No. 09-1521

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

EASTERN SHAWNEE TRIBE OF OKLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C. 1500, the Court of Federal Claims (CFC) does not have jurisdiction over "any claim for or in respect to which the plaintiff * * * has * * * any suit or process against the United States" or its agents "pending in any other court." The question presented is:

Whether 28 U.S.C. 1500 deprives the CFC of jurisdiction over a claim seeking monetary relief for the government's alleged violation of fiduciary obligations if the plaintiff has another suit pending in federal district court based on substantially the same operative facts that seeks relief paralleling the relief available in the CFC.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 582 F.3d 1306. The order of the court of appeals denying panel rehearing (App., *infra*, 33a-35a) and an opinion dissenting from the denial of rehearing (App., *infra*, 36a-39a) are reported at 598 F.3d 1326. The opinion of the Court of Federal Claims (App., *infra*, 16a-32a) is reported at 82 Fed. Cl. 322.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 2009. A petition for rehearing was denied

on March 17, 2010 (App., *infra*, 33a-39a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1500 of Title 28 of the United States Code 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.

STATEMENT

1. Section 1500 of Title 28 provides that the Court of Federal Claims (CFC) shall not have jurisdiction of "any claim for or in respect to which" the plaintiff has "any suit or process" against the United States or an agent thereof "pending in any other court." 28 U.S.C. 1500. In *Keene Corp.* v. *United States*, 508 U.S. 200 (1993), this Court explained that Section 1500's prohibition on CFC jurisdiction over a claim "for or in respect to which" the plaintiff has a pending suit "requires a comparison between the claims raised in the [CFC] and in the other lawsuit." *Id.* at 210. The Court also reasoned that Congress's use of the disjunctive "or" in the phrase "for or in respect to which" demonstrates that Section 1500 bars CFC jurisdiction "not only as to claims 'for . . . which' the plaintiff has sued in another court," but also "as to those [CFC claims] 'in respect to which' he has sued elsewhere." *Id.* at 213. The latter restriction,

Keene concluded, "make[s] it clear that Congress did not intend the statute to be rendered useless by a narrow concept of identity" of the CFC claim and the other lawsuit, which would mistakenly allow a "liberal opportunity to maintain two suits arising from the same factual foundation." *Ibid.*

Keene ultimately held that Section 1500 requires dismissal of a CFC claim when "the plaintiff's other suit [is] based on substantially the same operative facts as the [CFC] action," "at least" if there is "some overlap in the relief requested." 508 U.S. at 212.* Dismissal is required, the Court held, even if the other action is "based on [a] different legal theor[y]" that could not "have been pleaded" in the CFC. *Id.* at 212-214. Although the Court observed in *Keene* that Section 1500 has been criticized as "anachronistic" and acknowledged that Section 1500's jurisdictional restrictions may "deprive plaintiffs of an opportunity to assert rights," the Court stressed that the courts "enjoy no 'liberty to add an exception . . . to remove apparent hardship.'" *Id.* at 217-218 (quoting *Corona Coal Co.* v. *United States*, 263 U.S. 537, 540 (1924)). Such concerns, the Court explained, must be directed to "Congress, for [it is] that branch of the government" that has "the constitutional authority to define the jurisdiction of the lower federal courts" and that has "limited the jurisdiction of the Court of Claims"

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* *Keene*'s proviso regarding the existence of "at least * * * some overlap" in the requested relief, 508 U.S. at 212, reflected the Court's choice to reserve decision on the question whether a "judicially created exception[]" to Section 1500 might be proper to allow two suits involving substantially the same operative facts to proceed if the plaintiff seeks "completely different relief" in the CFC and the other court. *Id.* at 212 n.6, 214 n.9, 216 (discussing *Casman* v. *United States*, 135 Ct. Cl. 647 (1956)).

in Section 1500. *Id.* at 207, 217-218 & n.14 (quoting *Smoot's Case*, 82 U.S. (15 Wall.) 36, 45 (1873)).

2. On December 20, 2006, the Eastern Shawnee Tribe of Oklahoma (Tribe) filed a complaint in the United States District Court for the District of Columbia alleging that the United States had breached its trust duties to the Tribe. App., *infra*, 4a. The Tribe's district-court complaint seeks, *inter alia*, a full and complete accounting of the Tribe's trust funds and "such other relief as may be just and equitable." *Id.* at 5a-6a.

Eight days later, on December 28, 2006, the Tribe filed a similar complaint in the CFC, alleging that the government breached its trust duties to the Tribe and seeking both money damages and "[a]ny and all other relief * * * permitted by * * * applicable law." App., *infra*, 6a. The Tribe's CFC complaint specifically referred to the Tribe's pending suit in district court and stated that the Tribe's CFC action "seeks damages on [any] claims" that might be revealed as a result of any accounting ordered by the district court. *Id.* at 20a (quoting Compl. ¶ 31).

3. The CFC dismissed the Tribe's action in the CFC for want of jurisdiction, concluding that the Tribe's two lawsuits triggered Section 1500's jurisdictional bar because they concern the same operative facts and seek the same relief. App., *infra*, 16a-32a.

The CFC concluded that the Tribe's two complaints involved the same operative facts, App., *infra*, 23a-27a, because they "involve the same parties, the same trust corpus, and the same breach of the same trust duties over the same time period." *Id.* at 25a. The two actions, the court explained, "are basically different manifestations of the same underlying claim that the government failed properly to administer and manage [the Tribe's]

trust land and assets." *Ibid.* The court illustrated the overlap in the two cases by observing that the Tribe itself had indicated that it "seeks an accounting" in district court "to determine whether, and to what extent, the Tribe has suffered losses as a result of the government's [purported] breaches of trust" for which the Tribe's complaint seeks money damages in the CFC. *Id.* at 26a.

The CFC also concluded that the Tribe's suits sought the same relief because they sought "overlapping" and not "distinctly different" relief. App., *infra*, 27a-31a. The court reasoned that the Tribe's CFC action would require "the equitable 'relief' of an accounting [as] a necessary precursor to an award of damages" for a breach of trust, and that "that accounting would overlap with the accounting available * * * in district court." *Id.* at 27a-28a. The court observed that the Tribe's own statements reflect that the Tribe "recognizes that the accounting sought in district court is inextricably linked to the recovery of damages in this court," and concluded that the district court relief, which would determine the quantum of damages for the CFC action, "does not have considerable value independent of [a] monetary recovery" in the CFC. *Id.* at 29a-31a.

4. a. The Federal Circuit reversed and remanded. App., *infra*, 1a-15a. The court explained that its recent decision in *Tohono O'odham Nation* v. *United States*, 559 F.3d 1284 (2009), cert. granted, No. 09-846 (Apr. 19, 2010) (*Tohono*), was controlling and that, "[f]or the same reasons described in *Tohono*, § 1500 does not bar the [CFC] here from exercising jurisdiction over the Tribe's claims." App., *infra*, 10a; see *id.* at 2a.

The court of appeals explained that, under its precedents, Section 1500's jurisdictional bar is triggered only

when the plaintiff's suit in another court "arise[s] from the same operative facts" and seeks "the same relief" as its claims in the CFC. App., *infra*, 8a (citation and emphasis omitted). Because the Tribe "d[id] not persuasively dispute" that its CFC claims and district court suit "arise from the same set of operative facts," the court reasoned that "[t]he question is whether the complaints seek the same relief." *Ibid.*

The court of appeals explained that its decision in *Tohono* had made clear that it is only "the relief that the plaintiff *requests* that is relevant under § 1500." App., *infra*, 8a (quoting *Tohono*, 559 F.3d at 1291). *Tohono*, it explained, "examined similar issues" and "distinguished between the [plaintiff's] claims in the district court, which sought only equitable relief, and [its] claims in the [CFC], which sought only damages at law." *Ibid.* Although the plaintiff in *Tohono* "requested an equitable accounting" in district court and could similarly obtain "an accounting in aid of judgment" in the CFC, the court of appeals in *Tohono* held that Section 1500's jurisdictional bar did not apply because the plaintiff ultimately "requested different relief" because its CFC complaint only specifically "requested a legal remedy," namely, money damages. *Id.* at 8a-9a.

In this case, the court of appeals did not find it significant that the CFC would "have the authority to order an equitable accounting as ancillary relief" to the Tribe's claims for damages. App., *infra*, 3a. The court instead found dispositive the fact that "consequential damages were not sought in the district court and the district court could not award consequential damages." *Id.* at 9a. It thus concluded that, "[u]nder *Tohono*, * * * § 1500 is inapplicable." *Id.* at 10a-11a.

Judge Moore concurred. App., *infra*, 11a-15a. She agreed that, "under our holding in *Tohono*, [the court] must reverse." *Id.* at 14a. She explained that, *inter alia*, the majority unnecessarily read *Tohono* to depart from this Court's decision in *Keene* by requiring more than "some overlap in the relief requested." *Id.* at 12a-13a (citation omitted).

b. The court of appeals denied the government's rehearing petition in a published order. App., *infra*, 33a-39a. The court found "no conflict in our precedent" to warrant panel rehearing and explained that the government's petition for a writ of certiorari in *Tohono* confirmed that conclusion. *Id.* at 34a-35a. Judge Moore dissented. *Id.* at 36a-39a.

REASONS FOR GRANTING THE PETITION

In this case, the Federal Circuit held that 28 U.S.C. 1500 does not apply where a plaintiff who has brought a damages claim in the CFC has another suit pending in federal district court based on substantially the same operative facts, even though the plaintiff seeks relief in district court that would parallel the relief that the CFC would grant in resolving a claim for damages. The court of appeals concluded that this case was fully resolved by its decision in *Tohono*, App., *infra*, 10a, and, after that decision, this Court granted the government's petition for a writ of certiorari to review the Federal Circuit's judgment in *Tohono*. Because this case presents a question materially the same as that in *Tohono*, and because the court of appeals concluded that its decision in *Tohono* resolved the present case, the petition for a writ of certiorari in this case should be held pending the Court's decision in *Tohono*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *United States* v. *Tohono O'odham Nation*, No. 09-846, and then disposed of accordingly.

Respectfully submitted.

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JUNE 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2008-5102

EASTERN SHAWNEE TRIBE OF OKLAHOMA,
PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Filed: Sept. 17, 2009

Before: GAJARSA, DYK, and MOORE, Circuit Judges.

Opinion for the court filed by Circuit Judge DYK. Concurring opinion filed by Circuit Judge MOORE.

DYK, Circuit Judge.

The Eastern Shawnee Tribe of Oklahoma ("the Tribe") brought suit in the Court of Federal Claims, alleging that the United States had breached fiduciary and other duties as trustee of property and other assets owned by the Tribe. The Court of Federal Claims dismissed the case without prejudice, holding that 28 U.S.C. § 1500 precluded the Court of Federal Claims' jurisdiction over the Tribe's claims because the Tribe had earlier filed a district court complaint "aris[ing] from the same operative facts and seek[ing] essentially the same relief." *E. Shawnee Tribe of Okla. v. United*

States, 82 Fed. Cl. 322, 329 (2008). Recently in *Tohono O'odham Nation v. United States,* 559 F.3d 1284 (Fed. Cir. 2009), we held in similar circumstances that § 1500 was inapplicable because the complaints sought different relief in the Court of Federal Claims and in the district court. Accordingly, we reverse and remand.

INTRODUCTION

The United States has important trust obligations to Indian tribes. Various suits have been brought asserting breaches of those duties, including the failure to provide an accurate accounting of lease payments received by the United States on behalf of the tribes, an obligation that is now reinforced by statute. *See* American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 (codified at 25 U.S.C. §§ 4001-61). This case once again involves claims by an Indian tribe against the United States for breach of such trust duties, as well as questions as to the respective jurisdictions of the United States District Court for the District of Columbia and the Court of Federal Claims.

The Administrative Procedure Act ("APA") appears to provide that claims seeking monetary recovery and an equitable accounting for breach of trust duties must be brought in the Court of Federal Claims. Under the APA, the district court lacks jurisdiction unless parties are "seeking relief other than money damages." 5 U.S.C. § 702. Claims for monetary recovery and an equitable accounting appear to be essentially for "money damages" (as the Court of Federal Claims held here, *E. Shawnee,* 82 Fed. Cl. at 329). As the Supreme Court has recently noted, "[a]lmost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the

plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 210 (2002) (quoting *Bowen v. Massachusetts,* 487 U.S. 879, 918-919 (1988) (Scalia, J., dissenting)) (alteration in original) (quotation marks omitted). In addition, the district court lacks jurisdiction unless "there is no other adequate remedy in a court." 5 U.S.C. § 704. Again there appears to be an "adequate remedy" in the Court of Federal Claims. The Court of Federal Claims can award monetary relief and appears to have the authority to order an equitable accounting as ancillary relief, the Tucker Act having been amended in 1982 "to permit the Court of Federal Claims to grant equitable relief ancillary to claims for monetary relief over which it has jurisdiction, *see* 28 U.S.C. §§ 1491(a)(2), (b)(2)." *Nat'l Air Traffic Controllers Ass'n v. United States,* 160 F.3d 714, 716 (Fed. Cir. 1998).[1]

The United States Court of Appeals for the District of Columbia Circuit—we think incorrectly—has nonetheless held that §§ 702 and 704 of the APA do not bar a suit in the district court for an equitable accounting and the award of monetary relief, though it has agreed that some forms of monetary relief are unavailable in the district court and must be sought in the Court of Federal Claims. *See Cobell v. Norton,* 240 F.3d 1081,

[1] Before the 1982 amendment the Court of Federal Claims appears to have lacked such authority. *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." (citations omitted)).

1094, 1104 (D.C. Cir. 2001). The result is that responsibility for resolving these breach of trust controversies is split between the district court and the Court of Federal Claims.

The question presented here is whether a suit filed in the Court of Federal Claims seeking relief that was not sought in the district court and that the district court cannot award (even under the D.C. Circuit's expansive theory of district court jurisdiction) is barred by the provisions of 28 U.S.C. § 1500.

Section 1500 provides 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.

BACKGROUND

The Tribe is a federally recognized sovereign Indian tribe living in northeastern Oklahoma. The United States holds and manages funds, land, and resources in trust for the Tribe.

On December 20, 2006, the Tribe filed a complaint in the District Court for the District of Columbia against the Secretary of the Interior, the Special Trustee for American Indians, and the Secretary of the Treasury, alleging that the United States had breached its trust duties to the Tribe. *See* Complaint at 10, *E. Shawnee Tribe of Okla. v. Salazar*, No. 1:06-cv-02162-JR (D.D.C. Dec. 20, 2006) ("*District Ct. Compl.*").[2] In the district

[2] This district court litigation has been temporarily stayed in order to allow the parties to attempt settlement or alternative dispute resolution. *See* Parties' Joint Status Report at 7, *E. Shawnee Tribe of Okla. v. Salazar*, No. 1:06-cv-02162-JR (D.D.C. July 15, 2009).

court, the Tribe characterized its suit as an action "for an accounting and a reconciliation of its trust funds, for equitable relief, and for such other relief as the Court deems appropriate." *Id*. at 1. The Tribe sought several forms of relief in the district court, specifically asking:

1. For a declaration that the Defendants have not provided the Plaintiff with a complete, accurate and up to date accounting of the Plaintiff's trust funds as required by law.
2. For a declaration that by so doing, the Defendants have deprived the Plaintiff of the ability to identify whether it has suffered a loss, as well as any specific claims that it might have against the Defendants for their mismanagement of those funds.
3. For a mandatory injunction requiring the Defendants to provide a full and complete accounting of the Plaintiff's trust funds.
4. For a judicial order preserving any claims that the Plaintiff might uncover once it receives that accounting.
5. For an order directing the Defendants to manage all of the Plaintiff's current and future trust funds, properties and resources in full compliance with all applicable law and with their duties as the Plaintiff's guardian and trustee.
6. For an award of cost of suit, without limitation, attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. Section 2412, and other applicable federal statues, and under general principals [sic] of law and equity, and the fees and costs for expert assistance.

7. For such other relief as may be just and equitable.

Id. at 13.

Eight days later, on December 28, 2006, the Tribe filed a complaint in the Court of Federal Claims, alleging that the United States had breached its trust duties to the Tribe. *See* Complaint at 1, *E. Shawnee Tribe of Okla. v. United States*, 82 Fed. Cl. 322 (2008) (No. 1:06-cv-00917-CFL). In the Court of Federal Claims, the Tribe characterized its suit as an action "for money damages, with interest" from the failure of the United States to "generate, invest and manage the Plaintiff's tribal trust assets and property in the manner prescribed by applicable law." *Id*. The relief specifically requested by the Tribe was:

1. Consequential damages according to proof,
2. Incidental damages according to proof,
3. Compound interest on liquidated amount and judgment awards.
4. Pre-judgment interest,
5. Costs of the suit herein,
6. Attorneys fees, according to statute
7. Any and all other relief or damages as permitted by this Court or applicable law.

Id. at 17.

In January 2008, the Court of Federal Claims ordered the Tribe to show cause why its case should not be dismissed in light of 28 U.S.C. § 1500. After additional briefing by both parties and a hearing, the court determined that the Tribe's claims in the district court and

the Court of Federal Claims were "basically different manifestations of the same underlying claim that the government failed properly to administer and manage Eastern Shawnee's trust land and assets." *E. Shawnee,* 82 Fed. Cl. at 326. The court also determined that "the accounting sought [in the district court] is 'in essence' a claim for money damages," noting that such a claim would then "fall under the exclusive jurisdiction" of the Court of Federal Claims. *Id*. at 329. The court concluded that § 1500 removed its jurisdiction of the Tribe's case because the Tribe's claim for damages in the Court of Federal Claims arose "from the same operative facts and [sought] essentially the same relief as that sought by the Tribe in a case filed eight days earlier in district court," and dismissed the Tribe's suit without prejudice. *Id*. at 329.

The Tribe timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review without deference dismissals by the Court of Federal Claims for lack of jurisdiction. *Sacco v. United States,* 452 F.3d 1305, 1308 (Fed. Cir. 2006).

I

In *Keene Corp. v. United States,* the Supreme Court interpreted the term "claim" in § 1500. 508 U.S. 200, 210-14 (1993). The Court held that under § 1500, "the comparison of the two cases for purposes of possible 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." *Id*. at 212. In

Loveladies Harbor, Inc. v. United States, following *Keene,* we held that "[f]or 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 1545, 1551 (Fed. Cir. 1994) (en banc). The plaintiff here does not persuasively dispute that the claims in the district court and the Court of Federal Claims arise from the same set of operative facts. The question is whether the complaints seek the same relief.

In *Tohono* we examined similar issues involving the jurisdiction of the Court of Federal Claims under § 1500. The Tohono O'odham Nation ("the Nation") had filed a complaint in district court seeking an accounting and corrected statement of the Nation's assets held in trust by the United States, and then had filed a complaint in the Court of Federal Claims seeking money damages from the United States for breaching its fiduciary duty as trustee. *Tohono,* 559 F.3d at 1285-86.

We applied in *Tohono* the test for jurisdiction under § 1500 set forth in our opinion in *Loveladies.* We emphasized in *Tohono* that "it is the relief that the plaintiff *requests* that is relevant under § 1500," 559 F.3d at 1291, citing the Supreme Court's decision in *Keene*, 508 U.S. at 212 (discussing "overlap in the relief requested").

In *Tohono* we distinguished between the Nation's claims in the district court, which sought only equitable relief, and the Nation's claims in the Court of Federal Claims, which sought only damages at law. *Tohono,* 559 F.3d at 1289. We concluded that the district court complaint requested an equitable accounting and restatement of the Nation's trust accounts and that the Court of Federal Claims complaint requested a legal remedy—

"essentially consequential damages." *Id.* at 1290. We also distinguished the Nation's district court complaint as seeking "old money," characterized as "money that is already in the government's possession, but that erroneously does not appear in the Nation's accounts," from the Nation's Court of Federal Claims complaint seeking "new money," such as consequential damages and lost profits. *Id.* We concluded that the availability of an accounting in aid of judgment in the Court of Federal Claims "does not transform [an] unambiguous request for damages into a request for an accounting." *Id.* at 1291. Thus, we held that because the Nation had requested different relief in the district court and the Court of Federal Claims, the Court of Federal Claims had jurisdiction to hear the Nation's claims.

The basic holding in *Tohono* is that § 1500 is not a bar to claims seeking relief in the Court of Federal Claims where different relief is sought in the Court of Federal Claims and the relief sought in the Court of Federal Claims could not be awarded in the district court action. *See id.* at 1292 ("The Nation's complaint in the Court of Federal Claims seeks only . . . relief that the Nation has not requested in the district court, and which the district court is, in any event, powerless to award.").[3] Here, because consequential damages were not sought in the district court and the district court could not award consequential damages, § 1500 is not a bar to the Court of Federal Claims action. If claimants were barred by § 1500 from filing such a suit in the Court of Federal Claims with respect to claims not

[3] The concurrence here curiously suggests that this reading of *Tohono* "expands" the exception recognized by that case. We do no such thing. We simply recognize that *Tohono* imposes a dual requirement.

brought in the district court, the statute of limitations could well run on such claims during the pendency of the district court proceeding. On the other hand, if the protective filing of such claims were allowed, the government's interest in avoiding duplicative proceedings could be addressed by staying the Court of Federal Claims proceedings pending the outcome of the district court proceedings. *Cf. Tohono,* 559 F.3d at 1291-92.

II

As a panel, we are bound by the earlier decision in *Tohono.* For the same reasons described in *Tohono*, § 1500 does not bar the Court of Federal Claims here from exercising jurisdiction over the Tribe's claims.

The Tribe's Court of Federal Claims complaint here and its complaint in the district court differentiated the monetary relief sought in each court even more clearly than the two complaints in *Tohono.* Unlike the plaintiff in *Tohono,* who sought restitution and disgorgement in the district court in addition to an accounting, the Tribe here sought only a general accounting of its trust assets in the district court. In addition, here the Tribe's district court complaint disavowed at least some claims for money damages, stating that "[t]he Tribe may have claims to damages that cannot be ascertained until after the Defendants make a reconciliation and accounting of the Tribe's trust property and accounts" and that "[s]ome of these claims, should they exist, will have to be filed in the United States Court of Federal Claims." *District Ct. Compl.* at 12. Under *Tohono,* the Tribe thus

requested different relief in the district court than in the Court of Federal Claims, and § 1500 is inapplicable.[4]

We reverse the dismissal of the Tribe's suit and remand the case to the Court of Federal Claims.

REVERSED AND *REMANDED*

COSTS

No costs.

MOORE, Circuit Judge, concurring.

The only question before this court is whether, under 28 U.S.C. § 1500, the Tribe's suit in the United States District Court for the District of Columbia "was based

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[4] Following oral argument in this case, we requested supplemental briefing on the issue of whether § 1500 is applicable when the district court lacks jurisdiction over the claims asserted in district court. Both parties argued in their supplemental briefs that a district court's jurisdiction over the claims asserted in district court (as opposed to its jurisdiction over the claims asserted in the Court of Federal Claims) is in general irrelevant to a § 1500 analysis under *Frantz Equip. Co. v. United States,* 98 F. Supp. 579, 580 (Ct. Cl. 1951). However, both parties also recognized that the majority opinion in *Loveladies* concluded that a § 1500 analysis is inapplicable to a claim over which the district court concludes it lacks jurisdiction. *See Loveladies,* 27 F.3d at 1554 (concluding that because the district court had determined that it did not have jurisdiction to hear a takings claim, that claim was "without legal significance" in a § 1500 analysis). In the district court, the Tribe sued under the APA. *See District Ct. Compl.* at 2-3 (asserting that the district court has jurisdiction under 5 U.S.C. §§ 702, 704, and 706). As we have noted earlier, under § 702 the district court lacks jurisdiction unless parties are "seeking relief other than money damages." 5 U.S.C. § 702. Under § 704 it lacks jurisdiction unless "there is no other adequate remedy in a court." *Id*. § 704. There is a serious question here as to the district court's jurisdiction. However, we need not reach this issue in light of our earlier decision in *Tohono.*

on substantially the same operative facts . . . at least if there was some overlap in the relief requested" as its suit in the Court of Federal Claims. *Keene v. United States,* 508 U.S. 200, 212 (1993). I agree that we must reverse the Court of Federal Claims because the answer to this question is no, but I write separately to express my reasons for the decision and my concerns over the majority's unnecessary and troubling expansion of the test under § 1500.

There is only one standard for applying § 1500—the one announced by the Supreme Court in *Keene.* We could not and did not modify this standard in *Loveladies Harbor, Inc. v. United States,* 27 F.3d 1545, 1551 (Fed. Cir. 1994) (en banc), or in *Tohono O'odham Nation v. United States,* 559 F.3d 1284 (Fed. Cir. 2009). In order to fall within § 1500, the two suits must have both "substantially the same operative facts" and there must be "at least . . . some overlap in the relief requested." *Keene,* 508 U.S. at 212. It is contrary to *Keene* to apply § 1500 to two complaints that have no overlap in the relief requested. It is equally contrary to require that the relief requested in the two complaints be the same. None of the language in *Loveladies* or *Tohono* may be read to contravene *Keene* in these ways. *Loveladies* held that "[i]f the claims are distinctly different, Loveladies are excused from the jurisdictional dance required by § 1500." 27 F.3d at 1549. This holding is fully consistent with *Keene* because distinctly different claims have no overlap in the relief requested. Yet *Loveladies* creates some understandable confusion: "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." *Id.* at 1551; *see Tohono,*

559 F.3d at 1288 ("Under the test set forth in *Loveladies,* § 1500 is applicable only if two claims arise from the same operative facts and seek the same relief."). When presented with such an ambiguity, we must read our cases as consonant with Supreme Court precedent. Indeed, the ultimate holding of *Loveladies* leaves no doubt that the standard is substantially the same operative facts and some overlap in the relief requested: "[T]he claims in the two courts are for distinctly different and not the same or even overlapping relief—this case presents the straightforward issue of plaintiffs who seek distinctly different types of relief in the two courts." 27 F.3d at 1554.

Moreover, I cannot agree with the majority that "[t]he basic holding in *Tohono* is that § 1500 is not a bar to claims seeking relief in the Court of Federal Claims where different relief is sought in the Court of Federal Claims and the relief sought in the Court of Federal Claims *could not be awarded in the district court action.*" Maj. Op. at 8. With all due respect to the majority, the narrow holding of *Tohono* is clear: "Because we conclude that the Nation's complaint in the Court of Federal Claims seeks relief that is different from the relief sought in its earlier-filed district court action, we reverse." *Tohono,* 559 F.3d at 1285; *see also id.* at 1293 ("Because the relief requested in the Nation's district court complaint is different from the relief requested in its Court of Federal Claims complaint, § 1500 does not divest the Court of Federal Claims of jurisdiction."); *id.* at 1289-91 (detailing the different relief sought in the two complaints). Section 1500 turns on the relief sought, not the jurisdictional limitations of the courts. *See Dico v. United States,* 48 F.3d 1199, 1204 (Fed. Cir. 1995) ("[I]t is the responsibility of the plaintiff to allege, clear-

ly and with specificity, that different claims are involved in its two actions."). As *both* parties in this case argued in supplemental briefing, the jurisdiction of the district court is irrelevant in a § 1500 analysis:

> The applicability of Sec. 1500 to the first claim of plaintiff, asserted in its petition herein, is not conditioned upon the question of whether the District Court had jurisdiction of the claim asserted by the plaintiff therein; and it is not necessary to the decision, upon the defendant's plea to the jurisdiction of this court, for us to discuss the question of whether or not the District Court does or does not have jurisdiction of the counterclaim filed by plaintiff therein.

Frantz Equip. Co. v. United States, 98 F. Supp. 579, 580 (Ct. Cl. 1951). The majority's interpretation of the holding in *Tohono,* which incorporates an evaluation of the relief that can be awarded in the district court, contravenes the binding precedent of *Frantz.*[1] The majority may be justifiably concerned that the district court lacks jurisdiction to entertain a suit that serves as a legal predicate for money damages. But that issue is not before us. The proper fora for that dispute are the district court and the Court of Appeals for the District of Columbia Circuit.

There is no doubt that under our holding in *Tohono,* we must reverse. In *Tohono,* we held that § 1500 did not

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[1] *Loveladies* is not to the contrary. *See* Maj. Op. at 10 n.4. In that case, we did not evaluate the district court's jurisdiction. Rather, the *district court* dismissed the takings claim before it. Even this act of dismissal is irrelevant to the § 1500 analysis. *See Keene,* 508 U.S. at 204 (applying § 1500 to a Court of Federal Claims complaint even though the district court had dismissed the complaint filed there five days after the first complaint was filed in the Court of Federal Claims).

apply to the two complaints, and here, the Tribe took much greater pains to distinguish the relief it seeks in its two suits than the Tohono O'odham Nation did in *Tohono*. *See* Maj. Op. 9. Even without the close factual analogy of *Tohono* to aid us, I would reverse because the district court complaint lacks requests for restitution and disgorgement. *See Tohono,* 559 F.3d at 1295-96 (Moore, J., dissenting).

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 06-917

EASTERN SHAWNEE TRIBE OF OKLAHOMA, PLAINTIFF

v.

UNITED STATES, DEFENDANT

Filed: June 23, 2008

OPINION AND ORDER

LETTOW, Judge.

On December 28, 2006, the Eastern Shawnee Tribe of Oklahoma ("Eastern Shawnee" or "plaintiff"), a federally recognized Indian tribe, filed a complaint in this court ("C.F.C. Compl.") seeking damages for the United States' alleged breach of its fiduciary duties as trustee of Eastern Shawnee's assets and property. C.F.C. Compl. ¶ 1. Eight days earlier, on December 20, 2006, Eastern Shawnee had filed a complaint in the United States District Court for the District of Columbia against the Secretaries of the Interior and the Treasury and the Special Trustee for American Indians, seeking an accounting and reconciliation of its trust funds as well as injunctive and equitable relief related to the government's trust duties. *See* Complaint, *Eastern Shawnee Tribe of Oklahoma v. Kempthorne,* No. 1:06-CV-2162

(D.D.C. filed Dec. 20, 2006) ("D.D.C. Compl."). Because of the potential overlap in these two actions, this court issued an order on January 28, 2008, requesting that plaintiff show cause why this case should not be dismissed in light of 28 U.S.C. § 1500. That statute in essence bars this court from exercising jurisdiction over a claim if the same claim was already pending in another court. *See Keene Corp. v. United States*, 508 U.S. 200 (1993); *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994) (en banc).[1] The parties have responded with briefs in which plaintiff supports jurisdiction and defendant argues that the case must be dismissed on jurisdictional grounds. *See* Pl.'s Resp. to Order to Show Cause ("Pl.'s Resp.") at 4-8; Def.'s Response In Support of Order to Show Cause ("Def.'s Resp.") at 1. A hearing was held on June 10, 2008, and this jurisdictional controversy is now ready for disposition.

BACKGROUND[2]

Eastern Shawnee is recognized by the United States as a sovereign Indian tribe. The government holds and administers trust funds for the tribe, and it manages or oversees the management of natural resources located

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[1] Section 1500 of Title 28 provides 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 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.

[2] The recitations that follow do not constitute findings of fact by the court. Rather, the description of the case is drawn from the parties' filings and is either undisputed, except where a factual controversy is explicitly noted, or is alleged and assumed to be true.

on tribal lands. D.D.C. Compl. ¶¶ 8-9; C.F.C. Compl. ¶¶ 11-16. In 1994, Congress enacted the American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 (Oct. 25, 1994) (codified at 25 U.S.C. §§ 4001-61), specifying, among other things, that the Secretary of the Interior "shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian Tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. [§] 162)." 25 U.S.C. § 4011(a). In addition, the Secretary was obliged to prepare "a report identifying for each tribal trust fund account for which the Secretary is responsible a balance reconciled as of September 30, 1995." 25 U.S.C. § 4044. To meet these statutory requirements, in 1996 the government retained the accounting firm of Arthur Andersen LLP to prepare and issue an accounting report to plaintiff. C.F.C. Compl. ¶ 28. That report was issued in due course, but Eastern Shawnee contests the adequacy of the report. *Id.;* Hr'g Tr. 27:1 to 27:5 (June 10, 2008).[3]

Both complaints set forth a variety of alleged breaches by the government of fiduciary duties and mismanagement of plaintiff's trust corpus. *See* D.D.C. Compl. ¶¶ 18-21; C.F.C. Compl. ¶¶ 22-24. The allegations in-

[3] In this connection, the Indian Trust Accounting Statute, enacted annually as part of the appropriations acts for the Department of the Interior, provides that the statute of limitations does not begin to run on a claim against the United States concerning losses to or mismanagement of Indian trust funds until claimants have been furnished with an accounting. *See, e.g.,* Pub. L. No. 108-108, 117 Stat. 1241, 1263 (Nov. 10, 2003); *Shoshone Indian Tribe v. United States,* 364 F.3d 1339, 1344 & n.2 (Fed. Cir. 2004); *Wolfchild v. United States,* 62 Fed. Cl. 521, 547-49 (2004).

clude: failure to provide Eastern Shawnee with a full, accurate, and timely accounting of its trust funds; failure to maintain accurate books and records of the plaintiff's account; failure to disclose known losses; failure or refusal to reimburse trust beneficiaries for losses to their trust funds; and failure properly to create certain trust accounts and deposit the appropriate monies in those accounts. *See* D.D.C. Compl. ¶¶ 21, 29; C.F.C. Compl. ¶¶ 22-23.

The primary difference in the two contemporaneously filed complaints is that the complaint in district court focuses on equitable relief while in this court plaintiff seeks monetary damages. Eastern Shawnee asks the district court for a declaration that the defendants have not provided an adequate accounting of the plaintiff's trust funds, a declaration that this failure has deprived the plaintiff of the ability to identify whether it has suffered a loss and specific claims it might have, an injunction requiring the defendants to produce a complete, accurate, and up-to-date accounting, a judicial order preserving any claims that accounting might reveal, an order directing the defendants to manage all of the plaintiff's current and future trust funds in full compliance with all applicable law and with their duties as guardian and trustee, an award for cost of suit, and "such other relief as may be just and equitable." D.D.C. Compl. Prayer for Relief ¶¶ 1-7. In this court, Eastern Shawnee seeks consequential damages, incidental damages, compound and pre-judgment interest, costs of suit, attorneys' fees, and "[a]ny and all other relief or damages as permitted by this [c]ourt or applicable law." C.F.C. Compl. Prayer for Relief, ¶¶ 1-7.

The complaint in this court explicitly (and commendably) acknowledges the link between the two cases:

> Plaintiff has commenced an action against the Secretary of the Interior, the Secretary of the Treasury and the Special Trustee for Indian Affairs, in the United States District court for the District of Columbia, [*Eastern Shawnee Tribe of Oklahoma*] *v. Kempthorne, et. al.* To the extent that such an accounting to which the Plaintiff is entitled[,] determines or otherwise reveals that the Plaintiff has one or more additional monetary claims against the Defendant, the Plaintiff seeks damages on those claims in this action.

C.F.C. Compl. ¶ 31; *see also* C.F.C. Compl. ¶ 23 ("[B]efore filing this action, the Plaintiff filed a complaint in the United States District Court for the District of Columbia demanding a full accounting of its trust accounts, trust assets and trust property.") Given this understanding of a direct relationship between the two cases, the jurisdictional arguments by the parties focus on whether the operative facts underpinning the claims in the two cases are divergent enough that two different claims are involved, and, alternatively, whether the complaints seek sufficiently different relief that Section 1500 should not be invoked to bar this court's jurisdiction over Eastern Shawnee's claims in this court.

STANDARDS FOR DECISION

The jurisdiction of a federal court must be established as a threshold matter before the court may proceed with the merits of any action. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 88-89 (1998); *see* Rule 12(b)(1) of the Rules of the Court of Federal Claims

("RCFC"). Subject matter jurisdiction may be challenged by either party at any time, by the court *sua sponte,* or even on appeal. *Booth v. United States,* 990 F.2d 617, 620 (Fed. Cir. 1993).

As plaintiff, Eastern Shawnee bears the burden of establishing that the court has subject matter jurisdiction to consider its claims by a preponderance of the evidence. *Reynolds v. Army & Air Force Exch. Serv.,* 846 F.2d 746, 748 (Fed. Cir. 1988); *see McNutt v. General Motors Acceptance Corp. of Ind.,* 298 U.S. 178, 189 (1936). In determining whether subject matter jurisdiction exists, a court must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff. *Henke v. United States,* 60 F.3d 795, 797 (Fed. Cir. 1995); *see also Hamlet v. United States,* 873 F.2d 1414, 1415-16 (Fed. Cir. 1989).

This court has jurisdiction under the Tucker Act over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). Correlatively, the Indian Tucker Act confers jurisdiction on this court for claims against the United States brought by "any tribe, band, or other identifiable group of American Indians . . . whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which would otherwise be cognizable in the Court of Federal Claims." 28 U.S.C. § 1505. These statutes themselves, however, do not confer on a plaintiff a right to recovery; the plaintiff

must also identify a substantive right that is enforceable against the United States for money damages. *See United States v. Testan,* 424 U.S. 392, 398 (1976) (Tucker Act claims); *accord United States v. White Mountain Apache Tribe,* 537 U.S. 465, 472 (2003) (Indian Tucker Act claims). For Indian trust claims, a substantive right can be found in statutes and regulations from which it can be inferred both that the government assumed fiduciary responsibilities related to its trust relationship with Indian tribes and that a monetary remedy for breach has been provided. *See United States v. Mitchell,* 463 U.S. 206 (1983). However, any jurisdictional grant under the Indian Tucker Act is circumscribed by the bar of Section 1500.

ANALYSIS

Section 1500 restricts the subject matter jurisdiction of the Court of Federal Claims by forestalling "any claim for or in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States." 28 U.S.C. § 1500. The purpose of Section 1500 is to "bar . . . the claim of a plaintiff, who, upon filing, has an action pending in any other court 'for or in respect to' the same claim." *Keene Corp. v. United States,* 508 U.S. 200, 209 (1993). "Thus, [S]ection 1500 divests this court of subject matter jurisdiction when a plaintiff has elected to file the same claim in another court prior to filing suit in this [c]ourt." *Cooke v. United States,* 77 Fed. Cl. 173, 176 (2007). Whether another claim is "pending" for purposes of Section 1500 is determined at the time at which the suit is filed in this court, not some later time. *See Loveladies Harbor,* 27 F.3d at

1548.[4] And, "[f]or the Court of Federal Claims to be precluded from hearing a claim under [Section] 1500, the claim pending in another court must arise from *the same operative facts,* and must seek *the same relief.*" *Id.* at 1551 (emphasis in original); *see also Harbuck v. United States,* 378 F.3d 1324, 1328-29 (Fed. Cir. 2004).

A. "Same Operative Facts"

"Claims are the same where they arise from the same operative facts even if the operative facts support different legal theories which cannot all be brought in one court." *Harbuck,* 378 F.3d at 1329 (quoting *Johns-Manville Corp. v. United States,* 855 F.2d 1556, 1567 (Fed. Cir. 1988)). However, "[c]laims involving the same general factual circumstances, but distinct material facts[,] can fail to trigger [S]ection 1500." *Branch v. United States,* 29 Fed. Cl. 606, 609 (1993); *see also d'Abrera v. United States,* 78 Fed. Cl. 51, 58-59 (2007). Accordingly, if a material factual difference exists between two claims, they are not the same for purposes of Section 1500. *See Heritage Minerals, Inc. v. United States,* 71 Fed. Cl. 710, 716 (2006); *Williams v. United States,* 71 Fed. Cl. 194, 199-200 (2006).

In *Keene,* the Supreme Court instructed that a careful comparison of the operative facts for the claims is required. 508 U.S. at 210; *see also Harbuck,* 378 F.3d at 1324; *Loveladies,* 27 F.3d at 1553-54. The Supreme Court noted in *Keene* that Congress did not limit Section 1500 to claims "for . . . which" the plaintiff has sued in another court, but included those "in respect to which"

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[4] Eastern Shawnee concedes that its complaint filed in district court was pending at the time they filed their complaint in this court. *See* Pl.'s Resp. at 4-5.

claims by him were pending elsewhere. *Keene,* 508 U.S. at 213. Accordingly, the Court concluded that the statutory text "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." *Id*.

Eastern Shawnee contends that the complaints "contain material factual differences in that the two complaints involve different conduct." Pl.'s Resp. at 11. Eastern Shawnee asserts that the basis of the district court complaint is the failure to provide an adequate accounting, while the complaint in this court addresses the failure of the government properly to manage monetary and non-monetary trust assets. *Id*. at 11-12. This proffered distinction is not persuasive in light of prior precedents.

For example, in *Harbuck,* the plaintiff had filed claims under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e, 2000e-1 to 2000e-17, and the Equal Pay Act, 29 U.S.C. § 206(d), in district court, which transferred the latter claim to this court. *Harbuck,* 378 F.3d at 1326. This court dismissed plaintiff's claim under the Equal Pay Act because it consisted of "a subset of the same factual allegations as [plaintiff's] broader District Court case." *Harbuck v. United States,* 58 Fed. Cl. 266, 269 (2003). The court of appeals affirmed, holding that the two claims arose from the same set of operative facts, concluding that "[t]he difference between the two theories upon which [plaintiff] relies are but different manifestations of the same underlying claim that the Air Force discriminated against women by paying them less than men." *Harbuck,* 378 F.3d at 1329.

Here also, the claims in the case in the district court and in the instant action are basically different manifestations of the same underlying claim that the government failed properly to administer and manage Eastern Shawnee's trust land and assets. The two claims involve the same parties, the same trust corpus, and the same breach of the same trust duties over the same time period. The only apparent factual difference is a narrower focus on the accounting aspects of the alleged breaches of trust duties in the district court complaint.

Eastern Shawnee further relies upon *d'Abrera* where a copyright infringement claim was brought in this court after a Lanham Act claim had been filed in district court. *See d'Abrera,* 78 Fed. Cl. 51. One claim involved reproducing and distributing photographs without permission, license, or consent, while the other claim involved "deceiving individuals into believing that the book and the photographs were the unique work of [the defendants]." *Id*. at 58. Despite the existence of similar background facts in the *d'Abrera* action, the material operative facts were different and jurisdiction in this court was thus proper. Similarly, in *Heritage Minerals,* plaintiffs filed a taking action in this court based upon the alleged installation and maintenance of groundwater-monitoring wells on their property. 71 Fed. Cl. at 710-11. A previously filed claim in district court was based upon allegations that the Navy had contaminated the groundwater on their property. The court held that the new claim was based on different operative facts because the installation and maintenance of monitoring wells constituted "later and different conduct." *Id*. To the same effect, in *Cooke* the court had before it a claim filed in this court under the Fair Labor Standards Act, 29 U.S.C. § 215(a)(3), alleging that the government en-

gaged in retaliatory conduct in the form of denied opportunities and changes in the plaintiff's employment. That claim was considered to involve different operative facts from a prior claim filed in district court under the Equal Pay Act. 77 Fed. Cl. at 175-78.

In contrast, Eastern Shawnee's two claims have no distinguishing characteristics. The government's role here is essentially the same, properly to manage and account for the tribe's trusts and assets. The conduct alleged in the district court case of failing to provide a full and accurate accounting is encompassed within the averments of the instant case, which addresses "the failure of the CFC defendants to properly manage monetary and non-monetary trust assets." Pl.'s Resp. at 11-12; *see* C.F.C. Compl. ¶¶ 23, 30-34. Both actions turn on the government's past actions related to its management and administration of Eastern Shawnee's same tribal trust lands and assets. *See* D.D.C. Compl. ¶¶ 17-19; C.F.C. Compl. ¶¶ 13, 23-24, 30-31. Indeed, both suits specify that Eastern Shawnee seeks an accounting to determine whether, and to what extent, the Tribe has suffered losses as a result of the government's breaches of trust. *See* D.D.C. Compl. ¶¶ 17-19; C.F.C. Compl. ¶ 23.

Eastern Shawnee's posture in its two cases bears many similarities to the circumstances at issue in *Ak-Chin Indian Cmty. v. United States,* 80 Fed. Cl. 305 (2008), and *Tohono O'Odham Nation v. United States,* 79 Fed. Cl. 645 (2007). As the court stated in *Ak-Chin Indian Community:* "It is not apparent to the court how it could address facts related to the government's duty to invest and deposit plaintiff's trust funds without considering the facts related to the government's overall

trust obligations owed to plaintiff, including its duty to account." *Ak-Chin*, 80 Fed. Cl. at 319; *see also Tohono O'Odham Nation*, 79 Fed. Cl. at 652 ("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."). Thus, the two claims are based upon the same operative facts and constitute the "same claim" for Section 1500 purposes.

B. "Same Relief"

If the operative facts of two claims are the same, Section 1500 applies if the "same relief" is sought. *Keene*, 508 U.S. at 212. For Section 1500 to apply, the relief requested need not be identical as long as "there [is] some overlap in the relief requested." *Id*. In other words, to avoid the application of Section 1500, the relief requested must be "distinctly different." *Loveladies*, 27 F.3d at 1552. Thus, the inclusion of other and different requested relief does not bar application of Section 1500. *Id*. In *Tohono O'odham Nation*, the court commented that "for [S]ection 1500 purposes, the legal theory behind the allegations or the characterizations of the requests for relief are not controlling." 79 Fed. Cl. at 656. The court stated that the relevant inquiry is: "will the relief, in substance, be the same?" *Id*.

Eastern Shawnee contends that it does not seek the same relief in the actions because the relief sought in district court is solely equitable and the relief sought here is solely monetary. Pl.'s Resp. at 16. However, in substance the relief sought in the two complaints, an accounting and reimbursement for losses resulting from mismanagement, is overlapping. As explained below, if Eastern Shawnee were to establish liability for breaches

of trust in this proceeding, an accounting would be required, and that accounting would overlap with the accounting available in equitable proceedings such as the case brought in district court. In *Tohono,* the court recognized that:

> 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.

79 Fed. Cl. at 657. In short, once liability has been established, the equitable "relief" of an accounting is a necessary precursor to an award of damages. Moreover, this is not a situation where jurisdiction over an equitable accounting rests with district courts while this court is barred from undertaking an accounting. Instead, this court has the authority "to require an accounting in aid of its jurisdiction to render a money judgment." *Klamath & Modoc Tribes v. United States,* 174 Ct. Cl. 483, 490-91 (1966). In *Tohono,* this court observed that if a legal trust does exist and money is recoverable for breach, then "[t]he 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 ac-

tion [was] 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." 79 Fed. Cl. at 653.[5]

Eastern Shawnee recognizes that the accounting sought in district court is inextricably linked to the recovery of damages in this court. In its district court complaint, Eastern Shawnee specifically asks for a judicial order preserving any claims that an accounting might reveal. D.D.C. Compl. ¶ 34 ("Plaintiff *is entitled to declaratory and injunctive relief* requiring the Defendants to provide the Plaintiff with a full, complete and up-to-date accounting of all of the Plaintiff's trust funds, and *preserving any claims which might be identified* once that accounting is revealed.") (emphasis added). Moreover, Eastern Shawnee never states any purpose for its request for an accounting in the district court besides the desire to determine if mismanagement has occurred and it has suffered losses. *See* D.D.C. Compl. ¶¶ 18, 21, 33, 38. Correspondingly, in this court, Eastern Shawnee specifically requests "damages on those [*i.e.,* the district court] claims in this action." C.F.C. Compl. ¶ 31. Counsel for Eastern Shawnee was candid with the court in addressing the means by which the Tribe might ultimately obtain a monetary award:

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[5] In *Tohono,* the court pointed out that, as "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." 79 Fed. Cl. at 657 (citing *Restatement (Second) of Trusts* § 205 (1959)).

> THE COURT: Well, how do you propose to get money? Let's say that the action that's pending before Judge Robertson [in the district court] produces an indication or even a result that the accounting has not been proper, the historical accounting has not been proper and the Eastern Shawnee actually should have some more money in the trust accounts. How do you propose to get that money?
>
> MR. LEINBACH: Well, Your Honor, you do not request that money in a District Court. I presume that would be a claim that would be incorporated in this case presently, because we've already made general allegations that the U.S. Government has not properly invested trust assets, monetary assets, and has not properly collected monies due on such things as oil and gas royalties and what not. So those claims are already made here in this case for monetary damages.
>
> It may be very well that a full and complete trust accounting that's performed pursuant to some order in the District Court may shed some light as to the value of those claims, but those claims are already made here in this Court.

Hr'g Tr. 25:6 to 26:3 (June 10, 2008). In effect, the equitable relief sought in the district court has no independent, distinguishing significance from the monetary relief sought in this court.

The question whether the equitable relief sought in an action has any independent significance compared to monetary relief awardable in this court has been important in applying Section 1500. In *Kidwell v. Dep't of*

Army, 56 F.3d 279, 285 (D.C. Cir. 1995), the D.C. Circuit held that a claim seeking the equitable relief of a correction in military records had value independent from any monetary payments that might result from the requested change in records. If the equitable relief requested was "in essence" a claim for monetary damages, then the claim would fall within the exclusive jurisdiction of this court. *Id.* at 284. However, the D.C. Circuit held that the corrective equitable relief sought would lift the shame of receiving a less-than-honorable discharge and thus that relief was "in form and substance, not 'negligible in comparison' to monetary claims [Mr. Kidwell] may raise in the future." *Id.* at 286 (citing *Hahn v. United States,* 757 F.2d 581, 589 (3d Cir. 1985)). Here, in contrast, because the accounting does not have considerable value independent of monetary recovery, the accounting sought is "in essence" a claim for money damages.

Accordingly, while Eastern Shawnee correctly asserts that it does not specifically make a request for money damages in district court, Pl.'s Resp. at 18, in substance the requested relief overlaps with the request for money damages in this court. As a result, the relief sought in the district court case and this case is not "distinctly different," *Loveladies,* 27 F.3d at 1552, and Section 1500 bars this court from exercising jurisdiction over Eastern Shawnee's claims.

CONCLUSION

Section 1500 precludes this court from exercising jurisdiction over Eastern Shawnee's claim because it arises from the same operative facts and seeks essentially the same relief as that sought by the Tribe in a case filed eight days earlier in district court. Accord-

ingly, this case must be dismissed without prejudice under RCFC 12(b)(1). The clerk is directed to enter judgment to this effect.

No costs.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2008-5102

EASTERN SHAWNEE TRIBE OF OKLAHOMA,
PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Filed: Mar. 17, 2010

Appeal from the United States Court of Federal Claims in case 06-CV-917, Judge Charles F. Lettow

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ON PETITION FOR PANEL REHEARING

ORDER

Before: GAJARSA, DYK, and MOORE, Circuit Judges.

Order for the court filed by Circuit Judge DYK. Dissent filed by Circuit Judge MOORE.

DYK, Circuit Judge.

We have considered the petition for panel rehearing filed by the United States in *Eastern Shawnee Tribe of Oklahoma v. United States*, 582 F.3d 1306 (Fed. Cir. 2009).

In seeking panel rehearing, the United States urges that the panel erred in holding that under *Tohono O'odham Nation v. United States*, 559 F.3d 1284 (Fed. Cir. 2009), 28 U.S.C. § 1500 is inapplicable to bar "claims seeking relief in the Court of Federal Claims where different relief is sought in the Court of Federal Claims and the relief sought in the Court of Federal Claims could not be awarded in the district court action." *E. Shawnee*, 582 F.3d at 1311. The United States claims that this holding is inconsistent with *Frantz Equipment Co. v. United States*, 98 F. Supp. 579 (Ct. Cl. 1951), in that it looks at the district court's ability to award relief as part of the test. In reaching this conclusion, the United States fails to note that the later decision in *Casman v. United States*, 135 Ct. Cl. 647 (1956), necessarily supersedes *Frantz* to the extent that the two are inconsistent,[1] and *Casman* essentially adopted the same dual test as the one we articulated in the majority opinion here, *see id*. at 649-50. This is particularly noteworthy because the petition for certiorari filed by the United States in *Tohono* describes *Casman's* holding as adopting this dual test:

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[1] Because the Court of Claims typically sat en banc at the time of these decisions, which it did in *Casman*, it was at liberty to modify or effectively overrule its earlier decisions. Therefore, where Court of Claims decisions are inconsistent, we are obligated to follow the court's most recent decision. *See Doe v. United States*, 372 F.3d 1347, 1355 (Fed. Cir. 2004).

> *Casman* reasoned that Section 1500's purpose was "to require an election between a suit in the Court of Claims and one brought in another court," and concluded that the statute therefore should not apply if the "plaintiff has no right to elect between two courts." 135 Ct. Cl. at 649-650. Because Casman's request for back pay fell "exclusively within the [Court of Claims'] jurisdiction," and because the Court of Claims (at the time) lacked "jurisdiction to" grant Casman's request for specific relief "restor-[ing] [him] to his [federal] position," the Court of Claims held in *Casman* that Section 1500 did not apply when such "entirely different" relief must be sought in different courts. *Ibid*.

Petition for Writ of Certiorari at 18-19, *United States v. Tohono O'odham Nation*, No. 09-846 (U.S. Jan. 15, 2010) ("Petition for Certiorari") (footnote omitted). The United States' petition for certiorari also recognizes that our court en banc reaffirmed *Casman* in *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1549, 1551 (Fed. Cir. 1994) (en banc). Petition for Certiorari, *supra,* at 18. Thus there is no conflict in our precedent.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for panel rehearing is denied.

(2) The mandate of the court will issue on March 24, 2010.

FOR THE COURT

Mar. 17, 2010
Date

/s/ JAN HORBALY
JAN HORBALY
Clerk

MOORE, *Circuit Judge*, dissenting.

Because the majority's decision creates an erroneous standard for applying 28 U.S.C. § 1500, I respectfully dissent from the majority's denial of the government's petition for panel rehearing.

Section 1500 provides 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." The majority holds that § 1500 does not bar an action filed in the Court of Federal Claims when (1) an action filed in a U.S. district court seeks different relief and (2) the district court lacks jurisdiction to award the relief sought in the Court of Federal Claims action. According to the majority, our predecessor court "essentially adopted the same dual test" in *Casman v. United States*, 135 Ct. Cl. 647 (1956).

I would rehear this case because the majority's test—specifically its inquiry into the district court's jurisdiction—conflicts with precedent. In *Keene v. United States*, 508 U.S. 200 (1993), the Supreme Court stated that "the comparison of the two cases for purposes of possible dismissal would turn on whether the plaintiff's other suit was based on substantially the same operative facts as the Court of [Federal] Claims action, at least if there was *some overlap in the relief requested*." *Id.* at 212 (emphasis added). The Supreme Court explicitly left open "whether two actions based on the same operative facts, but seeking *completely different relief*, would implicate § 1500." *Id.* at 212 n.6 (emphasis added) (citing *Casman*, 135 Ct. Cl. 647).

We addressed this opening in *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994) (en banc). The *Loveladies* court stated as follows:

> The issue the Government raises, and which is now properly before us on the facts of this case, is 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 added). We assumed *arguendo* that Loveladies' two actions arose from the same operative facts. *Id*. at 1552. And we acknowledged that "the claims in the two courts are for distinctly different and not the same or even overlapping relief—this case presents the straightforward issue of plaintiffs who seek distinctly different types of relief in the two courts." *Id*. at 1554 (internal quotation marks omitted). The government argued that "§ 1500 precludes the Court of Federal Claims from hearing Loveladies' takings claim on the ground of operative facts alone." *Id*. at 1552. We rejected this argument, explaining that "[w]e know of no case arising from the same operative facts in which § 1500 has been held to bar jurisdiction over a claim praying for relief distinctly different from that sought in a pending proceeding." *Id*. at 1551. We held that § 1500 did not bar Loveladies' action in the Court of Federal Claims.[1]

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[1] Certain language in *Loveladies* creates some understandable confusion: "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. But the Supreme Court in *Keene* did not require "the same re-

Accordingly, under *Keene* and *Loveladies*, I understand the landscape for § 1500 to be as follows: (a) section 1500 bars jurisdiction when the operative facts are at least substantially the same and there is at least some overlap in the relief requested; and (b) section 1500 does *not* bar jurisdiction when the relief requested is "distinctly different," regardless of any similarity between the operative facts. *Keene* teaches the former; *Loveladies* the latter. Absent from *Keene* and *Loveladies* is an inquiry into whether the district court lacks jurisdiction to award the relief sought in the Court of Federal Claims action. Indeed the majority's infusion of such an inquiry into the § 1500 test conflicts with *Loveladies*, a decision from our court sitting en banc. For example, consider an action filed in the Court of Federal Claims that is based on the same operative facts but that seeks distinctly different relief than an action filed in a U.S. district court. Under the majority's test, § 1500 would bar the Court of Federal Claims action if the district court *possesses* jurisdiction to award the relief sought in the Court of Federal Claims action. But under *Loveladies*, § 1500 can never bar a Court of Federal Claims action seeking "distinctly different" relief, regardless of the district court's jurisdiction to award that relief.

Lastly, I do not believe that it is sensible for the majority to predicate jurisdiction in the Court of Federal Claims on that court's evaluation of a district court's jurisdiction. It may not always be the case that both courts agree on whether the district court possesses jurisdiction to award the relief sought in the Court of Federal Claims.

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lief," and we must read *Loveladies* as consonant with Supreme Court precedent.

For the foregoing reasons, I respectfully dissent from the majority's denial of the government's petition for panel rehearing in this case. The majority was not free to rewrite the law on § 1500.