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.

ON APPEAL FROM THE UNITED STATES
COURT OF FEDERAL CLAIMS
(Hon. Eric G. Bruggink, No. 06-944L)

ANSWERING BRIEF OF DEFENDANT-APPELLEE UNITED STATES

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5(b), there are about five cases in the United States Court of Federal Claims where issues relating to 28 U.S.C. § 1500 similar to those raised in this appeal are either pending or have recently been decided. There are approximately another five cases in the Court of Federal Claims where Section 1500 motions raising issues similar to this appeal may be filed soon. Counsel is unaware of any other case currently pending in this Court, another court of appeals, or the Supreme Court that raises issues similar to the ones presented here.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Tohono O'Odham Nation (the "Nation") filed a complaint in the United States Court of Federal Claims (the "CFC"), alleging jurisdiction under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505. Joint Appendix ("JA") 56. The CFC held that it lacked jurisdiction under 28 U.S.C. § 1500 and entered final judgment for the United States on December 20, 2007. JA 1. The Nation timely filed a notice of appeal on February 14, 2008. JA 32. This Court's jurisdiction rests on 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

Whether the CFC correctly concluded that it lacked jurisdiction over the Nation's complaint under 28 U.S.C. § 1500 because the Nation has a claim pending in another court that arises from the same operative facts and does not seek distinctly different relief.

STATEMENT OF THE CASE

The Nation filed a complaint in the United States District Court for the District of Columbia against the Secretaries of the Interior and the Treasury as well as the Special Trustee, Office of Special Trustee for American Indians. JA 35-53. That complaint alleges various breaches of the government's fiduciary duties with respect to tribal lands and assets held in trust for the Nation by the United States. The next day the Nation filed a complaint in the CFC, alleging the same breaches of fiduciary duties by the United States with respect to the same trust assets. JA 55-68. The United States moved to dismiss the CFC complaint for lack of jurisdiction pursuant to 28 U.S.C. § 1500. The CFC granted the motion, and the Nation appealed.

STATUTORY BACKGROUND

Section 1500 provides:

> 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.

28 U.S.C. § 1500.[1] Section 1500 originated in the aftermath of the Civil War, when residents of the Confederacy who had involuntarily parted with property (typically cotton) during the war sued in the (then) Court of Claims under the Abandoned Property Collection Act. *Keene Corp. v. United States*, 508 U.S. 200, 206 (1993). When those claimants had difficulty meeting the statutory requirements for maintaining suit against the government in the Court of Claims, they brought suit in other courts seeking compensation from federal officials (not the government directly) on tort theories, not under the statutory cause of

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[1] The first version of what is now Section 1500 was enacted in 1868. Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77. Although the language and codification of Section 1500 has changed over time, for purposes of the issues on appeal the language of Section 1500 throughout its history is not meaningfully different.

action. *Id.* It was those duplicative lawsuits that led Congress to enact Section 1500. *Id.* Thus, the purpose of Section 1500 is to force a plaintiff to choose between pursuing their claims in the CFC or in another court and to prevent the United States from having to litigate and defend in both courts. *See Harbuck v. United States*, 378 F.3d 1324, 1328 (Fed. Cir. 2004).

STATEMENT OF FACTS

I. DISTRICT COURT COMPLAINT

On December 28, 2006, the Nation filed a complaint (JA 35-53) in the United States District Court for the District of Columbia seeking judicial review of the government's past actions related to its management of the Nation's tribal trust lands and the associated resources and income derived therefrom as well as other assets held in trust by the United States (such as monies from judgments entered by federal courts on various claims previously brought by the Nation against the United States). JA 36-37, 40-41. The Nation also seeks review of the government's contemporaneous record-keeping (or accounting) of the government's actions with respect to the trust assets. JA 37, 43-44, 49- 51. The Nation describes "the core" of the trust assets

held by the government as "[t]ribal lands, associated resources, and the income derived therefrom" such as through the sale of natural resources and the conveyance of certain interests in land. JA 40.

The Nation's District Court complaint alleges a number of breaches by the government with respect to the trust assets. The alleged breaches include the failure: to provide a complete, accurate, and adequate accounting of trust property; to maintain books and records with respect to trust property; to refrain from self-dealing or otherwise benefitting from management of the trust property; to take reasonable steps to preserve and protect trust property; to take reasonable steps to bring and enforce claims held by the trust; to use reasonable skill and care to invest and deposit trust funds so as to maximize productivity of the trust property within the constraints of law and prudence; and to ensure that trust assets are used for their highest and best use. JA 43-44.

In the Nation's words, its District Court lawsuit is "an action to seek redress of breaches of trust by the United States . . . in the management of trust assets, including funds and lands, belonging to [the Nation], *and* to compel the defendants to provide a full and

complete accounting of all trust assets belonging to the Nation *and* to correct the balances of the Nation's trust fund accounts to reflect accurate balances." JA 35-36 (emphasis added). The Nation's prayer for relief bears out the breadth of what is at issue and the relief sought in its District Court lawsuit. The Nation seeks a decree: construing the government's trust obligations to the Nation ("including, *but not limited to*, the duty to provide a complete, accurate, and adequate accounting of all trust assets belonging to the Nation and held in trust by the [government]"); finding that the United States is, and has been since the trust's inception, in breach of its trust duties; directing the government to provide an accounting and to comply with all other fiduciary duties as determined by the court; and providing for the restatement of the Nation's trust fund account balances in conformity with the ordered accounting, including appropriate equitable relief such as disgorgement, equitable restitution, and an injunction. JA 52 (emphasis added).

II. COURT OF FEDERAL CLAIMS COMPLAINT

The day after filing its District Court complaint, the Nation filed a similar complaint in the CFC. The CFC complaint (JA 55-68), like its

District Court counterpart, seeks judicial review of the government's past management actions with respect to the Nation's trust lands (and the associated resources and income derived therefrom) and other assets held in trust by the United States (such as monies from judgments the Nation previously obtained against the United States). JA 55, 58-59, 62-67. Just as in the District Court, the CFC complaint describes "the core" of the Nation's trust assets as the Nation's tribal lands, their associated natural resources and income derived therefrom (such as the sale of the resources and conveyance of certain interests in tribal trust lands). JA 58.

In the CFC complaint, and again just like the District Court complaint, the Nation asserts a number of breaches by the government with respect to the trust assets. *Compare* JA 43-44 (District Court complaint) *with* JA 62-63 (CFC complaint). The Nation maintains that it did not receive adequate compensation from leases and permits for interests in mineral rights in the Nation's trust property because the United States did not obtain at least "fair market value" for the use of those tribal mineral resources and failed to collect "fair and reasonable compensation" for the Nation's benefit. *Compare* JA 35, 37-38, 40, 43-44

(District Court complaint) *with* JA 63-64 (CFC complaint). The Nation makes similar breach of trust allegations with respect to the United States' management of the Nation's non-mineral estates, such as easements, rights-of-way, and land leases on the Nation's Reservation. *Compare* JA 35, 37-38, 40, 43-44 (District Court complaint) *with* JA 64-65 (CFC complaint). With respect to those trust assets, the Nation alleges that the United States has failed to provide a complete and accurate accounting. JA 63, 64, 65. The Nation also asserts that the United States failed to invest timely the Nation's other assets, such as judgment and tribal fund monies, and failed to obtain the maximum investment return possible. *Compare* JA 35, 37-38, 40-41, 43-44 (District Court complaint) *with* JA 65-67 (CFC complaint).

The Nation describes its CFC lawsuit as "an action for money damages against the United States, brought to redress gross breaches of trust by the United States [as trustee] of land, mineral resources and other assets held by [the United States] for the benefit of the Tohono O'odham Nation." JA 55. In the CFC, the Nation seeks "a determination that the [United States] is liable to the Nation in damages for the injuries and losses caused as a result of [the United

States'] breaches of fiduciary duty" and "a determination of the amount of damages due the Nation." JA 67.

III. COURT OF FEDERAL CLAIMS' DECISION

The United States moved in the CFC to dismiss the Nation's complaint for lack of jurisdiction under Section 1500. The CFC granted the motion in a thorough and comprehensive order. The CFC performed a detailed comparison of the factual allegations in the District Court and CFC complaints and concluded that "[t]he two complaints clearly involve the same parties, the same trust corpus, the same asserted breaches of trust over the same period." 79 Fed. Cl. at 648-52. The court held that the operative facts for both complaints are "for all practical purposes, identical." *Id.* at 656.

The only difference between the two complaints that the CFC discerned was "the focus of the district court complaint on the equitable remedy of trust accounting and, in this court, on money damages." *Id.* at 652. The court explained that notwithstanding its apparent focus on an accounting, "the district court complaint specifically seeks money (disgorgement, restatement of accounts, and restitution)." *Id.* at 652. Likewise, the court explained that the Nation's

CFC complaint "although focusing on money damages, alleges a breach through failure to provide an adequate trust accounting and it seeks relief which . . . will require an accounting in aid of judgment." *Id.*; *see also id.* at 659.

The CFC proceeded to address whether those apparent differences in the complaints' requests for relief were enough to avoid Section 1500's jurisdictional bar. The court held they were not. The court noted that under the applicable case law, the relief sought in the District Court and CFC complaints must be distinctly different to avoid application of Section 1500, and rejected the notion that Section 1500 bars jurisdiction only when the relief sought in the two courts is "identical." *Id.* at 654-56. The CFC found unconvincing the Nation's argument that "because, traditionally, district courts do equity and [the CFC] gives monetary relief, whatever relief the district court grants is *per se* not duplicative of what [the CFC] can do." *Id.* at 656. The court identified "two major problems" with the Nation's contention. *Id.*

First, the court recognized that it is the language of the complaints that controls for purposes of the Section 1500 analysis, and the language of the complaints demonstrated that the Nation sought

overlapping relief in the two courts. *Id.* The court also recognized that it was not proper for it to parse a complaint to eliminate allegations or requests for relief that may lack jurisdictional basis in order to avoid the fact that the plain language of the complaints seek overlapping relief. *Id.* at 656-57.

Second, the court noted that "suits brought by Indian tribes, claiming a breach of trust, do not neatly separate between the exclusively injunctive relief typical in a district court [Administrative Procedure Act] 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." *Id.* at 657. No matter how characterized, the form of relief the Nation sought in both the District Court and the CFC was the same (money) and "the calculus involved in determining how much money the plaintiff is owed would be the same in both courts." *Id.* at 658. The court explained that "[a]lthough 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." *Id.* Thus, the court concluded that the Nation did not seek distinctly different

relief in the two courts, and Section 1500 divested it of jurisdiction over the Nation's complaint.

The court also found an additional overlap in the relief sought, independent of the monetary relief. The court found that the although a stand-alone general accounting may not be available in the CFC, "an accounting is unavoidable here." *Id.* at 659. Thus, if the Nation is successful, an accounting would be part of the relief in both the District Court and the CFC, providing additional proof that the Nation's claims in the two courts do not seek distinctly different relief.

STANDARD OF REVIEW

The Court reviews de novo the CFC's dismissal of the Nation's complaint for lack of jurisdiction. *AINS, Inc. v. United States*, 365 F.3d 1333, 1336 (Fed. Cir. 2004).

SUMMARY OF ARGUMENT

Section 1500 deprives the CFC of jurisdiction where the plaintiff's claim in the CFC is a "claim for or in respect to which" the plaintiff has pending in another court. For purposes of Section 1500, the Nation's claim in the CFC is the same as the claim it has pending in the District Court. Indeed, the policy and purpose underlying Section 1500 is that

the United States not be required to defend the same claims at the same time in two different courts; that is exactly what the Nation seeks to do here. The CFC correctly dismissed the Nation's complaint for lack of jurisdiction.

The term "claim" in Section 1500 is undefined in the statute, but the case law has developed some basic principles for determining whether claims are sufficiently similar such that the CFC is barred under Section 1500 from exercising jurisdiction. First, claims pending in the CFC and another court are sufficiently related to trigger Section 1500's jurisdictional bar if the claims arise from the same operative facts. The legal theory on which a plaintiff seeks to recover in each court is irrelevant. Second, even where the claims in the two courts arise from the same operative facts, Section 1500 does not apply where the plaintiff seeks "distinctly different" relief in the two courts.

Here, the CFC correctly held that the Nation's claims in the District Court and the CFC arise from the same operative facts. The claims in both courts arise from the same alleged conduct of the United States, with respect to the same trust property and funds of the Nation, and the same alleged breaches of trust. The Nation's contentions on

appeal are nothing more than an attempt to resurrect an argument that was rejected long ago -- that a claim's operative facts depend on the legal theory being pursued or the elements of proof necessary to present a prima facie case under that theory.

The court also correctly held that the Nation's District Court and CFC complaints do not seek distinctly different relief. The relevant inquiry is whether the form of relief sought in the two courts is the same, and here the Nation seeks monetary relief in both the District Court and the CFC.[2] To nonetheless allow the Nation to proceed in both the District Court and the CFC would be directly contrary to Section 1500's purposes of forcing a plaintiff to an election of proceeding in the CFC or another court, preventing the United States from having to litigate and defend against the same claims in two different forums, and avoiding exposure of the United States to duplicate liability. The Nation argues on appeal that it is seeking

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[2] The government does not agree or concede that any monetary relief is available in the District Court at all for the Nation's claims. The government's view of what relief is actually available in the District Court is, however, irrelevant to the Section 1500 analysis because it is the language of the complaint that controls. *See infra* at 40-42. In addition, it should be for the District Court to determine its own jurisdiction.

distinctly different relief in that it seeks money in each court based on different theories. The Nation's argument cannot be squared with the purposes of Section 1500 or this Court's decisions.

Finally, even though the overlap in monetary relief sought by the Nation is sufficient to trigger Section 1500, the CFC correctly held that, if the Nation is ultimately successful in the District Court and the CFC, the accounting in both courts provides an additional overlap in the relief the Nation seeks. The court correctly concluded that if the Nation establishes it is entitled to damages in the CFC, an accounting to establish the quantum of damages would be duplicative of the accounting the Nation seeks in the District Court, further demonstrating the Nation's complaints do not seek distinctly different relief.

The CFC's judgment should be affirmed.

ARGUMENT

THE COURT OF FEDERAL CLAIMS CORRECTLY DISMISSED THE NATION'S COMPLAINT FOR LACK OF JURISDICTION

Section 1500 deprives the CFC of jurisdiction over "any claim for or in respect to which" a plaintiff has pending in another court. The

court correctly held that the Nation's CFC claim is a "claim for or in respect to which" the Nation has pending in the District Court.[3] In reaching that conclusion, the CFC applied the correct legal standard and properly dismissed the Nation's complaint.

The statute does not define the term "claim" in Section 1500, and it has therefore fallen to the courts to explicate the term's meaning and how to determine whether a claim in the CFC is one "for or in respect to which" a plaintiff has pending in another court. The courts have developed some basic principles for making that determination. First, if the claims in the two courts arise from, or are based on, the same operative facts, they are sufficiently similar for Section 1500's jurisdictional bar; the jurisdictional bar is not defeated simply because a plaintiff is proceeding in each court on different legal theories. *See British Am. Tobacco Co. v. United States*, 89 Ct. Cl. 438, 440 (1939); *Los Angeles Shipbuilding & Drydock Corp. v. United States*, 152 F. Supp. 236, 237 (1957); *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1561-63 (Fed. Cir. 1988) (en banc); *Keene*, 508 U.S. at 211-15; *Loveladies Harbor,*

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[3] The Nation does not contest that its earlier filed District Court complaint was pending for purposes of Section 1500.

Inc. v. United States, 27 F.3d 1545, 1551 (Fed. Cir. 1994) (en banc) (must show "that the two claims arose from the same 'operative facts'").

Second, Section 1500 does not bar the CFC's jurisdiction where the plaintiff seeks "distinctly different" relief in the two courts. *See Loveladies*, 27 F.3d at 1551; *see also Casman v. United States*, 135 Ct. Cl. 647, 650 (1956). The Court has made clear that the relief sought in the two courts need not be identical for Section 1500 to apply; the relief need only be of the same nature -- monetary, injunctive, or declaratory. *See Johns-Manville*, 855 F.2d at 1566; *Loveladies*, 27 F.3d at 1552-54; *Dico, Inc. v. United States*, 48 F.3d 1199, 1202-03 (Fed. Cir. 1995) (finding "same relief" requirement met where plaintiff sought "money damages" for deprivation of property in CFC and sought "monetary relief" (statutory reimbursement) in District Court); *Harbuck*, 378 F.3d at 1329. Moreover, "[t]he inclusion of other or different requested relief in the two complaints does not avoid the application of [Section 1500]." *Harbuck*, 378 F.3d at 1329; *see also Keene*, 508 U.S. at 212. Thus, the relevant inquiry is whether the claims in the two courts seek "distinctly different" relief. If they do, Section 1500 will not bar the CFC's jurisdiction.

Finally, in Section 1500 Congress limited the CFC's jurisdiction not only as to claims "for which" a plaintiff has sued in another court, but also as to those "in respect to which" the plaintiff has sued elsewhere. That language, the Supreme Court has noted, "make[s] it clear that Congress did not intend the statute to be rendered useless by a narrow concept of identity providing a correspondingly liberal opportunity to maintain two suits arising from the same factual foundation." *Keene*, 508 U.S. at 213.

As we set forth below, the CFC properly applied those principles when it determined that the Nation's District Court and CFC claims are sufficiently similar for purposes of Section 1500.

A. The Nation's District Court and CFC Claims Arise From the Same Operative Facts

A comparative reading of the District Court and CFC complaints confirms that the Nation's claims in both courts arise from, and are based on, the same operative facts. As detailed above (and as the CFC laid out in painstaking detail, including a chart covering four and a half pages of the Federal Claims Reporter), the allegations in the Nation's CFC and District Court complaints closely resemble one another.

Supra at 3-8; 79 Fed. Cl. at 648-52. Indeed, as the CFC correctly held, "the two complaints clearly involve the same parties, the same trust corpus, the same asserted breaches of trust over the same period." 79 Fed. Cl. at 652. With respect to the Nation's claims regarding its trust lands (and the associated resources and income derived therefrom) the same operative facts underlie both the District Court and the CFC complaints -- what funds were collected and deposited and whether those funds were for an appropriate value. Similarly, the same operative facts underlie both the Nation's District Court and CFC claims respecting judgment and trust monies -- how the trust funds were appropriated, when and how they were invested, and the resources from which the Nation received consideration. That alone establishes that, for purposes of Section 1500, both the District Court and CFC complaints arise from the same operative facts.

Here there is even more, however. In the District Court, the Nation seeks an accounting that will identify the uncollected, under-collected, and under-invested receipts and investments related to trust property and funds, followed by an accurate restatement of its trust fund account balances to reflect those amounts. JA 35-37, 44, 51; *see*

also JA 73-74, 77-78. In its CFC complaint, the Nation seeks monetary damages for the very same uncollected, under-collected, or under-invested receipts and investment. JA 63-67. To arrive at an accounting and accurate restatement of the Nation's trust account (the District Court action) or an accurate award of monetary damages (the CFC action), both courts must consider and analyze the same operative facts, specifically, the nature of the receipts and transactions evidencing collections, deposits, and investments by the government related to the Nation's trust property and funds. Requiring the United States to litigate those issues in both the District Court and the CFC is precisely the sort of duplicative litigation that Section 1500 is intended to prevent.

The Nation attempts to escape the conclusion that its District Court and CFC claims arise from the same operative facts by asserting (Brief of Plaintiff-Appellant Tohono O'Odham Nation ("Br.") 24-30) that the "operative facts" are only those facts necessary for it to prove its claim in each court and they do not include "background facts." According to the Nation (Br. 28), its claim in the District Court is to obtain and enforce "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." In contrast, according to the Nation (Br. 29-30), its CFC complaint seeks to recover for a breach of money-mandating duties, namely the alleged failure of the United States to lease the Nation's property interests for fair market value or otherwise to collect reasonable amounts for those interests and the alleged failure of the United States to obtain maximum investment returns. The Nation therefore contends (Br. 30) that the "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." *See also* Br. 28 ("What is legally controlling is that the facts necessary to establish the breaches of those duties are materially different."). That argument fails for a number of reasons.

1. *That the Nation may have to prove different facts to be successful in the District Court and the CFC does not demonstrate that its claims arise from different operative facts*

Whether the Nation will have to prove a different set of facts in each court to succeed is irrelevant to whether the claims in those courts

arise from the same "operative facts" within the meaning of Section 1500. *See Johns-Manville*, 855 F.2d at 1564 ("Since the legal theory is not relevant, neither are the elements of proof necessary to present a prima facie case under that theory."). In *Los Angeles Shipbuilding*, a decision binding on the Court,[4] the Court of Claims rejected an argument similar to the Nation's. There, the plaintiff brought suit in both the Court of Claims and District Court for the refund of taxes. In the Court of Claims, the plaintiff proceeded on a theory of an "account stated" between it and the government, while in the District Court it proceeded on the theory of overpayment of taxes alleging erroneous and illegal assessment by the District Director of the IRS. *Los Angeles Shipbuilding*, 152 F. Supp. at 237. The plaintiff argued that those two claims did not arise from the same operative facts because the facts it would have to prove to be successful in each court were different. *Id.* at 237-38. The court rejected that argument. *Id.* at 238. Conceding that

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[4] In its first case heard and first published decision, the Federal Circuit adopted as binding precedent the holdings of its predecessor courts, the United States Court of Claims and the United States Court of Customs Appeals, announced by those courts before the close of business September 30, 1982. *South Corp. v. United States*, 690 F.2d 1368, 1369-71 (Fed. Cir. 1982) (en banc).

the plaintiff would probably have to submit different proof to succeed in each court, the court held that did not defeat Section 1500's jurisdictional bar because "the issue in both cases [wa]s whether plaintiff overpaid its taxes in the [relevant] years." *Id.* The court explained that "[t]he *claim* in this court and in the District Court is for the refund of taxes in those years." *Id.* Here, the Nation's claims in both courts arise from the same alleged conduct by the government with respect to the management of the same trust property and funds of the Nation. That is all that is needed for claims to arise from the same operative facts for purposes of Section 1500. Thus, the simple fact that the Nation may need some different evidentiary proof to succeed in the District Court and the CFC does not demonstrate that the two complaints are based on different operative facts.

Similarly, in *Harbuck* the Court held that the plaintiff's Equal Pay Act claim in the CFC and her Title VII claim in the District Court were the same claim for purposes of Section 1500. The plaintiff contended that the two suits involved different claims because her Title VII complaint centered on her non-selection for promotion while her Equal Pay Act claim centered on her taking the position of a male employee

and not receiving the same pay. *Harbuck*, 378 F.3d at 1329. The Court rejected that argument and held that both claims arose out of the same operative facts -- the Air Force's alleged sexual discrimination against women by paying them less than men. *Id.* at 1328-29. Just as Harbuck's claims arose from the same operative facts so too do the Nation's -- from the same alleged government conduct with respect to the same trust property and funds.

The Nation's argument is also contrary to the long line of cases that hold that claims do not arise from different operative facts simply because a plaintiff proceeds in the District Court and CFC on different legal theories. A plaintiff proceeding on different legal theories will often have to prove different facts to succeed in each court. But it is well-established that proceeding on different legal theories in the CFC and another court is not enough to demonstrate that the claims arise from different operative facts. *Johns-Manville*, 855 F.2d at 1562-64; *see also British Am. Tobacco*, 89 Ct. Cl. at 440 (Section 1500 "has no reference to the legal theory upon which a claimant seeks to enforce his demand"). As the Court explained, "[s]ince the legal theory is not relevant, neither are the elements of proof necessary to present a prima

facie case under that theory." *Johns-Manville*, 855 F.2d at 1564. That disposes of the Nation's suggestion that its claims must arise from different operative facts because the Nation must prove different facts to succeed in the District Court and the CFC.

2. *The Nation erroneously relies on inapposite and non-binding authority*

In the face of that authority, the Nation relies on (Br. 24-26) a footnote in *Loveladies*, various CFC decisions, and one Claims Court decision for the proposition that the "operative facts" inquiry "requires a comparison of those facts material to the proof of the plaintiff's claims and does not extend to 'background facts.'" The *Loveladies* footnote, 27 F.3d at 1551 n.17, is of no help to the Nation.[5] To the extent that

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[5] That footnote states:

> 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. Because it is unnecessary for our decision in this case, we need not further refine the meaning of "operative facts."

Loveladies, 27 F.3d at 1551 n.17.

footnote might be read to suggest that the legal theory on which a plaintiff is proceeding is relevant to, or determinative of, the operative facts inquiry, the footnote is dicta. In *Loveladies*, the claims in the two courts sought distinctly different relief which was enough to establish that Section 1500 did not apply. Thus, whether the claims arose from the same operative facts was irrelevant and that question was not presented. *See Loveladies*, 27 F.3d at 1551-54 & n.17; *see also Passamaquoddy Tribe v. United States*, 82 Fed. Cl. 256, 282 (2008) (noting that *Loveladies* "is of little precedential assistance" on the operative facts inquiry because the Court did not have to apply that concept). If there were any doubt, it is resolved by the fact that, even after *Loveladies*, the Court has continued to reject the notion that legal theories matter for purposes of Section 1500. *Harbuck*, 378 F.3d at 1329.

The CFC and Claims Court decisions also do not help the Nation. They are non-binding, inapposite, and distinguishable. For example, in *Heritage Minerals, Inc. v. United States*, 71 Fed. Cl. 710 (2006) and *Cooke v. United States*, 77 Fed. Cl. 173 (2007), the CFC denied a motion to dismiss based on Section 1500 because the operative facts of the relevant claims implicated later and different conduct by the

government. In *Heritage Minerals*, the underlying facts supporting the plaintiff's claims in the District Court and the CFC were temporally distinct and different government conduct. 71 Fed. Cl. at 715-16 (operative facts of District Court action were Navy's alleged contamination of the groundwater at its base starting in 1958 and the migration of those chemicals; operative facts for CFC action stemmed from subsequent government action of installing monitoring wells and 2001 administrative order requiring plaintiff to permit Navy to install well and enter its property to monitor and maintain wells). Likewise, in *Cooke*, the CFC denied a Section 1500 motion because the plaintiff's Fair Labor Standards Act claim involved "'later and different conduct'" than her Equal Pay Act claim. 77 Fed. Cl. at 177.

The same is true of *d'Abrera v. United States*, 78 Fed. Cl. 51 (2007). There the CFC likewise found that the plaintiffs' claims involved "different conduct." *Id.* at 58. In fact, in *d'Abrera* the plaintiffs' claim in the CFC "contain[ed] material factual allegations that [we]re in direct opposition with the claims they made in the district court." *Id.* at 59. The reasoning involved in *Heritage Minerals*, *Cooke*, and *d'Abrera* was also at work in the other cases on which the Nation relies. *See Fire-Trol*

Holdings, LLC v. United States, 65 Fed. Cl. 32, 34-35 (2005) (claims did not arise from the same operative facts because the action before the CFC was rooted in a substantive challenge to the actual procurement, whereas the facts underlying the District Court action were related to the plaintiff's challenge to the rulemaking); *William v. United States*, 71 Fed. Cl. 194, 200 (2006) (operative facts in each case were "demonstrably different" and it was readily apparent plaintiff "specifically and successfully endeavored to plead different factual element in each case"); *Branch v. United States*, 29 Fed. Cl. 606, 609-10 (1993) (District Court action was for fraudulent transfer while CFC action was taking claim based on the specific, discrete, and later event of FDIC's assessment); *Lucas v. United States*, 25 Cl. Ct. 298, 305 (1992) (District Court and Claims Court actions based on "two entirely separate contracts with distinct terms and purposes").

Unlike the circumstances presented in those non-binding cases, the Nation's District Court and CFC complaints do not challenge temporally-distinct or unrelated government conduct, nor do the Nation's complaints implicate demonstrably different underlying facts. Instead, the operative facts, that is, what the government allegedly did

with respect to managing the Nation's trust property and funds, are the same in both the District Court and CFC cases. *See also* supra at 3-8, 18-19.

3. *The Nation is wrong that there is limited overlap in the fact's relevant to its claims and that the CFC erred in relying on supposed "background facts"*

The Nation also asserts (Br. 32-34) that, at best, there is limited overlap in the operative facts to its claims in the District Court and the CFC. The Nation argues (Br. 33) that "[a]n overlap in the parties that are trustee and beneficiary, and even in the property involved, is, as a matter of law, insufficient." Initially, the Nation's apparent assertion that some overlap in operative facts is insufficient as a matter of law is erroneous. *See Passamaquoddy Tribe*, 82 Fed. Cl. at 282 ("*Johns-Manville* discussed the 'same' operative facts issue and concluded that precedent compelled dismissal of a claim in this court even where *only some* of the operative facts were the same as those supporting a claim pending before another federal court." (Emphasis added)). In any event, there isn't only some overlap in the parties and property involved. Instead, both the Nation's District Court and CFC complaints put at issue the same conduct by the government. As

discussed, in order to arrive at an accounting and accurate restatement of the Nation's trust account (the District Court action) or an accurate award of monetary damages (the CFC action), both courts must consider and analyze the same operative facts, specifically, the nature of the receipts and transactions evidencing collections, deposits, and investments related to the Nation's trust property and funds. Quite simply, there is a material overlap between the operative facts in the Nation's District Court and CFC complaints, and the two actions clearly arise out of the same operative facts.

The Nation contends (Br. 33-34) that while it included allegations of mismanagement and lack of prudent investment in both its District Court and CFC complaints those allegations "do not involve operative facts in the District Court but only in the CFC." According to the Nation (Br. 34), those allegations were included in the District Court complaint "merely as context and illumination -- that is, as background." But that simply is not the case. The Nation repeatedly tries to characterize its District Court action as one merely to compel the government to produce an accounting for the Nation's trust property and funds. In doing so, the Nation ignores a substantial

component of its District Court action -- that the Nation seeks an accounting *and* restatement of its trust account. JA 52. Indeed, the Nation has proposed a two-phased litigation for its District Court complaint in which the District Court will first issue declaratory relief as to the fiduciary duties applicable to the trust and then a decree directing a restatement and correction of the Nation's trust account balances in accordance with the results of the accounting.[6] In order to come up with an accurate restatement of the Nation's trust account, the District Court must necessarily address and resolve what, if any, mismanagement or lack of prudent investment occurred. Thus, those allegations in the Nation's District Court complaint are not the simple

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[6] In the parties' joint status report in the District Court, the Nation has proposed that the litigation be divided into two phases. In the first phase, the District Court would issue declaratory relief as to the fiduciary duties applicable to the trust. JA 73-74, 77-78. In the second phase (which the Nation terms (JA 77) "Accounting Trial & Remedies") the Nation seeks an accounting, followed by a decree from the District Court directing a restatement and correction of its trust account balances in accordance with the results of the accounting. JA 73-74 ("[T]o the extent the accounting demonstrates errors in the account balances, whether positive or negative, [the Nation] seeks a decree directing restatement and correction of [the Nation's] trust account balances reflecting the results of the accounting."), 91 ("[T]he Accounting Trial findings will serve as proper basis for the Court to determine whether the [Nation's] account balances are accurately stated or need adjustment.").

"background" or "context" that the Nation suggests. Instead, they are very much at issue in the District Court litigation, and the Nation's District Court claims clearly arise out of those operative facts.

Moreover, the Nation's argument basically faults the CFC for taking seriously the allegations made by the Nation in each of its complaints. The Nation belittles (Br. 31) the CFC's thorough analysis by portraying it as a simple side-by-side comparison of the District Court and CFC complaints and criticizes the CFC for failing to tease out the "non-operative" facts. As discussed above, however, when properly considered, the Nation's claims clearly arise from the same operative facts. And in any event, as the Nation recognizes elsewhere (Br. 53), the Nation is the master of its complaint, and if the Nation intended to bring different claims in the two courts it should have written its complaints to make that clear. It is the plain language of the complaint, the facts alleged and relief sought, that controls for purposes of Section 1500. *Dico*, 48 F.3d at 1203-04. As the Court has put it, "If a plaintiff in fact has two different claims . . . then it is the responsibility of the plaintiff to allege, clearly and with specificity, that different claims are involved in its two actions." *Id.* at 1204. The Nation cannot

now reinvent its claims and fault the CFC's analysis by re-characterizing the complaints' factual allegations as ill-considered "background" or "non-operative" facts. The CFC correctly examined the language of the complaints the Nation drafted and filed and determined that the Nation's claims arise from the same operative facts.

4. *The fact that the government could theoretically prevail in one court but not the other is irrelevant to whether the Nation's claims arise from the same operative facts*

The Nation also asserts (Br. 30) that because the government could theoretically prevail in one forum (either the District Court or the CFC litigation) but lose in the other demonstrates that its claims do not arise from the same operative facts. That argument fails. The Nation's argument is really just a "repackaging" of its argument that its claims do not arise from the same operative facts because the elements it must prove in each court (or the legal theory on which it is proceeding in each court) are different. A theoretical possibility of success by the government in one court but not the other is present whenever a plaintiff proceeds on different legal theories in the District Court and

the CFC. For example, where a plaintiff proceeds on a tort theory in one court and a contract theory in another, it is theoretically possible for the government to win in one forum but lose in the other. The government could prove that no contract existed, but still be liable in tort, or vice-versa. Nonetheless, as previously demonstrated (*supra* at 15-16, 23-24), the Court has rejected the argument that a plaintiff's claims arise from different operative facts because it is proceeding on different legal theories in the District Court and the CFC. That requires the Court to reject the Nation's argument here too.

In sum, the CFC correctly determined that the Nation's claims in the District Court and CFC arise from the same operative facts.

B. The Nation's District Court and CFC Complaints Do Not Seek Distinctly Different Types Of Relief

1. The Nation seeks monetary relief in both courts

Even where claims in the District Court and the CFC arise from the same operative facts, this Court has stated that the claims are not sufficiently related for purposes of Section 1500 where a plaintiff seeks "distinctly different types of relief in the two courts." *Loveladies*, 27 F.3d at 1554. Here, the court properly concluded that the Nation's

District Court and CFC complaints do not seek distinctly different relief and therefore Section 1500 deprived the CFC of jurisdiction.

The Nation contends (Br. 37) that it "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." In making that argument, the Nation emphasizes (Br. 48-50) that its District Court claim is one for an "equitable accounting" and characterizes that relief as "principally informational." The Nation goes so far as to contend (Br. 48) that "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."

Try as it might to characterize its District Court action as simply one for accounting that only hints at some future monetary award (Br. 48), the Nation cannot escape the fact that its District Court complaint seeks an accounting plus a restatement of its trust account balances to reflect the amount that should be there (including monies that the government failed to, but should have collected, deposited, and invested). JA 44, 51-52. The correction, or "restatement," of the

Nation's trust account balances is not simply correcting a mathematical error on an account ledger; it involves an infusion of cash.[7] If there were any doubt that the Nation wants the government to put real money in its trust account in accordance with the restatement, the District Court complaint resolves the doubt when the District Court complaint specifically seeks disgorgement and equitable restitution. JA 51-52. As discussed above, *supra* at 17-19, 29-31, the accounting that the Nation seeks would be tailored to specifications from the District Court in the form of a declaratory judgment as to the nature and scope of the fiduciary duties owed by the government with respect to the trust property and funds. That would then be followed by a restatement of account balances and associated monetary relief (including disgorgement or equitable restitution). JA 52. The Nation's CFC complaint seeks monetary relief arising out of the same government conduct. The Nation therefore does not seek distinctly different relief in the two courts. It is of no significance that the legal theory supporting the monetary relief in the District Court and the CFC may be different. *See also supra* at 15-16, 23-24. And because the monetary

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[7] *See supra* note 2.

relief that the Nation seeks in the CFC and the District Court are all premised on the same alleged breaches, the Nation's assertion (Br. 37-41) that it cannot obtain all the relief it seeks (an accounting and money) unless it proceeds in both courts is wrong. And in any event, the point of Section 1500 is to put a plaintiff to an election of what court it wants to proceed in; the fact that a plaintiff may not be able to proceed on a particular legal theory in a court is irrelevant. *See Keene*, 508 U.S. at 213-14; *Johns-Manville*, 855 F.2d at 1564-65. In addition, as explained *infra* at 40-42, the relevant question for purposes of Section 1500 is not what relief the Nation may be able to obtain given each court's jurisdictional limits, but instead, what relief does the Nation's complaint in each court *seek*?

While the Nation asserts (Br. 37) this case is like *Loveladies* and *Casman*, it is not. In both *Loveladies* and *Casman*, the relief sought in the District Court and the CFC was distinctly different in nature, whereas here the Nation seeks monetary relief in both courts. In *Loveladies*, the plaintiff challenged in the District Court the government's denial of a permit to fill wetlands (non-monetary relief) while in the CFC the plaintiff sought money damages, maintaining that

the denial of the permit constituted a taking and the Fifth Amendment required compensation. *See* 27 F.3d at 1553. In *Casman*, the plaintiff was separated from his position as a member of the Board of Review, Office of Military Governor. 135 Ct. Cl. at 648. In the District Court he sought to be restored to his prior position while in the CFC he sought a money judgment for back pay. *Id.* Thus, "the claim in [the Court of Claims] and the relief sought in the district court [we]re entirely different." *Id.* at 649-50. In stark contrast to those cases, the Nation has monetary claims in both its District Court and CFC complaints. That is all the overlap in relief that is required for Section 1500 to apply. The Nation's demand for an equitable restatement of its trust fund account balances and the associated money implicates the same monetary relief it seeks in the CFC.

The Nation nonetheless maintains that the monetary relief it seeks in the District Court is not the same relief as, and does not overlap with, the monetary relief it seeks in the CFC. The Nation bases that argument on various contentions, none of which has any merit. According to the Nation (Br. 51-52), in the District Court it does not seek compensation for "pecuniary losses suffered as a result of the

government's failure prudently to manage and invest the trust assets." The Nation asserts (Br. 51, 52) that in the District Court it seeks only "'old money' that is already in the hands of the government or a third party" while in the CFC it seeks only to make the government "pay 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." The distinction between "old" and "new" money that the Nation seeks to draw lacks any basis as a practical matter. In any event, a plain reading of the Nation's District Court complaint belies the Nation's current assertion that it seeks monetary compensation only for "old money." The District Court complaint alleges the same mismanagement of trust property and funds claims as well as failure to invest claims that the CFC complaint does. The District Court complaint then seeks an accounting and restatement of the Nation's trust account accordance with that accounting. Nothing in the District Court complaint limits the accounting and the monetary relief to "old

money."[8] Indeed, if the Nation is correct in its allegation that the United States did not prudently manage and invest the Nation's assets, it would be more than passing strange for the accounting and restatement of the Nation's trust account in the District Court not to reflect the proper balance of its account (i.e., the balance absent any proven mismanagement or lack of prudent investment). Otherwise, the accounting and restatement would not be an accurate statement of the Nation's trust account.

Nor is the money that the Nation seeks in the CFC somehow limited to "new money." As the CFC correctly described it, in the CFC "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." 79 Fed. Cl. at 658 n.14. The Nation offers no explanation (and there is none) as to how its requested monetary relief in the CFC would not include an

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[8] Thus, while the Nation faults (Br. 54-55) the CFC for supporting its conclusion that the Nation seeks both "old" and "new" money in the District Court with a review of the equitable remedies that were traditionally available for breaches of trust, one need not even resort to that inquiry. The plain language of the Nation's District Court complaint seeks both "old" and "new" money.

award for what the Nation calls "old money" -- money in the hands of the government or a third party that isn't in the Nation's account.

The Nation raises two additional, related arguments to support its assertion that it seeks only "old money" in the District Court while it seeks "new money" in the CFC. The Nation asserts (Br. 56) that the CFC over-read the District Court complaint's prayer for "additional equitable relief that may be appropriate," including disgorgement and equitable restitution. JA 51.[9] First, the Nation says (Br. 56) that request was mere boilerplate and should have been read by the CFC *not* to include a request for a restatement and money that the Nation would have in its account if the United States had complied with its fiduciary obligations. Second, the Nation says (Br. 56-57) that the CFC should have narrowly construed that boilerplate so as not to exceed the District Court's jurisdiction because extra-jurisdictional relief would not be "appropriate." The Nation's contentions lack merit. The

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[9] The paragraph of that relief request in the District Court complaint asks "[f]or 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)." JA 52.

fundamental problem with the Nation's assertions is that the language of the complaint controls, not the construction of the complaint that the Nation now puts forth. *See Dico*, 48 F.3d at 1203-04; *Keene*, 508 U.S. at 201 (requiring "some overlap in the *relief requested*" (emphasis added)). As set forth above, it is clear (even without reference to the Nation's supposed "boilerplate") that the Nation's District Court complaint seeks more than simply an accounting and seeks more than simply "old money." The Nation seeks in the District Court a decree of the fiduciary duties owed by the government and the breaches of those duties by the government (and the complaint includes allegations that the government has breached its duty to obtain maximum return on the trust properties and funds), an accounting in accordance with that decree, and a restatement of its trust account balances in accordance with that accounting, resulting in money flowing to the Nation. The Nation also is incorrect when it suggests that the CFC erred by not narrowly construing the relief the Nation seeks in the District Court based on that court's jurisdictional limits or the validity of the Nation's claims there. Section 1500 is concerned with only the relief *sought* in the District Court and the CFC. As was recognized long ago, "The

applicability of [Section] 1500 . . . is not conditioned upon the question of whether the District Court ha[s] jurisdiction of the claim asserted by the plaintiff therein." *Frantz Equip. Co. v. United States*, 98 F. Supp. 579, 580 (Ct. Cl. 1951).

Finally, the Nation asserts (Br. 58-62) that it seeks "equitable" monetary relief (e.g., disgorgement and equitable restitution) in the District Court which, the Nation maintains, is not the same relief as the "money damages" it seeks in the CFC and therefore Section 1500 is not applicable. At bottom, the Nation's argument is that, even though it seeks monetary relief in both the District Court and the CFC based on the same operative fact, it nonetheless seeks distinctly different relief in the two courts because the basis on which it seeks the monetary relief is different. The Nation's contention is wrong. Section 1500 does not turn on a narrow definition of "money damages" to be invoked. "Congress did not intend the statute to be rendered useless by a narrow concept of identity providing a correspondingly liberal opportunity to maintain two suits arising from the same factual foundation." *Keene*, 508 U.S. at 213. Instead, Section 1500 was designed to force plaintiffs to choose between pursuing their claims in the CFC or in another court

and in this way to prevent the United States from having to defend against the same claim in both courts. *Harbuck*, 378 F.3d at 1328. A necessary corollary to those principles is that Section 1500 prevents the government from being exposed to the potential for duplicate liability. Thus, it is the *form* of the relief that matters -- here, money -- not the theory by which the Plaintiff seeks to recover that money.[10] As discussed, the Nation seeks monetary relief for the same conduct in both the District Court and the CFC. A plaintiff cannot nimbly avoid Section 1500's jurisdictional bar simply by labeling the money it seeks to recover as "equitable" in one court and "damages" in another.

This Court addressed an argument similar to the Nation's in *Dico*. There, Dico claimed that it pursued different relief in the District Court and the CFC for purposes of Section 1500 even though it sought money in both courts. Dico argued the relief it sought was different because in the District Court it "sought reimbursement under CERCLA of monies expended pursuant to an EPA order and for which Dico was not

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[10] A rule that it is the *form* of relief sought in the two courts that matters for purposes of Section 1500 is consistent with the long-standing proposition that the Section 1500's jurisdictional bar will not be defeated simply because a plaintiff proceeds in the CFC and another court on different legal theories. *See supra* at 15-16, 23-24.

actually liable," while in the CFC Dico "sought money damages for deprivation of its property rights." *Dico*, 48 F.3d at 1202. Dico distinguished those two types of money on the grounds that one was "money damages" (the CFC) while the other (the District Court) was "statutory reimbursement," which Dico called "monetary relief." *Id.* The Court rejected Dico's argument and held that the complaints sought the same or overlapping relief and therefore Section 1500 applied. *Id.* at 1203. The Court found it dispositive that Dico sought money in the same amount in both courts for the same expenses. *Id.* It made no difference that Dico characterized the money sought in one court as damages and in the other court as statutory reimbursement or monetary relief. It was the form of relief that was critical. *Cf. Keene*, 508 U.S. at 216 (noting no need to address *Casman* exception for plaintiffs who seek distinctly different types of relief in two courts because "Keene had sought *monetary relief* in each of the cases pending when it filed the complaints seeking monetary relief" in CFC (emphasis added)); *United States v. County of Cook*, 170 F.3d 1084, 1091 (Fed. Cir. 1999) (claims "seek the same relief -- money with interest, albeit under different theories (tax law versus a Fifth Amendment takings theory)").

The same is true here. The Nation seeks monetary relief in both courts arising from the same operative facts, it has just labeled the money it seeks in each court differently.[11] Section 1500 cannot be defeated so easily.

2. *The Nation seeks relief in the form of an accounting in both courts*

The overlap in monetary relief sought by the Nation in the District Court and the CFC is sufficient to demonstrate that the Nation does not seek "distinctly different relief" in the two courts. Nonetheless, the CFC found additional overlap in the accounting relief that may be obtained in the two courts. 79 Fed. Cl. at 659 ("Independent, therefore, of the monetary relief aspects of the two complaints, there is overlap in the request for an accounting."). The

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[11] The Nation's reliance on *Bowen v. Massachusetts*, 487 U.S. 879 (1988), is misplaced because the label by which a plaintiff seeks monetary relief in two different courts is irrelevant for purposes of Section 1500. *Bowen* merely recognized that the fact that a judicial remedy may require a party to pay money to another is insufficient in and of itself to characterize the relief as "money damages." *See* 487 U.S. at 893. Here, it matters not whether the monetary award sought by the Nation in the District Court of the CFC is "money damages" per se. Instead, the inquiry is whether the Nation has asserted a claim seeking *monetary* relief in the District Court and the CFC (which it does), and whether such claims arise under the same operative facts (which they do).

Nation argues (Br. 42-43) that the court erred because the prayer for relief in the Nation's CFC complaint did not specifically request an accounting. The Nation does allege in its CFC complaint, however, that the United States breached its duty to complete and furnish an accurate and adequate historical accounting of all the trust property. JA 61-62. The Nation also includes an allegation that the United States has not provided a complete and accurate accounting in three of the CFC complaint's four counts. JA 63-65. And in the prayer for relief in its CFC complaint, the Nation seeks "a determination that the [United States] is liable to the Nation in damages" for its breaches of fiduciary duty and "a determination of the amount of damages due to the Nation." JA 67. Given the nature of the Nation's claim in the CFC, the court reasonably and properly concluded that, if the Nation is successful in demonstrating it is entitled to an award of damages, "an accounting is unavoidable here." 79 Fed. Cl. at 659. A plaintiff should not be allowed to avoid Section 1500's jurisdictional bar simply by omitting an explicit reference to relief that is an unavoidable consequence (here, an accounting) of the relief the plaintiff otherwise seeks.

The Nation also complains (Br. 44-47) that the CFC erred because any accounting the Nation may obtain in the CFC proceedings is a limited one -- an accounting in aid of judgment for the breaches proven by the Nation. In contrast, the Nation says (Br. 44), the accounting it seeks in the District Court will be a "general pre-liability equitable accounting," regardless of any showing of entitlement to monetary relief. Even accepting the Nation's distinction between the accountings in the two courts, the Nation acknowledges that the accounting it seeks in its District Court lawsuit is at least as broad as the one it may obtain in the CFC if the Nation is successful in establishing it is entitled to damages. That is so because the "pre-liability" accounting the Nation seeks in the District Court will be based on a decree as to the government's fiduciary obligations. Similarly, any accounting in aid of judgment in the CFC would be coextensive with the breaches of trust (if any) proven by the Nation. Thus, the accounting that the Nation may receive if it is successful in both the District Court and the CFC are sufficiently overlapping to trigger Section 1500. *See also E. Shawnee Tribe of Okla. v. United States*, No. 06-917, 2008 WL 2554943, at *6-8 (Fed. Cl. June 23, 2008) (finding plaintiff sought same accounting relief

in District Court and CFC in analogous circumstances and dismissing under Section 1500). In any event, it is the form of relief that matters, and in both courts, should the Nation ultimately be able to prove it is entitled to an accounting in the District Court and damages in the CFC, the relief would be accompanied by an accounting and therefore the relief sought is not "distinctly different."[12]

To summarize, the Nation seeks monetary relief in both the District Court and the CFC arising out of the same operative facts, and therefore the Nation does not seek distinctly different relief in the two courts. Moreover, although the overlap in monetary relief is sufficient for Section 1500's jurisdictional bar, the CFC correctly held that the Nation also seeks accounting relief in the District Court and CFC. The

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[12] There is even more overlap in the relief sought by the Nation in the two courts. In the District Court, the Nation seeks a decree as to the fiduciary duties the United States owes to the Nation and that the United States has failed to meet those obligations. JA 52-53. Similarly, in the CFC, the Nation seeks a determination that the United States is liable to the Nation in damages for injuries and losses caused by the alleged breaches by the United States of the same fiduciary duties. JA 67. Thus, in this sense too the Nation seeks the same relief in both the District Court and the CFC -- a determination of the government's fiduciary duties to the Nation and that the government has breached those duties.

CFC properly concluded that the Nation's claims do not seek "distinctly different" relief so as to avoid Section 1500's jurisdictional bar.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

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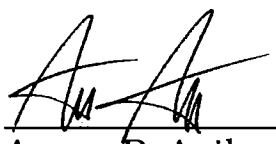

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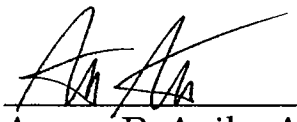

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