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 OF PROFESSOR GREGORY C. SISK AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST OF AMICUS CURIAE

As amicus curiae and the author of this brief, my name is Gregory C. Sisk.[1] I am the Orestes A. Brownson Professor of Law at the University of St. Thomas (Minnesota). My only interest in this matter is that of a legal scholar.

For more than two decades, my scholarly work has focused on civil litigation with the federal government. I have published both a treatise and the only law school casebook on the subject. *Litigation With the Federal Government* (ALI-ABA, 4th ed., 2006); *Litigation With the Federal Government: Cases and Materials* (Foundation Press, 2d ed., 2008). I also have written several law review articles on the Tucker Act, the Court of Federal Claims (CFC), and Indian breach of trust claims against the United States, some of which are cited in this brief.

My scholarly work on these subjects is cited regularly by the federal courts. *See, e.g.*, *United States v. Norwood*, 602 F.3d 830, 834 (7th Cir. 2010); *Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1123 n.12 (Fed.

[1] The parties have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person or entity made a monetary contribution to the preparation and submission of this brief other than me as Amicus Curiae and my employer (the University of St. Thomas by providing a professional development fund to each faculty member to support scholarly and public service work).

Cir. 2007); *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 511 n.3 (9th Cir. 2005); *District of Columbia v. United States*, 67 Fed. Cl. 292, 305 (2005); *see also* Judge S. Jay Plager, *Money and Power: Observations on the Jurisdiction of the U.S. Court of Federal Claims*, 17 Fed. Cir. B.J. 371, 374 (2008) (referring to one of my articles as the "definitive piece" on CFC jurisdiction over money claims and saying "it is always refreshing to find a law review article that addresses issues that are relevant to the work of judges and practicing lawyers").

As a former appellate attorney with the Civil Division of the U.S. Department of Justice and as an attorney admitted to the active practice of law, I have litigated cases on behalf of both the government and private parties that implicate the jurisdictional authority of the CFC. Most recently, I was co-counsel for the petitioner in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008).

During my service in the Department of Justice, I drafted legislation to encourage early resolution of questions about the respective jurisdiction of the District Court and the CFC. *See Tucker Act Appeals to the Federal Circuit,* 36 Fed. B. News & J. 41 (1989). This legislation, enacted by Congress in 1988, permits an interlocutory appeal by either the plaintiff or the government to the Court of Appeals for the Federal Circuit from an adverse District Court ruling on a motion to transfer the action to the CFC. Pub. L.

No. 100-702, Title V, § 501, 102 Stat. 4642 (1988) (codified at 28 U.S.C. § 1292(d)(4)).

SUMMARY OF THE ARGUMENT

Since the enactment of the Indian Tucker Act in 1946, 28 U.S.C. § 1505, the United States Court of Federal Claims (CFC) has been the forum for Indian breach of trust claims alleging the United States Government's failure to uphold its fiduciary responsibilities in managing Native American assets. This Court's landmark Indian breach of trust decisions over the decades have been rendered in cases that began in the CFC or its predecessor. *See, e.g.*, *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *United States v. Navajo Nation*, 537 U.S. 488 (2003); *United States v. Mitchell*, 463 U.S. 206 (1983).

The longstanding jurisprudence that Indian breach of trust claims involving assets held in trust by the United States are to be brought in the CFC was disturbed by an aberrational decision in the United States District Court for the District of Columbia. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 24-28 (D.D.C. 1999), *aff'd*, *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001). In that case, the District Court asserted authority under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, to adjudicate the accounting of government-established financial accounts for distribution of profits derived from Native American resources held in trust by the United

States. In so ruling, the District Court aggressively extended this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988) – a unique case involving Federal-State administration of the Medicaid health care program which this Court had found unsuited for review in the CFC.

The United States Court of Appeals for the Federal Circuit has nationwide and exclusive appellate jurisdiction over Tucker Act claims. 28 U.S.C. § 1295(a)(2), (3); *see generally United States v. Hohri*, 482 U.S. 64, 71-76 (1987). In addition, Congress has granted the Federal Circuit special authority to hear interlocutory appeals from cases that arguably have been mis-filed in District Court rather than in the CFC under the Tucker Act. *See* 28 U.S.C. § 1292(d)(4)(A).

Because the APA expressly excludes claims for which an adequate remedy lies in another court, 5 U.S.C. § 704, the Federal Circuit has confirmed that the CFC, rather than the District Court, retains its traditional and exclusive jurisdiction to hear claims against the Federal Government that are adequately remedied by a money judgment. *See, e.g.*, *Consol. Edison Co. v. United States Dep't of Energy,* 247 F.3d 1378 (Fed. Cir. 2001); *Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116 (Fed. Cir. 2007). The Federal Circuit specifically has reaffirmed the exclusive jurisdiction of the CFC over Indian breach of trust claims alleging Government mismanagement of Native American resources.

Eastern Shawnee Tribe v. United States, 582 F.3d 1306, 1308-09 (Fed. Cir. 2009).

Several Native American plaintiffs, including the Tohono O'odham Nation, have continued to file breach of trust claims alleging Government mismanagement of resources and financial accounts in the District Court for the District of Columbia. The Government has not employed the procedural tool designed by Congress for this circumstance, which is a motion to transfer the District Court action to the CFC under 28 U.S.C. § 1631, followed if necessary by an interlocutory appeal to the Federal Circuit for early resolution of the jurisdictional conflict under 28 U.S.C. § 1292(d)(4)(A). To add to the jurisdictional chaos, several of these tribes, again including the Tohono O'odham Nation, have filed parallel lawsuits in the CFC. Thus the stage was set for the present collision between dual lawsuits and the attendant controversy over the application of 28 U.S.C. § 1500.

This Court should clarify that the CFC is the forum for claims, such as the Indian breach of trust claims involved here, that ultimately seek or could be satisfied by a money judgment (and collateral relief). But for the mistaken premise by the tribes that the District Court rather than the CFC may hear an Indian breach of trust claim involving alleged Government mis-management of trust assets, no occasion would arise for the filing of parallel claims in both courts, and the § 1500 problem would evaporate.

ARGUMENT

By focusing on whether 28 U.S.C. § 1500 precludes the filing of nearly simultaneous lawsuits arising out of the same operative facts in two different federal courts, the parties neglect the more fundamental question of whether each of those federal courts has proper authority over the type of claim presented. If, as submitted in this amicus brief, the District Court does not have authority to adjudicate an Indian breach of trust claim that can be adequately remedied by a money judgment in the Court of Federal Claims, then the application of § 1500 may be unnecessary or superfluous in this case to implement the statutory policy of discouraging duplicative litigation against the Federal Government. Even if the lawsuit filed in the CFC were to be dismissed under § 1500, the parallel lawsuit filed in the District Court should be transferred to the CFC, thus effectively returning the matter to square one.

I. THE COURT OF FEDERAL CLAIMS HAS EXCLUSIVE JURISDICTION OVER INDIAN BREACH OF TRUST CLAIMS WHEN A MONEY JUDGMENT WOULD BE AN ADEQUATE REMEDY

A. Under the Indian Tucker Act, the Court of Federal Claims is the Forum Designated by Congress for Breach of Trust Claims Alleging Government Mismanagement of Indian Assets

"What today is the Court of Federal Claims shared its birth with that of the first significant grant of permission by the sovereign United States to its citizens to seek relief against it in the courts." Gregory C. Sisk, *Litigation with the Federal Government* § 4.02(a)(1), at 226 (4th ed. 2006). The United States Court of Claims was created by Congress in 1855 and given authority to hear claims against the United States founded upon federal statutes, regulations, and contracts. Act of February 24, 1855, ch. 122, 10 Stat. 612. In 1887, the Tucker Act was enacted to confirm the nationwide jurisdiction of the Court of Claims over money claims (other than in tort) based on federal statutes, executive regulations, and contract, while also expanding the court's authority to include actions based on the Constitution. Tucker Act of 1887, ch. 359, 24 Stat. 505 (1887); *see generally* Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 Vill. L. Rev. 155, 176-77 (1998).

The Tucker Act is a jurisdictional statute that also waives the Federal Government's sovereign immunity for monetary claims "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. §§ 1346(a)(2), 1491(a)(1). Trial court jurisdiction over "Big" Tucker Act claims against the United States is assigned by § 1491(a)(1) to the CFC. District Courts retain concurrent jurisdiction over Tucker Act claims for $10,000 or less under § 1346(a)(2), which is commonly known as the "Little" Tucker Act.

The Tucker Act remains the "foundation stone" in the adjudication of money claims against the United States. C. Stanley Dees, *The Future of the Contract Disputes Act: Is It Time to Roll Back Sovereign Immunity?*, 28 Pub. Cont. L.J. 545, 546 (1999). Congress has designated the CFC as the forum for demands against the public treasury, relying on its expertise with appropriations and other money-mandating statutes and its experience in adjudicating complex cases involving fiscal matters, financial transactions, and public monetary obligations.

In recent decades, Congress has granted to the CFC meaningful and considerable, although limited, remedial powers beyond awarding a money judgment. In 1972, Congress enacted the Remand Act as an amendment to the Tucker Act, authorizing the CFC "[t]o provide an entire remedy and to complete the

relief afforded by the judgment" by granting certain equitable relief attached to a money judgment, including "correction of applicable records." Remand Act of 1972, Pub. L. No. 92-415, 86 Stat. 652 (codified at 28 U.S.C. § 1491(a)(2)).

The CFC long has served as Congress's chosen forum for adjudicating financial and property disputes that arise from the nation's responsibilities to indigenous peoples. In 1946, Congress enacted the Indian Tucker Act, which as amended directs the exercise of jurisdiction by the Court of Federal Claims –

> in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska 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 otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. § 1505 (originally enacted as the Indian Claims Commission Act, ch. 959, § 24, Pub. L. No. 79-726, 60 Stat. 1055, 1057 (1946)).

With the enactment of the Indian Tucker Act, it would "never again be necessary to pass special Indian jurisdictional acts in order to permit the Indians to secure a court adjudication on any misappropriations of Indian funds or of any other Indian property by Federal officials that might occur in the

future." 92 Cong. Rec. 5313 (1946) (statement of Rep. Jackson). On the Indian Tucker Act and breach of trust claims, *see generally Cohen's Handbook of Federal Indian Law* § 5.05[1][b], at 426-32 (Nell Jessup Newton et al. eds., 2005); Gregory C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity,* 39 Tulsa L. Rev. 313, 316-17 (2004).

This Court's landmark Indian breach of trust decisions over the decades have been rendered on review of claims originally filed in the CFC or its predecessor. *See, e.g.*, *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *United States v. Navajo Nation*, 537 U.S. 488 (2003); *United States v. Mitchell*, 463 U.S. 206 (1983); *Seminole Nation v. United States*, 316 U.S. 286 (1942).

B. This Court's *Bowen v. Massachusetts* Decision, Which Approved District Court Review of Federal-State Medicaid Disputes under the Administrative Procedure Act, Did Not Suggest that Traditional Tucker Act Claims Could be Diverted from the Court of Federal Claims

When considering amendments to the Administrative Procedure Act (APA) in 1976, Congress sought to pull together the "patchwork" of various statutory waivers of federal sovereign immunity in the hopes of regularizing this area of law and reducing confusion. *See Massachusetts v. Departmental Grant Appeals*

Bd., 815 F.2d 778, 782-83 & n.3 (1st Cir. 1987). By providing that the APA applies only to actions "seeking relief other than money damages," 5 U.S.C. § 702, and where "there is no other adequate remedy in a court," 5 U.S.C. § 704, Congress designed the APA to be complementary with the Tucker Act, not overlapping or conflicting. *See* H.R. Rep. No. 94-1656, at 11 (1976) (the "explicit exclusion of monetary relief [from the amendment to the APA leaves] limitations on the recovery of money damages contained in * * * the Tucker Act * * * unaffected"); Richard H. Fallon, Jr., *Claims Court at the Crossroads*, 40 Cath. U. L. Rev. 517, 527 (1991) ("Congress clearly seems to have contemplated that there can be no suit in federal district court if the suit can instead be brought in the Claims Court under the Tucker Act.").

In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), this Court allowed a singular type of plaintiff to bring a peculiar claim for monetary relief under the APA framework rather than under the purview of the Tucker Act. Many feared that the Court had blurred the lines between the APA and the Tucker Act, which is also the jurisdictional border between the District Courts and the CFC.[2] *See Bowen*, 487 U.S. at 930

[2] The APA does not provide an independent grant of subject-matter jurisdiction to the federal courts. *See Califano v. Sanders*, 430 U.S. 99, 106-07 (1977). When a claim falls inside the scope of the APA's limited waiver of federal sovereign immunity, then the general federal-question jurisdictional statute, 28 U.S.C. § 1331, or the Indian tribe jurisdictional

(Continued on following page)

(Scalia, J., dissenting) ("[T]he jurisdiction of the Claims Court has been thrown into chaos."); *Suburban Mortgage Assocs.,* 480 F.3d at 1122 (saying that, through *Bowen*, "the [APA/Tucker Act] barrier sprang a leak, a leak that has threatened to become a gusher"); Marcia G. Madsen & Gregory A. Smith, *The Court of Federal Claims in the 21st Century: Specific Proposals for Legislative Changes*, 71 Geo. Wash. L. Rev. 824, 830 (2003) (describing *Bowen* as "upset[ting]" "fundamental understandings" about CFC and District Court jurisdiction). *See generally* Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims against the United States,* 71 Geo. Wash. L. Rev. 602 (2003).

As discussed below, however, the *Bowen* decision never suggested that the APA could be used to bypass the CFC for traditional money claims against the United States, such as presented by the classic Tucker Act scenario of an Indian breach of trust claim arising from government management of Native American assets. This Court has resisted extension of *Bowen* to new contexts. And, as discussed in a subsequent part of this brief, the Federal Circuit has established jurisdictional clarity in assignment

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statute, 28 U.S.C. § 1362, confers jurisdiction on the District Court.

of claims between federal courts, in a manner faithful to the specific ruling in *Bowen*.

In *Bowen v. Massachusetts*, the Court examined a challenge filed by the State of Massachusetts in District Court to the disallowance by the Federal Government of a reimbursement for certain health care expenditures under the matching payment provisions of the Medicaid statute, Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v. Although the Government challenged District Court authority under the APA, the Supreme Court majority held that the "money damages" exclusion in § 702 refers to claims seeking compensation for a loss. By contrast, the Court held, when money is "the very thing" to which a party is entitled, *Bowen*, 487 U.S. at 895, that money may be claimed in an action for specific relief under the APA:

> The State's suit to enforce § 1396b(a) of the Medicaid Act, which provides that the Secretary "shall pay" certain amounts for appropriate Medicaid services, is not a suit seeking money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money.

Bowen, 487 U.S. at 900. *But see id*. at 913-14 (Scalia, J., dissenting) (relying upon a distinction in the common law between a money judgment, which is "damages," and a nonmonetary remedy, which

is "specific relief," to conclude that a claim for retrospective monetary relief is outside the scope of the APA); *see also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210, 221 (2002) ("'Almost 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;'" quoting *Bowen*, 487 U.S. at 918-19 (Scalia, J., dissenting)).

In *Bowen*, the Court also rejected the Government's argument that § 704 of the APA barred judicial review because an alternative adequate remedy in the form of monetary relief was available against the United States in the then-Claims Court under the Tucker Act. *Bowen*, 487 U.S. at 901-08. Highlighting the special nature of the Medicaid financial participation arrangement between the Federal Government and the State of Massachusetts, the Court explained:

> [T]he nature of the controversies that give rise to disallowance decisions typically involve state governmental activities that a district court would be in a better position to understand and evaluate than a single tribunal headquartered in Washington. We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law. That policy applies with special force in this context because neither the Claims Court

> nor the Court of Appeals for the Federal Circuit has any special expertise in considering the state-law aspects of the controversies that give rise to disallowances under grant-in-aid programs. It would be nothing less than remarkable to conclude that Congress intended judicial review of these complex questions of federal-state interaction to be reviewed in a specialized forum such as the Court of Claims.

Bowen, 487 U.S. at 907-08. Moreover, the Court found it "anomalous to assume that Congress would channel the review of compliance decisions to the regional courts of appeals, see 42 U.S.C. § 1316(a)(3), and yet intend that the same type of questions arising in the disallowance context should be resolved by the Claims Court or the Federal Circuit." *Id*. at 908 (internal citation omitted).

Subsequently, in *Department of the Army v. Blue Fox*, 525 U.S. 255, 261-64 (1999), this Court unanimously reversed the extension of *Bowen* by one Court of Appeals to allow a subcontractor on a federal project to impose an "equitable lien" upon funds held by the United States. Holding that liens "are merely a means to the end of satisfying a claim for the recovery of money," the Court held this claim fell within the exclusion under the APA of actions for "money damages." *Id.* at 252-63. Thus, the Court recognized that lawsuits and devices that traditionally have been designed to recover money should be recognized for what they are in substance – money claims.

In sum, the Court in *Bowen v. Massachusetts* focused upon a dispute over an ongoing public welfare program arising from a unique Federal-State partnership relationship and held it was not well-suited for a Tucker Act suit in the CFC. The Court rejected what it called "the novel proposition that the Claims Court is the exclusive forum for judicial review" of Medicaid program disputes. *Bowen*, 487 U.S. at 883. Accordingly, the "most likely interpretation" of *Bowen* is that it does not "transfer matters traditionally within the exclusive jurisdiction" of the CFC. Cynthia Grant Bowman, Bowen v. Massachusetts: *The "Money Damages Exception" to the Administrative Procedure Act and Grant-in-Aid Litigation*, 21 Urb. Law. 557, 577-78 (1989) (arguing that *Bowen* should be limited to grant-in-aid programs); *see also Bowen*, 487 U.S. at 930 (Scalia, J., dissenting) (suggesting the courts "may have the sense" to "limit [the decision] to the single type of suit before us").

This Court has never suggested that traditional Tucker Act claims – government contract disputes, military employment claims, or Indian breach of trust claims involving management of Native American assets – could be diverted from the CFC to the District Court as purported claims for specific relief under the APA. *See Bowen*, 487 U.S. at 903 (describing the § 704 bar to judicial review when an adequate remedy lies elsewhere as "mak[ing] it clear that Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action").

C. Breach of Trust Claims Alleging Government Mismanagement of Indian Assets May be Adequately Remedied in the Court of Federal Claims and Thus Fall Outside the Scope of the Administrative Procedure Act for Judicial Review in District Court

1. The *Cobell* Case in the District of Columbia was an Unprecedented Projection of District Court Authority into the Province of the Court of Federal Claims over Indian Breach of Trust Claims

In 1996, a class action lawsuit on behalf of more than 300,000 Indians was filed as *Cobell v. Babbitt* in the United States District Court for the District of Columbia, alleging that the United States had failed to account for billions of dollars earned on oil and logging leases of millions of acres of land allotted to Indians in the last century but held in trust for them by the Federal Government. When the Government during discovery failed to turn over records for Indian trust accounts, the District Court took the extraordinary step of holding several leading officials, including the Secretary of the Interior, in contempt. *Cobell v. Babbitt*, 37 F. Supp. 2d 6, 38 (D.D.C. 1999). According to the District Court's findings, the Government has kept such poor records that it is incapable of determining what it owes each individual Indian or, for that matter, even which

individuals own which allotments. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 6-12 (D.D.C. 1999).

The *Cobell* litigation is still pending many years later. In 2006, the Court of Appeals for the District of Columbia Circuit ordered the action assigned to a different judge. *Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006). In 2009, the Court of Appeals remanded the case yet again to the District Court, overturning the District Court's ruling which had held that an accounting was not possible and ordered payment of $455 million as a "restitutionary award." *Cobell v. Salazar*, 573 F.3d 808, 809-10 (D.C. Cir. 2009). As of the date this brief was written, the *Cobell* accounting and asset administration claims had been settled for $1.4 billion, but congressional approval remained necessary. Cobell Settlement, at http://www.interior.gov/ost/cobell/index.html.

"Somewhat lost in the story of egregious government misconduct and adjudication of high-ranking government officials in contempt is the fact that the jurisdiction of the District Court – rather than the Court of Federal Claims – over the entire matter was doubtful and only possible through a generous reading of the *Bowen v. Massachusetts* decision." Sisk, *Tapestry*, *supra*, 71 Geo. Wash. L. Rev. at 661. The District Court in *Cobell* asserted authority over the matter under the APA, including the power to grant retrospective relief in the nature of an historical accounting of the accrued, past-due sums of

money that should be present in individual Indian trust accounts. But looking at the question with a "practical eye," *see New Mexico v. Regan*, 745 F.2d 1318, 1321 n.3 (10th Cir. 1984), the *Cobell* case is about *money* – how the Government was obliged as a fiduciary to safeguard it, how the Government mishandled it, to whom it is owed, and how much of it is due.

In *Cobell*, the District Court asserted the "crucial issue" was "whether the plaintiffs' requested retrospective remedy of an accounting is an equitable, specific claim, or whether it is simply a money damages claim in disguise." *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 39 (D.D.C. 1998). In response to the Government's argument that the equitable accounting remedy was only the prelude to a request for monetary relief, the District Court declared that there was no evidence that the true nature of the plaintiffs' claims was to obtain eventual monetary reimbursement. *Cobell*, 91 F. Supp. 2d at 25-26. "At most," the court said, "the enforcement of this statutory right [to an accounting] may partially support some future monetary claim (but not necessarily 'money damages'), which, because this is plaintiffs' own money, will only be compensatory to the extent that the money is missing from the trust." *Id.* at 28.

Quoting *Bowen v. Massachusetts*, the court said that the plaintiffs sought "'the very thing to which they are entitled,' an accounting of their money that actually exists in the [Individual Indian Money] trust." *Cobell*, 91 F. Supp. 2d at 28. In a terse

paragraph, the D.C. Circuit upheld this holding with citation to *Bowen*, finding that the plaintiffs' request for an accounting constituted "specific relief other than money damages" which the District Court had authority to hear under the APA. *Cobell v. Norton*, 240 F.3d 1081, 1094-95 (D.C. Cir. 2001).

This holding opened the floodgates at the E. Barrett Prettyman Federal Courthouse in Washington, D.C. Dozens of suits alleging mismanagement by the Government of Indian assets and funds are pending before the District Court for the District of Columbia. *See Assiniboine & Sioux Tribes v. Norton*, 527 F. Supp. 2d 130 (D.D.C. 2007) (listing cases). In thirty-one instances, Indian tribes have filed pairs of breach of trust suits in both the CFC and in the District Court. Pet. App. 94a-99a.

2. When an Indian Tribe Alleges a Breach of Trust by the Government in Management of Assets, the Court of Federal Claims May Afford a More Than Adequate Remedy

This Court long has recognized the adequacy of a money judgment to remedy a meritorious claim of breach of trust by the government in its fiduciary responsibilities to Native Americans. In the *Mitchell* Indian breach of trust case, this Court described the Tucker Act remedy in the Court of Federal Claims as, not merely adequate, but superior to the alternative of a suit for specific relief in the District Court under

the APA. As the Court explained, a Tucker Act suit for retrospective damages caused by the Government's breach of its fiduciary duty to manage resources held in trust is essential because "prospective equitable remedies" available under the APA would be "totally inadequate" in deterring Government mismanagement and ensuring that Native Americans receive the proper value of the managed resources. *Mitchell*, 463 U.S. at 226-28.

In both the District Court and the CFC, the Tohono O'odham Nation alleges that the United States has breached fiduciary duties in managing three million acres of tribal land with valuable natural resources, maintaining accurate accounts of income derived from the land, and administering trust money held from legal judgments in favor of the tribe. Pet. App. 58a-67a, 74a-89a. In its District Court complaint, the Nation relied on the APA for a waiver of sovereign immunity, citing *Bowen v. Massachusetts* and *Cobell*. Pet. App. 78a-79a.

Along with dozens of similar complaints filed by other tribes at about the same time, the Nation's pending lawsuit in the District Court requests an historical accounting of trust accounts (among other remedies). As was true in the *Cobell* case, however, the Nation's claim ultimately is about money:

> The *Cobell* plaintiffs did not seek an accounting from the government because they value bookkeeping exactitude in the abstract or appreciate the intrinsic beauty of a well-prepared financial statement. Rather,

> they sought an accounting for the practical purpose of hastening the day that the government will be called to account for – that is, required to *pay* – the money that it has wrongfully withheld.

Sisk, *Tapestry*, *supra*, 71 Geo. Wash. L. Rev. at 664.

Like the "equitable lien" device that this Court refused to countenance under the APA in *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262 (1999), the accounting of Native American trust accounts is "merely a means to the end of satisfying a claim for the recovery of money."

Even aside from the exclusion of claims for money damages under § 702 and the withdrawal of judicial review when an adequate remedy lies in another court under § 704, the APA is an uncertain source of authority for a freestanding cause-of-action to require the Government to prepare a comprehensive accounting of Indian trust assets. Before the District Court, the Tohono O'odham Nation insists that it possesses an independent cause of action in equity for an accounting that can be enforced outside of the APA, although the Nation still relies on the APA as a waiver of sovereign immunity. *See* Plaintiffs' Principal Brief in Opposition to Defendants' Motion to Dismiss (July 16, 2008). The Government argues that providing such an accounting is neither a discrete, non-discretionary, ministerial duty subject to review as "agency action" under §§ 702 and 706(1) nor "final agency action" subject to review under § 704. *See*

Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss (June 16, 2008).

Whichever party has the better of that argument, it is hardly surprising that a claim for an accounting of Indian trust assets does not fit comfortably under the APA. Instead, as this Court recognized a quarter-century ago, "Indians were to be given 'their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal government assumed,'" by Congress's enactment of that specific waiver of sovereign immunity commonly known as the Indian Tucker Act. *Mitchell*, 463 U.S. at 214 (quoting 92 Cong. Rec. 5312 (1946) (statement of Rep. Jackson)); *see also* 5 U.S.C. § 702 (precluding APA review "if any other statute that grants consent to suit explicitly or implicitly forbids the relief which is sought").

In any case, an Indian trust dispute involving Government management of tribal assets will rarely, if ever, arise separately from existing financial harm, which may be remedied by a forthright claim for a retrospective money judgment for breach of that trust. And the Tohono O'odham Nation's lawsuit in District Court is not that rare case.

In the very first sentence of its District Court complaint, the Nation alleges "breaches of trust by the United States * * * in the management and accounting of trust assets, including funds and land." Pet. App. 74a. In the first paragraph, the Nation seeks not only an accounting but the "correct[ion of]

the balances of the Nation's trust fund accounts to reflect accurate balances." Pet. App. 75a. Indeed, the Nation asks the District Court for remedies of "disgorgement" and "equitable restitution," Pet. App. 91a-92a, that is, a transfer of money from the Government to the Nation. Thus, both the accounting and the other "equitable" remedies sought by the Nation are claims that can be adequately remedied by a money judgment and collateral relief available in the CFC under the Tucker Act and Indian Tucker Act.

Before both the Federal Circuit and this Court, in an attempt to distinguish the two lawsuits, the Nation contends that its complaint in District Court seeks "'the return of "old money" that belongs to the Nation but erroneously does not appear on its balance sheet,'" while its complaint in the CFC seeks "'damages in the form of "new money" that the Nation should have earned as profit but did not.'" Br. Opp. 25 (quoting Federal Circuit opinion, Pet. App. 13a-14a).

Whether or not this is an accurate description of the relief sought in the two complaints, this argument about what the dissenting judge below called "particular pots of money as different relief" (Pet. App. 23a) only reveals how far this case has digressed from basic principles of Tucker Act jurisdiction in the CFC. The CFC's authority does not turn on such dichotomies as old/new money, equitable/legal remedies, money damages/monetary relief, or specific/substitutionary relief. Plainly and simply, the CFC

may award money, regardless of label. *See* Pet. App. 52a-53a (Moore, J., dissenting) ("While it may be true that money damages is a different technical legal theory than equitable restitution or disgorgement, nonetheless the claim for money damages [in the CFC] can access the same pot of 'old money' that the equitable claims in the district court can access."); *see also* Nora J. Pasman-Green & Alexis Derrossett, *Twenty Years After* Bowen v. Massachusetts – *Damages or Restitution*, 69 La. L. Rev. 749, 761 (2009) (explaining that "most restitution claims result in a money judgment, which is satisfied by the same enforcement procedures as a damage award").

In short, if a money-mandating substantive law authorizes payment, the CFC has the power under the Tucker Act and Indian Tucker Act to enter a money judgment. As the CFC held below, "in this court, no distinction is to be found between money 'old' and 'new.' Rather, if successful, a plaintiff is made whole, to the extent possible, by the payment of money for the government's breaches of trust." Pet. App. 53a.

When a retrospective monetary remedy is available, it is "adequate" absent extraordinary circumstances, notwithstanding the unavailability of prospective or equitable remedies. "[A]sking for 'more' relief where monetary relief will satisfy the claimant's needs cannot defeat the jurisdictional scheme set up by Congress – to centralize money claims against the government, except those claims

under $10,000 and those sounding in tort, in the [Court of Federal Claims]." *Amoco Prod. Co. v. Hodel*, 815 F.2d 352, 367 (5th Cir. 1987).

In addition, under the Remand Act of 1972, "[t]o provide an entire remedy and to complete the relief afforded by the judgment," the CFC has authority "as an incident of and collateral to any such judgment" to "issue orders directing * * * correction of applicable records * * * to any appropriate official of the United States." 28 U.S.C. § 1491(a)(2); *see also* H.R. Rep. No. 92-1023 (1972) ("[W]hen the Court of Claims does have jurisdiction over any case before it, this bill will enable the court to grant all necessary relief in one action.") Thus, the CFC may both award a money judgment for mismanagement of Native American resources and, incident and collateral to that money judgment, order correction of the financial records and trust accounts maintained by the government. *Eastern Shawnee Tribe v. United States*, 582 F.3d 1306, 1308 (Fed. Cir. 2009) (saying the Court of Federal Claims "appears to have the authority to order an equitable accounting as ancillary relief"); *Yankton Sioux Tribe v. United States*, 84 Fed. Cl. 225, 234 (2008) ("[W]hen [a] plaintiff [in the CFC] requests monetary damages for breach of trust, plaintiff is, in substance, also asking for an accounting in support of that award.").

Even prior to the congressional grant of additional remedial authority ancillary to a money judgment, the CFC has had "the power to require an

accounting in aid of its jurisdiction to render a money judgment on that claim," and discovery in the CFC has been available to obtain government documents and records relevant to the claim. *See Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483, 490-91 (1966); *see also* 28 U.S.C. § 2507 (authorizing CFC to "call upon any department or agency of the United States * * * for any information or papers, not privileged, for purposes of discovery or for use as evidence"); § 2521 (authorizing CFC to issue "subpoenas requiring the production of books, papers, documents or tangible things" and granting CFC the power to punish "contempt of its authority").

In sum, although supplemental to a monetary remedy, the CFC's power to demand a complete, detailed, and accurate accounting of the Nation's assets that the United States holds in trust should not be doubted. In any event, the APA does not remain available in the District Court whenever the alternative remedy afforded by Congress in another court is imperfect, awkward, or less than comprehensive; rather, the statute withdraws the power of judicial review under the APA when the alternative remedy in another court is "adequate."

D. With Nationwide Appellate Jurisdiction over Tucker Act Matters, the Court of Appeals for the Federal Circuit has Confirmed the Exclusive Jurisdiction of the Court of Federal Claims When a Claim may be Adequately Remedied by a Money Judgment

When the Court of Appeals for the Federal Circuit was created in 1982, Congress intended for it to exercise exclusive appellate jurisdiction over nontax Tucker Act claims in order "to provide reasonably quick and definitive answers to legal questions of nationwide significance." S. Rep. No. 97-275, at 3 (1981). Specifically, 28 U.S.C. § 1295(a)(3) grants jurisdiction to the Federal Circuit over all appeals from the Court of Federal Claims. Additionally, § 1295(a)(2) confers appellate jurisdiction upon the Federal Circuit over District Court decisions "if the jurisdiction of that court was based, in whole or in part, on section 1346[(a)(2)] of this title," that is, the Little Tucker Act.

In *United States v. Hohri*, 482 U.S. 64 (1987), this Court examined the comprehensive framework of the Federal Circuit's organic statute and noted the strong congressional expressions of the need for uniformity in the area of Tucker Act jurisprudence:

> A motivating concern of Congress in creating the Federal Circuit was the "special need for nationwide uniformity" in certain areas of the law. S. Rep. No. 97-275, p. 2

> (1981) (hereinafter 1981 Senate Report); S. Rep. No. 96-304, p. 8 (1979) (hereinafter 1979 Senate Report). The Senate Reports explained: "[T]here are areas of the law in which the appellate courts reach inconsistent decisions on the same issue, or in which – although the rule of law may be fairly clear – courts apply the law unevenly when faced with the facts of individual cases." 1981 Senate Report, at 3; 1979 Senate Report, at 9. The Federal Circuit was designed to provide "a prompt, definitive answer to legal questions" in these areas. 1981 Senate Report, at 1; 1979 Senate Report, at 1. Nontort claims against the Federal Government present one of the principal areas in which Congress sought such uniformity.

Hohri, 482 U.S. at 71-72.

In 1988, in the immediate aftermath of *Bowen v. Massachusetts*, Congress authorized an immediate interlocutory appeal by either the plaintiff or the government from a District Court ruling "granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under" 28 U.S.C. § 1631. Pub. L. No. 100-702, Title V, § 501, 102 Stat. 4642 (1988) (codified at 28 U.S.C. § 1292(d)(4)(A)). In this way, jurisdictional questions may be resolved at the outset of litigation, avoiding wasteful litigation on the merits in the wrong trial court. To "ensure uniform adjudication of Tucker Act issues in a single forum," the interlocutory appeal is

within the exclusive jurisdiction of the Federal Circuit. H.R. Rep. No. 100-889, at 52 (1988).

In *Consolidated Edison Co. v. United States Department of Energy*, 247 F.3d 1378, 1380-81 (Fed. Cir. 2001), nuclear utilities brought suit in District Court against the Federal Government challenging the constitutionality of statutory assessments against utilities for the Government's costs in decontaminating and decommissioning uranium processing facilities. The utilities sought a declaratory judgment that the statute was unconstitutional and an injunction against continued enforcement of the assessments. The Government moved to transfer the case to the CFC, asserting that adequate relief in the form of a refund of prior assessments would be available through the Tucker Act if plaintiffs were successful on the merits. After the District Court denied transfer and asserted authority under the APA, with citation to *Bowen v. Massachusetts*, the government took an interlocutory appeal to the Federal Circuit under 28 U.S.C. § 1292(d)(4). *Consol. Edison*, 247 F.3d at 1382.

The Federal Circuit concluded that the CFC could offer an adequate remedy, thus depriving the District Court of authority under the APA. *Consol. Edison*, 247 F.3d at 1380, 1382-86. Although the nuclear utilities may have avoided the "money damages" exclusion in § 702 of the APA by seeking only prospective relief, the District Court nonetheless was deprived of jurisdiction under § 704 of the APA because the CFC was empowered to provide an effective remedy. *Id*. at 1382-85. If the utilities were

successful in a suit for refund of previously paid assessments under the Tucker Act in the CFC, that judgment would operate by principles of res judicata to preclude the Government from continuing unlawful assessments in the future. Thus, because "[r]elief from its retrospective obligations will also relieve it from the same obligations prospectively," the CFC through a money judgment "can supply an adequate remedy even without an explicit grant of prospective relief." *Id*. at 1384-85.

With respect to *Bowen v. Massachusetts*, the Federal Circuit noted that the Supreme Court had "emphasized the complexity of the continuous relationship between the federal and state governments administering the Medicaid program." *Id*. at 1383. The Federal Circuit explained that when a case does not involve "a complex ongoing federal-state interface," the CFC may well be able to supply an adequate remedy through a money judgment. *Id*.

In subsequent decisions, the Federal Circuit has continued to affirm that "if a money judgment will give the plaintiff essentially the remedy he seeks – then the proper forum for resolution of the dispute is not a district court under the APA but the Court of Federal Claims under the Tucker Act." *Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1118 (Fed. Cir. 2007) ("[D]espite [the claimant's] valiant effort to frame the suit as one for declaratory or injunctive relief, this kind of litigation should be understood for what it is. At bottom it is a suit for money for which the Court of

Federal Claims can provide an adequate remedy, and it therefore belongs in that court."); *Christopher Village, L.P. v. United States*, 360 F.3d 1319, 1321 (Fed. Cir. 2004) (holding that a District Court does not have jurisdiction "to issue a declaratory judgment as to the government's liability for breach of contract solely in order to create a 'predicate' for suit to recover damages in the Court of Federal Claims").

In clarifying the state of the law pursuant to its national jurisdiction on Tucker Act matters, the Federal Circuit has specifically noted its disagreement with the federal courts in the District of Columbia. In *Eastern Shawnee Tribe v. United States*, 582 F.3d 1306, 1308-09 (Fed. Cir. 2009), the Federal Circuit cited to *Cobell*, stating: "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."

The Federal Circuit's message has been heard by some, but not all, judges in the District Court for the District of Columbia. In *Western Shoshone Nat'l Council v. United States*, 357 F. Supp. 2d 172, 176 (D.D.C. 2004), the court transferred Indian breach of trust claims for an accounting and monetary relief to the CFC, recognizing that the CFC had the power to conduct an accounting and award money. Citing the

Federal Circuit's *Consolidated Edison* decision, the court said that the tribe could "not cleverly circumvent jurisdiction of the Court of Federal Claims by asking for a declaratory judgment for an accounting which the [tribe] can then use to obtain money damages within the same suit." *Id*. at 176 n.7. But in *Osage Tribe v. United States*, 2005 WL 578171, at *2 (D.D.C. Mar. 9, 2005), the same judge who asserted APA authority over Indian breach of trust financial claims in *Cobell* cited that decision as establishing jurisdiction, denied a motion to transfer to the CFC, and chastised the Government, saying the court had "the dubious distinction of having heard these same arguments on multiple occasions."

And thus, jurisdictional disorientation persists.

II. THIS COURT SHOULD ADDRESS DUPLICATIVE LITIGATION AGAINST THE UNITED STATES BY CLARIFYING JURISDICTIONAL LINES AND DISCOURAGING ATTEMPTS TO BYPASS THE COURT OF FEDERAL CLAIMS WHEN A CLAIM FOR A MONEY JUDGMENT IS AVAILABLE

The Government contends that the Tohono O'odham Nation's breach of trust action filed in the Court of Federal Claims should be dismissed, because of the pendency of the Nation's parallel breach of trust action in the District Court, and that the Nation's action in the District Court should be dismissed on jurisdictional, sovereign immunity, and other grounds. The Nation responds that both the

CFC and the District Court lawsuits should be permitted to proceed along separate courses and result in two judgments. This amicus brief submits that the District Court lacks authority under the APA to hear the parallel lawsuit, that claims-splitting between these federal courts contradicts the congressional purpose to centralize monetary claims in the CFC and the Federal Circuit, and thus that the District Court action should be transferred to the CFC for unified adjudication under the Indian Tucker Act.[3]

If the analysis in this amicus brief is correct, then regardless whether the present CFC suit is dismissed under § 1500, another action arising from the same operative facts should be on its way to the CFC from the District Court through transfer under 28 U.S.C. § 1631 (confirmed if necessary by special interlocutory appeal to the Federal Circuit as provided in 28 U.S.C. § 1292(d)(4)). That transferred suit will then join or replace the present CFC suit. In the end, however winding may be the path, a single

[3] The Government moved for a transfer to the CFC in one of the nearly identical claims by other Indian tribes which are pending along with the Tohono O'odham Nation's action in District Court in the District of Columbia. *See Osage Tribe v. United States*, 2005 WL 578171, at *2 (D.D.C. Mar. 9, 2005). However, the Government subsequently dismissed its appeal to the Federal Circuit, *Osage Tribe v. Norton*, No. 05-1383 (Fed. Cir. July 8, 2005) (Order), thereby pretermitting early resolution of the jurisdictional question by the appellate court designated by Congress. *See* 28 U.S.C. § 1292(d)(4).

lawsuit for breach of trust should remain in or arrive before the Court of Federal Claims.

Whether the § 1500 jurisdictional bar applies to an action in the CFC may not pivot directly on whether the simultaneously pending suit in another court is jurisdictionally viable in that court. *See Frantz Equip. Co. v. United States*, 98 F. Supp. 579, 580 (Ct. Cl. 1951). Nonetheless, the question of proper authority over the parallel lawsuit in the District Court is not extraneous to the § 1500 question in this particular context. By comparing the two lawsuits to determine whether they truly arise from the same underlying claim, the limits on District Court authority under the APA come into sharper relief. Moreover, when § 1500 is read in *pari materia* with other federal jurisdictional statutes like §§ 1631 and 1292(d)(4), the congressional policy expressed in these statutes is not only to abridge duplicative litigation against the federal government but to avoid dismissal of a viable lawsuit when the jurisdictional defect can be corrected by moving the litigation to the proper federal forum.

First, as this Court observed in *Keene Corp. v. United States*, 508 U.S. 200, 210 (1993), the § 1500 question "requires a comparison between the claims raised in the [CFC] and in the other lawsuit." Although the parallel District Court action is not directly before this Court on the grant of the writ of certiorari from the judgment of the Federal Circuit, the nature of the claims in the District Court are necessarily under examination in this Court because

the comparison of the pleadings is part-and-parcel of the § 1500 same "claim" analysis.

As the Federal Circuit and the Nation construe § 1500, whether the same "claim" underlies each action turns on the type of remedy requested in each court. Given that the District Court's authority under the APA is withdrawn under § 704 when an "adequate remedy" is available in another court, a comparison of the remedies sought in the District Court under the APA and in the CFC under the Tucker Act is revealing. In many respects, the debate between the parties on the nature of the claims and remedies being sought in the competing actions runs parallel to the underlying questions about whether the District Court has remedial authority to proceed under the APA or instead whether this matter falls exclusively under the purview of the CFC through the Indian Tucker Act.

Second, this Court should consider, not only how to interpret and apply § 1500 in this particular case, but how to discourage renewed contests arising from matching lawsuits in different federal courts for the future. "Nothing is more wasteful than litigation about where to litigate, particularly when the options are all courts within the same legal system that will apply the same law." *Bowen*, 487 U.S. at 930 (1988) (Scalia, J., dissenting).

Under some circumstances, filings in both the District Court and the CFC of duplicative or alternative lawsuits arising out of the same operative

facts may be difficult to avoid, making application of § 1500 unavoidable as well. In *Keene*, for example, a manufacturer of asbestos pursuant to government specification sought indemnification for liability to those alleging injury by a contract claim in the CFC and simultaneously sought indemnification or contribution by the United States in tort by a third-party complaint in District Court. *Keene*, 508 U.S. at 203-04, 216. Because the contract-based theory could be pursued only in the Court of Federal Claims under the Tucker Act and the tort-based theory could be pursued only in the District Court under the Federal Tort Claims Act, the claimant could not seek adequate relief in a single forum. Thus, the conflict between courts could not be easily avoided without putting the claimant to an election of legal theories/causes of action.

However, in the Indian breach of trust context, when the claim involves the Government's management of assets and funds, no jurisdictional conflict is necessary, and a rivalry between federal courts can be prevented. By clarifying that the proper forum for this type of claim is the Court of Federal Claims, this Court can prevent the recurrence of these jurisdictional disputes in the future.

CONCLUSION

By departing from established jurisprudence that Indian breach of trust claims involving the

Government's fiduciary administration of Native American assets and funds are to be brought in the Court of Federal Claims, the District Court for the District of Columbia created the conditions necessary for the present conflict over the operation of § 1500. If this Court confirms the traditional and exclusive jurisdiction of the CFC over Indian breach of trust claims that can be adequately remedied by a money judgment (and collatereal relief), then claimants will have no basis in the future for filing duplicative actions in multiple courts. For this category of Indian breach of trust cases, the § 1500 problem will evaporate.

The Government always has had the power to cut through the jurisdictional fog – and practically (if not formally) moot the § 1500 problem – by filing a motion under 28 U.S.C. § 1631 to transfer the parallel suit now pending in the District Court. Even if the District Court should deny the motion to transfer, the Government would be empowered to take an interlocutory appeal to the Federal Circuit under 28 U.S.C. § 1292(d)(4)(A). Because the Federal Circuit has already agreed that Indian breach of trust claims that can be remedied by a money judgment should be heard in the CFC, the transfer would be successfully accomplished.

With this Court's clarification of jurisdictional lines, the path to a single Tucker Act suit in the CFC would be revealed. Whether the present CFC action is dismissed under § 1500, is voluntarily dismissed by the Tohono O'odham Nation upon transfer of the

parallel District Court action, or is consolidated by the CFC together with the transferred District Court suit, the ultimate outcome here should be the same: a single lawsuit should go forward in a single forum, which is the Court of Federal Claims.

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Respectfully submitted,

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