



November 6, 2012

VIA ELECTRONIC MAIL

Paul Verkuil, Chairman
Administrative Conference of the United States
1120 20th Street, N.W., Suite 706 South
Washington, D.C. 20036

Re: Public Comment on Repeal of 28 U.S.C. § 1500

Dear Chairman Verkuil:

Thank you for this opportunity to submit comments on the Administrative Conference's proposal to repeal 28 U.S.C. § 1500. The Navajo Nation (the "Nation") is a federally recognized Indian tribe. The Nation supports complete repeal of 28 U.S.C. § 1500. Section 1500 has been a jurisdictional stumbling block for the unwary for many years. Unfortunately, even wary plaintiffs too often find themselves unable to avoid falling victim to the injustice inherent to this antiquated and obsolete statute.

Indian tribes were recently in the spotlight with respect to § 1500 dismissals when tribal breach of trust cases were filed first in district courts seeking an accounting and then in the Court of Federal Claims ("CFC") seeking monetary relief. *Tohono O'odham* was the first of these tribal breach of trust cases to be dismissed and the dismissal appealed. *Tohono O'odham* ultimately made its way to the Supreme Court, where long-standing precedent for applying § 1500 was then changed. These tribes, whose money damages claims were dismissed, are only one example of plaintiffs who have fallen into the § 1500 trap. Section 1500 is a problem for a broad array of litigants, such as property rights litigants who need injunctive or declaratory rulings preliminary to a Fifth Amendment takings claim. Indeed, non tribal *amici* weighed in on the unnecessary burdens imposed on plaintiffs by § 1500 in the *Tohono O'odham* proceedings before the Supreme Court.

Judges have lamented the harsh and unjust outcome of § 1500 proceedings from the bench and in written opinions for many years. For example:

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. [citing Charles Dickens, "Oliver Twist," chapter 51] The untutored might suspect that the United States government would not rely on traps for the unwary to avoid having to respond to its citizens. Not so. The confluence of the literal reading of section 1500 and the judicial gloss put on it dictate that these *pro se* plaintiffs must have this taking claim dismissed, despite the fact that it is timely and that the court is given subject matter jurisdiction to hear it. The plaintiffs guessed wrong

as to the nature of their cause of action and then compounded their understandable error by commencing suit in district court before suing here.

Viazaburd v. United States, 46 Fed. Cl. 309, 310 (2000).

Even while acknowledging the hardships that result as plaintiffs are dismissed pursuant to § 1500, however, courts have also recognized that relief must come from the legislature. For example, the court's dismissal of *Tohono O'odham* concluded with the following observation:

We recognize that, if the filing dates of the complaints had been reversed, section 1500 would not be a problem and the two courts would use traditional principles of comity, collateral estoppel, and *res judicata* to sort out any duplication. While this illustrates the lack of need for section 1500 and its arbitrariness, we can do no more than make this observation and suggest that plaintiff attempt a legislative solution through a congressional reference or a new jurisdictional statute.

Tohono O'odham, CFC No. 6-944, ECF No. 26 at 26-27 n. 16, December 19, 2007.

The Navajo Nation has been able to avoid so far becoming ensnared in the § 1500 traps. The Nation is keenly aware, however, of other parties who were also cautious but nevertheless suffered draconian outcomes when they ran afoul of this statute. We recount here a few examples:

Petro-Hunt brought a declaratory judgment suit in Louisiana's federal District Court in 2000 under the Quiet Title Act. While the quiet title suit was pending, Petro-Hunt brought suit in the CFC 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 quiet title case. The district court entered a final judgment for Petro-Hunt confirming ownership of mineral acres in 2001. The title case was not fully concluded, however, until 2008 after all appeals were exhausted. Had Petro-Hunt waited to file its taking claim in the CFC until after the title case concluded to avoid dismissal under § 1500, it would have run past the CFC's six-year statute of limitations. Nevertheless, the CFC dismissed Petro-Hunt's temporary takings claim pursuant to § 1500. Even diligent plaintiffs may not be able to get in and out of district court, including appeals, before being timed out at the CFC.

The CFC dismissed *Central Pines Land*, a Fifth Amendment takings case based on application of the Supreme Court's *Tohono O'odham* decision on 28 U.S.C. § 1500. *Central Pines Land* was at an advanced stage of proceedings. The case had been pending since 1998. The court had issued opinions on motions for summary judgment, and, following trial on liability and damages, awarded \$1,667,042.86 as compensation for a temporary taking of mineral interests plus interest since the taking date. The Supreme Court's *Tohono O'odham* ruling was issued while the *Central Pines* parties briefed plaintiff's motion for attorney fees and costs.

In *Central Pines*, as in *Tohono O'odham*, plaintiffs argued unsuccessfully that neither the district court nor the CFC could have granted complete relief and that the district court could not have had jurisdiction over its CFC claims. Plaintiffs sought declarative relief in district court and compensation for a taking in the CFC. The court nevertheless determined, under *Tohono O'odham*, that it had lacked jurisdiction many years earlier, as of the time of filing *Central Pines*. It accepted the government's argument that it made no difference that the district court action was already completed long before the motion to dismiss under § 1500.

The CFC found that the *Central Pines* district court complaint was “for or in respect to” the same claim because of the substantial overlap of operative facts. The court's closing remarks on the obvious hardships that resulted are sobering. The court seemingly reached its conclusions with some reluctance as have other judges who have observed that the power to address inequities inherent to § 1500 lies with the legislature. “The court is of course mindful of the hardship caused by the application of section 1500 in this case. . . . However, as the government correctly notes, the jurisdictional bar created by section 1500 is not affected by the lengthy litigation history in this case and the departure from Federal Circuit precedent set forth in *Tohono*. Indeed, the Supreme Court acknowledged in *Tohono* that its decision could well lead to such results:

Even were some hardship to be shown, considerations of policy divorced from the statute's text and purpose could not override its meaning. Although Congress has permitted claims against the United States for monetary relief in the CFC, that relief is available by grace and not by right. If indeed the statute leads to incomplete relief, and if plaintiffs . . . are dissatisfied, they are free to direct their complaints to Congress.

Central Pines Land Co. v. United States, 99 Fed. Cl. 394, 407 (2011) (quoting *Tohono O'odham v. United States*, 131 S. Ct. 1723, 1731 (2011), *aff'd*, *Central Pines Land Co. v. United States*, No. 2012-5002, slip op. at 12-13 n. 6 (Fed. Cir. October 15, 2012) (“To the extent that § 1500 may impose hardship upon plaintiffs, the Supreme Court has made clear that the statutory language of § 1500 leaves no room to account for such hardship.”); *see also Keene Corp. v. United States*, 508 U.S. 200, 217-18 (1993) (“[T]he ‘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.’ We enjoy no ‘liberty to add an exception . . . to remove apparent hardship,’ and therefore enforce the statute.”).

Another tribal breach of trust case, *Osage Tribe v. United States*, which had been pending since 1999, could have met with a similar fate. After the Supreme Court's *Tohono O'odham* decision, the United States filed a motion to dismiss *Osage* based on the tribe having also filed in district court for an accounting. *See Osage*, CFC No. 99-550, ECF No. 646, June 9, 2011. The United States pressed on with its motion to dismiss *Osage* despite the fact that the district court case had already been voluntarily dismissed and despite the fact that the district court case had been filed five years after the CFC case. *Osage* settled so we don't know what the ultimate outcome of that motion to dismiss might have been. We do know that other CFC judges, relying on *Tecon Engineers*, have denied motions to dismiss under § 1500 where the district court case was filed

after the CFC case. It remains to be seen whether *Tecon* will survive if one of these denials of motions to dismiss makes its way to the Supreme Court.

Finally, one of the most egregious of unjust outcomes under § 1500 is yet another tribal breach of trust case. In the *Goodeagle* case, CFC No. 11-582, Quapaw allottees' class action in the CFC was dismissed because the plaintiffs were unavoidably among some 500,000 members of the *Cobell* historical accounting class in district court.

Pending Cases.

Other tribal cases are pending and at risk of being dismissed under § 1500 based on the new interpretation of the statute by the Supreme Court in *Tohono O'odham*. One of these is similar to the *Goodeagle* case. *Ramona Two Shields v. United States*, CFC No. 11-531, is a class action by members and descendants of members of the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota. The *Two Shields* allottees claim that BIA allowed their valuable oil and gas, part of the Bakkan shale formation, to be leased at below market value and then approved "flipping" of the leases at much higher prices. The United States moved to dismiss this breach of trust case about a year ago because plaintiffs were member of the *Cobell* "trust administration class." The motion to dismiss has not yet been argued or decided.

Future Claims.

Indian tribes who settle under the terms that have been standard in recent settlements of tribal breach of trust claims are required, as a preliminary step, by the terms of the settlement agreements, to first file an administrative claim with the Department of Interior before filing suit in district court for equitable remedies or in the CFC for money damages. Under current law, with the benefit of the *Tecon Engineers* sequence of filing exception, tribes can file first in the CFC, before seeking judicial review of an agency decision under the APA, and so not run afoul of §1500. If *Tecon* does not survive, however, where such cases are based on similar facts, regardless of sequence of filing, the CFC money damages claim would be dismissed under §1500 according to the Supreme Court's *Tohono O'odham* decision. Alternatively, tribes would have to refrain from seeking review of an adverse ruling from the Department of Interior so as not to be dismissed from the CFC. The best solution to this potential injustice is repeal of §1500.

Judicious Use of Stays.

In denying the government's motion to dismiss *Kaw Nation of Oklahoma v. United States* under 28 U.S.C. Sect. 1500, the court explained that:

in the wide majority of instances where two related suits are filed in different courts, one of them is stayed. That is what happened here, and likewise in many of the tribal trust cases that, until recently, were pending in both this court and a district court. To this court's knowledge, situations in which two related cases are

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both being actively litigated simultaneously are rare, limited in this arena perhaps to debates over whether a given case belongs in this court under the Tucker Act, 28 U.S.C. § 1491, or in the district courts under the Administrative Procedures Act, 5 U.S.C. § 702 (as construed by the Supreme Court in *Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988)). Thus, at least in terms of avoiding duplicative motion practice, discovery and trial, the concerns raised by defendant in this case are more hypothetical, than real. On the other hand, a persuasive case can be made that if defendant is successful in expanding the reach of section 1500, the result might be more, not less, duplicative litigation, as a couple of examples illustrate.

Kaw Nation of Oklahoma v. United States, CFC No. 6-934L, ECF No. 94 at 22, text accompanying n. 30. (February 29, 2012). The court goes on to discuss examples and provides citations to other related suits where one case was stayed.

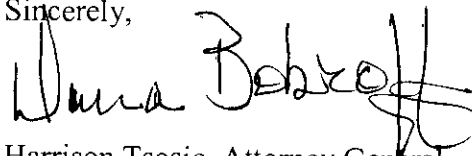
As the CFC noted in *Tohono O'odham*, doing without section 1500 "would not be a problem and the two courts would use traditional principles of comity, collateral estoppel, and *res judicata* to sort out any duplication."

There is no need to replace 28 U.S.C. § 1500 with yet another statutory imposition that would presumptively stay the later filed case. Even with the added qualification that such a presumptive stay would not apply where the court found that it was not in the interest of justice or where the parties agreed otherwise, the extra procedural burden is unjustified and unnecessary. A significant benefit of repealing § 1500 is actually reducing needless litigation and costly and time-consuming motions practice. A statutorily prescribed presumptive stay simply adds back another layer of complexity.

Conclusion.

The Navajo Nation urges the Conference to recommend a full repeal of 28 U.S.C. § 1500.

Sincerely,



Harrison Tsosie, Attorney General
Dana Bobroff, Deputy Attorney General
Navajo Nation Department of Justice

cc: U.S. Department of Justice, Office of Tribal Justice