

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

WYANDOT NATION OF KANSAS	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 06-cv-00919-LMB
	)	Judge Lawrence M. Baskir
THE UNITED STATES OF AMERICA,	)	
	)	(E-Filed August 1, 2011)
Defendant.	)	
_____	)	

**THE UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF ITS  
MOTION TO DISMISS FOR LACK OF JURISDICTION**

## **I. Introduction**

As explained in the United States' Motion to Dismiss for Lack of Jurisdiction [Dkt. No. 34], this Court should dismiss this case under 28 U.S.C. § 1500 ("Section 1500") because the statute precludes the Court of Federal Claims ("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.<sup>1</sup> In United States v. Tohono O'odham Nation, 131 S. Ct. 1723 (2011) ("Tohono O'odham Nation"), the United States Supreme Court 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." 131 S. Ct. at 1731. Section 1500 applies here because, on December 28, 2006, when Plaintiff filed its CFC claims based on alleged breaches of fiduciary duty and mismanagement of trust assets,

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<sup>1</sup> 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.

it had pending, in the United States District Court of the District of Columbia, a complaint alleging breaches of fiduciary duty and mismanagement of trust assets that were (and are) based on substantially the same operative facts.<sup>2</sup>

In its July 14, 2011, Opposition [Dkt. No. 37], Plaintiff contends that Tohono O'odham Nation has no effect on this Court's jurisdiction to hear its claims. See Pl.'s Opp. at 2-3. According to Plaintiff, its CFC claims and its district court claims are not based on substantially the same facts because (a) its claims in this Court and the district court are based on distinct trust duties, (b) the evidence presented in the trials in this case and the district court case will look different, and (c) any similarities between the two cases are limited to mere "background facts." See id. at 4-8.<sup>3</sup>

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<sup>2</sup> Plaintiff's district court case, which remains pending, is styled Wyandot Nation of Kansas v. Kempthorne, No. 05-cv-02491-TFH (D.D.C. filed December 30, 2005). Copies of Plaintiff's complaints in the district court and in this Court were attached as Exhibits A and B to the United States' Motion [Dkt. No. 34-2].

<sup>3</sup> Plaintiff faults the United States for allegedly remaining silent on the issue of this Court's subject-matter jurisdiction for the first four-and-one-half years that this case was pending. See Pls.' Opp. at 2-3. That argument has no merit for two reasons. First, the question of subject matter jurisdiction may 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). Second, the United

Plaintiff's arguments are unavailing. 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. Therefore, this Court should dismiss Plaintiff's CFC claims.

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

As the United States explained in its Motion, a comparative reading of the complaints in the district court case and this case reveals that the complaints are based on substantially the same operative facts because of substantial overlap in Plaintiff's relevant allegations. Plaintiff alleges in both complaints 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 non-monetary trust assets. Compare Amended District Court Complaint, ¶¶ 15, 17-19, 25 with CFC Complaint, ¶¶ 15, 17, 18, 29.

Faced with the fundamental similarity between its claims in this Court and the district court, Plaintiff argues that any similarity between the two

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States promptly filed its Motion after the Supreme Court reversed the Federal Circuit's ruling in Tohono O'odham Nation.

cases is limited to their “background facts” and does not extend to their operative facts. See Pl.’s Opp. at 6-7. The CFC rejected this argument by a tribal plaintiff in Ak-Chin Indian Community v. United States, 80 Fed. Cl. 305 (2008). There, the court explained 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 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 in the United States’ Motion, 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. Compare Amended District Court Complaint, ¶¶ 15, 17-19, 25 with CFC Complaint, ¶¶ 15, 17, 18, 29.

Similarly, 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 unpersuasive. See Pl.'s Opp. at 6-7. 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, ¶ 15 with CFC Complaint, ¶ 15.

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, ¶¶ 18, 21, 22, 25 with CFC Complaint, ¶¶ 17-21, 25. 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, ¶¶ 18, 19, 25 with CFC Complaint, ¶¶ 17, 31. Both complaints allege these breaches as to the same trust corpus (e.g., natural resources, 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.

It does not 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. Plaintiff has pled in its CFC Complaint that:

The Defendant has failed to keep records of and/or has failed to keep proper records regarding the 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 demanding a full accounting of its trust accounts, trust assets and trust property. As of the date of the filing of this action, 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 negligence, wrongdoing or other breaches of trust.

CFC Complaint, ¶ 18. Thus, Plaintiff recognizes that the accounting that it seeks in its Amended District Court Complaint involves the same operative facts at issue in its CFC Complaint and that the trust property at issue is the same for both cases.



The Supreme Court's reasoning in Tohono O'odham Nation validates the appropriateness of dismissing this case under Section 1500. In reinstating the CFC's dismissal of that case on Section 1500 grounds, the Supreme 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 Supreme Court further observed that the tribe'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 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, ¶¶ 5-11 with CFC Complaint, ¶¶ 5-13. 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, ¶¶ 17-20, 25 with CFC Complaint, ¶¶ 17, 18, 23-24. These allegations dispose effectively and conclusively of Plaintiff's argument about any differences in the operative facts of the Amended District Court Complaint and the CFC Complaint.

### **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 after Plaintiff filed its suit in the district court; both suits remain pending. Accordingly, for the reason explained above and in the United States' Motion, the elements of Section 1500 are satisfied, this Court lacks subject-matter jurisdiction, and thus it should dismiss this case.

Respectfully submitted this 1st day of August, 2011,

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