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November 9, 2012

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Tracy Toulou, Director  
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Dear Mr. Schroeder and Mr. Toulou:

On behalf of the Nez Perce Tribe, the Native American Rights Fund (NARF) submits the following comments in response to the October 10, 2012 letter to tribal leaders seeking their input on the Administrative Conference of the United States' (ACUS) proposal to reform 28 U.S.C. § 1500. While the Nez Perce Tribe joins in the comments submitted on this matter by the National Congress of American Indians and the Settlement Proposal to the Obama Administration group, the Tribe makes this separate submission in light of its recent direct experience in defending against a motion to dismiss by the United States based on Section 1500 grounds.

The Nez Perce Tribe is among the beneficiary Tribes for whom the United States holds funds and assets in trust. Having never received an accounting of these trust funds and assets, in 2006 the Tribe filed an action in the U.S. District Court for the District of Columbia, *Nez Perce Tribe, et al. v. Salazar* (No. 06-2239), seeking historical trust accountings and other declaratory and equitable relief, and an action in the U.S. Court of Federal Claims (CFC), *Nez Perce Tribe v. U.S.* (No. 06-910), seeking monetary damages for alleged breaches of trust. The Nez Perce Tribe was one of over 100 tribes who brought actions for historical trust accountings / money damages for the United States' historical breaches of trust.

In 2008, to determine whether the Nez Perce Tribe's CFC case should be dismissed for lack of jurisdiction under Section 1500, the CFC *sua sponte* ordered briefing and held an evidentiary hearing on "jurisdictional facts." *Nez Perce Tribe v. U.S.*, 83 Fed. Cl. 186, 187 (Fed. Cl. 2008). The evidentiary hearing entailed testimony by two NARF attorneys, the Chief Deputy Clerk for Operations of the CFC, and the Deputy Clerk for the U.S. District Court for the District of Columbia. 83 Fed. Cl. at 192-194.

The hearing helped the CFC, in response to the United States' Section 1500 arguments, "gather the necessary facts related to the time the complaints in this court and the district court were filed." *Id.* at 192.<sup>1</sup> From the hearing the CFC was "satisfied that the complaint in this court was filed before the corresponding complaint was filed in the district court [and that] 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." *Id.* at 194. The United States did not seek appeal of this decision.<sup>2</sup>

However, notwithstanding the CFC's decision, and notwithstanding that the parties had commenced active settlement negotiations regarding the Nez Perce Tribe's breach of trust claims, after the Supreme Court's decision in *United States v. Tohono O'odham Nation*, 131 Sc.D. 1723 (2011), the United States moved to dismiss the Tribe's CFC case under Section 1500. *Nez Perce Tribe v. U.S.*, 101 Fed. Cl. 139, 140 (Fed. Cl. 2011). The CFC again denied dismissal. *Id.*

The United States' post-*Tohono O'odham* motion to dismiss in *Nez Perce* was part of a wave of Section 1500 litigation in tribal trust cases, including "renewed Section 1500" litigation. *See, e.g., Haudenosaunee and Onondaga Nation v. U.S.*, (Fed. Cl. No. 06-909, ECF No. 52, Aug. 31, 2011) (United States' Renewed Motion to Dismiss for Lack of Subject Matter Jurisdiction). Before *Tohono O'odham*, the United States had sought Section 1500 dismissals in only seven of over 100 pending tribal trust cases.

After *Tohono O'odham*, the United States sought such dismissals in over twenty-five more tribal trust cases, and it re-litigated dismissal motions in cases like *Nez Perce* where it had lost such motions before *Tohono O'odham*. The United States even targeted cases like *Haudenosaunee*, where it was clear that a Tribe's CFC case was filed first, *Haudenosaunee and Onondaga Nation v. U.S.*, (Fed. Cl. No. 06-909, ECF No. 52, Aug. 31, 2011) (*see* United States' Renewed Motion to Dismiss for Lack of Subject Matter Jurisdiction, at Part V(A) "Plaintiff's Order of Filing is Irrelevant for the Purposes of Section 1500"), and *Osage*, where a Tribe already had voluntarily dismissed its district court action. *Osage Tribe v. U.S.*, (Fed. Cl. No. 99-550, ECF No. 646-1, June 9, 2011) (*see* Memorandum in Support of Defendant's Motion to Dismiss, at Part VI "The Subsequent Resolution of the District Court Action Does Not Affect the Application of Section 1500").

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<sup>1</sup> In *Tecon Engineers, Inc. v. U.S.*, 343 F.2d 943 (Ct.Cl. 1965), *cert. denied*, 382 U.S. 976 (1966), the Court of Claims held that a later-filed district court suit did not divest it of jurisdiction under Section 1500 to hear a prior-filed CFC suit – a holding sometimes referred to as the "order of filing" rule.

<sup>2</sup> Similar "order of filing" evidentiary hearings involving discovery and the testimony and cross-examination of witnesses including attorneys, paralegals, legal assistants, and court personnel were held in *Ak-Chin Ind. Comm. v. U.S.*, 80 Fed. Cl. 305 (Fed. Cl. 2008), *Salt River Pima-Maricopa Ind. Comm. v. U.S.*, 2008 WL 1883170 (Fed. Cl. Apr. 24, 2008), and *Coeur D'Alene Tribe v. U.S.*, 102 Fed. Cl. 17 (Fed. Cl. 2011). Attached hereto is a copy of the almost 40 page "Post-Evidentiary Hearing Brief" of the United States in support of its Section 1500 dismissal motion in *Salt River*, where dismissal ultimately was denied as it was in *Ak-Chin*.

To sum up, as shown on the attached “Overview,” of the over 100 recent pending tribal trust cases, over 30 – *i.e.*, about 1/3 – were, are or still may be affected by Section 1500. Including *Tohono O’odham*, 20 tribal trust cases in the CFC have been dismissed on Section 1500 grounds. Of these 20, 18 were dismissed where it was determined that the district court case was filed before the CFC case. In one, where the CFC was unable to determine the order of filing, the CFC action was dismissed. *Coeur D’Alene Tribe v. U.S.*, 102 Fed. Cl. 17 (Fed. Cl. 2011). In another, a Tribe’s voluntary dismissal of its CFC case where the United States’ post-*Tohono O’odham* motion to dismiss under Section 1500 was pending was granted. *Tonkawa Tribe v. U.S.*, (Fed. Cl., No. 06-938, ECF No. 55, July 28, 2011).

Seven Tribes have survived Section 1500 dismissals, including two before *Tohono O’odham* (*Ak-Chin Ind. Comm. v. U.S.*, 80 Fed. Cl. 305 (Fed. Cl. 2008); *Salt River Pima-Maricopa Ind. Comm. v. U.S.*, 2008 WL 1883170 (Fed. Cl. Apr. 24, 2008), and five after *Tohono O’odham* (all under the *Tecon* “order of filing” rule) (*Nez Perce Tribe v. U.S.*, 101 Fed. Cl. 139, 140 (Fed. Cl. 2011); *Kaw Nation v. U.S.*, 103 Fed. Cl. 613 (Fed. Cl. 2012); *United Keetoowah Band of Cherokee Indians v. U.S.*, 104 Fed. Cl. 180 (Fed. C. 2012); *Haudenosaunee and Onondaga Nation v. U.S.*, (Fed. Cl. No. 06-909, ECF No. 61, Mar. 27, 2012; *Otoe-Missouria Tribe v. U.S.*, 105 Fed. Cl. 136 (Fed. Cl. 2012)). Two of these five, including *Nez Perce*, essentially involved post-*Tohono O’odham* “renewed” motions to dismiss.

Moreover, the United States’ Section 1500 motions to dismiss remain pending in three tribal trust cases in the CFC; 1) *Colorado River Indian Tribes v. U.S.*, (Fed.Cl. No.06-901, ECF No. 51, July 1, 2011); 2) *Seminole Nation v. U.S.*, (Fed. Cl. No. 06-935, ECF No. 52, Aug. 7, 2008); and, 3) *Wyandot Nation v. U.S.*, (Fed. Cl. No. 06-919, ECF No. 34, June 7, 2011). Additionally, the Nez Perce Tribe in these comments has focused only on the recent “traditional” tribal trust cases and has not addressed past tribal trust cases or other cases brought by tribes or Indian individuals where Section 1500 has been an issue.

The Nez Perce Tribe of course understands the importance of threshold jurisdictional issues like Section 1500 in the overall scheme of seeking justice in judicial fora. Nevertheless, as the Tribe and other tribes with legitimate trust claims have experienced, considerable time and other resources of both sides have been expended in litigating matters related to a statute that ostensibly is designed to reduce alleged “duplicative” litigation without foreclosing claims of or remedies due litigants. The Tribe hopes that DOJ’s and ACUS’ more recent government-to-government efforts with Tribes to repeal or reform Section 1500 prove to be a more efficient and productive use of such resources that will facilitate and encourage the resolution of legal claims on their merits.

Sincerely yours,

Melody L. McCoy

cc Stephanie Tatham, Staff Counsel, ACUS Committee on Judicial Review  
Jonathan R. Siegel, Professor of Law, George Washington University Law School  
The Honorable Patrick J. Leahy, Chairman, Committee on the Judiciary, U.S. Senate