



U.S. Department of Justice

Office of Legal Policy

Washington, D.C. 20530

October 10, 2012

Dear Tribal Leader:

I write to invite you to share with the United States Department of Justice (“the Department”) any views you may have regarding a proposal that is currently under consideration by the Administrative Conference of the United States (“ACUS”). The Department is a member of ACUS, and I am writing to you in my capacity as the Department’s ACUS representative.

We provide below a brief description of the proposal, which concerns an effort to repeal and replace a Federal statute, 28 U.S.C. § 1500. The proposal was initiated and developed by ACUS’s Committee on Judicial Review, and the Department may be called upon to take an official position on it when it is before the ACUS Assembly (the 99 government and private representatives that comprise ACUS’s full voting membership) in December. Although the proposal did not originate here at the Department, we nevertheless believe that our formulation of an official position may benefit from consideration of any views you might have, and we accordingly solicit your comments, including answers to the specific questions listed later in this letter.

Background

ACUS is an independent federal agency comprised of both government and private representatives that is charged with improving the Federal administrative process. As part of an ongoing initiative, the ACUS Committee on Judicial Review undertook an examination of section 1500. That statute provides:

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.

As interpreted by the Supreme Court in its recent decision in *United States v. Tohono O'odham Nation*, 131 S. Ct. 1723 (2011), section 1500 prohibits consideration by the United States Court of Federal Claims ("CFC") of otherwise cognizable claims if the plaintiff also has pending litigation against the United States in any other court based on substantially the same operative facts, regardless of the type of relief sought.¹

ACUS's Committee on Judicial Review met on October 3, 2012, to consider a draft proposal, developed by ACUS staff, to send to Congress a recommendation that it replace section 1500 with a provision that would permit the CFC to assert jurisdiction over a lawsuit even if another related lawsuit is then pending in another court. (The draft staff proposal that was considered by the Committee is enclosed with this letter.) The Committee asked for the Department's comments on the draft proposal prior to its meeting, and the Department accordingly submitted a short statement of its preliminary views. (That statement, which contains further information about section 1500 and how it operates, is also enclosed with this letter.) In this statement, we informed the Committee that we intended to seek the views of tribal leaders, and that our consideration of any such views could affect the official position we articulate if the Committee were to adopt the draft proposal and forward it on for consideration by the ACUS Assembly.

Although aware of the concerns we expressed in our preliminary views statement and our intention to solicit the views of federally recognized tribes on the matter, ACUS's Committee on Judicial Review voted at its October 3 meeting to adopt in substance the draft proposal developed by ACUS staff, making only a modification to more clearly state that whenever a plaintiff has lawsuits based on substantially the same operative facts pending in both the CFC and another court, the courts should presumptively stay whichever suit was filed later. (When the Committee prepares a written version of the recommendation with the additional modification it voted to approve, we will forward that to you as well.) By virtue of the Committee's

¹ The Supreme Court's decision in *Tohono* involved a claim filed in the CFC after other litigation had been filed in another court. The Court did not squarely address the situation where a claim is filed in the CFC before litigation is commenced in another court, although the Court's opinion suggests that that distinction should not make a difference.

action, we expect the proposed recommendation to Congress will be forwarded to the ACUS Assembly and voted on at a meeting in early December of this year.

Solicitation of Views and Questions

Now that the proposed recommendation to repeal and replace section 1500 is no longer in draft form and will be considered by the ACUS Assembly, the Department invites any comments you may have on the proposal, the issues it raises, and the position (if any) the Department should take on it. We recognize that this is a fairly complex legal matter, and that you may wish to forward this letter to your legal counsel. In light of the date scheduled for the ACUS Assembly meeting in December, any written comments you may choose to offer must be received by November 9, 2012. Further, if you opt to submit such comments, we believe it would be most helpful if you address the following specific questions:

1. Do you believe that the ACUS proposal will have a significant impact on tribes that the Department of Justice should consider in formulating its official position on that proposal?
 - a. If yes, is all or part of that impact unique to tribes as compared to other potential litigants in the Court of Federal Claims?
 - b. How, if at all, would the ACUS proposal limit or expand the ability of tribes to bring claims against the federal government?
 - c. How, if at all, would the ACUS proposal interact with any statutes of limitations issues that relate to litigation brought by tribes?
2. Do you have experience with 28 U.S.C. § 1500 in litigation?
 - a. If yes, what has your experience been with the statute? In particular, are you aware of any cases in which a tribe or members of a tribe brought suit, had the suit dismissed pursuant to section 1500, and, as a result of the dismissal, were unable to obtain relief?

- b. In what circumstances, if any, do you believe it would be necessary for a tribe or members of a tribe to file suits arising from substantially the same operative facts in both the District Court and the Court of Federal Claims?
3. Are there any measures short of repeal or amendment of section 1500 that you would recommend considering to limit situations in which dismissals are required by that statute?
4. Is there a reason that you believe any reform of section 1500 must or should be undertaken now, as opposed to after some period of additional study of the effects of the statute in the developing legal landscape?

Logistics

In addition to soliciting written comments, as set forth above, the Department will hold a telephonic conference on November 1, 2012, at 3:00PM Eastern Time, if there is sufficient interest by tribal leaders in participating. If you would like to participate in the teleconference, please call 1-800-521-6079, pass code 997-34-555.

As noted above, the Department of Justice will accept written comments any time before the close of business on November 9, 2012. Please send comments to:

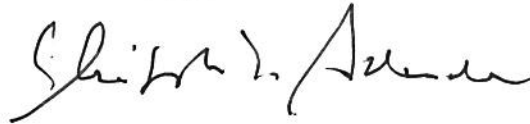
Email: 1500@usdoj.gov

Mail: Office of Tribal Justice
U.S. Department of Justice
RFK Main Justice Building, Room 2318
950 Pennsylvania Avenue, NW
Washington, DC 20530

Fax: (202) 514-9078

Finally, if you have any questions concerning this letter or the logistics of submitting comments, please contact the Department's Office of Tribal Justice at (202) 514-8812.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris H. Schroeder". The signature is fluid and cursive, with the first name "Chris" being more prominent and the last name "Schroeder" following in a similar style.

Christopher H. Schroeder
Assistant Attorney General