No. 09-846

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

TOHONO O'ODHAM NATION, RESPONDENT

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

BRIEF FOR *AMICI CURIAE* COLORADO RIVER INDIAN TRIBES AND NATIONAL CONGRESS OF AMERICAN INDIANS SUPPORTING RESPONDENT

STEVEN D. GORDON
Counsel of Record
STEPHEN J. MCHUGH
HOLLAND & KNIGHT LLP
2099 Pennsylvania Ave., NW
Washington, D.C. 20006
202-955-3000
steven.gordon@hklaw.com

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE

The Colorado River Indian Tribes ("CRIT") and the National Congress of American Indians ("NCAI"), as *amici curiae*, respectfully submit this brief in support of Respondent and urge affirmance of the Federal Circuit's decision in *Tohono O'odham Nation v. United States.*[1]

CRIT is a federally recognized Indian tribe whose reservation straddles the lower Colorado River for approximately 55 miles in Arizona and California and contains over 264,000 acres. The reservation was established to provide a homeland for Native Americans living along the river. Tribal lands produce sand and gravel and are leased to third parties for agricultural and commercial uses. The United States acts as trustee for these tribal lands and mineral rights and for monies belonging to the tribe that are held in trust.

On December 27, 2006, CRIT filed two different actions – in the district court and the Court of Federal Claims ("CFC") -- related to the

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[1] Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk pursuant to Rule 37.3.

government's performance of its duties as trustee for the tribe. Like the Tohono O'odham Nation ("Nation") and other Indian tribes, CRIT filed this pair of actions because, given the applicable jurisdictional limitations, both actions were necessary to obtain complete relief.

One complaint was filed in the District Court for the District of Columbia pursuant to the Administrative Procedure Act ("APA")[2] and 28 U.S.C. § 1361. *Colorado River Indian Tribes v. Salazar*, Case No. 06-CV-2212 (D.D.C.). It alleged that the federal defendants had failed to provide CRIT with a full and complete accounting of CRIT's trust funds and assets and sought a declaratory judgment to that effect. It also sought an injunction compelling such an accounting. The complaint did not seek any monetary relief.

The second complaint was filed in the CFC pursuant to the Tucker Act[3] and the Indian Tucker Act.[4] *Colorado River Indian Tribes v. United States*, No. 06-901 L (CFC). It alleged that the government has mismanaged CRIT's trust assets in various ways and sought an award of damages. CRIT has an obvious interest in whether this suit is precluded by 28 U.S.C. § 1500.

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[2] 5 U.S.C. §§ 551-559, 701-706.

[3] 28 U.S.C. § 1491.

[4] 28 U.S.C. § 1505.

NCAI is the oldest and largest national organization representing Indian tribal governments, with a membership of more than 250 American Indian tribes and Alaska Native villages. NCAI was established in 1944 to protect the rights of Indian tribes and improve the welfare of American Indians.

The government holds almost 56 million acres of land in trust for Indian tribes or their members, and manages those tribal lands and natural resources. In addition, the government holds approximately $2.9 billion in trust for tribes. Regulation, preservation and management of these lands and resources are essential governmental functions of the tribes, and tribal governments are increasingly taking over trust asset management under tribal self-determination statutes. Tribal governments – and NCAI -- have a keen interest in the decisions of this Court that affect the functioning of the Indian trust system, tribes' ability to receive an accounting of their trust assets, and tribes' ability to recover damages for mismanagement of those assets.

SUMMARY OF ARGUMENT

The Federal Circuit correctly decided that Section 1500's prohibition of duplicative claims based on the same operative facts does not preclude the Nation from seeking damages for breach of trust in the CFC and an equitable trust accounting in the district court.

1. The Federal Circuit's decision relies on the settled interpretation of Section 1500, deriving from *Casman v. United States*, 135 Ct. Cl. 647 (1956), that the prohibition on duplicative suits does not apply where a plaintiff seeks different relief in the two courts. The Government's construction of 28 U.S.C. § 1500 would cast aside this interpretation and preclude any suits in the CFC that are "associated in any way" with a suit in another court, even if they seek entirely different relief. But Congress acknowledged, and implicitly approved of, the use of parallel suits to obtain damages and equitable relief when it created the Claims Court (now the CFC) in 1982 and revised Section 1500 to apply to the new court. Congress considered, but did not adopt, a provision that would have empowered the Claims Court to grant declaratory and equitable relief in all Tucker Act cases in order to "avoid the costly duplication in litigation presently required when a citizen seeks both damages and equitable relief against the government." S. Rep. 97-275, at 19 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 32. In doing so, Congress never suggested that such related suits are prohibited by Section 1500. To the contrary, Congress pondered whether it should act to reduce the need for this parallel litigation by enhancing the remedial powers of the Claims Court.

2. Indian tribes are entitled to receive a trust accounting from the government, *i.e.* a detailed account of the trust receipts, disbursements, and property on hand, from which the tribe can assess

the status of the trust and whether it has been properly managed. The CFC cannot compel such an accounting. Because a trust accounting is distinct from and provides different relief than an action for money damages, a district court action seeking an accounting does not trigger Section 1500 and preclude an action for damages in the CFC. This conclusion does not change where, as here, the district court complaint also seeks associated equitable monetary relief that does not overlap with the damages sought in the CFC action.

3. A tribal claim for a trust accounting is based on different operative facts than a damages claim for breach of trust in the CFC. A claim for an accounting is based on two operative facts: (i) the government holds property in trust for the tribe and (ii) the government has not provided an accounting. In contrast, a damages claim for breach of trust is based on allegations that (i) the government has mismanaged tribal trust assets and (ii) the tribe has suffered damages as a result. This reinforces the conclusion that a tribal action for an accounting does not bar a separate claim for damages in the CFC under Section 1500.

ARGUMENT

I. SECTION 1500 DOES NOT BAR SUITS THAT SEEK DIFFERENT RELIEF

Section 1500 provides that the CFC "shall not have jurisdiction of any claim … for or in respect to which the plaintiff … has pending in any other court any suit or process against the United States or [an officer or agent of the United States]." In *Keene Corp. v. United States*, 508 U.S. 200 (1993), this Court construed Section 1500 to bar suits in the CFC that arise from the same operative facts and seek the same relief as a pending district court action, even if the CFC suit is premised on different legal theories than those advanced in the district court. *See id.* at 212. The Court noted that this was the settled judicial construction of the predecessor to Section 1500 and reasoned that Congress had effectively adopted this construction when it reenacted the statute in 1948. *Id.*

The Court in *Keene* left open the question whether Section 1500 is implicated where two actions are based on the same operative facts but seek different relief. *Id.* at 213 n.6 & 216. Shortly thereafter, the Federal Circuit ruled that Section 1500 does not apply where the claims in the two courts are for different relief, even if they arise from the same operative facts. *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994) (*en banc*). *Loveladies* reaffirmed the long-standing

construction of Section 1500, first articulated in 1956 in *Casman*.

In this case, the Federal Circuit followed *Loveladies* and held Section 1500 inapplicable because the Nation's CFC complaint seeks damages at law whereas its district court complaint requests different, equitable relief. Pet. App. 11a-12a. The court rejected the suggestion that Section 1500 applies because the Nation sought an accounting in both courts, noting that the prayer for relief in the CFC does not request an accounting and that any "accounting in aid of judgment" that the CFC might direct after the Nation had established liability was entirely different than the equitable pre-liability accounting the Nation sought in the district court. *Id.* at 15a.

The government now asks this Court to resolve the question left open in *Keene*. The government urges a sweeping construction of Section 1500 that would foreclose CFC jurisdiction whenever a suit "associated in any way" with the CFC claim is pending in another court, regardless of the relief sought. *Id.* at 23. According to the government, the statute "forces [a plaintiff to make] a choice between suits seeking different relief." *Id.* But Congress has not required plaintiffs to forego a complete remedy and elect between suits seeking different relief against the government. On the contrary, Congress has endorsed the use of parallel suits to obtain both

money damages and equitable relief against the government.

As noted above, Section 1500 has long been held not to bar an action in the (now) CFC that seeks different relief than the earlier-filed action. The seminal decision is *Casman*, in which a government employee sued in district court for reinstatement to his position and then filed suit in the Court of Claims for back pay. At the time, a claim for back pay fell exclusively within the jurisdiction of the Court of Claims, but that court could not restore the plaintiff to his position. 135 Ct. Cl. at 649-50. The court denied the government's motion to dismiss under Section 1500 because, although the two suits involved the same wrongful conduct, they sought different relief. *Id.* at 650. This construction of the statute subsequently was applied in a number of other cases. *See, e.g., Allied Materials & Equip. Co., Inc. v. United States*, 210 Ct. Cl. 714 (1976); *River Home & Agricultural Coop. v. United States*, 215 Ct. Cl. 959 (1977); *Deltona Corp. v. United States*, 222 Ct. Cl. 659 n.1 (1980). In 1980, the Court of Claims said that "[i]t is settled law that § 1500 does not bar a proceeding in this court, asking monetary relief, if the other pending suit seeks only affirmative relief such as an injunction or a declaratory judgment." *Truckee-Carson Irrigation Dist. v. United States*, 223 Ct. Cl. 684 (1980).

Meanwhile, Congress amended the Tucker Act in 1972 to empower the Court of Claims, as an adjunct

to an award of money damages, to issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and the correction of applicable records. Pub. L. No. 92-415, 86 Stat. 652 (1972). The purpose of the amendment was to allow persons in cases like *Casman* "to obtain all necessary relief in one action." S. Rep. 92-1066, at 1, *reprinted in* 1972 U.S.C.C.A.N. 3116. Congress noted that previously it had been necessary for a wrongfully discharged federal employee "to file an additional suit in a Federal District court to obtain reinstatement." S. Rep. 92-1066, at 2, *reprinted in* 1972 U.S.C.C.A.N. at 3118.

Subsequently, in 1982, Congress enacted the Federal Courts Improvement Act, Pub. L. No. 97-164, 96 Stat. 25, "an omnibus law effecting significant changes in the administration of the federal courts, including the abolition of the old Court of Claims and Court of Customs and Patent Appeals and the creation of the new United States Claims Court and the United States Court of Appeals for the Federal Circuit." *Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 862 (1990) (White, J., dissenting). Congress conferred on the Claims Court (now the CFC) the trial jurisdiction formerly exercised by the Court of Claims, including the Tucker Act and the Indian Tucker Act. And it amended Section 1500 to apply to the Claims Court, without making any other changes that would alter the established construction of the statute. Pub. L. No. 97-164, § 133, 96 Stat. 25, 39-41 (1981). Under

the reasoning of *Keene*, it must be presumed that Congress, in so doing, adopted the settled judicial construction that Section 1500 does not bar an action for damages in the Claims Court if the other pending suit seeks different substantive relief.

Congress's endorsement of the judicial construction of Section 1500 is confirmed by the legislative history of the 1982 Act. The Senate proposed to authorize the Claims Court to grant declaratory judgments and equitable relief in all controversies under the Tucker Act.[5] It explained that "this provision will avoid the costly duplication in litigation presently required when a citizen seeks both damages and equitable relief against the government." S. Rep. 97-275, at 19 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 32 (emphasis added); *see also* 127 Cong. Rec. S14692-S14694 (daily ed. Dec. 8, 1981) (remarks of Sen. Dole, the bill manager).

The counterpart House bill originally contained an identical provision empowering the Claims Court to grant declaratory judgments and equitable relief. But this provision was dropped after the Justice Department objected that it would "vastly broaden

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[5] S. 1700 would have amended 28 U.S.C. § 1491(a)(2) so that it began "To afford complete relief in controversies within its jurisdiction, the court may grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief …." 127 Cong. Rec. S11072 (Oct. 5, 1981).

the equitable power of the Article I Claims Court judges" and urged that the Claims Court should remain a special tribunal where only monetary claims against the United States are resolved. *Court of Appeals for the Federal Circuit – 1981*, Hearings on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 212 (1981) (Letter from Acting Assistant Attorney General Michael W. Dolan to Committee Chairman Peter W. Rodino, Jr.); *see also United States v. John C. Grimberg Co., Inc.*, 702 F.2d 1362, 1369-70 (Fed. Cir. 1983) (recounting the legislative history).

The final legislation did not confer on the Claims Court the broad grant of declaratory and equitable power proposed by the Senate. Rather, Congress adopted a different, much narrower provision empowering the Claims Court to grant declaratory judgments and equitable relief only in bid protests. *See* Pub. L. No. 97-164, § 133(a), 96 Stat. 25, 40 (1981). The result was that Congress left standing almost all of the existing limitations on declaratory and equitable relief under the Tucker Act, and the consequent need for plaintiffs to pursue a separate action in the district court in order to obtain declaratory or equitable relief against the government.

There is thus no question that Congress was fully aware at the time it created the Claims Court that certain plaintiffs would need to pursue separate

suits in the Claims Court and in district court to obtain complete relief. Significantly, Congress did not intimate that Section 1500 prohibits a litigant from bringing parallel suits in order to obtain both damages and equitable relief against the government. To the contrary, Congress considered expanding the remedial power of the Claims Court in order to eliminate the need for such duplication. Congress never intended to require a plaintiff to elect only one remedy, and the legislative history of the 1982 Act makes clear that Congress implicitly adopted the Court of Claims' long-standing interpretation of Section 1500 as barring only claims that seek the same relief.

II. A SUIT FOR AN ACCOUNTING IN DISTRICT COURT SEEKS DIFFERENT RELIEF THAN A DAMAGES SUIT IN THE CFC

Contrary to the government's argument, Pet. Br. at 47-48, a suit for a trust accounting in the district court does not seek the same relief as a damages action in the CFC.

A. Tribes Seek An Accounting To Obtain Essential Information About Their Trust Property

The purpose of a trust accounting is to provide the beneficiary "a detailed account of [the trust] receipts, disbursements, and property on hand, from

which the beneficiary can learn whether the trustee has performed his trust and what the current status of the trust is." G. Bogert *et al.*, *The Law of Trusts and Trustees* § 963 (2d ed. 1983). An accounting is not a remedy for trust mismanagement. Rather, a beneficiary is entitled to a full accounting, irrespective of whether any breach of trust has been alleged or proven. *See Restatement (Third) of Trusts* § 83 (2007) ("A trustee has a duty to maintain clear, complete, and accurate books and records regarding the trust property and the administration of the trust, and, at reasonable intervals on request, to provide beneficiaries with reports or accountings"). Thus, "[t]he most fundamental fiduciary responsibility of the government, and the Bureau [of Indian Affairs], is the duty to make a full accounting of the property and funds held in trust for the … beneficiaries of Indian trust funds." "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund," H.R. Rep. No. 102-499 at 5 (1992).

In the mid-1980's a government proposal to contract with a private bank to manage tribal trust funds brought to a head tribal concerns about trust asset management. At this time, most tribes were uninformed about the management of their trust funds and assets. They did not receive statements, listings of assets, or audits. Tribes often didn't know

the full extent of the land they owned,[6] what tribal property was leased and what wasn't, what the terms of the leases were, and whether or not the rents or royalties were being collected. This information is vital to their economic well-being and future development. Tribal leaders had significant concern that some of this information might be lost in transferring management responsibility to private hands.

Congress enacted a series of statutes requiring the government to provide accountings of Indian trust assets to the beneficiaries. In 1987 Congress required that Indian trust accounts be audited and reconciled. *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987). In 1989 Congress added a requirement that the accounts be reconciled to the earliest possible date. *See* Pub. L. No. 101-121, 103 Stat. 701 (1989). The American Indian Trust Fund Management Reform Act of 1994 required that tribes be provided with reconciled account statements as of September 30, 1995, 25 U.S.C. § 4044, and with quarterly statements of performance on an ongoing basis. 25 U.S.C. § 4011. The 1994 Act "recognized and reaffirmed … that the government has longstanding and substantial trust obligations to Indians … not

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[6] On large reservations, it is common for tribes to own hundreds or thousands of separate tracts of land and undivided interests within those tracts.

the least of which is a duty to account." *Cobell v. Norton,* 240 F.3d 1081, 1098 (D.C. Cir. 2001).

In 1991 the accounting firm of Arthur Andersen & Co. was engaged by the Bureau of Indian Affairs ("BIA") to perform a reconciliation of Indian trust fund accounts. The scope of the project subsequently was narrowed to a set of agreed procedures on tribal accounts for the 20-year time period of Fiscal Years 1973-1992. Andersen concluded its work in the fall of 1995. The BIA prepared its own reconciled account statements for tribal trust funds for Fiscal Years 1993-1995. In 1996, the BIA provided "reconciliation reports" to the tribes, which included the Andersen work product for 1973-1992 and the BIA work product for 1993-1995.

But these reconciliation reports were deeply flawed. For example, the BIA could not certify that the reconciliations were performed in compliance with the agreed upon procedures. Tribal accounts could not be fully reconciled or audited due to missing records and the lack of an audit trail in the BIA's systems. Some 32,901 noninvestment transactions with a total value of $2.4 billion could not be reconciled. Further, all tribal leases with collections greater than $5,000 – some 6,446 leases -- and a sample of 100 leases of less than $5,000 were to be reviewed. But, due to time constraints, 1,399 leases with collections greater than $25,000 were identified for testing, of which 755 lease files were located and only 692 leases were actually tested.

Because the BIA did not know the universe of tribal leases, it could not determine total lease revenue expected to be collected during a given period to establish a benchmark for testing. Oil and gas royalties on Indian leases were to be traced from collection by the Minerals Management Service ("MMS") to the general ledger maintained by the BIA. But because MMS retained records for only six years, records for most of the 20-year reconciliation period were not available and alternative procedures at MMS were not performed due to time constraints. And the BIA did not disclose to the tribes which procedures specified in the reconciliation contract had not been performed or could not be completed and the reasons why not. *See* U.S. General Accounting Office, *Financial Management: BIA's Tribal Trust Fund Account Reconciliation Results*, GAO/AIMD-96-63 at 1-2, 4-7, 12, and 20-22 (May 3, 1996).

Agricultural leases are the primary source of income for CRIT, and the reconciliation report provided to CRIT analyzed 68 agricultural leases of reservation land. But during the relevant time period, there had been a total of some 1,858 agricultural leases plus a number of residential and commercial leases. An "under-collection" rate was reported for those 68 agricultural leases, *i.e.* the shortfall between rents that should have been collected and those that were actually collected. There was no means, however, for applying this data to all of the agricultural leases, much less for the

residential and commercial leases, nor was any list or summary of all such leases provided.

A judicially-ordered trust accounting would provide CRIT – and other tribes – with precisely this kind of vital information. *See Restatement (Second) of Trusts*, § 199 (1959) (the beneficiary can maintain a suit "to compel the trustee to perform his duties as trustee"). Such an accounting may reveal or bolster damages claims for breach of trust, but it has independent utility even if it does not do so. An accounting could reveal potential claims against third parties (such as lessees or other parties who have breached agreements regarding the use of tribal land or assets). Or it could provide information that is essential to strengthen the ongoing management of the tribe's trust assets. Tribes want to control the fate of their property. While they are not free to replace the trustee, they could withdraw and assume management of some or all of their trust funds. *See* 25 U.S.C. § 4022. And they can lobby the Executive Branch and Congress to make any changes in the government's management of the trust that an accounting shows are desirable. At a minimum, an accounting would confirm or dispel suspicions that tribal trust assets have been (and may continue to be) mismanaged and depleted.

In short, an accounting would provide the tribe with essential knowledge about the condition of the trust to which it is entitled. This explains why CRIT

and other tribes have brought suits for a trust accounting, separate and apart from any damages claim based on alleged mismanagement of their trust assets.

B. The CFC Cannot Order A Trust Accounting

Tribes cannot obtain a trust accounting in the CFC. Except for bid protests, *see* 28 U.S.C. § 1491(b)(2), the CFC has no power to grant affirmative non-monetary relief unless it is tied and subordinate to a money judgment. *See James v. Caldera,* 159 F.3d 573, 580 (Fed. Cir. 1998). Even then, such relief is limited to orders directing restoration to office or position, placement in appropriate duty or retirement status, or correction of applicable records. 28 U.S.C. § 1491(a)(2).[7] Nor can the CFC enforce a tribe's statutory and common law right to an accounting pursuant to the APA, *See Lion Raisins, Inc. v. United States,* 416 F.3d 1356, 1370 n. 11 (Fed.Cir.2005) (CFC lacks APA

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[7] The Federal Circuit recently stated in dictum that the CFC "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….'" *Eastern Shawnee Tribe of Oklahoma v. United States*, 582 F.3d 1306, 1308 (Fed. Cir. 2009). This is simply not so. As enacted, the 1982 legislation provided for grants of equitable relief only with respect to bid protests.

jurisdiction); *Martinez v. United States,* 333 F.3d 1295, 1313 (Fed.Cir.2003) (same). Thus, the CFC acknowledged below that it "cannot simply order an accounting as stand-alone relief." Pet. App. 40a.

While, in certain circumstances, the CFC may direct an accounting in aid of judgment, that is not a form of relief at all; rather, it is a litigation tool sometimes used to calculate the quantum of damages after liability has been proven. It is confined to determining damages for specific breach(es) of trust and does not extend to all of the property held in trust. Further, its temporal scope is limited by the applicable statute of limitations, as opposed to an accounting to the earliest possible date as directed by Congress.

Moreover, in order to obtain any accounting in the CFC, a tribe first has to prove that a breach of trust occurred. As the CFC noted in this case, if "plaintiff satisfied its burdens of proof, what would ensue would amount to an accounting, albeit in aid of judgment." Pet. App. 41a. This sort of accounting is the antithesis of the trust accounting that Congress mandated. Congress envisioned a trust accounting as a precursor to a possible breach of trust claim, not as part of the relief that flows from a successful breach of trust action. Thus, when it enacted the various trust accounting provisions, Congress also provided that the statute of limitations shall not commence to run on Indian breach of trust claims until an accounting is

furnished from which the beneficiary can determine whether there has been a loss. *See Shoshone Indian Tribe v. United States*, 364 F. 3d 1339, 1344-51 (Fed. Cir. 2004).[8]

From a practical perspective, an accounting in aid of judgment is no substitute for a trust accounting. Proving a breach of trust claim may well require a tribe to establish the trust's receipts, disbursements, and/or property on hand – in which event an accounting in aid of judgment would be superfluous. Conversely, because of the difficulties and expense involved in proving a breach of trust, a tribe may limit its claims to those that are easiest to prove or involve the most money – in which event a full accounting that might expose other breaches will never occur.

C. Tribal Suits For A Trust Accounting Do Not Trigger Section 1500

As 2002 approached, Indian tribes were concerned that the government would assert that the

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[8] *See also*, *e.g.*. Act of November 5, 1990, Pub. L. No. 101-512, 104 Stat. 1915; Act of November 13, 1991, Pub. L. No. 102-154, 105 Stat. 990; Act of October 5, 1992, Pub. L. No. 102-381, 106 Stat. 1374; Act of November 11, 1993, Pub. L. No. 103-138, 107 Stat. 1379; Act of September 30, 1994, Pub. L. No. 103-332, 108 Stat. 2499; Act of April 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321.

flawed 1996 reconciliation reports had fulfilled its accounting obligation and triggered the six-year limitations period on breach of trust claims and claims under the APA. *See* 28 U.S.C. §§ 2501, 2401(a). To postpone the filing of needless claims and to encourage settlement negotiations, Congress provided that all of the reconciliation reports were deemed to have been received by tribes on December 31, 1999. *See* An Act to Encourage the Negotiated Settlement of Tribal Claims, Pub. L. No. 107-153, § 1, 116 Stat. 79 (2002) (codified at 25 U.S.C. § 4044 note). This effectively extended the limitations period by three years. At the end of this period, Congress again extended it by another year, thereby making the deadline for filing suit the end of 2006. Pub. L. No. 109-158, § 1, 119 Stat. 2954 (2005). With no further extensions in the offing, a number of tribes filed parallel suits in the district court and the CFC in late 2006. Pet. App. 94a-99a. This was a protective measure in a situation where the tribes were being forced to assert (and thereby preserve) their distinct claims for (1) mismanagement of trust assets and (2) the full accounting to which they are entitled.

In sum, a tribal suit for a trust accounting seeks different relief than a damages action in the CFC for breach of trust and so does not trigger Section 1500. A suit for an accounting seeks information about the identity, condition and use of the trust assets while an action for breach of trust seeks compensation for past mismanagement of trust assets.

The remaining question is whether Section 1500 is implicated where, as here, a tribe requests equitable monetary relief in connection with an accounting. Respondent's brief addresses this issue thoroughly and persuasively, and demonstrates that the equitable relief sought by the Nation in connection with the accounting is not the same as the damages the Nation seeks in the CFC. Amici adopt Respondent's analysis.

III. A SUIT FOR AN ACCOUNTING IS NOT BASED ON THE SAME OPERATIVE FACTS AS A DAMAGES SUIT FOR BREACH OF TRUST

Not only does a suit for a trust accounting seek different relief than a damages action for breach of trust, but it is based on different operative facts as well. This underscores the conclusion that – and furnishes an additional reason why -- Section 1500 is inapplicable here.[9]

"[O]perative facts are those facts essential to the grievance for which recovery is sought." *Allstate Financial Corp. v. United States*, 29 Fed. Cl. 366, 369 (1993). A fact must be "relevant to a judicially

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[9] Because the Federal Circuit majority concluded that the "same relief" requirement is not met in this case, it did not consider whether the Nation's complaints arise from the same operative facts. Pet. App. at 9a n.1.

imposed remedy" in order to be "operative." *Loveladies*, 27 F.3d at 1551 n.17.

A tribal claim for a trust accounting is based on two operative facts: (i) the government holds property in trust for the tribe and (ii) the government has not provided the tribe with an accounting. In contrast, a tribal claim for breach of trust is based on allegations that (i) the government has mismanaged tribal trust assets and (ii) the tribe has suffered damages as a result. These are completely distinct sets of operative facts. The facts which support an accounting would not support a claim for breach of trust, and vice versa.

Nor is there a necessary relationship between these sets of operative facts. Although evidence of mismanagement may result from an accounting, the government's failure to provide an accounting does not establish that it has mismanaged trust assets. Likewise, a tribe's claim for breach of trust is not dependent on its having received an accounting from the government.

In this case, the Nation's complaint for an accounting also included allegations that the government had mismanaged some of its trust assets. But these were not operative facts in the district court action; rather, they were mere background information. "Surplusage [in a complaint] can and should be ignored." *United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 378 (7th Cir. 2003). The operative facts in

a claim for a trust accounting remain the same regardless of what additional, non-operative facts may also be alleged.

Because a tribal claim for a trust accounting is based on different operative facts than a claim for money damages for breach of trust, it does not trigger Section 1500 and preclude a damages action in the CFC.

CONCLUSION

Congress implicitly approved of the use of separate suits to obtain damages and equitable relief against the government when it created the Claims Court (now the CFC) in 1982 and revised Section 1500 to apply to the new court. Because a tribal claim for a trust accounting in district court seeks different relief – and is based on different operative facts -- than a damages action for breach of trust in the CFC, it does not trigger Section 1500. Accordingly, the decision of the Federal Circuit should be affirmed.

Respectfully submitted,

STEVEN D. GORDON
Counsel of Record
STEPHEN J. MCHUGH
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, NW
Washington, D.C. 20006
202-955-3000
steven.gordon@hklaw.com

Counsel for Amici Curiae

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