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**VIA ELECTRONIC MAIL**

Professor Ronald M. Levin
Chair, Committee on Judicial Review
Administrative Conference of the United States
1120 20th Street, N.W., Suite 706 South
Washington, D.C. 20036

**Re: Public Comment on the Reform of 28 U.S.C. § 1500**

Dear Professor Levin and Fellow Committee Members:

We provide this public comment as counsel to the plaintiff in Petro-Hunt, L.L.C. v. United States, Case No. 00-512 (U.S. Court of Federal Claims), whose exercise of rights vested in it by the U.S. Constitution and the U.S. Congress has been denied in part by the anachronistic jurisdictional statute codified at 28 U.S.C. § 1500. We write in support of a full and outright repeal as originally recommended by the ACUS staff report. The repeal should be broadened to apply retroactively to all suits pending at the time the case of United States v. Tohono O'odham Nation, 131 S. Ct. 1723 (2011) was decided.

A brief procedural and factual background illustrates the unfairness worked by Section 1500 in Petro-Hunt's case. In the early 1990s, the United States began issuing mineral leases to third-parties on mineral property Petro-Hunt thought that it owned.[1] Petro-Hunt brought a declaratory judgment suit on February 18, 2000 in the Western District of Louisiana to quiet title to property located therein under 28 U.S.C. § 2409a (the Quiet Title Act or "QTA") and, in the alternative, asserted a request for just compensation against the United States. The United States answered by claiming ownership and asserting that the district court had no jurisdiction over the takings claim. The district court did not consider the just compensation claim. While the title suit was pending, Petro-Hunt brought suit in the U.S. Court of Federal Claims ("CFC") on August 24, 2000 claiming a taking of the same mineral property under the Fifth Amendment. The CFC granted a joint motion to stay the proceedings pending the outcome of the title case.

[1] The facts of Petro-Hunt's case are similar to Central Pines Land Co. et al. v. United States, Case No. 98-314 (U.S. Court of Federal Claims).

The district court entered a final judgment for Petro-Hunt confirming ownership in 110,000 acres of the 185,000 mineral acres in dispute. However, the title case was not concluded until 2008 after all appeals were exhausted. Had Petro-Hunt waited to file its taking claims in the CFC after the title case concluded to avoid Section 1500, it would have run past the six-year statute of limitations under the Tucker Act.[2]

In 2008, the parties jointly moved to lift the stay in the CFC. Petro-Hunt filed an amended complaint. The United States answered by moving to dismiss on statute of limitations grounds. The CFC dismissed the permanent takings claim but not the temporary takings claim as certain of the mineral leases were issued by the United States within six years of the filing date. The case proceeded through discovery until 2011 when the United States apparently realized that it had grounds for moving to dismiss based on Tohono, but also relying on Keene v. United States, 508 U.S. 200 (1993).

While expressing some displeasure with the United States for belatedly filing its motion, the court granted the Section 1500 motion in part based on Keene as it found that the plaintiff had alleged the same facts and sought the same relief in the district court action and the CFC.[3] Petro-Hunt, L.L.C. v. United States, Case No. 00-512L, 2012 WL 1571004, n. 7, May 2, 2012) ("The court is troubled that the defendant initially moved to stay this case, then allowed this case to remain dormant while defendant was litigating cases like Tohono, and did not raise the section 1500 issue until recently ...."). The court found that Petro-Hunt had filed an alternative claim for relief in the form of a takings claim in the district court action and had pled the same facts and sought the same relief in the CFC. The CFC therefore dismissed Petro-Hunt's temporary takings claim. Id.

Since the district court did not have jurisdiction over the alternative just compensation claim, the alternative count should have been deemed a nullity. See Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (1994) (*en banc*). In the bizzare world of Section 1500, the filing of a just compensation claim (in the alternative) in the wrong court became the death knell when the claim was filed in the CFC, the court that actually had jurisdiction over the takings count. This outcome is absurd.

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[2] 28 U.S.C. § 2501.

[3] The sole remaining claim in Petro-Hunt's case is a claim for a judicial taking based on Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, 130 S. Ct. 2592 (2010),

Section 1500 purports to protect the United States from a plaintiff recovering money damages "twice" for the same claim.[4] Section 1500 should not apply in cases where Congress has vested different federal courts with jurisdiction over different types of relief needed to make a plaintiff whole. Petro-Hunt is not seeking to recover money damages twice, but was pursuing its rights through the distinct federal courts vested with jurisdiction to adjudicate such claims.

Petro-Hunt sought a declaration of title in real property[5] and in the second case sought just compensation for a taking of private property subject to the outcome of title suit.[6] This filing order makes sense as Petro-Hunt would not have had a takings claim had the United States been adjudicated to be the owner of the entire mineral estate in the QTA.

These remedies are non-exclusive and non-duplicative and are provided by the U.S. Constitution (Fifth Amendment) and by Congress in statute (the QTA).[7] Prior to the enactment of the QTA in 1972, a private party could not file suit to quiet title against the United States and was forced to concede title and file suit for just compensation. Congress recognized that a private property owner should have the right to sue for title and provided a statutory right to do so without affecting a subsequent suit for money damages. The QTA stated: "This section [the QTA] … does not apply to or affect actions which may be or could have been brought under sections …, 1491 [the Tucker Act], … of [title 28]…". 28 U.S.C. § 2409a. A money judgment is not adequate to a property owner who wants to retain title and who is not subject to an eminent domain proceeding.

Section 1500 interferes with a plaintiff's right to retain ownership of its real property through a QTA suit and also assert a separate claim for just compensation for

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[4] The legislative history shows that the double recovery that Congress was concerned about was money, not title to real property. See 81 Cong. Globe 40th Cong., 2nd Sess. 2769 (1868) (statements by the Section 1500's sponsor Senator Edwards of Vermont).

[5] The Quiet Title Act (24 U.S.C. § 2409a) specifies exclusive jurisdiction for title actions in the federal district court where the real property is located. The statute does not permit the plaintiff to claim money damages, only a declaration of title.

[6] 28 U.S.C. § 1491 provides exclusive jurisdiction for just compensation claims in the U.S. Court of Federal Claims.

[7] See Craig A. Schwartz, "*Footloose: How to Tame the Tucker Act Shuffle After United States v. Tohono O'odham Nation*," 59 UCLA L. Rev. Discourse 2 (2011) (suggesting that "necessarily sequential" lawsuits ought not be covered by § 1500).

damages arising from an unlawful taking of private property by the United States. There were many cases prior to Tohono in which plaintiffs were able to obtain relief under both remedies.[8] Tohono changed the law in this regard, even though the issue of different relief was not before it.

Plaintiffs should have the ability to pursue both remedies and not be forced to an election between title and just compensation. Plaintiffs also should not have to navigate through an arbitrary order of filing rule that is a procedural trap that serves no purpose.[9] This formalistic approach is contrary to modern pleadings rules.[10] Federal district courts are well-suited to manage alleged duplicative litigation through their inherent power to manage their dockets. The same is true in Petro-Hunt's case where the district court and CFC have ably managed the two cases. There are probably countless other examples as well.

In addition, the threat of "paying twice" is invalid in the modern age given the concepts of res judicata and electronic filing. There is little to no risk that the United States will pay twice, as was the original concern when the statute was enacted more than 150 years ago. The United States also does not have to litigate the same case twice in this context as the factual, legal, and quantum questions are separate and distinct.

Section 1500 should be repealed. The repeal should be made retroactive to all cases pending at the time of the Tohono decision.

We have considered the comments submitted by the Department of Justice and respond as follows. First, there is no reason to delay repeal of this statute to let the courts develop the law post-Tohono. The harm to plaintiffs is immediate and real. Further delay will result in the denial of legitimate claims asserted by other plaintiffs. Tohono expanded the scope of Section 1500 as it eliminated the relief prong. The result of further delay will be the dismissal of additional cases.

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[8] Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 886 (Fed. Cir. 1983) (plaintiffs stayed later filed takings suit in Court of Federal Claims pending the outcome of its Quiet Title Act suit against the United States in federal district court).

[9] See Tecon Eng'rs, Inc. v. United States, 170 Ct. Cl. 389 (1965).

[10] "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Weston v. Commonwealth, 251 F.3d 420 (3rd Cir. 2001) (cited in 5 Wright & Miller, FEDERAL PRACTICE & PROCEDURE, Civil 3d § 1202 at 92-99 (2004 & 2010 Supp)).

Second, the Department's attempt to bolster the viability of the statute ignores the overwhelming evidence from judges who regularly decide Section 1500 motions and commentators who have examined the issue. The following quotes are among the more descriptive criticisms of the statute:

- "Mister Bumble might have made his judgment - that the law is an ass - less conditional if the operation of Title 28, Section 1500 had been explained to him." Vaizburd v. United States, 46 Fed. Cl. 309, 309 (2000) (citing Charles Dickens' "Oliver Twist").

- "Section 1500 is an anachronism. It was first enacted in 1868, and over the years has been encrusted with numerous shadings and tortured constructions." A.C. Seeman v. United States, 5 Cl. Ct. 386, 389 (1984).

- "Section 1500 of title 28…is an example of a statute that does now cause affirmative harm. Having outlasted the problem it was intended to address, section 1500 continues to wreak havoc with the jurisprudence of the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit (Federal Circuit). In fact, few issues in Federal Circuit's contemporary jurisprudence have caused greater confusion for both the bench and bar." Payson R. Peabody et. al., *A Confederate Ghost That Haunts the Federal Courts: The Case for Repeal of 28 U.S.C. § 1500*, 4 Fed. Cir. B.J. 95, 96 (1994).

- "Section 1500 is the modern incarnation of Congress' response to a post-Civil War exigency, namely, duplicative suits commenced by residents of the former Confederacy (the so-called "cotton claimants") seeking compensation for lost property under different theories of liability…. The cotton claimants are gone, but the statute designed to thwart them remains, substantially unchanged…. § 1500 can create hardships for plaintiffs, especially by denying them an opportunity for complete relief….Although § 1500 may be an anachronism depriving litigants of a fair opportunity to assert their rights, 'the 'proper theater' for such arguments ... 'is the halls of Congress, for that branch of the government has limited the jurisdiction of the Court of Claims.'" Lower Brule Sioux Tribe v. United States, 06-922 L, 2011 WL 6062269, *3, fn.4 (Fed. Cl., Dec. 1, 2011).

- "Section 1500 was, and continues to be, burdened with ambiguity that creates real-world problems for many litigants…similarly-situated litigants are treated differently, sometimes with stark results." Paul Frederic Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 Am. U. L. Rev. 301, 306 (1997).

- The Honorable Eric G. Bruggink of the CFC stated: "Section 1500 remains something of a judicial coelacanth, still swimming around despite its Civil War era rationale....the statute is now unnecessary because of the principles of *res judicata*, collateral estoppel, and comity...the effect of section 1500 is that, unlike disputes in other contexts, mistakes in classifying the nature of the suit or in picking relief can be fatal." *A Modest Proposal,* 28 Pub. Cont. L.J. 529, 539 (1999).

Third, the Department continues to erroneously assert that the order-of-filing rule in Tecon was overruled or questioned in Tohono. Many judges have already soundly rejected the Department's view.[11] That being said, the Department would clearly like to move in that direction. The reason is obvious. More cases would be dismissed as litigants could no longer rely on the "safe-harbor" provided by the order-of-filing rule. If the Department's view prevails, litigants will face additional motions to dismiss. Motions practice will increase as litigants will have to brief whether two cases are the same. Thus, the Department's concern about avoiding litigation appears to be misplaced. In sum, the Department's defense of the statute is not well-founded.

[11] United Keetoowah Band of Cherokee Indians in Okla. v. United States, 104 Fed. Cl. 180 (2012) (Judge Wheeler) (finding that ambiguous dicta from Tohono does not override longstanding Federal Circuit precedent from Tecon); Kaw Nation of Okla. v. United States, 103 Fed. Cl. 613 (Feb. 29, 2012) (Judge Allegra) (stating that "... it is abundantly clear that Tohono did not expressly overrule Tecon."); Nez Perce Tribe v. United States, 101 Fed. Cl. 139 (Sept. 27, 2011) (Judge Lettow) (rejecting the defendant's argument that Tohono overruled Tecon, stating that "[t]he words could scarcely be more plain" that the issue was not presented in Tohono).

Thank you for your consideration. Please let us know if we can provide additional information.

Sincerely,

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