

THE UNITED STATES' MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION

Pursuant to Rules 12(c) and 12(h)(3) of the Rules of the United States Court of Federal Claims, the United States respectfully moves for dismissal of this action because the Court lacks subject matter jurisdiction pursuant to 28 U.S.C. § 1500. Since this Court's ruling on August 22, 2008, that 28 U.S.C. § 1500 does not bar its jurisdiction in the case (see Dkt. 27), the Supreme Court has issued its decision in United States v. Tohono O'odham Nation, ___ U.S. ___, 131 S. Ct. 1723 (2011) (Tohono O'odham), which clarified the jurisdictional limits of 28 U.S.C. § 1500. Accordingly, the United States respectfully moves to dismiss this case.

As explained in the attached memorandum of points and authorities, Tohono O'odham makes clear that the Court lacks subject-matter jurisdiction over Plaintiff's claims in this case because those claims are "for or in respect to" claims pending before the United States District Court for the District of Columbia in Nez Perce Tribe v. Kempthorne, No. 06-cv-02239 (D.D.C.). Therefore, this Court should dismiss this case for lack of subject-matter jurisdiction.

Respectfully submitted this 1st day of July, 2011,

IGNACIA S. MORENO
Assistant Attorney General

/s/Michael D. Thorp
MICHAEL D. THORP
United States Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 663
Washington, DC 20044-0663
Telephone: (202) 305-0456
Facsimile: (202) 353-2021
E-mail: Michael.Thorp@usdoj.gov

Attorney of Record for the United States

OF COUNSEL:

ANTHONY P. HOANG
ANNA K. STIMMEL
United States Department of Justice
Environment and Natural Resources Division
P.O. Box 663
Washington, DC 20044-0663
Telephone: (202) 305-0241
Telephone: (202) 305-3895
Facsimile: (202) 353-2021
E-mail: Anthony.Hoang@usdoj.gov
E-mail: Anna.Stimmel@usdoj.gov

KYSCHIA PATTON
JAMES W. FERGUSON
Office of the Solicitor
United States Department of the Interior
Washington, DC 20240

THOMAS KEARNS
Office of the Chief Counsel
Financial Management Service
United States Department of the Treasury
Washington, DC 20227

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.	)	
	)	

UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

TABLE OF CONTENTS

I. INTRODUCTION 1

II. RELEVANT PROCEDURAL HISTORY 2

III. RELEVANT FACTUAL BACKGROUND 4

A. This Lawsuit 4

B. Plaintiff's Lawsuit in the District Court 5

IV. STANDARD OF REVIEW 5

V. ARGUMENT 7

A. 28 U.S.C. § 1500 7

B. This Case and the District Court Case Are Based on Substantially the Same Operative Facts. 8

C. Plaintiff's Same-Day Filings of its CFC and District Court Complaints Are Irrelevant for Purposes of Section 1500. 10

VI. CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Allen v. United States, 9 Ct. Cl. 458 (1986) 2

Aurbaugh v. Y&H Corp., 546 U.S. 500 (2006) 6

Corona Coal Co. v. United States, 263 U.S. 537 (1924) 12

Crusan v. United States, 86 Fed. Cl. 415 (2009) 6

Degirmenci v. Sapphire-Fort Lauderdale, 642 F. Supp.2d 1344 (S.D. Fla. 2009) 5

Delaware Valley Floral Group, Inc. v. Shaw Rose Nets, 597 F.3d 1374 (Fed. Cir. 2010) 5

Ervin & Assocs., Inc. v. United States, 44 Fed. Cl. 646 (Fed. Cl. 1999) 3

Newell Cos. v. Kenney Mfg. Co., 864 F.2d 757 (Fed. Cir. 1988) 14

Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222 (1957) 13

Hill v. United States, 8 Cl. Ct. 382 (1985) 8

Hobbs v. United States, 168 Ct. Cl. 646 (1964) 14

In re Skinner & Eddy Corp., 265 U.S. 86 (1924) 12

Ins. Co. of the West v. United States, 243 F.3d 1367 (Fed. Cir. 2001) 12

Keene Corp. v. United States, 508 U.S. 200 (1993) 7, 8, 11-13

Maguire Indus., Inc. v. United States, 114 Ct. Cl. 687 (1949) 13-15

Mars, Inc. v. Kabushiki-Kaisha Nippon Conlux, 24 F.3d 1368 (Fed. Cir. 1994) 6

Schy v. Susquehanna Corp., 419 F.2d 1112 (7th Cir. 1970) 6

Snyder v. United States, 63 Fed. Cl. 762 (2005) 6

Stone Container Corp. v. United States, 229 F.3d 1345 (Fed. Cir. 2000) 12

Tecon Eng'rs, Inc. v. United States, 343 F.2d 943 (1965) 11, 14, 15

Toxgon Corp. v. BNFL, Inc., 312 F.3d 1379 (Fed. Cir. 2002) 6

United States v. Tohono O'odham Nation, 131 S. Ct. 1723 (2011) 1, 7-13, 15

UNR Indus. v. United States, 962 F.2d 1013 (Fed. Cir. 1992) 7, 12, 14, 15

Wilson v. United States, 32 Fed. Cl. 794 (1995) 6

STATUTES & RULES

28 U.S.C. § 1500 . . . . . 1-3, 6-8, 12-15

28 U.S.C. § 260 (1946) 13

Federal Practice and Procedure Sec. 1367 6

RCFC 11 . . . . . 14, 15

RCFC 12(b)(1) 6

RCFC 12(h)(3) 6, 7

RCFC 12(c) 5

RCFC 59 5

I. INTRODUCTION

Plaintiff has a suit pending in this Court and a suit pending in the United States District Court for the District of Columbia ("District Court") that arise from substantially the same operative facts. See Opinion & Order, Dkt. No. 27 at 2 (quoting Joint Status Report, Dkt. No. 12 at 1) ("[T]he cases present the same operative claims and are based on the same operative facts; and [p]laintiff seeks essentially the same relief with respect to its trust fund accounts."). In both suits, Plaintiff alleges that the United States violated various treaty provisions, statutes, laws, and fiduciary obligations, and that it has mismanaged Plaintiff's trust assets.

This Court is one of limited jurisdiction. One of those jurisdictional limits, 28 U.S.C. § 1500 ("Section 1500"), provides the following:

> 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.

It is well-established that this Court lacks subject-matter jurisdiction to entertain a suit if the plaintiff has a suit pending in another court based upon substantially the same operative facts. As this Court is aware, the Supreme Court recently held that, "[t]wo 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." United States v. Tohono O'odham Nation, ___ U.S. ___, 131 S. Ct. 1723, 1731 (2011) ("Tohono O'odham").

On August 22, 2008, this Court held, after briefing and an evidentiary hearing, that Section 1500 is not a jurisdictional bar to this case because Plaintiff had filed this case before it had filed its case in the District Court. See Dkt. 27, at 12. Now, in light of Tohono O'odham, the United States

respectfully moves to dismiss the case for lack of subject-matter jurisdiction (and, in so doing, requests that the Court reconsider its prior ruling about the applicability of Section 1500). As Tohono O'odham makes clear, the only relevant inquiry to Section 1500's applicability here is whether this case and Plaintiff's case pending before the District Court, Nez Perce Tribe v. Kempthorne, No. 06-cv-02239 (D.D.C.), are based on substantially the same operative facts (which they indisputably are). The time of filing issue, which formed the basis for this Court's prior ruling regarding Section 1500, Dkt. 27, is not germane to the determination about whether the Court has jurisdiction over this case. Therefore, the Court should dismiss this case for lack of subject-matter jurisdiction.

II. RELEVANT PROCEDURAL HISTORY

On December 28, 2006, Plaintiff filed this case against the Secretary of the Interior, the Assistant Secretary of the Interior for Indian Affairs, and the Secretary of the Treasury, in their official capacities.[1/] Complaint, Dkt. No. 1 ("CFC Complaint"). Also on the same day, Plaintiff filed a case in the District Court against the Secretary of the Interior and the Secretary of the Treasury, in their official capacities.[2/] Nez Perce Tribe v. Kempthorne, No. 06-cv-2239 (D.D.C.),

---

[1/] Under the Rule 10 of Rules of the Court of Federal Claims ("RCFC") the only proper party defendant is the United States. See, e.g., Allen v. United States, 9 Ct. Cl. 458, 461, n.5 (1986). Notwithstanding Plaintiff's improper naming of defendant, however, the parties and the Court herein have treated the complaint as having been lodged against the United States.

[2/] There is an identity of parties in both lawsuits, even though, in its District Court case, Plaintiff named only federal officials in their official capacities. 28 U.S.C. § 1500 applies not only when the other case actually names the United States as a defendant but also when the other proceeding is 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, directly or indirectly under the authority of the United States." Id.

Dkt. No. 1 ("District Court Complaint"), attached hereto as Exhibit 1.[3/]

Pursuant to court order, the Parties filed a Joint Status Report Regarding Applicability of 28 U.S.C. § 1500 on April 1, 2008. Dkt. 12. Thereafter, this Court issued an order directing the Tribe "to show cause why the case should not be dismissed in light of the jurisdictional issue raised by 28 U.S.C. § 1500." Dkt. 13. After briefing and oral argument on July 22, 2008, the Court conducted an evidentiary hearing on August 5, 2008. On August 22, 2008, the Court issued its ruling that Plaintiff had filed the complaint in this case before it filed the complaint in the District Court case, albeit on the same day, and that, accordingly, Section 1500 did not divest the Court of jurisdiction over this case. Dkt. 27.

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

---

[3/] The United States focuses the discussion in this memorandum on the original complaints that Plaintiff filed in this case and in the District Court. Regardless of whether the original complaints or the amended complaints in Plaintiff's cases are used, however, the results are the same because the amended complaints relies on operative facts that are substantially the same as the ones in the original complaints. The amendments of the District Court complaints have consisted of (1) the addition of named plaintiffs; (2) the addition of a request that the Court order the United States to preserve documents relevant to the lawsuit; and (3) the express exclusion of certain tribes from the class that Plaintiff and the other Tribes in the District Court case tried unsuccessfully to establish. In other words, the amended District Court complaints are identical in substance to the original complaint, and, therefore, the amendment did not affect Plaintiff's jurisdictional posture for purposes of Section 1500. See, e.g., Ervin & Assocs., Inc. v. United States, 44 Fed. Cl. 646, 655 n.8 (Fed. Cl. 1999) (concluding that plaintiffs can cure defective *allegations* of jurisdiction with amended complaints but that they cannot remedy *actual jurisdictional defects*). Thus, even if this Court were to treat the amended complaints in this case and in Plaintiff's District Court case as the operative pleadings for purposes of Section 1500, this case still would suffer from fatal jurisdictional flaws and should be dismissed.

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.

III. RELEVANT FACTUAL BACKGROUND

A. This Lawsuit

In its complaint in this case, Plaintiff seeks damages for the United States' alleged mismanagement of Plaintiff's trust funds and trust resources. Plaintiff alleges that the treaties that created the Nez Perce Reservation, as well as Congressional statutes governing the United States' management of Indian trust funds, establish the United States as Plaintiff's trustee and impose upon the United States certain fiduciary obligations. CFC Complaint, Dkt. No. 1 at ¶¶ 9-13, 17-18. Plaintiff also alleges that Congress, by certain reports issued to certain sub-committees within the House of Representatives, has been critical of the Department of the Interior's ("Interior") historical management of Indian trust assets. Id. at ¶¶ 19-21. Plaintiff further alleges that Congress has imposed specific duties on the United States to audit and provide an accounting of tribal trust funds. Id. at ¶¶ 22-23. Plaintiff additionally alleges that "[t]he United States has breached, and is breaching, its trust responsibilities to the Tribe by its continuing failure to implement the basic trust fund administration and management procedures required by law." Id. at ¶ 27. Plaintiff claims that it has suffered a financial loss as a result of these alleged breaches of trust responsibilities. Id. at ¶ 28.

B. Plaintiff's Lawsuit in the District Court

In its District Court case, Plaintiff seeks a declaratory judgment stating that the United States breached its fiduciary trust obligations to Plaintiff and an order compelling the United States to provide a full and complete accounting of Plaintiff's trust funds. Plaintiff alleges that it is the beneficial owner of funds held in trust by the United States. District Court Complaint, Dkt. No. 1 at ¶ 9. Also, Plaintiff claims that federal treaties and statutes impose responsibilities on the United States as the trustee of tribal funds. Id. at ¶ 25. Further, Plaintiff alleges that various acts of Congress govern the United States' management of Indian trust funds and impose upon the United States fiduciary obligations. Id. at ¶¶ 32-34. Additionally, Plaintiff asserts that Congress, by certain reports issued to certain sub-committees within the House of Representatives, has been critical of the Interior Department's historical management of Indian trust assets. Id. at ¶¶ 35-37. Moreover, Plaintiff alleges that Congress has imposed specific duties on the United States to audit and provide an accounting of tribal trust funds. Id. at ¶¶ 39-40. Also, Plaintiff asserts that the United States' alleged "breaches and continuing breaches of trust . . . have resulted in and continue to result in harm to [Plaintiff] as trust beneficiar[y]." Id. at ¶ 56.

IV. STANDARD OF REVIEW

The United States brings this motion under RCFC 12(c) and 12(h)(3).[4/] Under RCFC 12(c), "[t]he objection that a federal court lacks subject-matter jurisdiction . . . may be raised by a party,

---

[4/] As an alternative, the Court may reconsider its previous ruling regarding the applicability of Section 1500 to this case, under RCFC 59. See Delaware Valley Floral Group, Inc. v. Shaw Rose Nets, 597 F.3d 1374, 1383 (Fed. Cir. 2010) (quoting Degirmenci v. Sapphire-Fort Lauderdale, 642 F. Supp.2d 1344, 1353 (S.D. Fla. 2009) (describing major grounds that justify reconsideration as "(1) an intervening change in the controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice.").

or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." Aurbaugh v. Y&H Corp., 546 U.S. 500, 507 (2006). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." RCFC 12(h)(3). "A motion to dismiss made after the filing of an answer serves the same function as a motion for judgment on the pleadings and may be regarded as one." Schy v. Susquehanna Corp., 419 F.2d 1112, 1115 (7th Cir. 1970); see also Wright & Miller, Federal Practice and Procedure Sec. 1367 ("if any of these procedural defects are asserted upon a Rule 12(c) motion, presumably the district court will apply the same standards for granting the appropriate relief or denying the motion as it would have employed had the motion been brought prior to the defendant's answer under Rules 12(b)(1), (6), or (7) or under Rule 12(f).") (collecting cases).

When deciding a motion to dismiss, the Court may review the content of the competing pleadings, exhibits thereto, matters incorporated by reference in the pleadings, whatever is central or integral to the claim for relief or defense, and any facts of which the Court will take judicial notice. Crusan v. United States, 86 Fed. Cl. 415, 417-18 (2009). The determination of whether this Court has subject-matter jurisdiction to hear Plaintiff's claims is a question of law. Toxgon Corp. v. BNFL, Inc., 312 F.3d 1379, 1381 (Fed. Cir. 2002). Dismissal is appropriate under RCFC 12(b)(1) where the Court of Federal Claims lacks jurisdiction under 28 U.S.C. § 1500. See, e.g., Snyder v. United States, 63 Fed. Cl. 762 (2005) (granting government's motion to dismiss pursuant to 12(b)(1) for lack of jurisdiction under 28 U.S.C. § 1500 and pursuant to RCFC 17(a)); Wilson v. United States, 32 Fed. Cl. 794 (1995) (granting government's motion to dismiss pursuant to 12(b)(1) or 12(b)(4) for lack of jurisdiction under 28 U.S.C. § 1500). Plaintiff has the burden of showing subject-matter jurisdiction. Mars, Inc. v. Kabushiki-Kaisha Nippon Conlux, 24 F.3d 1368, 1372

(Fed. Cir. 1994). If the pleadings establish that the Court lacks jurisdiction, the Court should grant the motion and dismiss the claims. RCFC 12(h)(3).

V. ARGUMENT

A. 28 U.S.C. § 1500

Section 1500 is a jurisdictional statute. Tohono O'odham, 131 S. Ct. at 1727; Keene Corp. v. United States, 508 U.S. 200, 207-08 (1993). It provides that "[t]he 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 . . . ." 28 U.S.C. § 1500. Its purpose is to "force plaintiffs to choose between pursuing their claims in the [CFC] or in another court" and to prevent the United States from having to litigate and defend against the same claim in both courts. UNR Indus. v. United States, 962 F.2d 1013, 1018, 1021 (Fed. Cir. 1992) (en banc); see also Tohono O'odham, 131 S. Ct. at 1730 (Section 1500's "clear" purpose is "to save the Government from burdens of redundant litigation").

Congress first enacted Section 1500 in 1868. Tohono O'odham, 131 S. Ct. at 1727, 1729; Keene, 508 U.S. at 206. Despite other statutory changes that have expanded the CFC's jurisdiction over time, Congress has re-enacted Section 1500 repeatedly without substantive change, and the statute continues to be a significant limitation on the CFC's jurisdiction. Tohono O'odham, 131 S.Ct. at 1729 (the reenactment of Section 1500 by Congress over time "reaffirmed the force of the [jurisdictional] bar and thus the commitment to curtailing redundant litigation").

As noted above, 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. "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." Tohono O'odham, 131 S. Ct. at 1731.

As the United States demonstrates below, Section 1500 applies herein. Therefore, this Court lacks jurisdiction, lacks discretion to retain the action, and must dismiss this case. Hill v. United States, 8 Cl. Ct. 382 (1985).

B. This Case and the District Court Case Are Based on Substantially the Same Operative Facts.

It is an undisputable fact that both the complaint in this case and the complaint in Plaintiff's District Court case are premised on the United States' alleged breaches of fiduciary obligations and the United States' alleged failures regarding the proper accounting and management of Plaintiff's trust assets. Compare District Court Complaint ¶¶ 1, 4-6, 25-41, 47-48, 50, 55-56 with CFC Complaint ¶¶ 4, 12-22, 27-28. This fact is fatal to this Court's subject-matter jurisdiction over this case. It is not necessary that the factual allegations in this case and in the District Court case be identical for Section 1500 to apply. The requisite item is only that the two suits are "based on substantially the same operative facts," even if the suits are based on different legal theories. Keene, 508 U.S. at 212. "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." Tohono O'odham, 131 S. Ct. at 1731.

The facts underlying the allegations raised by Plaintiff in its CFC complaint are substantially the same as those raised by Plaintiff in its District Court complaint. Both complaints relate to the same trust assets. Both complaints allege that the United States mismanaged the very same resources and property (*e.g.*, land and natural resources, including timber, minerals, grazing and agriculture, leases and easements), and both complaints request that the courts review the United

States' management of the same trust assets. Compare District Court Complaint ¶¶ 25-27, 30-32, and 56, with CFC Complaint, ¶¶ 11-19. Both complaints are based on the same alleged trust obligations for the United States, which include but are not limited to (1) collecting compensation for conveyances or uses, compare District Court Complaint ¶¶ 30 and 32, with CFC Complaint ¶¶ 12 and 16; (2) protecting, preserving, managing, and investing trust assets, including trust funds and trust property, compare District Court Complaint ¶¶ 30 and 33, with CFC Complaint ¶¶ 12-14, 16, and 18; (3) maintaining accurate records, compare District Court Complaint ¶¶ 42 with CFC Complaint ¶¶ 18 and 21; and (5) providing accurate and timely reports to account holders, compare District Court Complaint ¶¶ 34 and 38-40 with CFC Complaint ¶¶ 22-23.

Both complaints have named the same federal defendants. Compare District Court Complaint ¶¶ 20 and 21 with CFC Complaint ¶¶ 2 and 4. Further, both complaints assert that Plaintiff is the beneficial owner of land and natural resources held in trust by the United States. Compare District Court Complaint ¶¶ 1, 4, 25-27, 32, 38 with CFC Complaint ¶¶ 11, 17.

Plaintiff's position in this case is indistinguishable from that of the Tribe in Tohono O'odham. Just like the Tribe in Tohono O'odham, Plaintiff "brought two actions based on the same alleged violations of fiduciary duties with respect to the [Tribe's] lands and other assets." Id. at 1726-27. As in Tohono O'odham, Plaintiff's District Court case "alleges various violations of fiduciary duty with respect to those assets. The [Tribe] claimed, for example that the officials failed to provide an accurate accounting of trust property; to refrain from self-dealing; or to use reasonable skill in investing trust assets." Id. at 1727. Also as in Tohono O'odham, Plaintiff's "CFC complaint described the same trust assets and the same fiduciary duties that were the subject to the District Court complaint." Id.

Given these facts in Tohono O'odham, the Supreme Court ruled that "[t]he two actions both allege that the United States holds the same assets in trust for the [Tribe's] benefit. They describe almost identical breaches of fiduciary duty—that the United States engaged in self-dealing and imprudent investment, and failed to provide an accurate accounting of the assets held in trust, for example," id. at 1731, and thus it ruled that "Under § 1500, the substantial overlap in operative facts between the [Tribe's] District Court and CFC suits precludes jurisdiction in the CFC." Id. at 1731.

That same outcome is warranted here. The complaint in this case is based upon alleged breaches of trust by the United States in the management of Plaintiff's trust assets, while the complaint in Plaintiff's District Court case is also based upon alleged breaches of trust by the United States in the management of those exact same trust assets. Plaintiff's claims in both courts are based on substantially the same operative facts. Thus, Section 1500 applies and this Court should dismiss the case. Tohono O'odham,131 S. Ct. at 1731.

C. Plaintiff's Same-Day Filings of its CFC and District Court Complaints Are Irrelevant for Purposes of Section 1500.

Plaintiff filed its District Court complaint on the same day that it filed this case (December 28, 2006). On August 22, 2008, the Court ruled that, based on an evidentiary hearing, it was "satisfied that the complaint in this court was filed before the corresponding complaint was filed in district court."[5/] Dkt. 27 at 12. The Court determined, therefore, that "[s]ection 1500 [ ] is not applicable to bar jurisdiction over Nez Perce's complaint in this court because the complaint in

---

[5/] The United States continues to maintain that Plaintiff has not met its burden of showing by a preponderance of the evidence that it filed this case before it filed its District Court case. Nonetheless, the United States does not press the issue herein because, as explained above, the "order of filing" issue is not relevant for purposes of determining whether the Court has jurisdiction over this case under Section 1500.

district court was not pending at the time the complaint in this court was filed." Id. The Court based its decision on its reading of the statute and on the ruling in Tecon Eng'rs, Inc. v. United States, 343 F.2d 943, 170 Ct. Cl. 389 (1965) (as well as the decisions that followed Tecon's reasoning), wherein the predecessor of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") held that, in the circumstances of Tecon, the subsequent filing of a complaint in the district court did not deprive the CFC of jurisdiction. Dkt. 27, at 5-6. The Supreme Court's ruling in Tohono O'odham has made clear that this so-called "order of filing" rule, spawned by Tecon, is not good law. Indeed, Tohono O'odham addresses the "order of filing" question and makes clear the Federal Circuit in Tohono O'odham "was wrong to allow [Tecon] to suppress the statute's aims." Tohono O'odham, 131 S. Ct. at 1729-30. Thus, even if Tecon were once considered binding in cases like this,[6/] Tohono O'odham has sufficiently undermined Tecon such as the decision can no longer be considered binding authority. To be sure, the Supreme Court has not squarely rejected the so-called "order of filing" rule in a holding because, in Tohono O'odham, the relevant procedural posture was "not presented." Tohono O'odham, 131 S. Ct. at 1729-30 (explaining that "the CFC action [in] was filed after the District Court suit"); see also Keene, 508 U.S. at 216 ("[F]ind[ing] it unnecessary to consider, much less repudiate, the 'judicially created exceptions' to § 1500 found in Tecon [and other cases]"). Nonetheless, the rationale in Tohono O'odham makes clear that the order-of-filing rule attributed to Tecon does not survive. Both the Federal Circuit and the Supreme Court in recognized that the Tecon rule would deprive Section 1500 of "meaningful force" and guided the

---

[6/] As it did in its response to this Court's Order To Show Cause (Dkt. 18 at 5-9), the United States maintains that Tecon did not reflect controlling Federal Circuit precedent to which this Court (or a panel of the Federal Circuit) would have been bound, outside of the unusual circumstances reflected in that case.

Federal Circuit's narrow construction of the statute's jurisdictional bar. Tohono O'odham, 131 S. Ct. at 1729. The Supreme Court then directly addressed the Tecon decision and explicitly concluded that "the Court of Appeals was wrong to allow its precedents [in Tecon] to suppress the statute's aims." Id., at 1730 (emphasis added). Because Tecon "stands astride the path to a proper interpretation of section 1500," UNR Indus., 962 F.2d at 1023, and cannot properly "suppress the statute's aims," id., it erroneously interprets Section 1500.[7]

Even beyond Tohono O'odham's direct assessment of Tecon, the Supreme Court's overall reasoning in Tohono O'odham and Keene make clear that any order-of-filing rule that might be derived from Tecon is incorrect. The Supreme Court has clarified that Section 1500 is a "broad prohibition" on parallel litigation in the CFC and another court that strips the CFC of "jurisdiction over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States." Tohono O'odham, 131 S. Ct. at 1727-28. Nothing in Section 1500's text mentions filing order. Quite the contrary, the CFC loses "jurisdiction" whenever the plaintiff has "pending" in another court a suit that is related to its CFC claim. See 28 U.S.C. § 1500. The only two Supreme Court decisions before Tohono O'odham and Keene that found the statute applicable confirm that conclusion. 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 state court action immediately after the dismissal); Corona Coal Co. v. United States, 263 U.S. 537, 539-540 (1924) (dismissing

---

[7] Even if the Supreme Court's statements about Tecon could be considered dicta, the Federal Circuit has repeatedly held 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) (noting that the Federal Circuit is obligated to follow a Supreme Court interpretation even though it may be dicta); Stone Container Corp. v. United States, 229 F.3d 1345, 1349-50 (Fed. Cir. 2000) (stating that, as a subordinate court, the Federal Circuit should follow the Supreme Court's explicit and carefully considered understanding of the law, even if dicta).

appeal from Court of Claims decision because related district court action was filed while the appeal was pending). Both of those decisions held that the jurisdictional bar in Section 1500's direct predecessor applied when the Court of Claims (now CFC) action was filed first.

To be sure, the relevant text of Section 1500 was even clearer before 1948, when plaintiffs were expressly prohibited from "fil[ing] or prosecut[ing]" any claim in the Court of Claims if they had a related suit "pending in any other court." 28 U.S.C. § 260 (1946). Nevertheless, as the Supreme Court in Keene made 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.'" Keene, 508 U.S. at 209; see also Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 227 (1957) (explaining that "no changes of law or policy are to be presumed from changes of language" in the 1948 codification of the Judicial Code "unless an intent to make such changes is clearly expressed"); cf. Keene, 508 U.S. at 212 (observing that Congress presumably was aware of similar pre-codification decisions and adopted them in its 1948 codification of Title 28). Thus, although Keene reserved the question whether Tecon was properly decided, 508 U.S. at 209 n.4, the Supreme Court's rationale in Tohono O'odham and Keene, as well as prior precedents, compel the conclusion that the order of filing is irrelevant to Section 1500. Indeed, as noted, the relevant binding precedents (see, e.g., Skinner & Eddy, Corona Coal) dictate the conclusion that Section 1500 applies, regardless whether a plaintiff files its CFC claim first, second, or on the same day as its district court case.

As the United States has stated previously, (Dkt. 18), even before the Supreme Court's decision in Tohono O'odham, Tecon did not reflect controlling Federal Circuit precedent to which this Court (or a panel of the Federal Circuit) would have been bound outside the unusual

circumstances reflected in Tecon. Long before Tecon suggested that Section 1500 did not apply in the CFC action before it (which was filed before a related action in another court), the Court of Claims had held that Section 1500's jurisdictional bar applies in cases where the action was filed in this Court's trial-court predecessor before the related action in another court. See Hobbs v. United States, 168 Ct. Cl. 646, 647-648 (1964) (per curiam); Maguire Indus., Inc. v. United States, 114 Ct. Cl. 687, 688, 690 (1949) (assuming that Tax Court action was an agency proceeding and treating appeal therefrom as a later-filed suit in another court precluding CFC jurisdiction), cert. denied, 340 U.S. 809 (1950). Those earlier holdings were (and remain) binding on all subsequent panels of the Federal Circuit and this Court because they have not been overruled en banc. Cf. Newell Cos. v. Kenney Mfg. Co., 864 F.2d 757, 765 (Fed. Cir. 1988) (explaining that even "prior decisions of a panel of the court are binding precedent on subsequent panels unless and until overturned in banc"). Although the reasoning in Tecon is in tension with the holdings in Hobbs and Maguire Industries, Tecon should not be read as undermining those jurisdictional holdings outside of Tecon's own "resolution of the correct interpretation of Section 1500, with respect to the facts of th[e] case" then before the Court of Claims. See Tecon, 343 F.2d at 950 (emphasis added).

As the en banc Federal Circuit has explained, Tecon involved unique circumstances involving an "abuse of process and vexatious litigation" that would violate RCFC 11 today. UNR Indus., 962 F.2d at 1020. Specifically, the plaintiff in Tecon "filed the same claims in a district court and then moved the Court of Claims to dismiss [their] case under Section 1500" in an attempt to end the Court of Claims' authority over the claims (apparently because the litigation did not appear to be going its way). Id. Both the government and the Tecon court 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."[8/] Id.

Further, although Tecon suggested that the prior decision in Hobbs did not "fully" consider or decide the "issue of priority" presented in Tecon, 343 F.2d at 950 & n.7, the issues in Tecon cannot properly be separated from what Tecon itself recognized was the particular application of Section 1500 "with respect to the facts of this case." Id. at 950. Significantly, Tecon did not permit a plaintiff to continue litigating the merits of its claims against the United States. Rather, it allowed the court to dismiss claims with prejudice notwithstanding the plaintiff's invocation of Section 1500 in a context where the party's invocation of the statute could be deemed sanctionable conduct. Tecon did not purport to overrule the result in Hobbs. Also, it did not mention other similar Court of Claims decisions (like Maguire Industries). Therefore, Tecon should be read as being consistent with those precedents to address only the unusual circumstance in which Section 1500 is abused by a plaintiff as part of a vexatious litigation tactic (which tactic would be sanctionable under RCFC 11 today). Outside that limited factual context, Hobbs and Maguire Industries reflect the binding decisional law that should be followed here.

[8/] 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.

VI. CONCLUSION

For the foregoing reasons, this Court should dismiss this case for lack of subject-matter jurisdiction under Section 1500.

Respectfully submitted this 1st day of July, 2011,

IGNACIA S. MORENO
Assistant Attorney General

/s/Michael D. Thorp
MICHAEL D. THORP
United States Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 663
Washington, DC 20044-0663
Telephone: (202) 305-0456
Facsimile: (202) 353-2021
E-mail: Michael.Thorp@usdoj.gov

Attorney of Record for the United States

OF COUNSEL:

ANTHONY P. HOANG
ANNA K. STIMMEL
United States Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 663
Washington, DC 20044-0663
Telephone: (202) 305-0241
Telephone: (202) 305-3895
Facsimile: (202) 353-2021
E-mail: Anthony.Hoang@usdoj.gov
E-mail: Anna.Stimmel@usdoj.gov

KYSCHIA PATTON
JAMES W. FERGUSON
Office of the Solicitor
United States Department of the Interior

Washington, DC 20240

THOMAS KEARNS
Office of the Chief Counsel
Financial Management Service
United States Department of the Treasury
Washington, DC 20227