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November 13, 2012

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

Re: Public Comments on repeal of 28 U.S.C. §1500

Dear Chairman Verkuil:

We appreciate the opportunity to submit comments on the Administrative Conference's consideration of a proposal to repeal 28 U.S.C. §1500. Our firm represents Indian tribes nationwide on a range of matters including litigation against the United States in both the federal District Courts and the Court of Federal Claims. On behalf of our Tribal clients, we strongly support the repeal of 28 U.S.C. §1500.

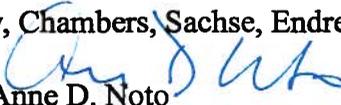
Our concerns about this matter are described in more detail in our letter of November 9, 2012 to the Office of Tribal Justice of the U.S. Department of Justice, a copy of which is enclosed. In that letter, we respond to preliminary comments that the Department of Justice indicated it had shared with the Administrative Conference on the proposed repeal of section 1500, as well as the impact of section 1500 on Indian tribes. For the reasons set out in our

Paul R. Verkuil, Chairman
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November 9, 2012 letter, as well as the reasons articulated by the Conference's Committee on Judicial Review, we urge the Conference to support a full repeal of 28 U.S.C. §1500.

Respectfully submitted,

Sonosky, Chambers, Sachse, Endreson & Perry LLP

By:  Anne D. Noto

Enclosure

cc: (w/encl)

Ronald M. Levin, Chairman, Committee on Judicial Review, Administrative Conference
of the United States

Tracy Toulou, Director, Office of Tribal Justice, U.S. Department of Justice

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U.S. Department of Justice
RFK Main Justice Building, Room 2318
950 Pennsylvania Ave. N.W.
Washington D.C. 20530

Re: Comments regarding proposal to repeal or amend 28 U.S.C. § 1500

Dear Mr. Toulou:

On behalf of our Tribal clients, we strongly urge the Department of Justice to support the repeal of 28 U.S.C. § 1500.

The Department, in its October 10, 2012 letter to Tribal leaders inviting comments on the section 1500 issues, provided a copy of the preliminary comments that the Department shared with the Administrative Conference of the United States (“ACUS”) on this matter. This letter addresses those preliminary comments and the impact of section 1500 on Tribes.

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First, the Department's preliminary comments are founded on the view that section 1500 is necessary to protect the federal government from the burdens of duplicative litigation. DOJ Prelim Cmets at 1. The Department's apparent premise – at least as it relates to suits brought by Indian tribes – is that Tribes will affirmatively initiate duplicative litigation against the United States, to force the United States to face multiple trials in different courts on the same operative facts. But Tribes do not want duplicative litigation any more than the federal government does.

To the contrary, while history is replete with examples of government mismanagement of tribal trust lands and resources, even apart from section 1500 Tribes face considerable obstacles in seeking relief against the government. Tribes want their day in court on their meritorious trust mismanagement claims, and Tribes will protect their interests by filing where necessary to obtain the relief they need. But Tribes surely do not have an interest in going forward and actively litigating claims twice at the same time. Prosecuting a claim against the United States in one forum is a heavy burden on a Tribe, and simultaneously prosecuting duplicative claims in multiple courts would multiply that burden in a manner that disadvantages Tribes most of all. After all, the Tribes cannot compete with the mammoth litigation resources of the federal government. Tribes want a straightforward path to justice, and are in no position to wear down the federal government with duplicative litigation.

Second, section 1500 in any event is not needed to prevent duplicative litigation. Other available mechanisms ensure that duplication does not occur. The courts can and do use stays to ensure that claims proceeding in different courts are adjudicated in an orderly way. *See Kaw Nation of Okla. v. United States*, 103 Fed. Cl. 613, 630 & n.30 (2012) (citing cases). Indeed, this was the practice in the Court of Claims for some period of time in implementing section 1500, before the Court re-examined the scope of that statute.¹ In addition to stays, the transfer statutes provide means by which cases may be transferred to the appropriate court for adjudication. Further, principles of res judicata, collateral estoppel and judicial estoppel are all available to protect the United States from the risks of duplicative litigation. Section 1500 is simply not needed.

¹ *See Griffin v. United States*, 85 Fed. Cl. 179, 192 & n. 12 (2008), *aff'd*, 590 F.3d 1291 (Fed. Cir. 2009), *reh'g denied*, 621 F.3d 1363 (Fed. Cir. 2010), citing, *Prillman v. United States*, 220 Ct.Cl. 677, 677, 652 F.2d 70 (1979) and *Hossein v. United States*, 218 Ct.Cl. 727, 729, 1978 WL 8481 (1978). *See also Pennsylvania R.R. Co. v. United States*, 363 U.S. 202 (1960) (finding that Court of Claims was under a duty to stay its case while railroad sought judicial review of agency order in the district court which was the only court with jurisdiction to review the agency's decision); *Creppel v. United States*, 41 F.3d 627, 633 (Fed. Cir.1994) (“Court of Federal Claims may stay a takings action pending completion of a related action in a district court.”).

Third, the Department in its preliminary comments states that repeal or amendment of section 1500 is premature and that the courts should be allowed time to assess how section 1500 applies. DOJ Prelim Cmts at 2. But additional litigation on the scope and meaning of 1500 will not serve the interests of justice, meet any interest of judicial economy, or even reduce the costs and burdens of litigation on the parties.

The history of judicial interpretation of 1500 itself demonstrates this point. Although the statute has been in effect for nearly 150 years, its scope and application have never been consistently stated or applied. As summarized by the Court of Federal Claims in *Griffin v. United States*, in the early years following enactment of section 1500, the statute was construed to allow a suit to be heard in the Court of Claims² so long as the plaintiff discontinued the suit it had filed in the district court.³ In 1939, the Court of Claims decided *British American Tobacco*⁴ and took a more absolute position, interpreting the statute to require dismissal of the action before the Court of Claims if another suit previously had been filed in a district court. Between 1950 and 1980 the Court returned to a more balanced approach and would stay proceedings in the Court of Claims until a district court action was complete – even in some cases where the relief sought in both courts was money damages.⁵

The Federal Circuit subsequently reversed these decisions, and applied a strict rule which required dismissal of a case before the Court of Federal Claims whenever an action arising out of the same facts was pending in another court at the time the suit was filed in the Court of Federal Claims. The Supreme Court affirmed this in *Keene Corp. v. United States*, 508 U.S. 200 (1993), except to leave standing the decision which construed 1500 as inapplicable when a case is filed first in the Court of Federal Claims.⁶ And while the courts had long held that claims were

² The Court of Claims' trial division is the predecessor to the Court of Federal Claims. The Court of Claims' appellate division is the predecessor to the Court of Appeals for the Federal Circuit.

³ See *Griffin*, 85 Fed. Cl. at 191, citing, *Pacific Mills v. United States*, 77 Ct. Cl. 775 (1933) and *Peterson v. United States*, 26 Ct. Cl. 93 (1890).

⁴ *British American Tobacco Co. v. United States*, 89 Ct. Cl. 438 (1939), 1939 WL 4266 (1939).

⁵ See n.1 *supra*.

⁶ *Id.*, 508 U.S. at 210 n.4, & 216, citing *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965). See also *Hardwick Bros. Co. II v. United States*, 72 F.3d 833, 886 (Fed. Cir. 1995) (stating that *Tecon* remains good law).

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different and not subject to section 1500 where different relief was sought in each case,⁷ the Supreme Court recently rejected this view. *United States v. Tohono O'odham Nation*, 131 S.Ct. 1723, 1730 (2011).

The Federal Circuit itself, in examining the history of the interpretation of section 1500 described it as "erratic." *UNR Indus., Inc. v. United States*, 962 F.2d 1013, 1019 (Fed. Cir. 1992) *aff'd sub nom. Keene Corp. v. United States*, 508 U.S. 200 (1993). The Supreme Court similarly recognized that the law had been described as anachronistic, and "that, even when first enacted, the statute did not actually perform the preclusion function emphasized by its sponsor" but found this to be a matter that would need to be addressed by Congress. *Keene Corp.*, 508 U.S. at 217.

In other words, far from providing a clear path to justice, section 1500 has provided a wavering and uncertain line which leads to more litigation – and the loss of rights of litigants to pursue their meritorious claims. Given this history and the alternative available tools by which potentially duplicative litigation can be effectively addressed, it is time to act, rather than to foster additional costly litigation about the meaning and scope of section 1500.

Fourth, the Department in its preliminary comments contends that repeal of section 1500 is not needed because attorneys for the plaintiffs should know where to file. *See* DOJ Prelim Cmts at 2, 3. But these matters are far from simple and legitimate questions about which court has jurisdiction over a given matter require resolution. Different claims may arise from one event or may warrant different relief which cannot be provided in a single forum. Differences in statutes of limitations and requirements for exhaustion of administrative remedies further complicate these issues.

Uncertainty about which federal court has jurisdiction to adjudicate a claim are matters on which able and experienced attorneys as well as members of the judiciary often disagree. For example, there is often debate on whether an invasion of property (such as flooding) caused by the United States is a tort within the jurisdiction of the district courts under the Federal Tort Claims Act, or a taking within the exclusive jurisdiction of the Court of Federal Claims. *See, e.g., Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. 2003); *Hansen v. United States*, 65 Fed. Cl. 76, 113 (2005); *Vaizburd v. United States*, 46 Fed. Cl. 309, 311 (2000). Or a claim might arise under more than one federal statute with the differences affecting the proper court in which the claim can be heard. *See, e.g., Griffin v. United States*, 85 Fed. Cl. 179, 187 (2008), *aff'd*, 590 F.3d 1291 (Fed. Cir. 2009), *reh'g denied*, 621 F.3d 1363 (Fed. Cir. 2010); *Harbuck v. United States*, 378 F.3d 1324 (Fed. Cir. 2004); *Dico, Inc. v. United States*, 48 F.3d

⁷ *See Casman v. United States*, 135 Ct. Cl. 647 (1956); *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994).

1199, 1202 (Fed. Cir. 1995). Likewise, litigants and the courts may disagree on whether the remedy sought in a case is prospective injunctive relief within the jurisdiction of the district courts under the Administrative Procedure Act, or is in fact one for damages within the exclusive jurisdiction of the Court of Federal Claims. *See Bowen v. Massachusetts*, 487 U.S. 879 (1988); *Doe v. United States*, 372 F.3d 1308, 1314 (Fed. Cir. 2004); *Katz v. Cisneros*, 16 F.3d 1204 (Fed. Cir. 1994).

These and similar issues must be resolved by allowing the court with jurisdiction to proceed. Congress has sought to address these matters by enacting transfer statutes so that claims, if initially filed in a federal court that later finds it did not have jurisdiction, may transfer the case to the appropriate federal court. Congress expressly authorized the transfer of cases between the district courts and the Court of Claims and vice versa in 1960. *See Act of September 13, 1960*, 74 Stat. 912 formerly codified at 28 U.S.C. § 1406(c) and 28 U.S.C. § 1506 (1964 ed). The purpose of the transfer act was “to cure jurisdictional defects” and “prevent otherwise meritorious claims from being time-barred as a result of unavoidably inappropriate choices of forum.”⁸ Further, “[i]n order to prevent dismissal of suits which would become time barred when the appropriate forum was finally been determined,” Congress included in the transfer act a provision under which the statute of limitations on transferred claims would be tolled.⁹ In 1982, Congress amended the transfer act to expand the authority to transfer cases between federal courts so that transfers could be done at both the trial and appellate levels. 28 U.S.C. § 1631. Congress did this in light of jurisdictional questions that were arising with increasing frequency when claims arose under more than one federal law. Congress followed the model established by the 1960 Act to ensure that resolution of those jurisdictional questions did not preclude consideration of the claims on the merits.¹⁰ Both the legislative history of the transfer acts, as well as more recent court decisions implementing transfers under those acts, well illustrate the extent to which reasonable minds (parties and courts) may often disagree about whether a claim lies within the jurisdiction of a given federal court. *See, e.g., Christianson v. Colt Industries Operating Corp.*, 486 U.S. 500 (1988).

⁸ H. Rep. No. 85-2145 at 1 (1958); *see also* 104 Cong. Rec. 13163-13165 (Daily Ed. July 21, 1958); H. Rep. No. 86-523 at 3 (1959); S. Rep. No. 86-1894 at 2-3 (1960).

⁹ H. Rep. No. 86-523 at 3 (1959).

¹⁰ S. Rep. No. 97-275 at 11 (1981). *See also Hearings on Judicial Housekeeping before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice*, 95th Cong. 2d Sess., 372-390 (1978) (describing the on-going jurisdictional questions arising from remedies available under the APA and specific federal environmental laws).

But the broad remedial purposes intended by Congress in the transfer acts are undermined by the continued existence of section 1500 – which often prevents a litigant from going forward in any court. For example, in a number of cases, at the urging of the federal government, the courts have held that even where a federal district court finds it appropriate to transfer claims to the Court of Federal Claims and even if no claims remain in the district court, section 1500 requires dismissal of the case following the transfer. *See, e.g., United States v. County of Cook*, 170 F.3d 1084 (Fed. Cir. 1999); *Harbuck v. United States*, 378 F.3d 1324 (Fed. Cir. 2004); *Griffin v. United States*, 590 F.3d 1291 (Fed. Cir. 2009), *reh'g denied*, 621 F.3d 1363 (Fed. Cir. 2010). The government has persuaded the courts that because the transfer act treats the transferred claim as if it had been filed on the date originally filed in the district court (to prevent an otherwise meritorious claim from being time-barred), the transferred claim was essentially “pending” in the district court at the same time it was before the Court of Federal Claims and therefore must be dismissed under section 1500. As a result, section 1500 is being invoked and applied even where a plaintiff filed only one lawsuit in only one court (and thereby did not burden the federal government with duplicative litigation), and notwithstanding clear congressional intent that jurisdictional defects be cured by transfer to the appropriate court. In sum, section 1500 leads to patently unfair results.

Fifth, the Department in its preliminary comments suggests that if a plaintiff has distinct claims that are viable in both the district court and the Court of Federal Claims but cannot be litigated simultaneously, those claims could still be litigated sequentially “by a diligent plaintiff acting within the generous six-year statute of limitations.” *See* DOJ Prelim Cmts at 2. Here again, we respectfully disagree.

As our experience litigating Tribal claims reflects, litigation against the federal government – whether in the district court or Court of Federal Claims – is rarely concluded within six years, so sequential litigation cannot fairly be viewed as a viable solution. To the contrary, sequential litigation leads to a diminution in the right of Tribes to obtain full relief. For example, under federal law, a Tribe cannot lease its land to third parties without federal approval of the lease. If the federal government fails or refuses to approve a lease of tribal land (such as for purposes of allowing cattle to be grazed on the land), the Tribe might need two forms of relief: 1) injunctive relief to compel the agency to approve the lease, and 2) damages for the time the land was idle.

A suit for injunctive relief in district court – which itself must await exhaustion of administrative remedies – could take several years (particularly because administrative appeals are typically so prolonged). But, because of section 1500, the Tribe cannot file its damages action while the district court action is pending. So, the Tribe faces a Hobson’s choice. The Tribe may file in district court and lose its claim for damages if exhaustion of administrative remedies and the district court action take more than six years. Or, the Tribe may file a damages action in the Court of Federal Claims and – if the federal government prevails in its current

efforts to have *Tecon* overruled¹¹ – lose the opportunity for prospective injunctive relief that might have stemmed the losses.

Likewise, if actions of the federal government result in environmental contamination of Tribal lands, the Tribe may initiate suit under the federal environmental laws to enjoin the activity and prevent further contamination of Tribal lands. But the contamination may also have resulted in a diminution of the value of the Tribal lands and warrant a claim for damages for this loss. Because of section 1500, a Tribe that brings a suit in the district court to enjoin the contamination may well not see that case concluded before the statute of limitations runs on a suit for damages.

Here again, Tribes are merely seeking a legal regime that allows them to bring meritorious claims. Those claims should not be lost because of federal delay. There is rarely a deadline by which federal agencies must decide administrative appeals, and the position of the United States has been that the statute of limitations is not tolled while administrative appeals are pending. *See Kaw Nation of Okla.*, 103 Fed. Cl. at 631-632. Moreover, even after administrative review is concluded, a rule that required a plaintiff to sequentially litigate its claims in order to avoid the problems created by section 1500 will only create an incentive for defense counsel to delay proceedings in the district court so that, if the district court action continues longer than six years, no action for damages can be pursued.

Justice for Tribes should not become a war between tribal diligence in advancing claims and federal efforts to delay. But to the extent litigants are required to use sequential litigation, section 1500 creates that tension, and will ultimately lead to the unfair loss of meritorious claims by Tribes.

Conclusion

As the courts have found, “nothing is more wasteful than litigation about where to litigate, particularly when the options are all courts within the same legal system that will apply

¹¹ While the courts have held that section 1500 does not apply if suit is filed first in the Court of Federal Claims and later in the district court, *see Tecon*, the Department’s position, as stated in both its preliminary comments to ACUS and as reflected in recent litigation is that *Tecon* is no longer good law and that section 1500 divests the Court of Federal Claims of jurisdiction whenever an action arising out of the same operative facts, is pending in a district court. *See, e.g., Kaw Nation of Okla.*, 103 Fed. Cl. at 615.

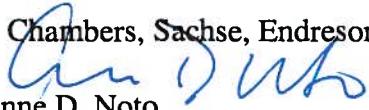
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the same law.”¹² Litigation regarding complex jurisdictional questions may be unavoidable. But because of their very limited resources, it is Tribes that have the greatest stake in avoiding duplicative litigation and unnecessary fights over where to litigate. Section 1500 exacerbates this problem by compounding litigation on jurisdictional questions, and even worse, once the jurisdictional issue is resolved, by unilaterally penalizing a plaintiff with complete dismissal of an otherwise meritorious suit if, at the time the suit was filed, the law was unclear about the proper forum in which it was to be heard.

Tribes deserve better treatment in pursuing justice against the United States. Section 1500 should be repealed and we urge the Department to support such an effort.

Respectfully submitted,

Sonosky, Chambers, Sachse, Endreson & Perry, LLP

By:  Anne D. Noto

¹² *Suburban Mortg. Associates, Inc. v. U.S. Dept. of Hous. & Urban Dev.*, 480 F.3d 1116, 1118 (Fed. Cir. 2007) quoting *Bowen v. Massachusetts*, 487 U.S. at 930 (Scalia, J., dissenting).