

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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| OMAHA TRIBE OF NEBRASKA |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Case No. 06-911 |
| |) | |
| THE UNITED STATES OF AMERICA, |) | Judge Nancy B. Firestone |
| |) | |
| Defendant. |) | (E-Filed July 5, 2011) |
| _____ |) | |

**THE UNITED STATES' RESPONSE TO PLAINTIFF'S SUPPLEMENTAL BRIEF
REGARDING THIS COURT'S ORDER TO SHOW CAUSE
WHY ITS CLAIMS ARE NOT BARRED BY 28 U.S.C. § 1500**

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I. INTRODUCTION

Defendant, the United States of America, hereby respectfully submits the following memorandum of points and authorities in response to Plaintiff's Supplemental Brief [ECF No. 39] ("Pls.' Supp. Br.") regarding this Court's June 1, 2011, Order [ECF No. 38] (the "Order to Show Cause").

This Court is one of limited jurisdiction. Those jurisdictional limits – set by Congress – include 28 U.S.C. § 1500 ("Section 1500"), which precludes the CFC from exercising jurisdiction over a plaintiff's claim if the plaintiff "has pending in any other court" another suit against the United States (or individuals acting under the authority of the United States) "for or in respect to" that claim.

In a recent decision, United States v. Tohono O'odham Nation, 131 S. Ct. 1723 (2011), the United States Supreme Court examined this statute, and held that for purposes of Section 1500, "[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." Tohono O'odham Nation, 131 S. Ct. at 1731. In so doing, the Court reversed the determination of the United States Court of Appeals for the Federal Circuit that two suits are for or in respect to the same claim "only if they share operative facts and also seek overlapping relief." Id. at 1727. The Court's holding that "overlapping relief" is irrelevant to Section 1500 also effectively overrules the Federal Circuit's prior rulings that Section 1500 divests the CFC of jurisdiction only when the plaintiff's claim pending in another court "seek[s] the same relief." Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1551 (Fed. Cir. 1994) (en banc).

Plaintiff filed this case on December 28, 2006, after it had filed a companion case in the United States District Court for the District of Columbia on June 2, 2004.¹ See Order to Show Cause at 1. As this Court stated, “Plaintiff’s allegations in both cases relate to the trust accounting and trust management duties and responsibilities allegedly owed by the defendant to the plaintiff.” Id. In light of Tohono O’odham Nation, this Court ordered Plaintiff to show cause, by filing a supplemental brief on or before June 17, 2011, why its claims are not barred by Section 1500. See Order to Show Cause at 2. This Court also ordered the United States to respond to Plaintiff’s supplemental brief in accordance with the Rules of the United States Court of Federal Claims. See id.

As in Tohono O’odham Nation, both the Amended District Court Complaint and the CFC Complaint allege claims that are based on substantially the same operative facts. Further, nothing in Plaintiff’s supplemental brief demonstrates that this Court may exercise jurisdiction over this case. Plaintiff has failed to show cause, and thus this Court should dismiss this case for want of subject-matter jurisdiction.

¹ Plaintiff’s district court case is styled Omaha Tribe of Nebraska v. Kempthorne, No. 1:04-cv-00901-TFH (D.D.C.), and it remains pending. Plaintiff attached as Exhibit B [ECF No. 39-2] to its supplemental brief a copy of the original complaint that it filed in the district court case, and it also attached as Exhibit A [ECF No. 39-1] to that brief a copy of its complaint in this Court (“CFC Complaint”). Plaintiff failed to note, however, that on September 1, 2006 – before it filed suit in this Court – it filed an amended complaint in the district court. A copy of that amended complaint (“Amended District Court Complaint”) is attached hereto as Exhibit C. The United States submits that because the Amended District Court Complaint was Plaintiff’s operative district court complaint at the time that Plaintiff filed suit in this Court (and remains Plaintiff’s operative complaint in the district court), this Court should compare the Amended District Court Complaint to the CFC Complaint to determine whether the two cases are based on substantially the same operative facts for purposes of Section 1500.

II. ARGUMENT

A. Legal Standard for Dismissal Under Section 1500

This Court must dismiss suits over which it lacks jurisdiction. See RCFC 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”). It is well established that the question of subject-matter jurisdiction can be raised by a party or by the court at any stage of a judicial proceeding, including on appeal. Fanning, Phillips, & Molnar v. West, 160 F.3d 717, 720 (Fed. Cir. 1998); see also Consol. Coal Co. v. United States, 351 F.3d 1374, 1378 (Fed. Cir. 2003) (“[U]nder federal rules any court at any stage in the proceedings may address jurisdictional issues. Thus, even if the issue is not properly raised, this court sua sponte may consider all bases for the trial court’s jurisdiction.”).

Section 1500² helps to define the jurisdiction of this Court by limiting the scope of that jurisdiction. Tohono O’odham Nation, 131 S. Ct. at 1727; Keene Corp. v. United States, 508 U.S. 200, 207-08 (1993). The statute’s application is often based on the well-pleaded allegations in the complaints that have been filed by a plaintiff in different courts, thereby triggering the question whether the filing of a second suit based on substantially the same operative facts divests the CFC of jurisdiction. See, e.g., Keene, 508 U.S. at 207 (trial court correctly applied Section 1500 “by looking to the facts existing when Keene filed each of its complaints”); Dico, Inc. v. United States, 48 F.3d 1199, 1203 (Fed. Cir. 1995). If, based on a review of the

² The full text of Section 1500 is as follows:

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.

complaints filed in two different courts, the CFC determines that it lacks jurisdiction under Section 1500, it must dismiss the case. RCFC 12(h)(3); Tohono O’odham Nation, 131 S. Ct. at 1731.

Section 1500 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. . . .” The “clear” purpose of Section 1500 is to “save the Government from burdens of redundant litigation,” Tohono O’odham Nation, 131 S. Ct. at 1730, by “forc[ing] plaintiffs to choose between pursuing their claims in the [CFC] or in another court,” UNR Indus. v. United States, 962 F.2d 1013, 1018 (Fed. Cir. 1992), *aff’d sub nom. Keene*, *supra*. Congress first enacted this jurisdictional limitation in 1868. Tohono O’odham Nation, 131 S. Ct. at 1729; Keene, 508 U.S. at 206. Unlike other statutory changes that have expanded the CFC’s jurisdiction over time, Congress re-enacted Section 1500 without substantive change, and the statute continues to be a significant constraint on the CFC’s jurisdiction. *See* Tohono O’odham Nation, 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”).

At the time that Plaintiff filed its suits, the Federal Circuit had interpreted Section 1500 as precluding the CFC from exercising jurisdiction only if the claim pending before another court arose from the same operative facts as the CFC claim and sought the same relief as the CFC claim. *See Loveladies*, 27 F.3d at 1551. But the Supreme Court had not been presented yet with the question whether Section 1500 requires that both claims seek the same relief.³ Since that

³ Before the Federal Circuit’s *en banc* ruling in Loveladies, the Supreme Court had interpreted Section 1500 in Keene, *supra*. Because the “same relief” question was not presented in Keene, the Supreme Court did not reach or decide “whether two actions based on the same

time, the Supreme Court has resolved that precise question. In Tohono O’odham Nation, the Court ruled 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.” 131 S. Ct. at 1731 (emphasis added). If Section 1500 applies, this Court lacks jurisdiction and thus must dismiss this case. Hill v. United States, 8 Cl. Ct. 382 (1985); see also Tohono O’odham Nation, 131 S. Ct. at 1731 (holding that the lack of jurisdiction under Section 1500 requires dismissal of the CFC case).

B. Plaintiff’s District Court Claims and CFC Claims Are Based on Substantially the Same Operative Facts.

As the Supreme Court explained in Tohono O’odham Nation, two suits are “for or in respect to the same claim” for purposes of Section 1500 “if they are based on substantially the same operative facts, regardless of the relief sought in each suit.” Tohono O’odham Nation, 131 S. Ct. at 1731; see also Keene, 508 U.S. at 212 (“[U]nder the immediate predecessor of § 1500, the comparison of the two cases for purposes of possible dismissal would turn on whether the plaintiff’s other suit was based on substantially the same operative facts as the Court of Claims action,”); Tohono O’odham Nation, 131 S. Ct. at 1731 (“Under § 1500, the substantial overlap in operative facts” in two suits “precludes jurisdiction in the CFC”). In other words, Section 1500 will “preclude[] jurisdiction in the CFC” when there is “substantial overlap in [the] operative facts” in the two cases. Tohono O’odham Nation, 131 S. Ct. at 1731.

A comparative reading of Plaintiff’s Amended District Court Complaint and CFC Complaint demonstrates that Plaintiff’s two suits are based on substantially the same operative facts. As explained more fully below, the two complaints use essentially identical factual

operative facts, but seeking completely different relief, would implicate § 1500.” Keene, 508 U.S. at 212 n.6 (citing Casman v. United States, 135 Ct. Cl. 647 (1956); Boston Five Cents Sav. Bank, FSB v. United States, 864 F.2d 137 (Fed. Cir. 1988)).

allegations to assert that the United States, as trustee, breached fiduciary duties owed to Plaintiff by allegedly failing to account properly for and to manage properly Plaintiff's trust funds and assets. Compare Amended District Court Complaint, ¶¶ 16, 18-20, 26 with CFC Complaint, ¶¶ 20, 22, 23, 35. Consequently, the facts underlying these allegations are substantially the same in both cases.⁴

1. The Amended District Court Complaint

In its district court case, Plaintiff alleges the existence of a trust corpus which, according to Plaintiff, has been mismanaged by the United States:⁵

[Plaintiff] is the beneficial owner of certain monies currently or previously held in trust for the Plaintiff by the United States, as well as of certain land and other trust assets, title to which is held in trust by the United States for the benefit of the Tribe. The Plaintiff is also the owner of the natural resources located on their land held in trust and managed by the United States, including, among others: water, timber, and a variety of mineral reserves. The Plaintiff's trust holdings

⁴ The decisions that the Federal Circuit and the CFC have rendered in Eastern Shawnee thus far are also instructive here. The tribe in that case is represented by the same counsel representing Plaintiff herein, and the allegations in the complaints filed by that tribe in the CFC and the district court are essentially identical to those in the complaints in Plaintiff's district court and CFC cases. (Copies of the complaints that the Eastern Shawnee Tribe filed in the district court and the CFC are attached hereto as Exhibits A and B.) Judge Lettow dismissed the Eastern Shawnee Tribe's case under Section 1500 after finding that the complaints in the tribe's district court and CFC cases were based upon the same operative facts. See Eastern Shawnee Tribe of Oklahoma v. United States, 82 Fed. Cl. 322 (2008). Likewise, the Federal Circuit determined on appeal that "[t]he plaintiff here does not persuasively dispute that the claims in the district court and the Court of Federal Claims arise from the same set of operative facts." Eastern Shawnee Tribe of Oklahoma v. United States, 582 F.3d 1306, 1310-11 (Fed. Cir. 2009). As a result, the Federal Circuit concluded that the only remaining question on appeal was simply "whether the complaints seek the same relief." Id. While the Supreme Court's Tohono O'odham Nation decision has now overturned the Federal Circuit's reasoning regarding the inapplicability of Section 1500 to Eastern Shawnee, that fact does not have any bearing on the Federal Circuit's antecedent determination that the Eastern Shawnee Tribe's cases – like the ones at issue here – involve claims based on substantially the same operative facts.

⁵ The United States does not concede the truth of the allegations in the operative complaint in either of Plaintiff's cases. Rather, the United States is accepting Plaintiff's allegations only for the purpose of determining whether Section 1500's jurisdictional bar applies in this case.

also include land which is valuable for grazing, agricultural, and recreational use, and for other purposes.

Amended District Court Complaint, ¶ 8. Plaintiff requests judicial review of the United States' past actions regarding the management of (1) Plaintiff's tribal trust lands, associated resources, and income derived therefrom, and (2) other assets held in trust by the United States for Plaintiff's benefit. Id. at ¶¶ 8-13. Moreover, Plaintiff seeks judicial review of the United States' contemporaneous record-keeping, or accounting, of those actions. Id. at ¶¶ 16, 18-19.

Plaintiff alleges that the United States has certain trust obligations, including but not limited to (1) the duty to collect trust funds owed to Plaintiff; (2) the duty to create trust accounts to hold those funds; (3) the duty to ensure that the monies owed or paid for the loss or use of tribal lands and trust resources are placed into accounts; (4) the duty to maintain adequate records with respect to Plaintiff's trust property; and (5) the duty to maintain adequate systems and controls to guard against errors or dishonesty. Id. at ¶ 16. The breaches alleged by Plaintiff relating to the United States' management of tribal lands, associated resources, and judgment monies include, among others: (1) the failure to provide a full and complete accounting of the sources of Plaintiff's trust funds; (2) the failure to provide an accurate accounting of the amount contained in each of Plaintiff's accounts; (3) the failure to maintain accurate books and records with respect to Plaintiff's trust property and accounts; (4) the failure or refusal to disclose known losses or unmade or incomplete payments; (5) the failure or refusal to reimburse trust beneficiaries for losses to their trust funds; and (6) failure to properly create trust accounts and to deposit appropriate monies in those accounts. Id. at ¶ 21.

Plaintiff contends that the foregoing alleged breaches of fiduciary duty have limited its ability to know or ascertain (1) how funds that the United States appropriated to it were invested; (2) how funds that the United States appropriated to it were expended; (3) why certain trust fund

payments were made; (4) why certain trust fund interest was paid; (5) how the United States determined what amounts were due to Plaintiff; and (6) whether Plaintiff has suffered any losses of its trust assets. Id. at ¶¶ 11, 18, 21, 31. Plaintiff alleges that the accounting that it requests in the district court will illuminate the true state of Plaintiff's trust accounts and enable Plaintiff to determine whether it has suffered a loss and if so to what extent.⁶ Id. at ¶¶ 21, 31.

2. The CFC Complaint

This case directly parallels Plaintiff's district court case. Plaintiff demands herein judicial review of the United States' past actions relating to the management of (1) Plaintiff's tribal trust lands, natural resources, and income derived therefrom, and (2) other assets held in trust for Plaintiff's benefit. See CFC Complaint, ¶¶ 11-13. The mismanagement claims pending in this case concern the same resources and assets (e.g., lands, water rights, surface rights to lands, timber, natural resources, leases, resources use agreements) implicated in the complaint in the district court case. Compare CFC Complaint, ¶¶ 11-13 with Amended District Court Complaint, ¶¶ 8, 9, 12.

As it has done in the Amended District Court Complaint, Plaintiff alleges herein that Defendant had certain trust obligations in regards to Plaintiff's trust property, including but not limited to (1) the duty to collect trust funds owed to Plaintiff; (2) the duty to create trust accounts to hold those funds; (3) the duty to ensure that the monies owed or paid for the loss or use of tribal lands and trust resources are placed into accounts; (4) the duty to maintain adequate

⁶ The United States does not agree that the district court has jurisdiction to grant the relief that Plaintiff requests in its district court case. Nonetheless, it is for the district court to determine whether it has jurisdiction over the amended complaint that Plaintiff has filed in that court. Cf. Forsgren v. United States, 73 Fed. Cl. 135, 142 (2006) ("This court will not step into the shoes of a district court judge and create the fiction that the district court complaint is 'deemed' dismissed."). In any event, the validity of Plaintiff's claim in the district court is irrelevant to this Court's determination of whether Section 1500 precludes its exercise of jurisdiction over this case.

records with respect to Plaintiff's trust property; and (5) the duty to maintain adequate systems and controls to guard against errors or dishonesty. Compare CFC Complaint, ¶ 20 with Amended District Court Complaint, ¶ 16. Also, Plaintiff alleges that the United States is in breach of its trust obligations, for the following reasons, among others, (1) failure to obtain the highest rate of interest and earnings on Plaintiff's trust funds; (2) failure to properly invest Plaintiff's trust monies in a timely manner; (3) failure to obtain the highest and best price for the use and taking of Plaintiff's trust assets; (4) failure to properly invest and manage Plaintiff's judgment funds and other trust monies; (5) failure to keep records; and (6) failure to administer and manage the Plaintiff's trust lands, funds, and assets with the greatest skill and care required of a trustee. See CFC Complaint, ¶¶ 23, 24, 37. Further, Plaintiff asserts that the United States' alleged breaches of its fiduciary duties have "severely limited . . . Plaintiff's ability to determine the full extent of its losses. . . ." Compare CFC Complaint, ¶ 30 with Amended District Court Complaint, ¶ 31. Additionally, Plaintiff asserts that it seeks an accounting in the district court case, and that this accounting may reveal that it has "one or more additional monetary claims against the Defendant." CFC Complaint, ¶ 31. Plaintiff effectively concedes that its CFC and district court claims involve substantially the same operative facts, by asserting that, if an accounting in connection with the district court action uncovers additional claims for damages, Plaintiff "seeks damages on those claims in this action." Id.

3. Plaintiff's Argument that Its District Court and CFC Claims Are Based on Different Operative Facts Is Unavailing.

Notwithstanding the foregoing, Plaintiff maintains that the evidence presented in the trials in this case and in its district court case will look different and that, therefore, the CFC and district court cases do not share operative facts and that any similarities between the allegations in the two cases constitute mere "background facts" rather than operative allegations. See Pls.'

Supp. Br. at 4-7. Also, Plaintiff argues that its claims in this Court and the district court are based on distinct trust duties and therefore are not based on substantially the same operative facts. See id. at 5-6. These arguments are meritless. They are contrary to prior decisions by the CFC in cases alleging a breach of the United States' obligations as trustee to Indian tribes, and they find no support in the Tohono O'odham Nation decision.

In Ak-Chin Indian Community v. United States, 80 Fed. Cl. 305 (2008), the plaintiff tribe, like Plaintiff, argued that any similar facts in its District Court and CFC actions were merely background facts. In rejecting that assertion, the CFC stated that:

[t]he similarities between plaintiff's Court of Federal Claims complaint and District Court complaint extend beyond mere background facts. The factual basis for plaintiff's allegation of the government's breach of trust responsibilities in each case is the same because, in both actions, the courts will have to analyze the same facts regarding the government's management and administration of the same trust funds and assets over the same time periods.

Id. at 318.

The same scenario is presented in this case. Here, the operative facts, namely, the United States' actions in managing Plaintiff's trust property and funds, are the same in both this case and Plaintiff's district court suit. Indeed, as discussed above, the complaints in this case and Plaintiff's district court case use essentially identical factual allegations to assert that the United States, as trustee, breached fiduciary duties owed to Plaintiff by allegedly failing to account properly for and to manage properly the exact same trust funds and assets. Compare Amended District Court Complaint, ¶¶ 16, 18-20, 26 with CFC Complaint, ¶¶ 20, 22, 23, 35.

Plaintiff's argument that its complaints are based on different sets of operative facts because they plead different trust duties of the United States is similarly unpersuasive. See Pls.' Supp. Br. at 5-6. The Amended District Court Complaint and the CFC Complaint belie

Plaintiff's claim of operative factual dissimilarity by describing the same alleged trust duties. Compare Amended District Court Complaint, ¶ 16 with CFC Complaint, ¶ 20.

In any event, Plaintiff's effort to avoid the allegations that it has set forth in its complaints by asking this Court to limit its review to an artificially narrow selection of "operative facts" for the two lawsuits is unconvincing. As the CFC explained in Ak-Chin, the trust duties of the United States cannot be so easily delineated that alleged breaches of such duties could be said to arise from separate sets of operative facts:

Notwithstanding plaintiff's attempt to distinguish the government's trust duties in each complaint, the operative facts, those facts upon which plaintiff's allegations of breaches of the government's trust responsibility are based, are the same in both the Court of Federal Claims complaint and the District Court complaint. In each action, the courts must consider the government's management and administration of plaintiff's trust. The court will be required to review the government's alleged failure to maintain records and account for plaintiff's trust property by considering any existing records related to the government's collection, handling, and investment of the Community's trust funds and property. The nature of Indian trust cases and the government's trust responsibility owed to Indian tribes does not lend itself to a simple delineation or separation of operative facts as they pertain to the government's various duties owed to Indian tribes. It is not apparent to the court how it could address facts related to the government's duty to invest and deposit plaintiff's trust funds without considering the facts related to the government's overall trust obligations owed to plaintiff, including its duty to account. It is simply not the case that there are two different and separate sets of trust duties described in plaintiff's District Court complaint and its Court of Federal Claims complaint. Therefore, the court finds that plaintiff's Court of Federal Claims complaint and District Court complaint contain the same operative facts for purposes of the § 1500 jurisdictional bar.

80 Fed. Cl. at 319-20; see also Yankton Sioux Tribe v. United States, 84 Fed. Cl. 225, 233 (2008) (quoting Ak-Chin for same proposition).

As with the Ak-Chin complaints, the operative facts underlying the Amended District Court Complaint and the CFC Complaint are, for all practical purposes, identical. Both complaints allege the United States' lack of prudent investment and other mismanagement of Plaintiff's trust funds and property. Compare Amended District Court Complaint, ¶¶ 19, 22, 23,

26 with CFC Complaint, ¶¶ 22, 23, 25, 31. Both complaints allege the United States' duties to account, keep adequate records, refrain from self-dealing, preserve trust assets, and invest prudently to maximize returns. Both complaints allege breaches of the same previously listed duties. Compare Amended District Court Complaint, ¶¶ 19, 20 with CFC Complaint, ¶¶ 22, 37. Both complaints allege these breaches as to the same trust corpus (e.g., lands, natural resources, grazing rights, mineral rights, rights in property, and tribal trust funds). In analyzing these allegations, this Court and the district court will have to consider the United States' management and administration of Plaintiff's trust corpus. The courts will have to review the existing records related to the United States' collection, handling, and investment of Plaintiff's trust funds and property in both cases. Therefore, the underlying facts are the same for purposes of the Section 1500 jurisdictional bar.

Nor does it matter that Plaintiff anticipates, as it asserts, producing different evidence at the two trials in this case and the district court case, which may or may not occur, especially where Plaintiff pleads in its CFC Complaint that:

Defendant has failed to keep records of and/or has failed to keep proper records regarding Plaintiff's trust accounts and assets . . . Defendant has never provided the Plaintiff with a full and meaningful accounting of its trust assets and trust funds. Indeed, before filing this action, the Plaintiff filed a complaint in the United States District Court for the District of Columbia demanding a full accounting of its trust accounts, trust assets and trust property. To date, the Defendant has failed to provide that accounting or other sufficient information which would otherwise afford the Plaintiff the ability to determine whether, and to what extent, it has suffered a loss as a result of the Defendant's continual wrongdoing or other breaches of trust.

CFC Complaint, ¶ 23. Plaintiff recognizes that the accounting that it seeks in the district court involves the same operative facts at issue in its CFC Complaint and that the trust property at issue is the same for both cases.

Nothing in Tohono O’odham Nation, supra, supports Plaintiff’s arguments, and, indeed, the Supreme Court’s reasoning in that case shows that dismissal under Section 1500 would be proper here. In reinstating the CFC’s dismissal of that case on Section 1500 grounds, the Court observed that the Tohono O’odham Nation’s district court “complaint alleged various violations of fiduciary duty with respect to” assets held in trust for the tribe by the federal government, and “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.” Tohono O’odham Nation, 131 S. Ct. at 1727. The Court further observed that the Tohono O’odham Nation’s CFC “complaint described the same trust assets and the same fiduciary duties that were the subject of the District Court complaint. And it alleged almost identical violations of fiduciary duty. . . .” Id.

The complaints in this case and Plaintiff’s district court case follow the same pattern. As in Tohono O’odham Nation, 131 S. Ct. at 1727, the Amended District Court Complaint and the CFC Complaint allege the existence of the same assets held in trust for Plaintiff by the federal government. Compare Amended District Court Complaint ¶¶ 8, 9, 11 with CFC Complaint ¶¶ 11-13. Also as in Tohono O’odham Nation, 131 S. Ct. at 1727, the Amended District Court Complaint and the CFC Complaint allege that the United States has breached its trust responsibilities to Plaintiff, including by failing to provide an accurate accounting, and by failing to use reasonable skill in managing and investing trust assets. Compare Amended District Court Complaint ¶¶ 19-21, 26 with CFC Complaint ¶¶ 22-24. These allegations dispose effectively and conclusively of Plaintiff’s argument about any differences in the operative facts of its cases in this Court and in the district court.

III. CONCLUSION

Plaintiff's claims in this case are based on substantially the same operative facts as its claims in its district court case. This suit was filed nearly two months after Plaintiff filed its suit in the district court; both suits remain pending.⁷ Accordingly, the elements of Section 1500 are satisfied, this Court lacks subject-matter jurisdiction in this case, and the Court should dismiss the case.

Respectfully submitted this 5th day of July, 2011,

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⁷ 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 Engineers, Inc. v. United States, 170 Ct. Cl. 389 (1965).

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