No. 2008-5043

In the United States Court of Appeals for the Federal Circuit

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TOHONO O'ODHAM NATION,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS IN CASE NO. 06-CV-944, SENIOR JUDGE ERIC G. BRUGGINK

BRIEF OF PLAINTIFF-APPELLANT TOHONO O'ODHAM NATION

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FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Tohono O'odham Nation v. United States

No. 2008-5043

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

Appellant certifies the following (use "None" if applicable; use extra sheets if necessary):

1. The full name of every party or amicus represented by me is:

Tohono O'odham Nation

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None

4. ☑ There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Kilpatrick Stockton LLP, Keith M. Harper, G. William Austin, III, Mark I. Levy, Catherine F. Munson, Raymond M. Bennett

5/5/08
Date

Signature of counsel

Keith M. Harper
Printed name of counsel

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

STATEMENT OF RELATED CASES

Pursuant to Fed. Cir. R. 47.5, counsel for Plaintiff-Appellant is not aware of any other appeals from this civil action that have previously been before this or any other appellate court. Counsel also is unaware of any case pending in this or any other court that will directly affect or be directly affected by this Court's decision in the pending appeal.

The question presented in this case is also at issue in a number of cases filed by other Indian Tribes and pending before the United States Court of Federal Claims. In each of these cases, there is, or recently was, a pending motion to dismiss for lack of jurisdiction under 28 U.S.C. § 1500. As here, the government has argued in each case that the Tribe's equitable accounting action in the United States District Court presents the same claim as its claims in the Court of Federal Claims for money damages for failure prudently to invest and manage its trust assets. Counsel for Plaintiff-Appellant represents the Tribe-Beneficiary in the following cases: *See Salt River Pima-Maricopa Indian Community v. United States*, Case No. 06-943L (Fed. Cl.); *Ak-Chin Indian Community v. United States*, Case No. 06-9321 (Fed. Cl.); *Passamaquoddy Tribe v. United States*, Case No. 06-942 (Fed. Cl.).

JURISDICTIONAL STATEMENT

The Tohono O'odham Nation (the "Nation") invoked the jurisdiction of the United States Court of Federal Claims ("CFC") under 28 U.S.C. §§ 1491(a)(1) and 1505, alleging breaches of trust duties concerning the Nation's trust assets. The CFC dismissed the action and entered final judgment on December 20, 2007. The Nation timely appealed on February 14, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the CFC erred by dismissing under 28 U.S.C. § 1500 the Nation's action in the CFC for money damages for breaches of the duty of prudent management and investment on the ground that the Nation's separate action in the United States District Court for the District of Columbia for an equitable accounting based on breach of the duty to account presents the same "claim."

STATEMENT OF THE CASE

This is an action for money damages brought in the CFC to redress breaches of the trust duty of prudent management and investment by the United States as the trustee of funds, land, mineral resources, and other assets held in trust for the Nation. On May 18, 2007, the government moved to dismiss the action for lack of subject-matter jurisdiction pursuant to 28

U.S.C. § 1500. The CFC granted that motion on December 19, 2007. *See Tohono O'odham Nation v. United States*, 79 Fed. Cl. 645 (2007).

STATEMENT OF FACTS

Section 1500 provides, in relevant part, that "[t]he United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States." 28 U.S.C. § 1500. *See* Statutory Addendum, *infra*. The term "claim" is not defined in the statute. As this Court *en banc* has made clear, however, "to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from the ***same operative facts***, and must seek the ***same relief***." *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1551 (Fed. Cir. 1994) (*en banc*) (emphases in original).

On December 28 and 29, 2006, the Nation filed two different complaints against the government for breaches of its trust duties – one in the District Court and one in the CFC. Consistent with the jurisdiction of each court, each complaint rested on different trust duties and operative facts and sought different relief.

In the District Court, the Nation alleged a breach of the duty to account and sought to compel the government to provide a complete,

accurate, and adequate accounting of the property it holds in trust for the Nation. That complaint cited decades of inaction on the part of the United States in disregard of its fundamental duty to account and the government's failure to maintain adequate records to permit the Nation to ascertain the true state of its trust assets. In the CFC, by contrast, the Nation sought money damages for losses it has suffered as the result of the United States' breaches of its fiduciary duties to maximize trust income by prudent investment and to obtain fair and reasonable compensation for the use of the Nation's land and other non-monetary assets. The Nation sought only money damages and did not request any accounting whatsoever or any other equitable relief. However, despite the differences both in the trust duties and supporting operative facts asserted and in the relief sought in the two courts, the CFC concluded there was "virtually 100 percent overlap" between the two claims. *Tohono O'odham*, 79 Fed. Cl. at 657.

I. TOHONO O'ODHAM NATION.

The Tohono O'odham Nation, formerly known as the Papago Tribe, is a federally recognized Indian tribe in Southern Arizona with more than 26,000 members. Between 1874 and 1955, several Executive Orders and Acts of Congress established the tribal lands of the Nation. Nearly three million acres of non-contiguous tribal land comprise the second largest

Indian reservation in the United States. These lands have produced copper, other minerals, sand, and gravel, and have been leased to third parties and the government for rights-of-way, business uses, and other purposes.

The United States acts as trustee both for these tribal lands and mineral rights and for substantial monies and other assets belonging to the Nation and held in trust. As trustee, the United States is charged with "'moral obligations of the highest responsibility and trust'" and is answerable for any failure to comply with "'the most exacting fiduciary standards.'" *Cobell v. Norton* ("*Cobell VI*"), 240 F.3d 1081, 1099 (D.C. Cir. 2001) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)).

II. DISTRICT COURT COMPLAINT.

The District Court Complaint, filed on December 28, 2006, alleged that the United States breached its duty to account and sought equitable relief to remedy the government's longstanding failure to provide a complete, accurate, and adequate accounting of ***all*** property held in trust by the United States for the Nation's benefit. (*See* District Ct. Compl. ¶ 1 [JA35-36].) The duty to provide an accounting, one of the most basic duties a trustee owes a beneficiary, requires "a full disclosure and description of each item of property constituting the corpus of the trust. . . ." *Cobell VI*, 240 F.3d at 1103 (citation omitted). Under traditional equitable principles,

this duty requires the government's accounting to "contain sufficient information for the [Nation] readily to ascertain whether the trust has been faithfully carried out." *Id.* (citation omitted). The United States has never provided the Nation with a complete historical accounting of its trust assets despite repeated statutory directives to discharge its preexisting duty to account. (*See* District Ct. Compl. ¶¶ 25, 29 (citing statutory provisions) [JA45-47].)

The Nation filed its District Court Complaint to compel the government finally to comply with its duty to provide a complete accounting to the Nation. In Count One of the District Court Complaint, the Nation requested a declaration (1) that the government owes a fiduciary duty to provide a complete and accurate accounting of all funds and assets, and (2) that defendants are in violation of their duty. (*Id.* ¶¶ 34-39; Prayer ¶¶ 1-4 [JA50-52].) In Count Two, the Nation requested injunctive relief directing defendants to provide such an accounting and to comply with their other fiduciary duties as determined by that court. (*Id.* ¶¶ 40-42; Prayer ¶ 5 [JA51-52].) Further, to the extent the accounting demonstrated errors in the account balances (whether positive or negative), the Nation asked for

> a decree providing for the restatement of the Nation's trust fund account balances in conformity with this accounting, as well as any additional equitable relief that may be appropriate (e.g.,

disgorgement, equitable restitution, or an injunction directing the trustee to take action against third parties).

(*Id.* ¶¶ 1, 43; Prayer ¶ 6 [JA35-36, JA52].)

The equitable accounting the Nation seeks in the District Court will address the government's trust obligations to account for the Nation's assets. Even if the Nation prevails in the District Court and obtains a correct restatement of its accounts, however, this will not compensate the Nation for the government's failures prudently to manage and invest the trust assets for more than 100 years. These latter duties are distinct from the duty to account, and establishing the breach of these duties requires the proof of different operative facts and leads to only one remedy: damages to compensate for losses due to the government's breach. Accordingly, the Nation brought a separate suit in the CFC.

III. CFC COMPLAINT.

On December 29, 2006, the Nation filed a Complaint for money damages in the CFC to redress specific breaches of statutory, regulatory, and fiduciary duties in the management and investment of the Nation's trust funds and non-monetary trust assets. (CFC Compl. ¶ 1 [JA55].) As the Supreme Court has recognized, these duties are money-mandating and for their breach a plaintiff may be compensated for any loss by an award of

money damages in the CFC. *See United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 228 (1983).

The CFC Complaint alleges four distinct claims for the breach of the duty of prudent management and investment with respect to different tribal funds and assets. Count I alleges mismanagement of the mineral rights on the land the United States holds in trust for the Nation. (CFC Compl. ¶¶ 25-30 [JA63-64].) As trustee, the United States is required to enter into and approve leases and issue permits for interests in mineral rights for not less than fair market value. (*Id.* ¶ 29 [JA64].) Count I seeks compensatory damages for the United States' breach of its fiduciary duty by failing to lease the Nation's property interest for fair market value and failing to collect fair and reasonable compensation for the benefit of the Nation. (*Id.*)

Count II alleges similar mismanagement of the Nation's non-mineral interests in its trust land, including easements, rights-of-way, and land and building leases. (*Id.* ¶¶ 31-35 [JA64-65].) The Nation seeks compensation for failures to obtain fair and reasonable compensation for leases on these property interests or in exchange for the grant of easements or rights-of-way across the Nation's property. (*Id.* ¶ 34 [JA65].)

Count III alleges mismanagement and failure prudently to invest the principal and earnings of judgment funds (*i.e.*, funds appropriated to satisfy

court judgments). (*Id.* ¶¶ 36-40 [JA65-66].) The Nation has suffered damages as the result of this failure to maximize trust income. (*Id.* ¶ 40 [JA66].)

Finally, Count IV alleges mismanagement and failure prudently to invest the principal and earnings of other funds held in trust for the Nation, including proceeds from leases, permits, easements, rights-of-way, and "Indian Moneys Proceeds of Labor" (IMPL) funds. (*Id.* ¶¶ 41-45 [JA66-67].) The United States breached its fiduciary duty to the Nation both (1) by holding money in certain trust funds in cash, in excess of liquidity needs, rather than investing it, and (2) when the United States did invest the Nation's trust funds, by failing to maximize trust income by prudent investment. (*Id.* ¶¶ 43-44 [JA66-67].) Because of these breaches of fiduciary duty, the Nation was damaged by the loss of investment of trust funds at a higher rate of return. (*Id.*)

For all four counts, the only relief requested to redress the government's breach of its fiduciary duties prudently to invest and manage the Nation's assets is an award of money damages. (CFC Prayer ¶¶ 1-4 [JA67].)

IV. PROCEEDINGS BELOW.

The CFC granted the government's motion to dismiss the Complaint for lack of subject-matter jurisdiction pursuant to 28 U.S.C. § 1500 on the ground that the Nation's complaint pending in the District Court raised the same claim as its CFC complaint.

Rather than applying the test this Court established in its *en banc* decision in *Loveladies*, which looks to the operative facts, the trial court inquired whether "[a]s a practical matter, will the same background facts be relevant?" *Tohono O'odham*, 79 Fed. Cl. at 656. Accordingly, it compared not the operative facts but all of the factual allegations in the two complaints. *See id.* at 648-52. On the basis of its assessment of background facts, the court erroneously concluded that "there can be no meaningful dispute" that "the operative facts asserted in the complaint are, for all practical purposes, identical" (*id.* at 656) and that there is "virtually 100% overlap" in the facts (*id.* at 657).

With respect to relief, the CFC concluded there was "overlap" between the requests for relief because it believed the Nation sought a "full accounting" and "money" in both courts. *Id.* at 653, 656. As to the accounting, the court acknowledged that under "none of its broader jurisdictional grants does [the CFC] have general equitable powers" and that

the court cannot order a general pre-liability equitable accounting as "stand-alone relief." *Id.* at 653. Nonetheless, the court concluded that an "accounting" would be "unavoidable" (*id.* at 659) in the CFC because an "accounting in aid of judgment" (*id.* at 653), a procedural tool at the court's disposal to help to determine damages, would surely be necessary (although the Nation never actually requested it).

As to monetary relief, the trial court concluded there were overlapping requests for money in both courts. The court relied upon the Nation's request in the District Court for a restatement of its account balances in conformity with the accounting, as well as other equitable relief to the extent such additional relief would be warranted and appropriate, *e.g.*, disgorgement and equitable restitution. Because the court reasoned that the CFC in this Indian trust case is sitting as a court of equity and can provide monetary remedies for breach of fiduciary duties (*id.* at 657), and because the court interpreted the Nation's request in the District Court for other appropriate equitable relief to include the same money damages it sought in the CFC (*id.* at 658 & n.14), it concluded that there was "virtually 100 percent overlap" between the relief sought in the two complaints. *Id.* at 657.

SUMMARY OF ARGUMENT

The CFC's decision to dismiss the Nation's complaint rested upon three critical legal errors.

1. First, the court erred by applying the wrong standard under § 1500, comparing general similarities between the two complaints rather than, as *Loveladies* requires, "the same operative facts" and "the same relief." 27 F.3d at 1550. By relying upon ill-defined notions of general "overlap" between the cases, rather than a careful comparison of the operative facts and the relief actually requested, the court failed to heed this Court's directive that § 1500 should be construed narrowly to avoid dismissal of "non-duplicative suits" and thereby denied the Nation the complete relief to which the law otherwise entitles it. *Loveladies*, 27 F.3d at 1556.

2. Second, the trial court erred in concluding the CFC and District Court Complaints involve the same operative facts for purposes of § 1500. Rather, the Nation's equitable accounting claim in the District Court arises from different operative facts involving the breach of a different trust duty from its claims in the CFC.

In the District Court, the Nation seeks to compel the government to fulfill its most basic trust duty to provide a complete, accurate, and adequate

accounting. The operative facts necessary to establish the breach of that trust obligation relate to the government's failure over more than a century to fulfill this fundamental fiduciary obligation. Although the District Court Complaint refers to other facts, they are not operative facts with respect to the accounting claim; as this Court held in *Loveladies*, it is only the operative facts, not the background facts, that determine whether § 1500 applies.

In the CFC, by contrast, the Nation asserts breaches of the money-mandating duties of the trustee prudently to manage and invest trust assets. In that case, therefore, it must prove discrete breaches of those duties in the government's management of the Nation's assets. The operative facts for those claims relate to the failure of the United States to maximize trust income by prudent investment and to obtain fair and reasonable compensation for the use of the Nation's land and other assets.

Where, as here, the two suits involve different operative facts and different conduct, § 1500 does not bar CFC jurisdiction.

3. Third, the trial court also erred in concluding that the Nation sought virtually the same relief in both courts. In the District Court, the Nation sought the equitable remedies available in that court for the breach of the duty to account: an order directing the government to provide the

required accounting and other appropriate equitable relief that can be properly determined and could be available after the accounting is provided, including restatement of the Nation's accounts to correct the balances in accordance with the accounting. It did not request money damages to compensate the Nation for losses resulting from imprudent investment or mismanagement of the Nation's trust assets; the latter form of relief was only requested (and is only available) in the CFC. *See* 5 U.S.C. § 702 (waiving sovereign immunity in the District Court for relief "other than money damages"). Nor is the general pre-liability equitable accounting, available and requested only in the District Court, the same as the narrow post-liability accounting in aid of judgment that the CFC might ultimately use to assist it in computing damages for the government's mismanagement of trust assets.

Accordingly, because the Nation's two cases do not seek either the same monetary remedy or the same accounting, they do not involve the same relief under § 1500.

STANDARD OF REVIEW

Whether the CFC erred by dismissing the complaint for lack of jurisdiction is a pure question of law that this Court reviews *de novo*. *Frazer v. United States*, 288 F.3d 1347, 1351 (Fed. Cir. 2002). In reviewing a

dismissal for lack of jurisdiction, the Court must accept as true all allegations of fact and draw all reasonable inferences in the plaintiff's favor. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995).

ARGUMENT

THE CFC ERRED IN DISMISSING THE NATION'S COMPLAINT UNDER § 1500.

I. CONTRARY TO THE STANDARD APPLIED BY THE CFC, DISMISSAL UNDER 28 U.S.C. § 1500 IS IMPROPER UNLESS THE CFC AND DISTRICT COURT COMPLAINTS INVOLVE THE SAME "CLAIM," WHICH REQUIRES THAT THEY *BOTH* ARISE FROM THE "SAME OPERATIVE FACTS" *AND* SEEK THE "SAME RELIEF."

The purpose of 28 U.S.C. § 1500 is to "prohibit the filing and prosecution of the ***same claims*** against the United States in two courts at the same time." *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1562 (Fed. Cir. 1988) (emphasis added). Therefore, to determine whether § 1500 applies, the inquiry requires a comparison of the "claims" brought in the CFC with the "claims" already sued upon in another court. *See Keene Corp. v. United States*, 508 U.S. 200, 210 (1993); *Loveladies*, 27 F.3d at 1549. Because the statute does not provide a definition of the term "claims," the "meaning and scope of the term ... has been left to caselaw development." *Id.*

Since this Court's *en banc* decision in *Loveladies*, it has been well-settled that the two actions do not present the same "claim" unless they ***both***

(1) arise from the same operative facts ***and*** (2) seek the same relief. *See Loveladies*, 27 F.3d at 1551 ("For the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from ***the same operative facts***, and must seek ***the same relief***" (emphases in original)); *accord Harbuck v. United States*, 378 F.3d 1324, 1328 (Fed. Cir. 2004). The test is in the conjunctive. If either requirement is missing, § 1500 does not apply. *Loveladies*, 27 F.3d at 1551-52 (each requirement is necessary to preclude CFC jurisdiction).

The trial court applied the wrong legal standard in dismissing this case under § 1500. Rather than comparing the ***operative*** facts alleged in the District Court and CFC Complaints and assessing whether the two complaints seek the ***same*** relief, the court looked broadly at the general similarities between the allegations in the two complaints to determine whether "[a]s a practical matter ... the same ***background facts*** [will] be relevant, and ... the relief, ***in substance***, [will] be the same?" *Tohono O'odham*, 79 F.3d at 656-57.[1]

[1] Like the court below, Judge Hewitt also departed from the rule in *Loveladies* in *Ak-Chin Indian Community v. United States*, 80 Fed. Cl. 305, 316 (2008). Judge Hewitt generally followed Judge Bruggink's analysis in concluding that the claims in that case were the same, including comparing the similarities in the relief sought and all of the facts in the complaints, including the background facts. Judge Hewitt did not, however, adopt Judge Bruggink's analysis equating a general equitable accounting with an

The trial court gave three reasons for articulating a standard that differed from *Loveladies*. None of these withstands scrutiny.

1. First, with respect to the term "same relief," the CFC believed the Nation misconstrued the term to mean "identical relief." *Id.* at 656. The trial court noted that while this Court in *Loveladies* said that § 1500 applies only if the two complaints seek the same relief, elsewhere it described the inquiry as whether "there is a pending action in another court that seeks ***distinctly different relief***." *Id.* (quoting *Loveladies*, 27 F.3d at 1549). Therefore, the trial court concluded, "we have to assume that the Federal Circuit intended by 'same relief' to mean that two complaints seek relief that is not 'distinctly different.'" *Id.*

The trial court misunderstood the Nation's position. As this Court recognized in *Loveladies*, and as we explained in the court below, two complaints do not seek the same relief if the suits "pray[] for distinctly different relief." 27 F.3d at 1552.

At the same time, it equally is not the law that the two requests must be entirely different in every respect in order to constitute "distinctly

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accounting in aid of judgment. *See* p. 42 n.3, *infra*. Despite concluding that the complaints presented the same claim, the court in *Ak-Chin* denied the government's motion to dismiss under § 1500 on the ground that the Community's claims in the district court were not "pending" at the time the CFC complaint was filed. *Id.* at 313.

different relief." Indeed, that was not the case in *Loveladies* itself. As the Court there explained, despite the inclusion of similar requests for relief in the two prayers for a declaration of a taking and an acknowledgment that the plaintiffs might have "framed their pleadings with more precision," the Court held that the complaints must be read "in light of the legal and factual circumstances in which they were drawn" and noted that there was "little doubt" that the two complaints sought different relief. *Id.* at 1554.

At bottom, even if there is some general similarity, what is decisive for § 1500 is whether the complaints seek "duplicative" or materially different relief – that is, do they seek to accomplish the same end twice in two different courts. *See* pp. 36-37, *infra*. The CFC's fundamental error in this respect was to inquire whether there is ***any*** similarity or overlap in relief – rather than whether there is complete or material overlap – in determining if the relief is the same. *See Loveladies*, 27 F.3d at 1552 ("*Casman* and *British American* establish two applicable principles – (i) identity of relief requested, and (ii) identity of operative facts – with which to test the identity of claims. As we have seen, this court has consistently adhered to those principles."). And, for the reasons stated below, the relief sought in the two complaints here is not literally, or even materially, identical. *See* pp. 41-62, *infra*.

2. Second, the trial court reasoned that its conclusion that the relief requested is the "same" if there is any similarity between the requests is "compelled by the controlling language of" the Supreme Court's decision in *Keene*. *Tohono O'odham*, 79 Fed. Cl. at 656. In *Keene*, the Supreme Court said that the comparison of the two cases under § 1500 "would turn on whether the plaintiff's other suit was based on substantially the same operative facts ... at least if there was some overlap in the relief requested." 508 U.S. at 212.

The trial court misunderstood the Supreme Court's statement that § 1500 would apply if, in addition to the same operative facts, there is "some overlap in the relief requested." "Overlap in relief" does not refer to an amorphous standard requiring nothing more than that the relief requested in the two courts have a general similarity or be similar in nature. Rather, it means an actual overlap in the relief requested such that the plaintiff's success in both cases would entitle it to recover the same relief in each proceeding, *i.e.*, duplicative relief that would require the government to defend against the same "claim" twice.

The Supreme Court, in stating that "some overlap" in the relief might be sufficient for § 1500, explicitly relied upon its earlier decision in *Ex Parte Skinner & Eddy Corp.*, 265 U.S. 86 (1924). *See* 508 U.S. at 212. In that

case, the Court, after noting that the claims raised substantially the same causes of action and were based on the same factual predicate, explained that the proceedings sought the same relief but that in one action the plaintiff also made a demand for anticipated profits that was not included in the other complaint. *See Keene*, 508 U.S. at 211 (citing *Ex Parte Skinner & Eddy*, 265 U.S. 86). In other words, the two cases did in fact seek identical relief, but one case also sought further relief in addition to what was the same in both courts. Given the identity in the common, or overlapping, relief, the Court held that the cases sought the same relief for purposes of the predecessor of § 1500.

This Court followed the same rule against lesser-included overlapping relief in *Harbuck*, 378 F.3d 1324. There, where one of the prayers for relief in the CFC was "identical to one of the prayers for relief in the ... district court complaint," the Court held that the "inclusion of other and different requested relief in the two complaints does not avoid the application of [§ 1500]." *Id.* at 1329 (citing *Keene*, 508 U.S. at 212).

Therefore, under *Keene* and *Harbuck,* § 1500 applies where the plaintiff has sought identical relief in both cases and also sought additional relief, thereby rendering the relief in one case "overlap[ping]" or subsuming

the relief in the other. Because that is not true here, the trial court's analysis was erroneous.

3. Third, the trial court also misunderstood the Supreme Court's statement in *Keene* regarding the operative facts. That decision does not create a new and expansive standard requiring, as the trial court did here, comparison of all background rather than operative facts.

In *Keene*, the Supreme Court emphasized, rather than disavowed, that § 1500 looks to the "operative" facts. *See* 508 U.S. at 212-13. Furthermore, to satisfy § 1500, the two complaints must present "substantially the same operative facts. . . ." *Id.*, 508 U.S. at 212. Put differently, there must be at least a material overlap or commonality between the operative facts in the two complaints. *See Cooke v. United States*, 77 Fed. Cl. 173, 178 (2007) ("The fact that two claims share the same factual background is insufficient to divest this Court of jurisdiction when there is a material difference between the operative facts relevant to each claim"); *Heritage Minerals, Inc. v. United States*, 71 Fed. Cl. 710, 716 (2006) ("[W]hile claims 'may be supported by some common operative facts,' § 1500 is not implicated where 'the material facts supporting each claim [are] characterized as largely dissimilar") (citation omitted).

As a matter of law, therefore, § 1500 is not applicable simply because one or even a few operative facts are the same in both complaints if there is a "material difference between the operative facts relevant to each claim." *Cooke*, 77 Fed. Cl. at 178. Instead, there must be a "substantial" or "material" overlap or commonality to invoke § 1500.

4. Finally, the trial court's broad test, comparing the general similarity of the two complaints, runs afoul of this Court's admonition in *Loveladies* that § 1500 must be construed as narrowly as possible to avoid dismissing non-duplicative claims for relief. As the *en banc* Court noted, "Section 1500 was enacted to preclude duplicate [claims in the aftermath of the Civil War for private property (usually cotton) confiscated from residents of the Confederacy] – claims for money damages – at a time when *res judicata* principles did not provide the Government with protection against such 'duplicative lawsuits.'" *Loveladies*, 27 F.3d at 1556 (emphasis deleted) (quoting *Keene*, 508 U.S. at 206). Recognizing that § 1500 has long outlived the narrow purpose for which it was enacted, the Court cautioned that "[w]hatever viability remains in § 1500, absent a clear expression of Congressional intent we ought not extend the statute to allow the Government to foreclose non-duplicative suits, and to deny remedies the Constitution and statutes otherwise provide." *Id.*; *see also Stone v.*

Immigration and Naturalization Serv., 514 U.S. 386, 405 (1995) (Jurisdictional statutes "must be construed with strict fidelity to their terms"). For this reason as well, the trial court's decision below should be reversed.

II. THE TRIAL COURT ERRONEOUSLY HELD THAT THE NATION'S CLAIMS, WHICH ASSERT DIFFERENT TRUST DUTIES, INVOLVE THE SAME OPERATIVE FACTS.

The Nation's claim for a full and complete accounting of its trust assets arises from the government's failure, for more than a century, ever to comply with its ***trust duty to provide an accounting*** for all assets held in trust for the Nation. The Nation brought that suit to compel the United States to comply with its duty to account. In the CFC, by contrast, the Nation has sued the United States for breach of its ***duty of prudent management and investment*** of trust assets. These claims rest upon specific failures to invest trust property or to maximize the Nation's return. Given these critical differences in the underlying trust duties, the two cases naturally involve different operative facts.

As this Court recognized in *Loveladies*, not every fact alleged in a complaint is operative, and it is only the operative facts that are germane under § 1500. *See* 27 F.3d at 1549-50, 1551 n.17. The trial court ignored this distinction and instead compared all of the facts alleged in the two

complaints, including background facts, rather than comparing the operative facts necessary to prove each claim. Under the correct standard, the operative facts in the two cases are materially different, and therefore the two suits do not involve the "same claim."

A. "Operative Facts" Under Section 1500 Are Those Facts Necessary To Prove The Plaintiff's Claims And Do Not Include Background Facts.

As the *en banc* Court recognized in *Loveladies*, "operative facts" do not include every fact alleged in a complaint, but instead require some link between the facts and the elements of the claim to be proved:

> Despite its lineage, it can be argued that there is a basic epistemological difficulty with the notion of legally operative facts independent of a legal theory. Insofar as a fact is 'operative' – *i.e.*, relevant to a judicially imposed remedy – it is necessarily associated with an underlying legal theory, that is, the cause of action. For example, without legal underpinning, words in a contract are no different from casual correspondence.

27 F.3d at 1551 n.17. Although the Court thus explained its general understanding of "operative facts," this issue was not critical to the decision in *Loveladies* and therefore the Court concluded it was unnecessary to "further refine" the term. *Id.*

Consistent with *Loveladies*, the Court of Federal Claims in other cases has correctly understood that the inquiry requires a comparison of those facts material to the proof of the plaintiff's claims and does not extend to

"background facts." The "fact that two claims share the same factual background is insufficient to divest [that] Court of jurisdiction when there is a material difference between the operative facts relevant to each claim." *Cooke*, 77 Fed. at 178; *see also Fire-Trol Holdings, LLC v. United States*, 65 Fed. Cl. 32, 34 (2005) (Facts that are "merely background" are "not operative facts directly giving rise to the claims pled."); *Heritage Minerals*, 71 Fed. Cl. at 716 ("'Claims involving the same general factual circumstances, but distinct material facts can fail to trigger section 1500.'") (citation omitted).

Under this legal standard, the Court of Federal Claims has consistently concluded that claims involving similar background facts, but different operative facts, do not implicate § 1500. For example, in *d'Abrera v. United States*, 78 Fed. Cl. 51 (2007), the court held that § 1500 did not apply even though the plaintiff's Lanham Act claim in the district court shared the same "general factual background" with its copyright infringement claim in the CFC. Rather, it was dispositive that the "conduct" giving rise to each claim was different. *Id.* at 58. Specifically, the Lanham Act claim involved the plaintiff's allegation that the defendant had misrepresented plaintiff's photographs as his own, while the copyright infringement claim involved plaintiff's allegation that defendant reproduced

and distributed hundreds of plaintiff's photographs without permission. *Id.* Although both claims involved the same pictures and the unauthorized use of those pictures, the claims arose from different "conduct" and therefore were not the "same claim" for purposes of § 1500.[2]

The Court of Federal Claims has decided a long line of cases to the same effect. *See, e.g.*, *Cooke*, 77 Fed. Cl. at 177-78 (Equal Pay Act claim in district court did not involve same operative facts as retaliation claim in CFC despite the same factual background); *Fire-Trol*, 65 Fed. Cl. at 34-35 (operative facts underlying district court action for contamination of groundwater did not arise from same operative facts as taking claim arising from subsequent installation of wells to monitor contamination of groundwater); *Williams v. United States*, 71 Fed. Cl. 194, 199-200 (2006) (even though "[m]any of the factual allegations ... match[ed]," claims arose from different operative facts); *Branch v. United States*, 29 Fed. Cl. 606, 608

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[2] In *Ak-Chin*, Judge Hewitt acknowledged that in *d'Abrera* different "conduct" formed the basis of the plaintiff's claims, but attempted to distinguish the case on the ground that the Ak-Chin Indian Community alleged "the exact same conduct" in the two complaints because in each complaint the Community alleged that the United States "has consistently and egregiously failed to comply" with its fiduciary obligations. 80 Fed. Cl. at 319. These general statements about the United States' failures as trustee, however, do not describe the conduct that is the subject of each lawsuit. Instead, the conduct that matters in the District Court is the United States' failure to provide an accounting and in the CFC the entirely separate and distinct failure prudently to manage and invest trust assets.

(1993); *Lucas v. United States*, 25 Cl. Ct. 298, 308 (1992) (claims involved different operative facts even though some general facts in common).

The rule that the courts should carefully compare only the operative facts necessary to prove the plaintiff's claims, and not every fact alleged in the two complaints, is consistent with pleading practices under the Civil Rules. *See* Ct. Fed. Cl. R. 8. Different from the code pleading regime applied at common law, which required strict adherence to a set of rigid pleading rules, plaintiffs are now free to – and regularly do – provide background for the court to understand the context and gravamen of the asserted claims. Thus, failure to distinguish between the plain statement of the facts necessary to state a claim and the other allegations in a complaint under § 1500 effectively penalizes plaintiffs for telling their full story in the same way as other complaints filed in federal court every day and thereby constitutes a trap for the unwary under § 1500. It is critical, therefore, as *Loveladies* holds, to compare the operative facts in each complaint to determine whether they present the same claim.

B. The District Court And CFC Complaints Do Not Present The Same Operative Facts.

The trial court concluded that "the operative facts asserted in the complaint[s] are, for all practical purposes, identical." *Tohono O'odham*, 79 Fed. Cl. at 656. That simply is wrong under *Loveladies*. To be sure, there

are similarities between the two complaints. But that is neither surprising nor legally dispositive: In each case it is the trust relationship between the United States as trustee and the Nation as beneficiary that underlies the Nation's claims and gives rise to the separate and distinct trust duties violated. What is legally controlling is that the facts necessary to establish the breaches of those duties are materially different. As in *d'Abrera*, even though the Nation's claims involve the same plaintiff, the same defendant, and perhaps even some of the same property, it is legally decisive that the "conduct" that gives rise to each claim is different. 78 Fed. Cl. at 58.

The principal duty the Nation seeks to enforce in the District Court is the government's obligation to provide a complete, accurate, and adequate accounting of all property held in trust by the United States for the Nation's benefit. This is an obligation the United States, as trustee, has not fulfilled since the inception of the trust more than a century ago. (*See* District Ct. Compl. ¶¶ 34-39, 41-42; Prayer ¶¶ 1-3, 5 [JA50-52].)

It is a well-settled principle of trust law that the "trustee ... owes his beneficiary a duty to render at suitable intervals ... a formal and detailed account of his receipts, disbursements, and property on hand, from which the beneficiary can learn whether the trustee has performed his trust and what the current status of the trust is." G. BOGERT, et al., THE LAW OF TRUSTS

AND TRUSTEES § 963 (2d ed. 1983); *see also* 2A A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS § 172 (4th ed. 1987) ("Not only must the trustee keep accounts, but he must render an accounting when called on to do so at reasonable times by the beneficiaries."). In order to establish a breach of this fiduciary duty, a beneficiary need only prove that a trust relationship exists and that the beneficiary has not been provided the required accounting. *See* BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 963; *Cobell VI*, 240 F.3d at 1104.

In this case, the operative facts establishing the general accounting claim in the District Court will relate to the government's failure to comply with this core duty. (*See* District Ct. Compl. ¶¶ 34-39, 41-42; Prayer ¶¶ 1-3, 5 [JA50-52].) These facts will demonstrate that no complete and adequate accounting has ever been done.

The operative facts supporting the general accounting claim in the District Court are materially different from the facts needed to establish the breach of the money-mandating duties that support the Nation's four-count complaint in the CFC. In the CFC, to establish Counts I and II, the Nation must prove that the United States failed to lease its mineral rights and other property interests for fair market value or otherwise to collect fair and reasonable amounts for those interests on behalf of the Nation. (*See* CFC

Compl. ¶¶ 29, 34 [JA64-65].) Similarly, under Counts III and IV, the Nation must establish that the United States has failed to obtain the maximum investment returns that could have been legally and practically obtained for funds the United States holds in trust. (*See* CFC Compl. ¶¶ 39; 43-44 [JA66-67].) These operative facts in the CFC Complaint are self-evidently different from those necessary to prove the Nation's entitlement to a complete equitable accounting in the District Court.

That the Nation's two sets of claims do not involve the same operative facts is demonstrated by the fact that the government could in theory prevail in either of the cases but lose the other. For instance, the government theoretically could establish in the District Court that it had faithfully carried out its duty to account, but still have utterly failed in its duty prudently to invest and manage the Nation's assets in the CFC. Conversely, the government theoretically could show in the CFC it prudently managed and invested the Nation's trust assets, but at the same time never have provided an adequate accounting to the Nation.

In sum, given that the accounting and mismanagement claims could be resolved differently on the merits, they cannot be the same claim but must be different claims under *Loveladies*.

C. The Trial Court Erroneously Focused On Background Rather Than Operative Facts.

The trial court reached a contrary conclusion because it failed to focus its inquiry, as *Loveladies* requires, on the operative facts. Indeed, the court expressly framed the issue to be whether "[a]s a practical matter, will the same ***background*** facts be relevant?" *Tohono O'odham*, 79 Fed. Cl. at 656 (emphasis added).

Based upon this misreading of *Loveladies*, the court compared ***all*** of the factual allegations set forth in the two complaints. In particular, relying upon a side-by-side comparison of the facts in the two complaints that included (indeed, largely consisted of) non-operative or background facts (*id.* at 648-52), the court reached the erroneous conclusion that the "underlying facts are the same" and, "for all practical purposes, identical" (*id.* at 656).

In declining to differentiate operative from background facts, the trial court relied upon the general principle that § 1500 is not avoided simply because the two cases involve different legal theories. *See*, *id.* at 656-57; *see also Keene*, 508 U.S. at 212. The court's reasoning misunderstands this principle of law. This principle simply means that it is not enough to avoid § 1500 that the cause of action is different in each case. For example, if the facts necessary to prove a regulatory taking claim brought in the CFC are the

same as those necessary to prove a tort claim already pending in another court, then it is irrelevant what the legal theories are because the operative facts are the same under *Loveladies*. This does not mean, however, that the Court simply should compare all the facts alleged somewhere in the complaint, as the trial court did here. Indeed, if that were the case, then this Court would not have referred to and defined "operative facts" in *Loveladies*, 27 F.3d at 1551 & n.17. Moreover, every one of the cases cited above (*see* pp. 25-27, *supra*), where the background facts overlapped but the operative facts differed, would be open to doubt.

Furthermore, even under its erroneous legal standard, the court identified only a few areas of overlap, and those areas involve either a few basic operative facts that do not constitute a material overlap between the two cases, or background rather than operative facts. First, the court noted that the Nation's two complaints both involve "the same parties" and "the same trust corpus (lands, buildings, mineral resources, rights in property, and tribal funds)." *Tohono O'odham*, 79 Fed. Cl. at 652, 656. The Nation does not disagree, for example, that proof the United States holds these assets in trust for the Nation is one fact necessary to prove the accounting claim in the District Court (with respect to those assets) as well as the claims for money damages in the CFC (again, with respect to those assets).

Nonetheless, this limited overlap in some basic operative facts is not sufficient by itself to satisfy § 1500. Rather, there must be a "substantial" or "material" overlap between the operative facts. *See* pp. 21-22, 24-25, *supra* (§ 1500 does not apply where there are material differences between the operative facts presented); *Keene*, 508 U.S. at 212; *Cooke*, 77 Fed. Cl. at 178. An overlap in the parties that are trustee and beneficiary, and even in the property involved, is, as a matter of law, insufficient. *See d'Abrera*, 78 Fed. Cl. at 58; *Fire-Trol*, 65 Fed. Cl. at 34-35.

Second, the CFC noted that the Nation "has included language in both complaints alleging mismanagement and lack of prudent investment." *Tohono O'odham*, 79 Fed. Cl. at 656. Although both complaints summarize a number of duties of the United States as trustee and allege its many breaches of those duties over the last century (*id.* (citing District Ct. Compl. ¶¶ 1-4, 20 [JA35-38, JA43-44] and CFC Compl. ¶¶ 1-23 [JA55-63])), the mismanagement allegations do not involve operative facts in the District Court but only in the CFC. That is, they are not necessary to prove that the Nation is entitled to a full and complete equitable accounting; were those allegations not in the District Court Complaint, there would be no basis to dismiss the Nation's accounting claim.

Instead, the allegations of the government's failures prudently to invest and manage the Nation's assets were included in the District Court Complaint merely as context and illumination – that is, as background – for the Nation's accounting claim and the beneficiaries' pressing need for an accounting. The primary purpose of a general equitable accounting is to provide the necessary information for the beneficiary to handle its trust affairs, and that duty is violated, without more, where a trust relationship exists and the trustee has failed to furnish a complete and timely accounting.

The mismanagement allegations in the District Court Complaint simply serve to illustrate the practical significance of that accounting duty. Here, the Nation believes that its trust assets have not been prudently managed and invested and that the requisite accounting would inform the Nation of the government's failure properly to handle those assets. Thus, those allegations, rather than being necessary to the accounting cause of action, merely supply the background of the accounting claim by educating the trial court to the importance of the accounting in order to "ascertain[] the true state of [the Nation's] trust assets." (District Ct. Compl. ¶¶ 21-23 [JA44-45].).

In sum, despite the trial court's conclusion to the contrary based upon the general similarities it identified between the complaints, the two suits do

not involve the same operative facts. For that reason, they do not present the same claim under § 1500.

III. THE TRIAL COURT ERRONEOUSLY HELD THAT THE NATION'S REQUEST FOR AN EQUITABLE ACCOUNTING IN THE DISTRICT COURT SEEKS THE SAME RELIEF AS ITS REQUEST FOR MONEY DAMAGES IN THE CFC.

In addition, even if, contrary to the foregoing, the District Court and CFC Complaints involved the same operative facts, § 1500 still would not apply because the suits seek "distinctly different types of relief in the two courts." *Loveladies*, 27 F.3d at 1554 (quoting *Keene*, 508 U.S. at 216). For this independent reason, the ruling below granting the government's motion to dismiss should be reversed.

A. Section 1500 Does Not Apply Where The Pending Complaints Seek Different Relief.

It is well-settled in both this Court and the CFC that §1500 does not apply where the relief sought in the District Court and the CFC is not the same. *See Johns-Manville*, 855 F.2d at 1566.

The first case to adopt this principle was *Casman v. United States*, 135 Ct. Cl. 647 (1956). In *Casman*, a government employee sued in District Court alleging that he had been unlawfully discharged from his position with the government and seeking reinstatement. While that suit was pending, he also sued in the Court of Claims for backpay denied him as a result of the

allegedly unlawful removal. *Id.* The plaintiff's claim for backpay was one that fell within the jurisdiction of the Court of Claims, but the Court of Claims was without jurisdiction to restore him to his position. *Id.* The Court of Claims held that § 1500 did not bar the plaintiff's claim for backpay; recognizing that the purpose of § 1500 was to prohibit plaintiffs from bringing the same claim in two courts, in *Casman* neither court had jurisdiction to award the plaintiff the relief sought in the other court and therefore the claims were not the same. *Id.* To hold otherwise, the court concluded, would be to deny the plaintiff complete relief. *Id.*

This Court *en banc* reaffirmed *Casman* in *Loveladies*. There, the plaintiff sought money damages in the CFC for the harm suffered as a result of the denial of a wetlands development permit; by contrast, in the District Court, the plaintiff sought reversal of the denial of the permit itself. This Court held § 1500 did not apply because the plaintiff sought different relief in each court. *See Loveladies*, 27 F.3d at 1551. Relying upon *Casman*, the Court concluded § 1500 does not extend to such "non-duplicative" suits. *Id.* at 1556.

As *Loveladies* and *Casman* thus recognize, where the plaintiff's suits seek different relief and therefore pose no risk of duplicative recovery against the government on the same claims, § 1500 does not apply. *See*

Cooke, 77 Fed. Cl. at 178 ("[T]he requirement of distinct relief prevents the Government from having to pay twice for the same alleged wrong."); *see also OSI, Inc. v. United States*, 73 Fed. Cl. 39, 46 & n.15 (2006) (noting § 1500 applied in cases like *Harbuck*, 378 F.3d 1324, where the plaintiff sought the "exact same quantum and measure of monetary damages."). Accordingly, in cases where full relief can be granted for each claim in each forum without double recovery against the government, the two claims are not the same for purposes of § 1500. *See Loveladies*, 27 F.3d at 1553-54; *Cooke*, 77 Fed. Cl. at 178.

B. The Nation Seeks Different Relief In Each Court And Could Not Have Obtained Complete Relief In Either Court Alone.

Here, as in *Loveladies* and *Casman*, the Nation seeks different relief in each court: it seeks a general equitable accounting of trust assets in the District Court and money damages in the CFC. (District Ct. Compl. Prayer ¶¶ 1-6 [JA52-53]; CFC Compl. ¶ 30, 34, 35, 40, Prayer ¶ 2 [JA64-67].) Likewise, because of the jurisdictional limits of the two courts, it could not have brought all of its claims, and could not have obtained complete relief, in either court alone.

First, the Nation could not have brought its general equitable accounting action in the CFC. It is well-settled that the CFC does not have

jurisdiction to compel the United States to provide a general accounting of trust assets. *See Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483, 487 (1966) ("It is fundamental that an action for accounting is an equitable claim and that courts of equity have original jurisdiction to compel an accounting. ... Our general jurisdiction under the Tucker Act does not include actions in equity."); *American Indians Residing on the Maricopa-Ak Chin Reservation v. United States*, 229 Ct. Cl. 167, 667 F.2d 980, 990 (1981), *cert. denied*, 456 U.S. 989 (1982) (no jurisdiction to award a general accounting); *Osage Nation v. United States*, 57 Fed. Cl. 392, 393 n.2 (2003) ("[T]his court does not have jurisdiction over claims for a pre-liability accounting").

Indeed, the court below acknowledged that under "none of its broader jurisdictional grants does this court have general equitable powers" and that the CFC cannot order a general, pre-liability accounting as "stand-alone relief." *Tohono O'odham*, 79 Fed. Cl. at 653. Likewise, the government concedes that the CFC "lacks the power to order a general accounting." *See Ak-Chin Indian Community v. United States*, No. 06-932L (Fed. Cl. Sept. 21, 2007) (Def. Reply Mot. to Dismiss at 18)[Dkt. No. 29]; *Salt River Pima-Maricopa Indian Community v. United States*, No. 06-943 (Fed. Cl. Sept. 27, 2007) (Def. Reply Mot. to Dismiss)[Dkt. No. 20].

Nor could the Nation have filed its claims for money damages in the District Court. The Nation's claims in the CFC, predicated on the trust duties of prudent investment and management of its assets, request compensation for the loss suffered as the result of the United States' past violations of these fiduciary obligations. The relief sought is thus recovery as a substitute for the losses the Nation incurred in the return that should have been realized on its assets held in trust. Therefore, the relief sought is "money damages." *See Mitchell II*, 463 U.S. at 216 ("Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act. The claim must be one for money damages against the United States."); *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988) ("Money damages" refers to "a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for suffered loss.") (emphasis in original). And it is clear that the United States has not waived sovereign immunity in the District Court for such claims for money damages. *See* 5 U.S.C. § 702 (waiving sovereign immunity only for relief other than "money damages").

Therefore, the Nation could not have brought both of its claims together in either court. *See Loveladies*, 27 F.3d at 1550 ("[U]sing differing relief as a characteristic for distinguishing claims was especially appropriate

here, because the Court of Federal Claims and its predecessor ... could not grant the kinds of general equitable relief the district courts could, even in cases over which they otherwise would have had subject-matter jurisdiction."); *Casman*, 135 Ct. Cl. 647, *2 ("Here the plaintiff obviously had no right to elect between courts."). As in *Loveladies* and *Casman*, if the Nation had filed a complaint only in one court, it could not have obtained complete relief.

This analysis accords with this Court's interpretation of § 1500. Although the statute protects the government against duplicative litigation over the same claim in two courts, it does not protect the government from defending against two suits seeking different relief and thus involving different claims. *See Loveladies*, 27 F.3d at 1550-51; *Johns-Manville*, 855 F.2d at 1566. Nor does it deprive a plaintiff of full and complete relief by foreclosing an action otherwise proper in the CFC for money damages. *See Cooke*, 77 Fed. Cl. at 178 (citing *Loveladies*). As this Court recognized in *Loveladies*, it is neither good law nor sound policy to require plaintiffs to forgo their monetary claims in favor of equitable remedies against the government. *See* 27 F.3d at 1556. Therefore, "absent a clear expression of Congressional intent," this Court "ought not extend the statute to allow the

Government to foreclose non-duplicative suits, and to deny remedies the Constitution and statutes otherwise provide." *Id.*

The trial court did not dispute that jurisdictional restrictions on the District Court and the CFC preclude the Nation from obtaining in either court both a general equitable accounting and money damages for failure prudently to invest and manage the Nation's assets. Instead, it dismissed the Nation's claims in the CFC based upon two conclusions: (1) there is an impermissible overlap between the accounting requested in the District Court and the "accounting in aid of judgment" available (but not requested) in the CFC, and (2) the Nation had actually requested the same money damages in the District Court that it sought in the CFC (even if the District Court did not have jurisdiction to award such relief). *See Tohono O'odham*, 79 Fed. Cl. at 652-54. As discussed below, each of these conclusions is legally erroneous.

C. The Trial Court Erroneously Held The Nation Seeks The Same Relief Of An Accounting In Both Courts.

Despite the settled rule that the Nation cannot obtain in the CFC a general equitable accounting to provide a comprehensive statement of its trust assets – a proposition that the trial court conceded – the court below nonetheless dismissed the CFC action for money damages under § 1500 on the ground that "[b]oth actions ... will require an accounting" (*id.* at 659)

and that the government will have to provide "a ***full accounting*** ... albeit in aid of judgment (*id.* at 653 (emphasis added)). In reaching this conclusion, the court noted that the CFC "has the power to require an accounting in aid of its jurisdiction to render a money judgment on that claim." *Id.* at 653 (quoting *Klamath & Modoc Tribes*, 174 Ct. Cl. at 490-91).[3]

As a matter of law, the trial court erred in holding that an accounting in aid of judgment is equivalent to a full pre-liability equitable accounting. First, the Nation never asked for an accounting in aid of judgment in the CFC. Second, an accounting in aid of judgment is neither itself a form of relief nor in any way comparable to the general equitable accounting of all trust assets the Nation seeks as an equitable remedy in the District Court.

1. The Nation's Complaint did not request an accounting in aid of judgment in the CFC.

As this Court has held, it is the relief the parties "seek" that matters under § 1500. *Loveladies*, 27 F.3d at 1551. Indeed, the trial court acknowledged that the "language of the complaints controls." *Tohono O'odham*, 79 Fed. Cl. at 656. Given this legal standard, the court below erred in ascribing to the Nation a request for relief that the Complaint does

[3] Notably, the court in *Ak-Chin*, although it adopted some aspects of the trial court's decision in this case, did not adopt the trial court's conclusion that the plaintiff sought an accounting in both courts. *See Ak-Chin*, 80 Fed. Cl. at 321-22.

not contain. In this case, the CFC Complaint quite simply makes no request for an accounting of any kind.

To circumvent this controlling standard, the trial court ruled that the Nation had implicitly requested an accounting in the CFC because an accounting in aid of judgment "is unavoidable here and will be coextensive with all the plaintiff's claims of breach." *Id.* at 659. Neither of those propositions is correct.

First, it is entirely possible that an accounting in aid of judgment may not be necessary. For example, the Nation may have sufficient knowledge and evidence independent of the litigation to establish damages. Information produced in the course of pre-trial discovery also might be adequate to prove damages. For now, the dispositive point is that at this early stage of the litigation, there is simply no way of knowing whether or to what extent an accounting in aid of judgment may be employed in calculating damages.

Second, even if an accounting in aid of judgment ultimately occurs, we demonstrate in the next section that it will not be, as the trial court believed, "coextensive" with the general equitable accounting the Nation seeks in the District Court.

2. An accounting in aid of judgment is not equivalent to the pre-liability general equitable accounting the Nation seeks in the District Court.

The CFC's authority to conduct a limited post-liability accounting in aid of judgment to facilitate its calculation of an award of money damages is not the same as the general pre-liability equitable accounting requested, and available, in the District Court. The former is a litigation tool, not a form of judicial relief, used by the court to calculate an award of damages; the latter is an equitable remedy to compel a trustee to provide a complete accounting to a beneficiary and is available only in the District Court.

Fundamentally, an accounting in aid of judgment is not a form of ***relief*** at all. In a suit for money damages, "after a trial on the issue of liability" determining "that defendant has violated its statutory fiduciary obligations," it is within the court's jurisdiction to order an accounting in aid of the judgment "for the purpose of enabling the court to determine the amount which plaintiffs are entitled to recover." *Klamath & Modoc Tribes*, 174 Ct. Cl. at 491. Like discovery or a class action, the accounting in aid of judgment is a means at the court's disposal to facilitate the exercise of its proper jurisdiction and to facilitate an award of the relief the parties actually seek. *Cf. Quinault Allottee Ass'n and Individual Allottees v. United States*, 197 Ct. Cl. 134, 453 F.2d 1272, 1274 & n.1 (1972) ("If procedural

techniques which are the children of equity were forbidden to this court, we could not utilize such common and useful practices as intervention, depositions, and discovery.").

By contrast, a general accounting of assets is a recognized form of equitable relief. *See Cobell VI*, 240 F.3d at 1108; *Klamath & Modoc Tribes*, 174 Ct. Cl. 483, 487. Indeed, in this case, that is itself the relief the Nation seeks in the District Court.

Moreover, contrary to the trial court's conclusion, the scope and nature of the accounting in aid of judgment the CFC has authority to conduct is, as a matter of law, entirely different from the general pre-liability equitable accounting available in the District Court. The scope of such an accounting in a trust case is extremely narrow. It is derivative of, and inextricably tied to, an antecedent determination of liability for breach of a money-mandating duty. Therefore, it is necessarily confined to determining damages for the specific ways in which the plaintiff has proven that the trustee has breached it trust duties. *See Klamath & Modoc Tribes*, 174 Ct. Cl. at 486.

In contrast, the general accounting the Nation seeks in the District Court is not only independent of a preceding determination of liability but also is far more probing in nature and far more comprehensive in scope. The

obligation to account exists irrespective of any showing of liability or entitlement to money damages; it is a freestanding and fundamental trust obligation of the trustee without any precondition. *See* BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 963 ("In order to obtain an accounting it is not necessary for the beneficiary to allege that there is any payment immediately due him under the trust or that the trustee in some way is in default."); *see also* RESTATEMENT (SECOND) OF AGENCY § 399 , comment e (1959). Thus, the scope of the obligation is not limited to a specific ground of liability or determination of damages, but extends to all of the property held in trust for the beneficiary and to all information necessary "for the beneficiary readily to ascertain whether the trust has been faithfully carried out." *Cobell VI*, 240 F.3d at 1103 (citation omitted).

A general accounting therefore will require the government to render a formal and detailed account of all of the land, funds, and resources it holds in trust. *See Cobell VI*, 240 F.3d at 1103 ("It is black-letter trust law that '[a]n accounting necessarily requires a full disclosure and description of each item of property constituting the corpus of the trust at its inception'" (citation omitted) (alteration in original); Bogert, THE LAW OF TRUSTS AND TRUSTEES § 963 ("The trustee ... owes his beneficiary a duty to render at suitable intervals ... a formal and detailed account of his receipts,

disbursements, and property on hand, from which the beneficiary can learn whether the trustee has performed his trust and what the current status of the trust is."); Scott, THE LAW OF TRUSTS § 172 ("Not only must the trustee keep accounts, but he must render an accounting when called on to do so at reasonable times by the beneficiaries."); Indian Trust Management Reform Act of 1994 ("1994 Act"), 25 U.S.C. § 4011(a) (2000) (reaffirming United States' fiduciary duty to provide tribal trust beneficiaries an accounting of "all funds held in trust by the United States for the benefit of an Indian tribe ... which are deposited or invested pursuant to Section 162a of this title."); BLACK'S LAW DICTIONARY (8th ed. 2004) (defining accounting as "the report of all items of property, income, and expenses" prepared by the trustee for the beneficiary).

For these reasons, the accounting in aid of judgment available in the Court of Federal Claims (but never requested and possibly not necessary) is not the same as a general accounting available (and requested) in the District Court.

3. The pre-liability general equitable accounting the Nation seeks in the District Court is principally informational and does not itself constitute a request for money damages.

Finally, there is no basis to treat the requested equitable accounting in the District Court as itself a claim for money damages simply because the accounting could reveal information that might lead to future claims for money. Any such possibility does not transform the District Court suit into one seeking money damages. *See Kidwell v. Dep't of Army*, 56 F.3d 279, 284 (D.C. Cir. 1995) ("A plaintiff does not 'in essence' seek monetary relief ... merely because he or she hints at some interest in a monetary reward. ... Even where a monetary claim may be waiting on the sidelines, as long as the plaintiff's complaint only requests non-monetary relief that has 'considerable value' independent of any future potential for monetary relief ... we respect the plaintiff's choice of remedies and treat the complaint as something more than an artfully drafted effort to circumvent the jurisdiction of the Court of Federal Claims.").

As discussed above, the principal value of the general equitable accounting requested in the District Court is informational. The accounting will produce a report that will provide the Nation with important information about its assets that will enable it to make a host of judgments about those assets that it otherwise would lack information to reach – judgments that

have nothing to do with any possibility of future damages claims against the government.

For example, an equitable accounting will identify and reveal information about all the encumbrances across the Nation's land, including rights-of-way and easements. A complete accounting of this information will aid the Nation by providing it with information essential to the management and effective utilization of those assets.

Furthermore, an accounting also might alert the Nation that it should exercise its right in prescribed circumstances to seek cancellation of a lease of trust property made for business purposes. *See* 25 C.F.R. § 162.619. An accounting also could reveal a delinquency in third-party payments under a lease entitling the Nation to special fees from that party. 25 C.F.R. § 162.616. Or, upon discovery of a failure of a third party to make a receivables payment, the Nation might bring an action against that party to collect the payment. *See Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968).

Significantly, an equitable accounting also could provide information to enable the Nation to decide whether to withdraw and manage for itself some or all of the funds now held in trust by the United States. *See* 1994 Act, 25 U.S.C. § 4022. It is difficult to imagine a more significant right – or

one further removed from possible suits for money damages against the government – that an equitable accounting would inform.

At the end of the day, the most the government can argue is that it is possible the accounting the Nation seeks in the District Court may reveal, in addition to a great deal of other important information about its trust assets and rights, breaches of trust that might someday lead to a separate claim for money damages against the United States. This possibility, however, does not gainsay that the District Court Complaint seeks independent and valuable relief in its own right regardless of the entirely speculative prospect of a future suit in the CFC for additional money damages.

D. The Trial Court Erroneously Concluded That The Nation Seeks The Same Monetary Relief In Both Courts.

The trial court also erroneously concluded that the Nation seeks to recover the same money in both the District Court and the CFC. *See Tohono O'odham,* 79 Fed. Cl. at 657 ("[I]t is obvious that there is virtually 100 percent overlap" in the relief sought.). The trial court rooted that conclusion in a single reference (recited in two passages) in the District Court Complaint requesting a "restatement of the Nation's trust fund account balances in conformity with [the] accounting, as well as any other equitable relief that may be appropriate (e.g., disgorgement, equitable restitution, or an

injunction directing the trustee to take action against third parties)." *Id.* at 651; District Ct. Compl. ¶ 43; Prayer ¶ 6 [JA51-52].

With respect to the relief of restatement and correction of its accounts, the Nation has not requested the same relief in the District Court as the money damages it seeks in the CFC. To the extent the equitable accounting demonstrates errors in the account balances (either positive or negative), the Nation has requested that the District Court exercise its equitable authority to correct and restate the accounts in accordance with that accounting. This simply involves the return of monies that the government's own account records, when accurately stated, indicate the Nation is entitled to. For this reason, it is a request for "old money" that is already in the hands of the government or a third party. Thus, the restatement does nothing more than reallocate the money that is there from the wrong account to the correct account in accordance with the accounting. *See Cobell v. Babbitt* ("*Cobell I*"), 30 F. Supp. 2d 24, 41 (D.D.C. 1998) ("[T]he plaintiffs seek an accounting of money already owed to them and held in trust by the defendants. ... [I]t is in no way compensatory or substitutionary in nature.").

Contrary to the trial court's conclusion, the restatement will not provide the compensatory relief the Nation seeks in the CFC. In the District Court, the Nation's request for restatement does ***not*** seek compensation for

pecuniary losses suffered as a result of the government's failure prudently to manage and invest the trust assets. Rather, the Nation has brought those claims, as it must, only in the CFC as requests for money damages. Such awards will require the government to compensate the Nation for its monetary loss, *i.e.,* to pay to the Nation "new money" that was never in the accounts, but that would have been if the United States had complied with its fiduciary obligation to manage and invest the Nation's assets in a prudent way.

Thus, although the relief in both courts could have financial consequences, each case involves different money in nature and amount and therefore a different "claim" for purposes of § 1500. *See, e.g.*, *Cooke*, 77 Fed. Cl. at 178 (2007) (plaintiff's Equal Pay Act and Fair Labor Standards Act claims sought "distinct relief because the full amount of requested relief [could] be granted for each claim in a different form and measure, and thus there [was] no risk of subjecting the Government to double liability"); *OSI*, 73 Fed. Cl. at 45 (two claims were not the same when each sought different measure and amount of money). If the two claims do not involve the same money, then there is no risk of "duplicative" relief. *See Loveladies*, 27 F.3d at 1556 (quoting *Keene*, 508 U.S. at 206) (§ 1500 intended to prevent "duplicative lawsuits"); *see also* pp. 36-37, *supra*.

Beyond the request for a restatement in accordance with the results of the accounting, the trial court and the government advance two reasons why in their view the Nation's requests for "other equitable relief that may be appropriate," including such possible relief as "equitable restitution" and "disgorgement," inherently incorporate a request for payment of the same money the Nation has requested in the CFC. Neither of these has merit.

1. The trial court erroneously ruled that the Nation's boilerplate request for other "appropriate" equitable relief in the District Court sought all relief historically available in equity against a trustee even though such relief is not available in the District Court.

The trial court concluded there is "virtually 100 percent overlap" between the relief requested in the two courts. *Tohono O'odham*, 79 Fed. Cl. at 657. That conclusion was based entirely on the request, routinely included as boilerplate in almost every complaint, for "other equitable relief that may be appropriate (e.g., disgorgement, equitable restitution, or an injunction directing the trustee to take action against third parties)." *Id.* at 651.

The trial court plainly erred in its reading of the relief sought in the District Court. It is the relief requested that is controlling under § 1500 (*see* p. 42, *supra*) and the Nation as Plaintiff is the master of its complaint. *See The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913).

The trial court's fundamental error was its assumption that the Nation's Complaint in the District Court sought all remedies that were traditionally available against a trustee in a court of equity, including compensatory relief, such as lost profits. *See Tohono O'odham*, 79 Fed. Cl. at 657. The court read the District Court Complaint this way even though – as it appeared to agree – the District Court clearly would have no jurisdiction to grant compensatory relief and therefore the Nation, although otherwise carefully tailoring its Complaints to the jurisdiction of each court, would have had no reason to seek it. *See* 5 U.S.C. § 702 (United States has not waived its sovereign immunity from suit in District Court under § 702 only for relief "other than money damages").

The trial court emphasized that in the old divided court system, all breach-of-trust claims were actions in equity regardless of the relief sought, "includ[ing] the recovery of money." *Tohono O'odham*, 79 Fed. Cl. at 657. As the court noted, equitable remedies for a breach of trust traditionally included "any loss or depreciation in value of the trust estate resulting from the breach of trust, any profit made by the trustee, or any profit which would have accrued to the trust estate if there had been no breach of trust," as well as "profits lost due to mismanagement and improper investment." *Id.* (citing RESTATEMENT (SECOND) OF TRUSTS §§ 205, 208-11 (1959); JOHN N.

POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 158 (5th ed. 2002); RESTATEMENT (THIRD) OF TRUSTS, Prudent Investor Rule § 205(b) (1992)). On that basis, the court reasoned that in equity "not only can the trustee be forced to return money to the trust account, the trustee can also be compelled to put new money into the account." *Id.* at 658. Thus, "it is without question that equitable remedies for breach of trust ... are concerned with far more than just 'old money.'" *Id.* at 658 n.14.

From this general rule that equity could award money, new or old, against a trustee, the trial court concluded the Nation's request for "equitable relief" must be read to include all remedies traditionally available in equitable courts (even if no longer currently available in the District Court) and therefore to be coextensive with its requests for money damages against its trustee in the CFC. *See id.* at 658 ("[T]he aspects of the district court request for relief, which plaintiff characterizes as unique because they arise in equity, are nevertheless the same requests for relief which give [the CFC] jurisdiction."). Therefore, "[r]egardless of the [Nation's] intent" (*id.* at 658 n.14) in drafting its request for other appropriate equitable relief in the District Court, the trial court held that the District Court Complaint encompassed all relief historically available against a trustee in a court of equity.

The trial court's construction of the Complaint is erroneous. Nearly every complaint includes a boilerplate request for "other appropriate relief." As previously noted, it would become a trap for unwary plaintiffs if this catch-all phrase, routinely included in complaints, deprives the CFC of jurisdiction under § 1500 in cases that otherwise do not involve the same operative facts or the same requested relief. Rather, it should be read here in the context in which it was made – as part of the request for a restatement of the Nation's accounts, which does not involve compensation for loss. *See, e.g., Marks v. United States*, 34 Fed. Cl. 387, 400 (1995) ("catch all phrases" for "any other appropriate relief" did not change the nature of the two claims for injunctive relief and money damages, which were clearly "different").

Furthermore, this request should not be read to extend the relief sought by the Nation to exceed the District Court's jurisdiction to award it. Such extra-jurisdictional relief cannot be characterized as "additional equitable relief that may be ***appropriate***." (Dist. Ct. Compl. Prayer ¶ 6 (emphasis added) [JA52].) To be sure, if relief is specifically requested that is outside the court's jurisdiction, it should not be disregarded for purposes of § 1500. *See Tohono O'odham,* 79 Fed. Cl. at 654 ("[E]ven if the district court does not have jurisdiction over the monetary relief sought, it is the 'relief requested,' not the 'relief available' that is relevant." (internal

citations omitted)). However, an amorphous catch-all request for "other ... appropriate" equitable relief cannot reasonably be interpreted so expansively and indiscriminately as to include all remedies a court of equity could once have awarded against a trustee even though the District Court sitting in equity today does not have jurisdiction to award that relief. "Appropriate relief," if it means anything, must mean relief the court appropriately has jurisdiction to award.

Here, the relief that may be awarded against the United States in the District Court clearly does not include compensation for loss (*i.e.*, money damages) that the Nation seeks in the CFC. *See* 5 U.S.C. § 702 (waiving sovereign immunity only for relief other than "money damages"); *Bowen*, 487 U.S. at 895 ("Money damages" refers to "a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for suffered loss.") (emphasis in original); *Mitchell II*, 463 U.S. at 216 (Tucker Act claim must be "one for money damages against the United States."). Accordingly, the request in the Nation's District Court Complaint for "other equitable relief that may be appropriate" does not entail the money damages sought in the CFC.

2. Equitable restitution and disgorgement, which the Nation's Complaint identifies as examples of possible relief that might be appropriate after the accounting, do not involve the same relief as the money damages sought in the CFC.

The government also argued in the court below that since providing full relief for the breach of the duty to account might involve the transfer of money through equitable restitution and disgorgement, there is "overlap" in the two complaints because they both seek "monetary relief."

As discussed *supra*, however, it is not enough to implicate § 1500 that two complaints both seek relief that involves the payment of money; the complaints must seek the same money. The well-settled distinctions between specific relief like equitable restitution and disgorgement (which relate to specific monies to which the plaintiff is entitled and are measured by the gains that accrue to the trustee), and money damages (which compensate the plaintiff for injury and are measured by the loss to the beneficiary) make clear that in these cases the Nation's two requests do not involve a request for the same money.

As the Supreme Court recognized in *Bowen*, the law has "long recognized the distinction between an action at law for damages – which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation – and an equitable action for specific relief –

which may include an order providing for ... 'the recovery of specific . . . *monies*.'" 487 U.S. at 893 (citation omitted) (emphasis in original). Thus, on the one hand, an action at law for "money damages" is "intended to provide a victim with monetary compensation for an injury to his person, property or reputation." *Id.* On the other, an equitable action for specific relief, including "the recovery of specific property *or monies*," is not one for damages because it does not compensate for loss. *Id.* Rather, specific remedies "'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" *Id.* at 895 (citation omitted).

This Court, like many others, has recognized the same principles. *See Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 797 (Fed. Cir. 1993) (claim seeking return of money unlawfully withheld from airlines involved money to which they were legally entitled, and therefore order that the funds "be paid over to their rightful owner [was] in no way an order for the payment of 'money damages'"). *See also, e.g., United States v. Minor*, 228 F.3d 352, 355 (4th Cir. 2000), *cert. denied,* 516 U.S. 865 (1995); *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 747 (D.C. Cir. 1995).

Likewise, equitable restitution and disgorgement, as forms of specific relief, are measured by the unjust gain to the defendant, not, as in the case of money damages, the loss to the plaintiff:

> Damages always begin with the aim of compensation for the plaintiff .... Restitution, in contrast, begins with the aim of preventing unjust enrichment of the defendant. To measure damages, courts look to the plaintiffs' loss or injury. To measure restitution, courts look at the defendants' gain or benefit.

D. DOBBS, LAW OF REMEDIES § 3.1, at 280 (2d ed. 1993). Thus, equitable restitution and disgorgement, if ultimately employed by the District Court to provide complete relief in accordance with the accounting, would be measured by the unjust gains that have accrued to the government through breach of the duty to account, and would ensure that any money or assets misappropriated for the government's benefit (or their equivalent, measured by the trustee's unjust gain) are returned to the Nation's account.

Accordingly, such remedies would not result in the same relief as the money damages sought in the CFC because they would not compensate the Nation for losses due to imprudent management and investment. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) (Restitution encompasses a decree "ordering the return of that which rightfully belongs to" the plaintiff.); *see also, e.g., id.* ("Restitution, which lies within that equitable jurisdiction, is consistent with and differs greatly from ... damages ...."); D. DOBBS, LAW OF REMEDIES § 4.1(2) (2d ed. 1993), at 557 ("***[R]estitution*** is not ***damages***; restitution is a restoration required to prevent unjust enrichment." (emphases in original)); *Crocker v. Piedmont Aviation, Inc.*, 49

F.3d at 747 (when an action in restitution seeks a payment of money "because that sum of money was itself the thing unjustly taken[,] .... the payment of money from defendant to plaintiff represents a kind of specific relief rather than compensatory damages. Whatever restitution may encompass, ... we clearly may not collapse it into the broader notion of 'compensation.'" (citation omitted)); *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) ("Disgorgement is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating [the law].").

The court below rejected this distinction between specific relief and money damages as irrelevant for purposes of § 1500 because the Supreme Court's decision in *Bowen* interpreted the term "money damages" in 5 U.S.C. § 702 but "section 1500 makes no such distinction." *See Tohono O'odham*, 79 Fed. Cl. at 658. That conclusion is incorrect.

The distinction in the law between specific relief of equitable restitution and compensatory relief of money damages does not arise from use of the term "money damages" in § 702 but from the age-old difference between relief available in courts of equity and law. *See Bowen*, 487 U.S. at 895-896 (presuming that Congress understood the meaning of the term "money damages" in the law when it enacted § 702); D. Dobbs, LAW OF

REMEDIES § 4.1(2) (noting distinction between restitution and damages without any reference to § 702); *Porter*, 328 U.S. at 402 (same even before the APA was enacted). While § 1500 does not make any explicit reference to money damages, two claims are not the same if one seeks different relief, including different money, than the other.

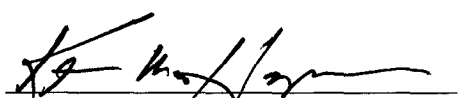
Thus, the longstanding distinctions between specific relief like equitable restitution and disgorgement – which are measured by the unjust gain to the defendant and require the return of the very thing to which the plaintiff is entitled – and money damages – which are designed to compensate the plaintiff for loss – demonstrate that the Nation's two requests neither are the same in nature nor seek the same money. That the Supreme Court recognized this distinction in *Bowen* for purposes of § 702 does not render it irrelevant in determining whether "claims" for "relief" are the "same" under § 1500.

CONCLUSION

The judgment of the CFC should be reversed.

Respectfully submitted,

May 5, 2008



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In the United States Court of Federal Claims

No. 06-944 L

THE TOHONO O'ODHAM NATION,

JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Published Opinion, filed December 19, 2007, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed, without prejudice, for lack of jurisdiction pursuant to RCFC 12(b)(1). No costs.

Brian Bishop
Clerk of Court

December 20, 2007 By: s/Lisa L. Reyes

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $455.00.

In the United States Court of Federal Claims

No. 06-944L
(Filed: December 19, 2007)

* *

THE TOHONO O'ODHAM NATION, *Plaintiff,* v. THE UNITED STATES, *Defendant.*	28 U.S.C. § 1500; Motion to Dismiss; Lack of Jurisdiction; Breach of Trust; Trust Accounting; Accounting in Aid of Judgment; Money Damages; Equitable Remedies for Breach of Trust

* *

Keith Harper, Washington, DC, with whom was *G. William Austin*, for plaintiff.

Kevin J. Larsen, United States Department of Justice, Environmental and Natural Resources Division, Washington, DC, with whom was *Matthew J. McKeown*, Acting Assistant Attorney General, for defendant. *John H. Martin* and *Anthony P. Hoang*, Department of Justice, *Thomas Bartman*, Department of the Interior, and *Rachel Howard*, Department of the Treasury, of counsel.

OPINION

BRUGGINK, *Judge*.

This is one of numerous actions pending in this court and the federal district courts brought by Indian tribes against the United States for breach of trust. Plaintiff, the Tohono O'odham Nation ("Nation" or "plaintiff"), a federally recognized Indian tribe, alleges that the United States, acting by and through the Secretary of the Interior, the Special Trustee for American Indians, and the Secretary of the Treasury, breached its fiduciary duties as trustee of various funds and property owned by the Nation. Accordingly, plaintiff, as beneficiary, seeks damages for losses resulting from defendant's alleged

mismanagement of the trust funds and property. The day before filing this action, plaintiff filed a suit in district court against the United States similarly seeking to redress breaches of trust with respect to the accounting and management of the same trust assets. Pending now is defendant's motion to dismiss pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC") for lack of jurisdiction because of the operation of 28 U.S.C. § 1500 (2000) ("section 1500"), a statutory provision that divests this court of jurisdiction to hear claims that are already pending in another court. The matter is fully briefed. Oral argument was heard on October 3, 2007. For the reasons discussed below, we grant defendant's motion to dismiss.

BACKGROUND[1]

The United States has long maintained a unique relationship with various Native American tribes, acting as trustee of tribal lands and funds for the benefit of the individual tribes. Such is the case with the lands and funds of the Tohono O'odham Nation, a tribe of approximately 26,000 members located in southern Arizona. Between 1874 and 1955, a series of executive orders and Acts of Congress established various areas of non-contiguous land as the Nation's tribal reservations. Collectively, the land is the second largest Indian reservation in the United States, consisting of nearly three million acres. The United States manages both the Nation's tribal land and any income derived therefrom. Sources of income include the sale of valuable natural resources, such as copper, sand and gravel, and the conveyance of partial interests in tribal land to third parties, such as leases, easements, and rights-of-way. In addition, the United States holds in trust money awarded from legal judgments ("judgment fund") against the federal government on various claims brought by the Nation before the Indian Claims Commission. The judgment fund includes an award of $26 million to the Nation in 1976 as settlement for a takings and trespass claim against the United States.

On December 28, 2006, the Nation filed suit in the United States District Court for the District of Columbia, setting forth a variety of allegations of breach of fiduciary duties with respect to the United States' management and administration of the Nation's trust assets. The Nation's principal

[1]The facts are drawn from the two complaints, and, for purposes of this motion, are assumed to be correct.

complaint is that the United States, as trustee, has "grossly mismanaged and continue[s] to grossly mismanage the trust and [has] failed for over a century to carry out the most basic and fundamental trust duties owed to the Nation." District Compl. ¶ 4. The district court complaint describes various examples of mismanagement, including the United States' failure to provide an adequate accounting of trust assets; failure to maintain an adequate accounting system and adequate trust records; failure to ensure that the trust assets are managed so as to yield a maximum return to the Nation; failure to collect, invest, and disburse trust funds; and improper conversion of trust funds for use by the United States.

As a result of the alleged mismanagement of the trust assets, the Nation argues that it is unable to determine the "true state of its trust assets." *Id.* ¶ 21. Specifically, the Nation is unable to determine the accurate account balances of trust funds, how much money should have been credited to the funds or paid directly to the Nation, how much of the trust property has been converted to the use of the United States, and whether the United States obtained fair market value for the various leases and sales of trust assets. The Nation believes such instances of mismanagement constitute breaches of the United States' fiduciary duties as trustee of the Nation's assets.

The Nation characterizes its district court complaint as "an action to compel federal officials to perform a duty owed to the Nation." *Id.* ¶ 9. The Nation asks the district court for a decree delineating the fiduciary duties owed to the Nation; a decree that the United States has breached those duties; a decree directing the United States to provide a complete, accurate, and adequate accounting of all of the trust assets and to comply with its fiduciary duties; a decree "providing for the restatement of the Nation's trust fund account balances in conformity with this accounting;" and "any additional equitable relief that may be appropriate (e.g. disgorgement, equitable restitution, or an injunction . . .)."[2] *Id.* Prayer for Relief ¶ 6.

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[2]The Nation also requests a declaration with respect to an accounting report prepared by Arthur Andersen LLP, an accounting firm contracted by the United States in the 1990s to reconcile the Nation's trust accounts. The Nation requests that the district court declare that the Andersen report is not a "complete, accurate, and adequate accounting" of the trust accounts. District Compl. Prayer for Relief ¶ 3.

On December 29, 2006, the Nation filed suit in this court. In the complaint, the Nation similarly maintains that, for over a century, the United States has owed, and continues to owe, fiduciary duties and responsibilities to the Nation as trust beneficiary. These duties include, *inter alia*, the proper management and administration of the trust; maintaining accurate accounts and adequate records; performing a complete, accurate, and adequate accounting of all trust property for the Nation; maximizing the productivity of the trust assets through reasonably skillful investments; and generally exercising the highest responsibility, care, and skill in the administration of the trust.

The Nation alleges that the United States has "consistently and egregiously failed to comply with these and other fiduciary duties incumbent on a trustee and imposed on the United States." CFC Compl. ¶ 23. The alleged instances of breach include the United States' failure to administer the trust in the interest and for the benefit of the Nation, failure to keep and maintain accurate accounts with respect to the trust assets, failure to preserve the trust assets from loss, failure to collect and deposit trust funds, failure to invest trust assets so as to maximize returns, and failure to refrain from self-dealing with trust assets.

The Nation explains that its action in this court is "for money damages . . . brought to redress gross breaches of trust by the United States . . . as trustee[] of land, mineral resources and other assets." *Id.* ¶ 1. Alleged damages include losses resulting from the United States' failure to obtain fair market value or otherwise compensate the Nation with respect to the removal of natural resources from tribal lands by third parties or the use of tribal lands by third parties in the form of easements, permits, or rights-of-way. The Nation also alleges that it suffered losses from the United States' mismanagement of tribal funds, including the loss of potential investment returns. Accordingly, the Nation requests that the court determine that the United States is liable for the injuries and losses caused by the breaches of fiduciary duty and for a determination of the amount of damages due.

The complaints closely resemble one another. The following table is a side by side comparison of portions of the allegations presented in each complaint:

District Court	Court of Federal Claims
Nature of Action: "to seek redress of breaches of trust by the United States . . . in the management and accounting of trust assets, including funds and lands . . . and to compel the defendants to provide a full and complete accounting of all trust assets . . . and to correct the balances of the [] trust fund accounts to reflect accurate balances." District Compl. ¶ 1.	Nature of Action: "for money damages against the United States, brought to redress gross breaches of trust by the United States . . . as trustees . . . of land, mineral resources and other assets . . . ." CFC Compl. ¶ 1. "[T]his case arises out of Defendant's continuing material breaches of statutory, regulatory, and fiduciary duties owed to the Nation and the Nation seeks damages for Defendant's mismanagement . . . ." *Id.*
Funds/Assets: "Involved in this action are funds and other assets, including approximately 2,900,000 acres of land . . . ." *Id.* ¶ 2. "These lands comprise a reservation located in the southern most part of the State of Arizona . . . ." *Id.* ¶ 3.	Funds/Assets: The Papago Reservation ("Sells Reservation"): "consists of approximately 2,800,000 acres of land." *Id.* ¶ 10. The San Lucy District ("Gila Bend Indian Reservation"): "consists of approximately 3,800 acres of land." *Id.* ¶ 11. The San Xavier District: "consists of approximately 69,189 acres of land." *Id.* ¶ 12.

[T]hese lands have produced, *inter alia*, copper, other minerals, sand, and gravel, and such trust lands have been leased to third parties and to the government for rights-of-way, business uses, and other purposes." *Id.* ¶ 3.	"[T]he mineral rights on the Nation Reservation are managed by the Defendant as trustee . . . ." *Id.* ¶ 14. "A substantial portion of the funds held by the United States in trust . . . is derived from income from tribal lands." *Id.* ¶ 15 "Income is derived from, *inter alia*, the sale of the natural resources and the conveyance of certain interests in the . . . land, including leases, easement, and rights of ways." *Id.* ¶ 16.
"[T]he trust funds are comprised of both judgment funds . . . and funds that receive their trust character as proceeds of trust property, specifically the lease and sale of resources or lands . . . ." *Id.* ¶ 2.	"Additional assets held in trust by the United States . . . are derived from a judgment on various claims brought by the Nation against the United States. . . . [T]he Indian Claims Commission approved a settlement award of $26 million ($26,000,000) on behalf of the Nation . . . ." *Id.* ¶ 17.

Trust Obligations:	Trust Obligations:
"The United States unquestionably owes substantial fiduciary obligations to the Nation with respect to the management and administration of the Nation's trust funds and other assets." *Id.* ¶ 12.	"Because the United States engages in pervasive management and control of the Nation's tribal assets pursuant to federal statutes and regulations, . . . the government has assumed the fiduciary obligations of a trustee." *Id.* ¶ 18
"Because the United States holds the Nation's tribal lands and other assets in trust, it has assumed the fiduciary obligations of a trustee." *Id.* ¶ 15.	
"The longstanding trust relationship between the United States and the Nation and the United States' resulting fiduciary duties are rooted in and derived from numerous statutes and regulations." *Id.* ¶ 16 (followed by a list of statutory and regulatory provisions).	"The century-long trust relationship between the United States and the Nation, and the resultant fiduciary responsibilities incumbent on the United States, are rooted in and derived from a number of statutes, regulations and executive orders." *Id.* ¶ 19 (followed by a list of statutory and regulatory provisions).
"The statutes, regulations, and executive orders giving rise to the United States' fiduciary duties provide the 'general contours' of those duties, but the more specific details are filled in through reference to general trust law and 'defined in traditional equitable terms.'" *Id.* ¶ 18.	"The statutes, regulations, and executive orders giving rise to the United States' fiduciary duties provide the 'general contours' of those duties, but the details are filled in through reference to general trust law." *Id.* ¶ 21.

"These duties include . . . the duty to: (a) a complete, accurate, and adequate historical accounting of all the trust property, with such accounting containing sufficient information to enable the Nation to readily ascertain whether the trust has been faithfully carried out; (b) Maintain adequate books and records with respect to the trust property . . . ;	"These duties include . . . the duty to: "c. Keep and render clear and accurate accounts with respect to the administration of the trust, by maintaining adequate books and records with respect to the trust property . . . ; d. Furnish . . . a complete, accurate, and adequate historical accounting of all the trust property, with such accounting containing sufficient information to enable the Nation to readily ascertain whether the trust has been and is being faithfully carried out;

(c) Refrain from self dealing or otherwise benefitting from management of the trust property; (d) . . . [P]reserve and protect trust property; (e) [E]nforce claims held by the trust; (f) Use reasonable skill and care to invest and deposit trust funds in such a way as to maximize the productivity of trust property . . . ; and (g) . . . [E]nsure that trust property is used for its highest and best use." *Id.* ¶19.	e. Exercise the 'highest responsibility,' care and skill in the administration of the trust; f. Preserve the trust assets . . . ; . . . . g. Keep the trust assets of the Nation separate from [non-trust property]; h. Properly collect and deposit the trust funds of the Nation; i. . . . [U]sing reasonable skill and care to invest and deposit trust funds in such a way as to maximize the productivity of trust property . . . ; and j. Refrain from self-dealing . . . ." *Id.* ¶ 22.

Breaches of Trust:	Breaches of Trust:
"The United States . . . has consistently and egregiously failed to comply with these and other fiduciary obligations and continues to do so." *Id.* ¶ 20.	"The United States has consistently and egregiously failed to comply with these and other fiduciary duties incumbent on a trustee . . . ." *Id.* ¶ 23
"Its breaches of trust include . . . :	"These breaches of trust include . . . :
(a) Failure to provide and unconscionably delaying the performance of a complete, accurate, and adequate accounting of trust property;	a. Failure to properly administer the trust for the benefit of the Nation;
(b) Failure to maintain adequate books and records . . . ;	. . . .
(c) Failure to refrain from self-dealing . . . ;	c. Failure to keep and render clear and accurate accounts . . . ;
(d) Failure to . . . preserve and protect trust property;	d. Failure to furnish complete and accurate information . . . ;
(e) Failure to . . . bring and enforce claims held by the trust;	e. Failure to exercise the 'highest responsibility,' care, and skill in the administration of the trust;
(f) Failure . . . to invest and deposit trust funds . . . to maximize the productivity of trust property . . . ;	f. Failure to preserve the trust assets . . . ;
(g) Failure to ensure that trust assets are used for their highest and best use." *Id.*	g. Failure to keep trust assets of the Nation separate from [non-trust property];
	h. Failure to properly collect and deposit the trust funds of the Nation;
	i. Failure to make the assets of the trust productive . . . ;

	j. Failure to invest and deposit trust funds in such a way as to maximize the productivity of trust property . . . ; and k. Failure to refrain from self-dealing . . . ." *Id.*
Counts I-II: "Specifically, the defendants have, *inter alia*, failed to provide the Nation with a complete, accurate, and adequate accounting of the Nation's trust assets . . . ." *Id.* ¶ 36. "The Nation is entitled to a further declaration that the defendants have breached the fiduciary duties they owe to the Nation by, *inter alia*, failing to provide the Nation with a complete, accurate, and adequate accounting . . . ." *Id.* ¶ 38.	Counts I-III: "The United States, as trustee, has never provided the Nation a complete and accurate accounting of the revenue the United States collected or was required to collect under mineral leases and permits." *Id.* ¶ 28. "Defendant breached its fiduciary duty by failing to lease such property interest for fair market value and failing to collect fair and reasonable compensation for the benefit of the Nation." *Id.* ¶ 29. "The Nation is entitled to a money damage award against the United States from its mismanagement of the Nation's mineral resources in an amount to be proven at trial." *Id.* ¶ 30.

"The Nation is entitled to a further declaration (1) delineating the defendants' fiduciary duties to, among other things, enable proper discharge of their accounting obligation and (2) finding that the defendants have breached their duties so declared." *Id.* ¶ 39. "The Nation is entitled to injunctive relief directing the defendants to provide a complete, accurate, and adequate accounting of the Nation's trust assets . . . and to comply with all other fiduciary duties as determined by this Court." *Id.* ¶ 42. "The Nation is further entitled to make exceptions and objections to the accounting provided, to a restatement of their trust fund account balances in conformity with the ultimate and complete accounting, and to any additional equitable relief that may be appropriate (e.g., disgorgement, equitable restitution, or an injunction . . .)." *Id.* ¶ 43.	"The nation is entitled to a money damage award against the United States from its mismanagement of the Nation's mineral resources in an amount to be proven at trial." *Id.* ¶ 30. "The United States, as trustee, has never provided the Nation a complete and accurate accounting of the revenue the United States collected or was required to collect, in granting easements and rights of way and leasing tribal properties." *Id.* ¶ 33. "Defendant breached its fiduciary duty to lease such property interests . . . for fair market value, and to collect fair and reasonable compensation for the benefit of the Nation." *Id.* ¶ 34. "The Nation is entitled to a money damage award against the United States arising from its mismanagement of the non-mineral interests in the Nation's trust land . . . ." *Id.* ¶ 35. "At no time has the United States provided the Nation a complete and accurate accounting of judgment funds held in trust for its benefit." *Id.* ¶ 38.

"The Nation is entitled to further injunctive relief directing the defendants to bring themselves into conformity with their fiduciary obligations and otherwise address breaches of trust found by the Court." *Id.* ¶ 44.	"[T]he United States has failed to invest, and continues to fail to invest, the principal and earnings of judgment funds held in trust, in a timely manner." *Id.* ¶ 39. "[T]he United States has failed to invest trust funds to obtain the maximum investment returns possible . . . ." *Id.*
Prayer for Relief: "For a decree construing the trust obligations of the defendants to the Nation, including but not limited to, the duty to provide a complete, accurate, and adequate accounting . . . ." *Id.* Prayer for Relief ¶ 1. "For a decree that the United States . . . has been in breach of its trust obligations . . . , specifically including, *inter alia*, its fiduciary duty to provide a complete, accurate, and adequate accounting of all trust assets . . . ." *Id.* Prayer for Relief ¶ 2. "For a decree delineating the fiduciary duties owed by the defendants to the Nation with respect to the management and administration of the trust assets belonging to the Nation." *Id.* Prayer for Relief ¶ 4.	Prayer for Relief: "For a determination that the Defendant is liable to the Nation in damages for the injuries and losses caused as a result of Defendant's breaches of fiduciary duty." *Id.* Prayer for Relief ¶ 1.

"For a decree providing for the restatement of the Nation's trust fund account balances in conformity with this accounting, as well as any additional equitable relief that may be appropriate (e.g., disgorgement, equitable restitution, or an injunction directing the trustee to take action against third parties). *Id.* Prayer for Relief ¶ 6.	"For a determination of the amount of damages due the Nation plus interest . . . ." *Id.* Prayer for Relief ¶ 2. "For such other and further relief as the Court deems just and appropriate." *Id.* Prayer for Relief ¶ 4.

The two complaints clearly involve the same parties, the same trust corpus, the same asserted trust obligations, and the same asserted breaches of trust over the same period of time. The only apparent difference in the complaints is the focus in the district court on the equitable remedy of a trust accounting and, in this court, on money damages. We use the term "focus" advisedly. Despite its apparent emphasis on an accounting, the district court complaint specifically seeks money (disgorgement, restatement of accounts, and restitution). The complaint here, although focusing on money damages, alleges a breach through failure to provide an adequate trust accounting and it seeks relief which, as explained below, will require an accounting in aid of judgment. Whether the differences in focus are sufficient, under section 1500 jurisprudence, to prevent the overwhelming similarities from triggering the jurisdictional bar is discussed below.

DISCUSSION

The Jurisdiction of the Two Courts

This court has jurisdiction under the Indian Tucker Act, 28 U.S.C. § 1505 (2000), to allow Native American tribes the right to bring suit in the Court of Claims like any other plaintiff. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) ("the Indian Tucker Act, confers a like waiver for Indian tribal claims that 'otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe'"). This is only a jurisdictional grant to the court, however. Like the general Tucker Act, 28 U.S.C. § 1491 (2000), it is not the substance of the cause of action; that

must be found elsewhere in law.[3] In Indian trust accounting cases, absent a special jurisdictional statute, a common device in the past century, the substantive right must be found in statutes from which a trust relationship can be inferred, and one which can reasonably be construed to imply a money remedy for breach. *See United States v. Mitchell*, 463 U.S. 206 (1983).

Under none of its broader jurisdictional grants does this court have general equitable powers. This means, as plaintiff correctly points out, that the court cannot simply order an accounting as stand-alone relief. Instead, "the court has the power to require an accounting in aid of its jurisdiction to render a money judgment on that claim." *Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483, 490-91 (1966); *see also The American Indians Residing on Maricopa-Ak Chin Reservation v. United States*, 229 Ct. Cl. 167, 169 (1981). It is presumably this power which plaintiff invokes in its complaint here, when, for example, it recites that,

> the United States, as trustee, has never provided the Nation a complete and accurate accounting of the revenue the United States collected . . . under mineral leases and permits. . . . Defendant breached its fiduciary duty by failing to lease such property interest for fair market value . . . . The Nation is entitled to a money damage award against the United States arising from its mismanagement of the Nation's mineral resources in an amount to be proven at trial.

CFC Compl. ¶¶ 28-30.

Assuming that the plaintiff persuades this court that the statutory framework gives rise to a trust, the breach of which is remediable by the payment of money, the court then will have to hear detailed evidence from both sides about how the United States performed as trustee. The United States, as trustee, would have to meet plaintiff's prima facie case of breach with a full accounting for its conduct. In short, assuming this action were to proceed in this court, and plaintiff satisfied its burdens of proof, what would ensue would amount to an accounting, albeit in aid of judgment.

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[3]"It is enough, then, that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages." *White Mountain Apache*, 537 U.S. at 473.

As to the district courts, Congress enacted a statute in 1966 giving them jurisdiction to hear suits brought by tribes arising under the Constitution, laws or treaties of the United States. *See* 28 U.S.C. § 1362 (2000) ("section 1362"). Native American tribes thus may bring suit in district court like any other plaintiff. *See Sac & Fox Nation of Okla. v. Cuomo*, 193 F.3d 1162, 1165 n.3 (10th Cir. 1999) ("[28 U.S.C. § 1362] affords jurisdiction of suits by Indian Tribes that involve federal questions"). Like the Tucker Act and the Indian Tucker Act, section 1362 has been treated as waiving sovereign immunity but not creating a cause of action. The cause of action must come from some other provision in law that is within the jurisdiction of the district court. In this case, plaintiff cites 28 U.S.C. § 1331 ("section 1331") (federal question jurisdiction) and 5 U.S.C. § 706 (actions under the Administrative Procedures Act).

Judicial review under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 500 *et seq.* (2000), is available "when there is no other adequate remedy in a court." *Id.* § 704. Jurisdiction is unavailable, however, under the APA when the action seeks "money damages." *See id.* § 702. Presumably, this is what prompts plaintiff to urge us to ignore as "non-operative" those portions of the district court complaint that appear to seek money. It is unclear, however, whether plaintiff genuinely does not seek any monetary relief from the district court, or if plaintiff wants monetary relief but views it as different than what is available here and thus not problematic under the APA. During oral argument, the court asked plaintiff's counsel if plaintiff would be willing to disavow monetary relief in the district court. Counsel declined to do so:

> [T]he government says that equitable remedies, like disgorgement and restitution, are monetary relief. We think that's dead wrong, but if that's what they mean by "monetary relief," then I can't agree that we're not seeking those equitable – what we view as equitable and they view as monetary – then I certainly can't agree that we're not seeking that in District Court. We are entitled to the full panoply of remedies that a court of equity has.

Tr. 37-38, Oct. 3, 2007. This is consistent with the district court prayer for relief, in which plaintiff asks for a decree providing for a restatement of account balances in conformity with the accounting and for "any additional equitable relief that may be appropriate (e.g. disgorgement, equitable restitution, or an injunction . . .)." District Compl. Prayer for Relief ¶ 6. There

is thus nothing "inoperative" about this request, or the allegations of mismanagement and self-dealing that lead up to it.

In any event, for purposes of section 1500, even if the district court does not have jurisdiction over the monetary relief sought, it is the "relief requested," *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993), not the "relief available" that is relevant. *See Frantz Equip. Co. v. United States*, 120 Ct. Cl. 312, 314 (1951) ("The applicability of [section 1500] . . . is not conditioned upon the question of whether the District Court had jurisdiction of the claim asserted by the plaintiff therein"). Indeed, even if the district court action had been dismissed in the interim, the inquiry would still be whether, assuming section 1500 is a bar, the district court proceeding was pending at the time the action in this court was initiated.[4]

Section 1500

Section 1500 deprives the court of jurisdiction "of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States . . . ." 28 U.S.C. § 1500. Section 1500 thus protects the United States from being forced to defend against duplicative suits.

The history of section 1500 is nearly as long and storied as that of this court and its predecessor, the United States Court of Claims. Following the Civil War, owners of seized southern cotton brought suit under The Captured and Abandoned Property Act of 1863 for the value of the seized cotton upon a showing that the claimant had not given aide to the Confederacy. *See* Paul F. Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 Am. U. L. Rev. 301, 303 (1997). Many claimants also brought

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[4]Even if any misgivings we had about the district court's jurisdiction to grant monetary relief, *see The Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 139 n.10 (2004), were relevant under section 1500, as plaintiff points out, under *Bowen v. Massachusetts*, 487 U.S. 879 (1988), it is not inconceivable that the district court could construe the request for monetary relief as not "money damages" under the APA. While this might persuade the district court to retain jurisdiction, it does not mean that the plaintiff does not seek money. As we discuss below, we view the concerns of section 1500 to be the overlap in the ultimate relief, however characterized in terms of legal theory.

suit in the local district courts against the Treasury officers who had seized the property. *Id.* In response, Congress in 1868 adopted the predecessor to what is now codified as section 1500.[5]

The feature of section 1500 that is controverted here is the question of whether the complaints involve the same "claim." The first reported decision of the modern era dealing with the meaning of the term "claim" in section 1500 was *British American Tobacco v. United States*, 89 Ct. Cl. 438 (1939).[6] The Court of Claims there held that the contract suit was barred when another action in district court sought monetary recovery in tort based on the same set of operative facts. *Id.* at 440. "[T]he word 'claim,' as used in [the statute] has no reference to the legal theory upon which a claimant seeks to enforce his demand if it appears, as it does here, that the defendant in a suit in another court was, in respect of the subject matter or property in respect of which the claim was made . . . ." *Id.* The "operative facts" or "subject matter" of the claim were thus the determinative factor rather than the legal theory asserted.

In *Casman v. United States*, 135 Ct. Cl. 647 (1956), the court held that the plaintiff's claim for back pay was not barred by section 1500 even when a suit based on the identical set of facts for employment reinstatement was pending in district court. *Id.* at 650. The court noted that the purpose of section 1500 was to force plaintiffs to elect between the Court of Claims and another court in which to pursue its whole claim against the government. *Id.* at 649 (citing *Matson Navigation Co. v. United States*, 284 U.S. 352, 355-56 (1932)). The plaintiff's suit in the Court of Claims was not barred because the equitable relief requested in district court was not available in the Court of Claims. *Id.* at 650. The court stated that section 1500 did not require plaintiffs to elect between monetary and equitable relief. *Id.*

In *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed. Cir. 1988), the Federal Circuit upheld the dismissal of plaintiff's suit for contractual indemnification in the United States Claims Court[7] because

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[5] 15 Stat. 75, 77 (June 25, 1868).

[6] The statute applied in *British American* was a predecessor to section 1500 and was the same in substance as 28 U.S.C. § 1500.

[7] Prior to 1992, this court was known as the United States Claims Court. We refer to the court as it was called at the time of decision cited.

plaintiff had pending a claim based on the identical facts brought under the Federal Tort Claims Act[8] in district court. *Id.* at 1567-68. Both complaints sought recovery of costs and expenses. The Federal Circuit revisited section 1500 in *The Boston Five Cents Sav. Bank, FSB v. United States*, 864 F.2d 137 (1988). There, the Federal Circuit allowed a suit for money damages in the Claims Court while a similar suit seeking declaratory judgment was pending in the district court. *Id.* at 139-40 (citing *Casman*, 135 Cl. Ct. at 649-50). The court held that although the complaints were identical, *Johns-Manville* did not apply because monetary damages were only available in the Claims Court. Id. at 140.

The issue reached the Supreme Court in *Keene Corp. v. United States*.[9] The Court held that "dismissal would turn on whether the plaintiff's other suit was based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested. That the two actions were based on different legal theories did not matter." 508 U.S. at 212 (citing *British American*, 89 Ct. Cl. at 440) (internal citations omitted). Because the issue was not before it, the Court declined to "decide whether two actions based on the same operative facts, but seeking completely different relief, would implicate § 1500." *Id.* at 213 n.6. The Court limited *Casman* to situations in which the relief was completely different in both suits. *Id.* at 214 n.9, 216 (citing *Johns-Manville*, 855 F.2d at 1566-67; *Boston Five Cents*, 864 F.2d at 139).

The Court also addressed the concern that section 1500's anachronistic character prevented some claimants from asserting rights that Congress had

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[8] Codified at 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-80 (2000).

[9] In *Keene*, the plaintiff had been sued in district court by various individuals for asbestos related injuries. Plaintiff filed a third-party complaint against the United States seeking indemnification because it used the asbestos pursuant to government specifications. It subsequently filed two complaints in the Court of Claims (eventually transferred here) seeking damages from the cost of litigating and settling the asbestos litigation. The Court held that claims in this court were barred by the application of section 1500. 508 U.S. at 202.

otherwise granted them.[10] The Court dismissed this argument, stating that, "the 'proper theater' for such arguments, as we told another disappointed claimant many years ago, 'is the halls of Congress, for that branch of the government has limited the jurisdiction of the Court of Claims.'" *Id.* at 217 (quoting *Smoot's Case*, 82 U.S. 36, 45 (1873)).

The Federal Circuit subsequently addressed section 1500 in light of the *Keene* decision in *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (1994). In *Loveladies*, the plaintiff was denied a wetlands development permit and filed suit in the District Court for the District of New Jersey, challenging the denial under the APA. While an appeal was pending before the Third Circuit, the owner brought suit in the Claims Court under a theory of regulatory taking.[11] This court heard the case, ruled for plaintiff, and awarded damages. The government appealed on the basis of section 1500. The Federal Circuit articulated a two-part test for the application of section 1500. "For the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from the same operative facts, and must seek the same relief." 27 F.3d at 1551. Applying the test, the Federal Circuit upheld the judgment in plaintiff's favor, holding that the two complaints sought entirely different relief. *Id.* at 1554.

Plaintiff seizes on the use of the term, "same relief" in *Loveladies*, arguing, in effect, that the relief must be identical before section 1500 is triggered. Plaintiff ignores, however, other language in *Loveladies*. The court described the issue as "whether § 1500 denies jurisdiction to the Court of Federal Claims if, at the time a complaint for money damages is filed, there is a pending action in another court that seeks *distinctly different relief*." *Id.* at 1549 (emphasis supplied). Elsewhere the court iterates the inquiry: "If the claims are distinctly different, Loveladies are excused from the jurisdictional dance required by § 1500." *Id.* The two suits, were, of course, distinctly different. The district court proceeding was a routine suit for injunctive and

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[10] The court stated that the trial judge in *Keene* was not the first to call the statute "anachronistic" and even noted that some have argued that the statute has never really performed its intended function. 508 U.S. at 217 (citing *A.C. Seeman, Inc. v. United States*, 5 Cl. Ct. 386, 389 (1984)); *see also* Gregory Schwartz, Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents, 55 Geo. L.J. 573, 579 (1967).

[11] *See* 21 Cl. Ct. 153 (1990).

declaratory relief under section 1331 and the APA; the suit here sought compensation for a taking.

In short, we have to assume that the Federal Circuit intended by "same relief" to mean that two complaints seek relief that is not "distinctly different." That reading of *Loveladies* is, in any event, compelled by the controlling language of *Keene.* The Court viewed the precedent as dictating dismissal when "plaintiff's other suit was based on substantially the same operative facts . . . at least if *there was some overlap in the relief requested.* . . . Congress did not intend the statute to be rendered useless by a narrow concept of identity. . . ." 508 U.S. at 212-13 (emphasis supplied). Later, the Court noted that the *Casman* exception applied when a plaintiff sought "distinctly different types of relief" in the two courts. *Id.* at 214 n.9.

In sum, we believe that the inquiry is whether there is meaningful overlap both in the underlying facts and in the relief sought in the two actions. A perfect symmetry of demands for relief is not necessary.

As we indicated above, there can be no meaningful dispute about the first prong of the claim test: the operative facts asserted in the complaint are, for all practical purposes, identical. Plaintiff has included language in both complaints alleging the mismanagement and lack of prudent investment. *Compare* District Compl. ¶¶ 1-4, 20 *with* CFC Compl. ¶¶1, 23 (both complaints include the duties to account, keep adequate records, refrain from self-dealing, preserve trust assets, and invest prudently as to maximize return). Both complaints allege breaches of the same previously listed duties. *Compare* District Compl. ¶ 20 *with* CFC Compl. ¶¶ 23. It is also undisputed that plaintiff is alleging these breaches in relation to the same trust corpus (lands, buildings, mineral resources, rights in property, and tribal funds). The underlying facts are the same.

We view plaintiff's real argument to be that, because, traditionally, district courts do equity and this court gives monetary relief, whatever relief the district court grants is *per se* not duplicative of what this court can do. The fact that the plaintiff has asked for what looks like overlapping relief (money and an accounting in both courts) thus becomes immaterial. As a matter of law, the powers of the courts are different so there cannot be the same "claim" pending for purposes of section 1500.

There are at least two major problems with that approach. The first we have already discussed. Under section 1500, the court is not obligated to parse the complaint to eliminate allegations or requests for relief that are jurisdictionally unsound. The language of the complaints controls. Moreover, for section 1500 purposes, the legal theory behind the allegations or the characterizations of the requests for relief are not controlling. As a practical matter, will the same background facts be relevant, and will the relief, in substance be the same? Here, we think it is obvious that there is virtually 100 percent overlap.

The more principled reason that this literal application of section 1500 is appropriate has to do with the unique character of Indian trust claims. Unlike regulatory disputes, suits brought by Indian tribes, claiming a breach of trust, do not neatly separate between the exclusively injunctive relief typical in a district court APA review of agency action on the one hand, and, on the other hand, a suit here for money damages flowing from the consequences of that agency action. In substance, the action for breach of trust in this court is an equitable proceeding that produces a monetary remedy. Thus while the court has jurisdiction because of the demand for money, the process for getting to that relief is fundamentally equitable, meaning that there is potential overlap of both the accounting and money aspects of the two complaints.

Even though a traditional common law breach of trust claim is an action in equity, *see Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990), equitable remedies for breach of trust include the recovery of money. As is explained in the Restatement (Second) of Trusts, in addition to seeking purely injunctive or declaratory relief, the beneficiary can recover any loss or depreciation in value of the trust estate resulting from the breach of trust, any profit made by the trustee, or any profit which would have accrued to the trust estate if there had been no breach of trust. Restatement (Second) of Trusts § 205 (1959).[12]

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[12]*See* Comments to § 205:

> *a. Alternative remedies for breach of trust.* If the trustee commits a breach of trust, the beneficiary may have the option of pursuing a remedy which will put him in the position in which he was before the trustee committed the breach of trust; or of pursuing a remedy

Section 205 of the Restatement's revision of the Prudent Investor Rule makes clear that a trustee can be held responsible to the beneficiary for "the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered."

> which will give him any profit which the trustee has made by committing the breach of trust; or of pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust.
>
> . . . .
>
> Comment on Clause (c):
>
> *i. Failure to make a profit.* If the trustee commits a breach of trust, he is chargeable with any profit which would have accrued to the trust estate if he had not committed such a breach of trust. . . . .
>
> This rule is applicable to income as well as principal. Thus, if the trustee in breach of trust fails to make the trust property productive he is liable for the amount of income which he would have received if he had not committed the breach of trust (see § 207).

The same point is stated in Pomeroys Equity Jurisdiction § 158:

> A court of equity will always by its decree declare the rights, interests, or estate of the *cestui que trust*, and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the *final* relief to be obtained by the *cestui que trust* consists in a recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust . . . .

John N. Pomeroy, A Treatise on Equity Jurisprudence § 158 (Spencer Symons ed., 5th ed. 2002).

Restatement (Third) of Trusts, Prudent Investor Rule § 205(b) (1992). The comments to that section support our holding that the equitable relief available for a breach of trust includes profits lost due to mismanagement and improper investment:

> If the breach of trust causes a loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration, the beneficiaries may surcharge the trustee for the amount necessary to compensate fully for the consequences of the breach. Thus, the recovery for an improper investment by a trustee would ordinarily be the difference between (1) the value of the investment and its income and other product at the time of surcharge and (2) the amount of the funds expended in making the investment, increased (or decreased) by the amount of the total return (or negative total return) that would have accrued to the trust and its beneficiaries if the funds had been properly invested.

Id. § 205 cmt. i.

Sections 208-211 of the Restatement (Second) deal specifically with liability of the trustee for selling property it was his duty to retain, liability for failing to sell trust property that he had a duty to sell, liability for purchasing property it was not his duty to purchase, and liability for failing to purchase property it was his duty to purchase.[13] *See also* Restatement (First) of

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[13] Section 207, Liability for Interest, presupposes a monetary recovery for breach of trust:

> (1) Where the trustee commits a breach of trust and thereby incurs a liability for a certain amount of money with interest thereon, he is chargeable with interest . . . .
> (2) Where the trustee is chargeable with interest, he is chargeable with simple and not compound interest, unless
> (a) he has received compound interest, or
> (b) he has received a profit . . . , or
> (c) it was his duty to accumulate the income.

Restatement (Second) of Trusts § 207 (1959).

Restitution § 4(f) (1937) (stating that a person entitled to restitution may receive a number of remedies including "decree in equity for the payment of money").

In short, not only can the trustee be forced to return money to the trust account, the trustee can also be compelled to put new money into the account.[14] Thus the aspects of the district court request for relief, which plaintiff characterizes as unique because they arise in equity, are nevertheless the same requests for relief which give this court jurisdiction. The fact that the money comes from a cause of action in equity is immaterial. This is a critical part of the holding in *White Mountain Apache*, where Justice Souter wrote that, once a specific fiduciary duty is established, "general trust law [is to be] considered in drawing the inference that Congress intended damages to remedy a breach of obligation." 537 U.S. at 477. *See also Mitchell*, 463 U.S. at 225-26 (holding that the fiduciary obligations at issue could be fairly interpreted as mandating compensation, given that the existence of a trust exposes the trustee to liability for damages should it breach its obligations) (citing Restatement (Second) of Trusts §§ 205-212 (1959)); *The Navajo Nation v. United States*, 501 F.3d 1327, 1343 (Fed. Cir. 2007) ("Where the government exercises actual control within its authority, neither Congress nor the agency needs to codify such actual control for a fiduciary trust relationship that is enforceable by money damages to arise") (citing *White Mountain Apache*, 537 U.S. at 475); *The Shoshone Indian Tribe of the Wind River Reservation v. United States*, 58 Fed. Cl. 77, 82 (2003) (holding that plaintiff had established the existence of fiduciary duties and that it could thus recover money damages for any breach of those duties).

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[14] At oral argument, plaintiff's counsel attempted to assure the court that monetary relief in district court would consist only of money already somewhere in the government's possession (old money), and that the money damages in this court would consist entirely of "new money," *i.e.*, money that should have been earned but never was. Regardless of plaintiff's intent, it is without question that equitable remedies for breach of trust, as shown by the above quoted authorities, are concerned with far more than just "old money." Similarly, in this court, no distinction is to be found between money "old" and "new." Rather, if successful, a plaintiff is made whole, to the extent possible, by the payment of money for the government's breaches of trust. That remedy is sought in both courts and thus section 1500 is implicated.

Plaintiff's argument that, under *Bowen*, the transfer of money does not change equitable relief into money damages, *see* 487 U.S. at 893-94, is thus irrelevant. Although the Court held that the term "money damages" found in 5 U.S.C. § 702 was distinct from the more general meaning of "monetary relief," 487 U.S. at 896-901, section 1500 makes no such distinction.

As this court has held, and the Supreme Court has acknowledged, it is the form of the relief (money) that is relevant. *Harbuck v. United States*, 58 Fed. Cl. 266, 269 (2003) (citing *Keene*, 508 U.S. at 212), *aff'd*, 378 F.3d 1324 (2004). However characterized, the calculus involved in determining how much money the plaintiff is owed would be the same in both courts. Although plaintiff refers to the money requested here as "damages," the action here is for a breach of trust, and the means for proving breach and financial injury would be the same as in the district court.[15]

In addition, as we discussed above, although a pre-liability, stand-alone general accounting is unavailable in this court, after a presentation of sufficient evidence, an accounting is unavoidable here and will be coextensive with all the plaintiff's claims of breach. The accounting is necessary to establish the quantum of damages. Independent, therefore, of the monetary relief aspects of the two complaints, there is overlap in the request for an accounting. Both actions, in sum, seek a restatement of accounts, restitution, and disgorgement and both will require an accounting. There is plainly substantial overlap in the operative facts as well as in the relief requested. That being the case, unfortunately for plaintiff, section 1500 is a bar.[16]

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[15] "The inclusion of other and different requested relief in the two complaints does not avoid the application of [section 1500]. As long as the same relief is sought in both cases – here money damages – the second prong of the [section 1500] requirement . . . is satisfied." *Harbuck v. United States*, 378 F.3d 1324, 1329 (Fed. Cir. 2004) (citing *Keene*, 508 U.S. at 212) (internal citations omitted).

[16] 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

CONCLUSION

Section1500 divests this court of jurisdiction over plaintiff's claim because it arises from the same operative facts and seeks the same relief as the claim in district court. Accordingly, defendant's motion to dismiss is granted. The clerk is directed to dismiss the complaint without prejudice for lack of jurisdiction pursuant to RCFC 12(b)(1). No costs.

s/ Eric G. Bruggink
ERIC G. BRUGGINK
Judge

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new jurisdictional statute.

PROOF OF SERVICE

Pursuant to Fed. R. Appellate P. 32(a)(7) and Fed. Cir. R. 28(a)(13), I hereby certify that a copy of the foregoing BRIEF OF PLAINTIFF-APPELLANT TOHONO O'ODHAM NATION has been served by U.S. Postal Service this 5th day of May, 2008, upon the following counsel of record:

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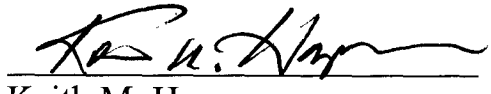
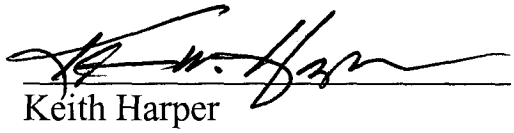


Keith M. Harper

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 13,819 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word, version 2000, in Times New Roman, 14-point.



Keith Harper

STATUTORY ADDENDUM

28 U.S.C. § 1500:

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.