NO. 18-1720

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LUMMI TRIBE OF THE LUMMI RESERVATION, WASHINGTON, LUMMI NATION HOUSING AUTHORITY, HOPE TRIBAL HOUSING AUTHORITY, FORT BERTHOLD HOUSING AUTHORITY,

Plaintiffs-Appellants,

FORT PECK HOUSING AUTHORITY,

Plaintiff,

v.

UNITED STATES,

Defendant-Appellee.

APPEAL OF ORDER OF THE UNITED STATES COURT OF FEDERAL CLAIMS
Case 1:08-CV-00848-RHH (Senior Judge Hodges

BRIEF OF DEFENDANT-APPELLEE

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants invoke the Court's jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) to review a final decision of the Court of Federal Claims (CFC). We note, however, that the CFC order at issue is the order dismissing this action "[p]ursuant to the mandate filed on January 12, 2018 in this case by the United

States Court of Appeals for the Federal Circuit." Appx55. That mandate directed the CFC to "dismiss this action for lack of subject-matter jurisdiction." *Lummi Tribe of the Lummi Reservation, Washington v. United States,* 870 F.3d 1313, 1320 (Fed. Cir. 2017) (*Lummi V*).

STATEMENT OF THE ISSUES

1. Whether the trial court erred in following this Court's mandate to "dismiss this action for lack of subject-matter jurisdiction."

2. Whether the trial court erred by dismissing this action for lack of subject-matter jurisdiction without deciding whether to transfer the action pursuant to 28 U.S.C. 1631.

STATEMENT OF THE CASE

Plaintiffs-Appellants are an Indian tribe and three Indian Housing Authorities (collectively, the Tribes) who received annual block grants administered by the United States Department of Housing and Urban Development (HUD) pursuant to the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. §§ 4101-4212. The Tribes brought suit in the Court of Federal Claims under the Tucker Act and the Indian Tucker Act, 28 U.S.C. §§ 1491(a)(1) and 1505, respectively, alleging that HUD improperly deprived them of grant funds to which they were entitled by (1) misapplying the formula for calculating each grantee's annual block grant amount

and (2) failing to provide a hearing required by statute. *Lummi Tribe of the Lummi Reservation v. United States*, 870 F.3d 1313, 1316 (Fed. Cir. 2017). The Tribes' complaint asserted that the alleged violations of NAHASDA statutory and regulatory provisions also constituted breaches of annual NAHASDA funding agreements, trust or fiduciary duty. Appx32-35.

"On June 9, 2016, this Court granted the government's petition for interlocutory appeal to 'ensure that the Court of Federal Claims is the court of proper jurisdiction before requiring it and the parties to undergo extensive unnecessary proceedings.'" *Lummi Tribe*, 870 F.3d at 1315 (quoting the Court's order granting appeal). After briefing and oral argument, the Court had ensured itself that jurisdiction in the Court of Federal Claims was *not* proper, and so issued its judgment and order "instruct[ing] the Claims Court to dismiss this action for lack of subject matter jurisdiction." *Id.* at 1320.

The Tribes sought review of this Court's judgment and order by petitioning for panel rehearing or rehearing en banc. Appx63. The Tribes' petition for rehearing argued precisely what they argue again here: (1) the decision that CFC jurisdiction over the action is lacking was wrong, (2) dismissal is wrong because the Tribes have claims that have not yet been addressed, and (3) the CFC should have the option to consider transferring the case pursuant to 28 U.S.C. § 1631. Appx63-65. The Court invited a response from the United States, which the

United States filed, and both the panel that heard the appeal and all active circuit judges considered the petition. Appx57-58. Having considered the arguments that are repeated on appeal here, the Court denied the Tribes' petition and ordered issuance of its mandate to dismiss the action for lack of subject matter jurisdiction. *Id.*

Pursuant to the Court's mandate, the Court of Federal Claims dismissed the action as instructed. Appx55.

The Tribes now appeal again to this Court to reverse the dismissal it had just ordered---and to do so after having already reconsidered it on petition for rehearing and rehearing en banc. The appeal argues, as did the Tribes' earlier petition for rehearing, that the Court erred in its jurisdictional holding and erred in ordering dismissal because of remaining claims and the option for transfer under § 1631. Tribes Br. at 9-19. The Tribes also have appealed the Court's order of dismissal to the Supreme Court by filing a petition for certiorari, which is pending. Pet. for cert., No. 17-1419 (filed Apr. 5, 2018).

The Tribes have had every lawful opportunity to seek reconsideration and appeal of the Court's order to dismiss for lack of subject matter jurisdiction, and their arguments have been considered and rejected The appeal should therefore be summarily denied.

SUMMARY OF ARGUMENT

The Tribes' arguments in this appeal are identical to arguments already presented to, and rejected by, this Court on the Tribes' petition for rehearing before the Court issued its mandate to dismiss the action for lack of subject matter jurisdiction. There is simply no warrant for reconsideration again (re-reconsideration). Following full briefing by both sides, the Court has already rejected the Tribes' arguments for reconsideration made in its petition for rehearing and for hearing *en banc*. Thus, the attack on this Court's earlier decision is not only improperly raised in an appeal of the *trial court's* order, it already has been decided.

Taking a slightly different tack on the premise that this Court's ruling was in error, the Tribes argue again here, as they did before on petition for rehearing, that this Court's order could not have meant what it said because not all their asserted grounds for jurisdiction were decided by this Court's prior opinion and mandate. This argument too repeats the one made in the Tribes' petition for rehearing, and is meritless. This Court granted its permission for interlocutory appeal based on an CFC order that reaffirmed its prior decisions "in toto," and in doing so explicitly stated that the appeal was granted to "ensure" whether the action was properly in the Court of Federal Claims and would encompass "any question that is included within" that order. Appx61 and n.2.

The Tribes' alternative contentions for jurisdiction---that HUD's alleged violations of substantive law also "constituted" breaches of contract and fiduciary duty--- have already been decided. Indeed, they have already been explicitly heard and decided on the Tribes' petition for rehearing. In addition, the Court addressed these alternative theories by necessary implication because it analyzed the Tribes' complaint (which contains these contentions) and determined the substantive duties it alleged were violated created no right to a damages award and so the Tucker Act provided no jurisdiction. *Lummi Tribe*, 870 F.3d at 1319 ("Here, the underlying claim is not for presently due money damages"; it can only be for equitable relief because under NAHASDA, the Tribes are not entitled to a "free and clear transfer of money"). In any event, assuming they did not raise and the Court did not consider those alternate theories of jurisdiction in the prior appeal, pursuant to the mandate rule, that failure forecloses their being raised here.

Finally, the Tribes argue that the Court's mandate to dismiss the action denied them an opportunity to seek transfer under 28 U.S.C. § 1631. The Tribes raised this argument too in their petition for panel rehearing and rehearing *en banc*. Appx63-65. The Court evidently disagreed and denied the petition.

In sum, the Tribes' appeal of the CFC's implementation of this Court's mandate to dismiss the action for lack of subject matter jurisdiction amounts to no

more than another request for reconsideration of questions this Court has already fully considered and decided. It should be summarily denied.

ARGUMENT

I. This "Appeal" for Reconsideration of This Court's Prior Decision and Mandate Is Barred By The Mandate Rule

In effect, the Tribes are appealing not a CFC decision or judgment, but this Court's own mandate to dismiss the case for lack of subject matter jurisdiction. They are appealing this Court's mandate . . . to this Court. There is thus nothing for this Court to review on appeal; it could only reconsider its prior holding and mandate which is barred by the mandate rule.

A. The Mandate Rule

Pursuant to the mandate rule, issues decided by the court of appeals are barred from further consideration -- absent limited exceptions the Tribes do not claim. *TecSec, Inc. v. Int'l Bus. Machs. Corp.*, 731 F.3d 1336, 1341-42 (Fed. Cir. 2014) ("After our mandate issues, the mandate rule forecloses reconsideration of issues implicitly or explicitly decided on appeal."). A mandate includes "all issues within the scope of the appealed judgment . . . ." *Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1383 (Fed. Cir. 1999). For an issue to be implicitly decided, it must be decided by necessary implication. *TecSec, Inc.*, 731 F.3d 1336 at 1341-42.

"An issue that falls within the scope of the judgment appealed from but is not raised by the appellant in its opening brief on appeal is necessarily waived."

Id.; *see also Retractable Techs., Inc. v. Becton Dickinson & Co.*, 757 F.3d 1366, 1371 (Fed. Cir. 2014); *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1360 (Fed. Cir. 2008) ("[T]he mandate rule precludes reconsideration of any issue within the scope of the judgment appealed from—not merely those issues actually raised."); *Doe v. United States*, 463 F.3d 1314, 1327 (Fed. Cir. 2006) ("[T]he mandate rule 'forecloses litigation of issues decided by the district court but foregone on appeal or otherwise waived.' ") (quoting *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993)).

B. The Tribes' Appeal Is Barred Because It Argues Only That The Court's Prior Mandate Was Wrong

The Court's mandate was explicit and unambiguous. It decided that the Court of Federal Claims must "dismiss *this action* for lack of subject matter jurisdiction." *Lummi Tribe*, 870 F.3d at 1320 (emphasis added). It thus decided the dispositive jurisdictional issue for the complaint in its entirety. This was because the Court correctly concluded that the factual bases for the complaint raised no claim within the CFC's jurisdiction. The Court reviewed the complaint as a whole and explained that "their only alleged harm is having been allocated too little in grant funding. Thus, at best, the Tribes seek a nominally greater strings-attached disbursement. But any monies so disbursed could still be later reduced or clawed back." *Id.* at 1318. Accordingly, the Court correctly held that "[h]ere, the underlying claim is not one for presently due money damages. It is for larger

strings-attached NAHASDA grants---including subsequent supervision and adjustment," and hence could create a right only to "equitable relief." Id. at 1319. "Indeed," the Court concluded, "*any* such claim for relief under NAHASDA would necessarily be styled in the same fashion." *Id.* (emphasis in original).

The Court's prior mandate thus decided, explicitly and unambiguously, that the complaint as a whole raises no basis for jurisdiction in the Court of Federal Claims. Whether the Tribes are correct to characterize their alternative theories of jurisdiction (that the same facts also "constitute" breaches of trust, or explicit or implicit contracts) as separate "claims," the Court unmistakably dismissed them in its prior mandate dismissing the action for lack of jurisdiction. Pursuant to the mandate rule the jurisdictional issue was decided and is barred from further consideration. *TecSec, Inc.*, 731 F.3d at 1341-42.

Even if the Court's unambiguous dismissal of the action did not explicitly or by necessary implication decide the issue of whether the CFC has jurisdiction over the Tribes' claim for larger strings-attached NAHASDA grants, the Tribes' further assertion now of alternative grounds for jurisdiction are necessarily waived because they fall within the scope of the judgment appealed from. The prior appeal was for review of the CFC's reaffirmation of its jurisdiction under the Tucker Act. Both the CFC and the Federal Circuit agreed the appeal was warranted, in part because it would answer for once and all the dispositive question

whether there was Tucker Act jurisdiction over this case. As this Court put it when granting the interlocutory appeal:

> We . . . agree with the Court of Federal Claims that the United States has met the criteria for appeal under § 1292(d)(2) and that the petition should be granted. As that court explained in certifying the order, there is not only a controlling question of law but also a substantial ground for difference of opinion under the applicable case law as to *whether this was a complaint that could properly be brought under the Tucker Act*, and immediate *review will ensure that the Court of Federal Claims is the court of proper jurisdiction* before requiring it and the parties to undergo extensive unnecessary proceedings.

Appx61 (emphasis added). To this the Court noted its authority to "review any question that is included within the [CFC's] September 30, 2015 order." *Id.* n.2. The Tribes' renewed question whether Tucker Act jurisdiction exists on the ground that HUD's alleged violations of NAHASDA also constituted breaches of trust or contract falls within the scope of the jurisdictional judgment appealed from. If the Tribes did not adequately raise their alternative arguments for jurisdiction in that prior appeal, they cannot be revived now. Under the mandate rule, they are necessarily waived. *TecSec, Inc.*, 731 F.3d 1336 at 1341-42.

And even if the Tribes' alternative theories for jurisdiction were not waived, they were explicitly made to the Court in the Tribes' petition for panel rehearing and rehearing *en banc*, as discussed above. Following full briefing by both sides, the Court properly denied the petition. Appx57-58. Those arguments were thus decided on the first appeal, by necessary implication if not explicitly. They may

not now be reconsidered (again). *TecSec, Inc.*, 731 F.3d at 1341-42 ("After our mandate issues, the mandate rule forecloses reconsideration of issues implicitly or explicitly decided on appeal.").

C. No Exceptions To The Mandate Rule Permit Re-Reconsideration of the Tribes' Jurisdictional Arguments

As this Court has held, there are exceptions to the mandate rule, but the circumstances "must be exceptional." *Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1349 (Fed. Cir. 2001). "Exceptional circumstances include a substantial change in evidence, a change in controlling legal authority, or a showing that the prior decision was 'clearly' incorrect and would result in a 'manifest injustice.'" *Haggart v. United States*, 131 Fed. Cl. 628, 638, *reconsideration denied*, 133 Fed. Cl. 568 (2017) (citing *Banks v. United States*, 741 F.3d 1268, 1276 (Fed. Cir. 2014)); *accord Huffman v. Saul Holdings Ltd P'ship*, 262 F.3d 1128, 1133 (10th Cir. 2001) (a deviation from the mandate rule is permitted "'if blatant error from the prior . . . decision would result in serious injustice if uncorrected,'" (quoting *United States v. Webb*, 98 F.3d 585, 587 (10th Cir. 1996))). The party arguing in favor of such a circumstance has a "heavy burden." *Branning v. United States*, 784 F.2d 361, 363 (Fed. Cir. 1986). The Tribes raise no exceptional circumstances in their appeal such as a change in fact or law. And given that the Tribes made the same arguments before in their earlier petition for rehearing, and not only the panel, but all active circuit judges already considered and rejected those arguments,

there can be no "blatant error" in the Court's decision that the Tucker Act provides no jurisdiction in this case. There are no exceptional circumstances here, and the mandate rule forbids re-reconsideration of the CFC's lack of jurisdiction over this action.

II. The Transfer Issue Too Was Decided In The Prior Appeal And Should Not Be Reconsidered In This Appeal

Finally, the Tribes contend that the Court's mandate erred by dismissing the case without instructing that it be transferred to a district court (or that transfer be considered) under 28 U.S.C. § 1631.

Again, this Court has already considered this question in the Tribes' petition for panel rehearing and rehearing *en banc*, in which they specifically argued that "where a claim for equitable relief has been wrongly brought in the CFC, the court should transfer the case to the appropriate federal district court." Appx64. Following full briefing, the Court summarily denied the petition and issued its mandate instructing the trial court to dismiss the complaint. Appx58. In instructing the CFC to dismiss the complaint in total and full stop, the Court necessarily considered and rejected the possibility that the case could be transferred to district court.

Therefore, this Court addressed the transfer statute in the appealed judgment and determined it did not apply. Given this Court's explicit order and, especially in light of its specific consideration of this question, the trial court had no authority

to do anything but dismiss. *See, e.g., In re Nwogu,* 570 Fed. Appx 919, 921 (2014) ("By vacating the decision that the Government could properly withhold payment, our mandate precluded the Court of Federal Claims from staying payment"); *Rectractable Technologies, Inc.*, 757 F.3d at 3-6 (the trial court could not entertain additional proceedings on the jury verdict because the injured party did not seek to have it reviewed in the appeal).

To the extent the Tribes complain that *this Court* erred by not transferring the matter or giving the trial court leeway to do so, they, again, are simply seeking to reconsider a question already considered without satisfying the conditions for doing so. *E.g.,* Section IC *infra*. Moreover, it was not improper for this Court to not have transferred the case.

The transfer statute provides, in relevant part:

> Whenever a civil action is filed in a court . . . or an appeal is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed . . .

Thus, given the trial court's lack of jurisdiction, a transfer would not be proper absent a finding that the receiving court (apparently, a court in the 10th Circuit) would have possessed jurisdiction. There was no basis for that conclusion, however, because, as this Court knew before both its original ruling and its decision on the petition for rehearing, the 10th Circuit already had decided that the

monetary remedy available in the district court was limited to a specific year's grant appropriation, and the relevant year's appropriations were likely exhausted. *See Lummi Tribe*, 870 F.3d at 1319-1320 (discussing *Modoc Lassen*, the related litigation in the 10th Circuit); *Modoc Lassen Indian Hous. Auth. v. United States Dep't of Hous. & Urban Dev.*, 881 F.3d 1181, 1196 (10th Cir. 2017) ("Here, the district court awarded the Tribes money damages when it ordered HUD to compensate them using funds from grant years other than the grant years during which HUD wrongfully collected the alleged overpayments"). In this case, the Tribes made no contention---either in their earlier petition for rehearing or in this appeal---that any of the bygone appropriations they sought had been set aside or otherwise remained. *See* Appx63-65. Thus, the Court could reasonably determine that transfer to a district court would be moot.

Accordingly, this Court properly instructed the trial court to dismiss the complaint.

CONCLUSION

For these reasons, the appeal should be dismissed or, in the alternative, the trial court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANT-APPELLEE'S OPENING BRIEF this 23rd day of July, 2018 on counsel for the plaintiffs-appellants as follows:

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