

QUAPAW TRIBE OF OKLAHOMA

P.O. Box 765
Quapaw, OK 74363-0765

(918) 542-1853
FAX (918) 542-4694

November 2, 2012

Professor Ronald M. Levin, Chair
Committee on Judicial Review
Administrative Conference of the United States
1120 20th Street, NW, Suite 702 South
Washington, D.C. 20036

Re: Public Comment on Reform—28 U.S.C. § 1500

Dear Professor Levin:

These comments are submitted on behalf of the Quapaw Tribe of Oklahoma (the O-Gah-Pah), a federally recognized Indian tribe. The Quapaw Tribe supports full and immediate repeal of 28 U.S.C. § 1500 for all pending and future cases in the Court of Federal Claims. Section 1500 is antiquated and unnecessary, an unwarranted unique protection that no other defendant in any other court enjoys, and is increasingly used by the federal government as a sword to force plaintiffs to relinquish legitimate claims. We experienced these problems firsthand in the breach of trust lawsuit sponsored by the Quapaw Tribe on behalf of its tribal members, *Goodeagle v. United States*. Our experience in that case also demonstrates that a presumptive stay, which would deprive trial judges of discretion in the management of cases before them, would simply create yet another obstacle for plaintiffs in The People's Court (as the Court of Federal Claims is often designated). A presumptive stay would deprive courts of discretion to utilize modern case management tools to resolve duplicative lawsuits, and force plaintiffs to engage in legal wrangling over whether a stay was warranted. The problems inherent with keeping Section 1500 on the books have been exacerbated by the Supreme Court's ruling in *United States v. Tohono O'Odham Nation*,¹ under which courts have broadly construed the "same claim" language in Section 1500 to apply to different cases seeking different relief but involving similar facts, forcing many plaintiffs to elect remedies.

Reasons for Full and Immediate Repeal of Section 1500

Although Section 1500 may have served a legitimate purpose when it was enacted in 1868 and the federal government faced defending identical cotton claims in different courts, Section 1500's legitimacy has long since been superseded by an array of procedural devices that protect all parties against duplicative lawsuits and allow courts to take steps to promote judicial efficiency. For example, a case improperly filed in district court may be transferred to the Court of Federal Claims and vice versa.² The Federal Rules of Civil Procedure also permit parties to

¹ 131 S. Ct. 1723 (2011).

² 28 U.S.C. § 1631.

seek transfers and consolidation as needed, move for a stay, or seek dismissal when faced with duplicative lawsuits, relying on estoppel doctrines when appropriate. Likewise, there is also the general recognition in modern jurisprudence that courts have inherent authority to manage their dockets by using multi-district case management rules, granting stays, and transferring or consolidating cases to avoid duplicative litigation.

In addition, there is no need to substitute a presumptive stay for the mandatory dismissal currently required by Section 1500. A stay is always an option if the parties believe that the same claim is pending in another forum. So there is no good reason to deprive the trial judge of discretion to resolve the problem nor any reason to require a plaintiff to overcome a stay presumption if another remedy would be more suitable. The Court of Federal Claims—like all federal courts—has broad, inherent authority to manage its docket and this authority includes the power to stay proceedings.³

There is also no justification for carving out a special statutory protection for the federal government in the Court of Federal Claims that no other litigant enjoys in any court. Far from it, in fact, for the Department of Justice often files identical civil enforcement actions against the same party in different courts such as in instances where the defendant is a large company doing business in several places. The Justice Department also often “overfiles” duplicative federal actions, piling on state enforcement actions where federal and state regulatory authority overlaps. In fact, the government even files parallel civil and criminal prosecutions involving the same infraction, leaving the defendant to mount a defense to both cases. The Justice Department apparently does not believe that these private defendants need any special statutory protections against duplicative lawsuits brought by the government—but demands that protection for itself. Private defendants sometimes find relief against the government’s duplicative filings through consolidation and transfer, stays, or dismissals. The protections in the legal system should be symmetrical—either providing all defendants or no defendants with enhanced statutory protections against duplicative lawsuits—particularly in the Court of Federal Claims, a court established so the government can grant justice against itself.

³ *Landis v. North American Co.*, 299 U.S. 248 (1936) (the power to stay proceedings derives from “the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants”); *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1415 (Fed. Cir. 1997) (“The power of a federal trial court to stay its proceedings, even for an indefinite period of time, is beyond question.”); *Stephenson v. United States*, 37 Fed. Cl. 396 (1997) (“Federal courts have ‘an ample degree of discretion’ in deciding whether to defer to other federal proceedings in order to avoid duplicative litigation”) (citing *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)); *Nat’l Bank of Detroit v. United States*, 1 Cl. Ct. 712, 714 (1983) (“A motion for stay of proceedings pending resolution of related claims in another forum is directed to the court’s discretion.”).

Goodeagle v. United States

But there is an even bigger problem with Section 1500, which is why the Quapaw Tribe so strongly supports its full and immediate repeal. Section 1500's original purpose was to serve as a shield but today it is used as a sword to dismiss lawsuits simply because there is pending another lawsuit with similar facts, and to wear down and waste the resources of private litigants for no legitimate reason. A case in point is the tribal sponsored breach of trust lawsuit brought on behalf of Quapaw tribal members, *Grace Goodeagle v. United States*, No. 11-582L. In *Goodeagle*, the Government claimed that Section 1500 deprived the Court of Federal Claims of jurisdiction to hear the *Goodeagle* claims because it asserted that the *Goodeagle* claims were also pending in *Cobell v. Salazar*, No. 96-1285, in the U.S. District Court for the District of Columbia. The trial judge agreed, and dismissed *Goodeagle*.

But no legitimate purpose under Section 1500 was served by dismissing *Goodeagle*. None of the *Goodeagle* plaintiffs had filed the *Cobell* class action suit—in fact the *Goodeagle* plaintiffs, along with over 1,000 members of the Quapaw Tribe, moved to be excluded from that case. The Government opposed that motion, requiring that they remain in the *Cobell* case. Then the Government moved to dismiss their Court of Federal Claims case on the ground that they were parties to the *Cobell* suit—and prevailed. The *Goodeagle* plaintiffs were thus deprived of their breach of trust claim because the Government forced them to remain unnamed members of a non-opt-out class in *Cobell*, using this as a sword to dismiss their very different breach of trust claim in the Court of Federal Claims on the ground that the facts were sufficiently similar to constitute the “same claim” under Section 1500.

I would note, too, that a stay would not have resolved the *Goodeagle* problem, for the district court will continue to maintain jurisdiction over *Cobell* for many years managing and overseeing the settlement and restitutionary payments. In short, the *Goodeagle* plaintiffs would have been stuck in Section 1500 purgatory (read “stayed”) for many years to come.

The Government's argument in *Goodeagle* boiled down to a threadbare assertion that the purpose of Section 1500 would be vindicated by dismissing *Goodeagle* based solely on the *Goodeagle* plaintiffs' forced membership in the Historical Accounting Class, even though that class's claim for an equitable historical accounting was “discharged” by Congress.

A Stay Substitutes One Problem for Another

We further understand that there has been a suggestion that Section 1500 be repealed and replaced with a presumptive stay. But substituting a presumptive stay is a solution in search of a problem that no longer exists and has been resolved by the federal rules and the legal system itself. In addition, prior to the Supreme Court's ruling in *Tohono*, the Federal Circuit's holding in *Loveladies Harbor, Inc. v. United States*,⁴ defining the “same claim” in Section 1500 to mean a case with the same operative facts and seeking the same relief, further avoided many problems

⁴ 27 F.3d 1545 (Fed. Cir. 1994).

Professor Ronald Levin
November 2, 2012
Page 4

under the provision. *Tohono* cut the heart out of the Federal Circuit's reasonable interpretation of Section 1500 by adopting a draconian interpretation of the provision, so that "same claim" became cases based on similar facts and seeking different relief.

Armed with the new ruling in *Tohono*, the Government immediately filed dozens of motions to dismiss in cases that had been pending for years but which were suddenly deemed "duplicative." The Government did not report being overwhelmed by identical lawsuits being filed in the district court and in the CFC.

The suggestion that Congress enact an automatic stay presumption in lieu of Section 1500 merely trades one hardship for another. There is no legitimate reason for not supporting Section 1500's full repeal. This provision provides unique protections for the United States, that other litigants do not enjoy. Other litigants, including the United States in district courts, rely on well-established court management procedures to guard against duplicative or cumulative lawsuits.

The reality is that there is no problem with identical lawsuits being filed or need for special protections for the United States against having to defend against identical claims in two different forums at the same time. The law solved this problem many decades ago, and for that reason, Section 1500 stands alone as an antiquated relic of a time in which courts had not yet developed mechanisms such as *res judicata*, consolidation, and transfers for case management.

Conclusion

Therefore, we support full repeal of this provision, applied to all pending suits in which Section 1500 is an issue.

Sincerely,



John L. Berrey, Chairman
Quapaw Tribal Business Committee

JLB/

cc: Quapaw Tribal Business Committee