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The Jurisdiction of the Court of Federal Claims and Forum Shopping in Money Claims Against the Federal Government

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> *[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.*
>
> Judge S. Jay Plager[1]

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1. Suburban Mortg. Assocs. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116, 1118 (Fed. Cir. 2007).

INTRODUCTION

Over the past decade, the U.S. Court of Appeals for the Federal Circuit has issued a series of opinions[2] clarifying the jurisdictional priority of the United States Court of Federal Claims (CFC) under the Tucker Act (which authorizes non-tort money claims against the United States)[3] over a variety of claims against the federal government that are essentially means to a monetary end. In these cases, plaintiffs had cleverly or mistakenly transformed financial disputes into requests for injunctive or declaratory relief under the Administrative Procedure Act (APA)[4] that purportedly could be filed in U.S. District Court.

Because the APA expressly excludes judicial review in District Court when an "adequate remedy" lies in another court,[5] the Federal Circuit has repeatedly confirmed that the CFC retains its traditional and exclusive jurisdiction to hear claims against the federal government that are adequately remedied by a money judgment. The Federal Circuit's leading jurisdictional decisions, emphasizing the sufficiency of a money judgment in the CFC to resolve claims that are essentially pecuniary in nature, have arisen in such varied contexts as an objection by nuclear utilities to government assessments for costs in decontaminating uranium processing facilities;[6] a claim by a federally subsidized, low-income housing project that the government breached a contract by refusing to permit adequate rental increases, which in turn led to foreclosure on the housing project's federally insured mortgage;[7] and efforts by a lender to force assignment to and obtain reimbursement from the government on a defaulted nursing home mortgage under a federal mortgage guarantee program.[8]

In recent years, the jurisdictional tug-of-war between the Court of Federal Claims (under the Tucker Act) and the District Court (under the APA) has been most sharply featured in the adjudication of a series of breach of trust claims presented by individual Native Americans and American Indian tribes against the federal government. While the governing principles and jurisdictional lines drawn in statutory waivers of sovereign immunity and accompanying jurisdictional enactments generally apply across the wide diversity of disputes involving the federal government, the problem of forum shopping has emerged most prominently in Indian breach of trust litigation since the late 1990s.

Since the enactment of the Indian Tucker Act in 1946 (which authorizes money claims by Indian tribes against the United States),[9] the Court of Federal Claims has been the forum for Indian breach of trust claims alleging the United States

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2. *See infra* Part I.C.
3. *See* 28 U.S.C. § 1491 (2006 & Supp. II 2009); *infra* Part I.A.
4. 5 U.S.C. §§ 701–706 (2006).
5. 5 U.S.C. § 704 (2006).
6. Consol. Edison Co. of N.Y. v. U.S. Dep't of Energy, 247 F.3d 1378, 1381 (Fed. Cir. 2001).
7. Christopher Vill., L.P. v. United States, 360 F.3d 1319 (Fed. Cir. 2004).
8. Suburban Mortg. Assocs. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116 (Fed. Cir. 2007).
9. 28 U.S.C. § 1505 (2006).

government's failure to uphold its fiduciary responsibilities in managing Native American funds and resources. The Supreme Court's landmark Indian breach of trust decisions over the past several decades have been rendered in cases that began in the CFC or its predecessors.[10] In recent years, the Federal Circuit has reaffirmed the exclusive jurisdiction of the CFC over Indian breach of trust claims alleging government mismanagement of Native American funds.[11]

The venerable understanding that Indian breach of trust claims involving individual or tribal assets are to be pursued as claims for money in the CFC was disturbed by an aberrational decision, *Cobell v. Babbit*,[12] issued a little more than a decade ago by the U.S. District Court for the District of Columbia and later affirmed by the U.S. Court of Appeals for the District of Columbia Circuit. In that case, the District Court asserted authority under the APA to adjudicate the management and evaluate the records of government-established financial accounts, which were used to distribute to individuals the profits derived from Native American resources held in trust by the United States.[13]

In assuming jurisdiction over the *Cobell* case, the District Court aggressively extended the Supreme Court's 1988 decision in *Bowen v. Massachusetts*[14]—a unique case arising from the federal-state administration of the Medicaid health care program that the Supreme Court had found unsuited for review in the CFC.[15] Although the *Cobell* complaint was framed as a request for an historical financial accounting of individual Indian trust accounts, the case always was about missing money, as eventually confirmed by the 2010 congressionally approved $3.4 billion settlement of the *Cobell* litigation.[16]

In the years following the District Court jurisdictional ruling in *Cobell*, dozens of other Indian tribes followed suit (pun intended) by lodging their complaints in District Court. In these cases, the tribes reformulated Indian breach of trust disputes—that previously would have been destined for the CFC as claims for a money judgment—into equitable requests for an accounting of trust assets that purportedly could be filed instead in District Court.[17] Indeed, to justify pursuit of breach of trust claims in District Court, these tribes denigrated the ability of the

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10. *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). *See infra* Part II.B.1.

11. *See* E. Shawnee Tribe of Okla. v. United States, 582 F.3d 1306, 1308–09 (Fed. Cir. 2009), *vacated and remanded on other grounds*, 131 S. Ct. 2872 (2011).

12. 91 F. Supp. 2d 1, 24–28 (D.D.C. 1999), *aff'd sub nom.* Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001).

13. *See infra* Part II.A.

14. 487 U.S. 879 (1988).

15. *See infra* Part I.B.

16. Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064. On the settlement, see generally *infra* notes 167–168 and accompanying text.

17. *See* Assiniboine & Sioux Tribes v. Norton, 527 F. Supp. 2d 130, 130–32 (D.D.C. 2007) (listing cases).

CFC to provide full relief in such cases,[18] notwithstanding that other tribes have continued to pursue remedies for breach of trust solely in the CFC.[19]

To add to the jurisdictional chaos, several tribal plaintiffs not only filed breach of trust claims in District Court seeking an accounting and monetary restitution, but simultaneously filed parallel breach of trust lawsuits in the CFC that forthrightly sought money damages under the Tucker Act and the Indian Tucker Act.[20] Because 28 U.S.C. § 1500 bars the CFC from taking jurisdiction if the plaintiff "has pending in any other court any suit or process against the United States" that is "for or in respect to" the same "claim,"[21] the filing of these duplicative suits created an even more immediate and direct jurisdictional collision.

In 2011, in *United States v. Tohono O'odham Nation*,[22] the Supreme Court reiterated that lawsuits filed in the CFC must be dismissed under § 1500 if parallel litigation is pending in District Court.[23] Reading § 1500 as "a robust response" to the burdens of duplicative litigation against the United States,[24] the Supreme Court held that a plaintiff may not maintain one lawsuit in the CFC while a second lawsuit is proceeding in another court that arises out of the same operative facts, even if the two lawsuits seek wholly different relief.[25]

Although the direct question before the Supreme Court in *Tohono* was the force of the CFC jurisdictional bar in § 1500, the Court's analysis sheds light on the underlying question of the proper forum for claims that ultimately seek or could be satisfied by a money judgment available under the Tucker Act in the CFC.[26] In rejecting the plaintiff's claim of hardship by being limited to a single forum, the *Tohono* Court observed that the plaintiff "could have filed in the CFC alone and if successful obtained monetary relief to compensate for any losses caused by the Government's breach of duty."[27]

In another decision from the same term, *United States v. Jicarilla Apache Nation*,[28] the Court clarified the limits on tribal requests for information from the federal government, specifically rejecting common-law trust theories as a basis for demanding government documents.[29] Indian breach of trust claims brought under the APA in District Court have been premised on a supposed independent cause of

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18. *See* Brief for Respondent at 11, 34, 46, United States v. Tohono O'odham Nation, 131 S. Ct. 1723 (2011) (No. 09-846) (arguing that the CFC cannot provide "full relief" because it cannot direct an accounting of tribal assets).

19. *See, e.g.*, United States v. Jicarilla Apache Nation, 131 S. Ct. 2313 (2011) (resolving discovery dispute in ongoing Indian breach of trust litigation brought in CFC); Jicarilla Apache Nation v. United States, 100 Fed. Cl. 726, 731–38 (Fed. Cl. 2011) (holding that tribal trust account statutes create a fiduciary duty by the government to the tribe).

20. *See infra* Part III.A.

21. 28 U.S.C. § 1500 (2006).

22. 131 S. Ct. 1723 (2011).

23. *See infra* Part III.A.

24. *Tohono O'odham Nation*, 131 S. Ct. at 1725, 1728.

25. *Id.* at 1727–31.

26. *See infra* Part III.B.

27. *Tohono O'odham Nation*, 131 S. Ct. at 1730–31.

28. 131 S. Ct. 2313 (2011).

29. *Id.* at 2318, 2330.

action for an accounting under the inherent equitable authority of the federal courts, a theory that is no longer viable after *Jicarilla Apache*.[30]

In light of these judicial developments, attempted detours from the CFC in cases arising from monetary disputes with the federal government—in Indian breach of trust cases or otherwise—should be coming to an end.[31] For example, but for the mistaken argument that District Courts have broader remedial powers in Indian breach of trust cases through inherent equitable authority, Native American tribes and individuals would have had less incentive to bypass the Tucker Act and Indian Tucker Act remedies available in the CFC, which include both money and collateral equitable-type relief.[32] Indeed, the monetary and collateral relief authority of the CFC offers a fuller and richer set of remedies to Native Americans who establish breach by the United States of fiduciary duties, especially in contrast to the increasingly doubtful and limited accounting remedy in District Court. Accordingly, no reason remains to file parallel Indian breach of trust claims in both courts, either simultaneously or successively.

With the exclusive jurisdictional authority of the CFC being confirmed directly and indirectly by the Supreme Court and the Federal Circuit for cases arising from what essentially are pecuniary disputes, this Article concludes that the § 1500 problem has evaporated for many types of suits. For claims in which ultimate recovery of money from the United States is the essence, recent rulings in both the Supreme Court and the Federal Circuit confirm that, when "[a]t bottom it is a suit for money," then "the Court of Federal Claims can provide an adequate remedy, and it therefore belongs in that court."[33]

I. THE COURT OF FEDERAL CLAIMS AND THE ADEQUACY OF MONEY JUDGMENTS

A. The Court of Federal Claims and Exclusive Jurisdiction over Money Claims Against the United States

What today is known as the United States 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."[34] In 1855, Congress created the United States Court of Claims and gave it authority to hear claims against the United States founded upon federal statutes, regulations, and contracts.[35] In 1887, the Tucker Act[36] was enacted to confirm the nationwide jurisdiction of the Court of Claims over money claims (other than in tort) based on

30. *See infra* Part II.B.3.
31. *See infra* Part III.B.
32. *See infra* Part II.B.2.
33. Suburban Mortg. Assocs. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116, 1118 (Fed. Cir. 2007).
34. GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT § 4.02(a)(1), at 226 (4th ed. 2006).
35. Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612.
36. Tucker Act of 1887, ch. 359, 24 Stat. 505.

federal statutes, executive regulations, and contracts, while also expanding the court's authority to include monetary actions based on the Constitution.[37]

In 1982, through the Federal Courts Improvement Act,[38] Congress divided the original Court of Claims into two related entities: (1) the Claims Court, which henceforth would serve as the trial forum for Tucker Act and certain other claims against the federal government, including government contract claims;[39] and (2) the United States Court of Appeals for the Federal Circuit, which would be the appellate court with jurisdiction over Tucker Act case appeals generally and over cases from the Claims Court specifically.[40]

The Claims Court was designated as an "Article I court"[41]—that is, a court created by Congress pursuant to its legislative powers under Article I of the Constitution and whose judges do not have the life-tenure protection guaranteed to members of the regular federal judiciary by Article III of the Constitution.[42]

In 1992, the Claims Court was renamed the "United States Court of Federal Claims"[43] (CFC), the denomination that it retains today.

The Tucker Act is a jurisdictional statute that also waives the federal government's sovereign immunity from suit and authorizes 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."[44] 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.[45]

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37. *Id.* § 1. *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).

38. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of 28 U.S.C.). On the Federal Courts Improvement Act and the creation of the then-Claims Court, see generally Richard H. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 GEO. WASH. L. REV. 543, 545, 585–87 (2003).

39. *See* § 105(a), 96 Stat. at 26–28.

40. *Id.*, §§ 127, 165, 96 Stat. at 37–38, 50.

41. 28 U.S.C. § 171(a) (2006).

42. *See* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988). *But see* SISK, *supra* note 34, § 4.02(a)(3), at 231–32 (arguing "that the Court of Federal Claims should be integrated more fully into the Judicial Branch by formally [being designated with] Article III status," and that "[g]iven that a judge of the Court of Federal Claims upon expiration of his or her fifteen-year term may become a senior judge and thereby continue to act in a judicial capacity and receive a full salary, the court already has been given *de facto* Article III status by Congress").

43. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506, 4516 (codified in scattered sections of 18 and 28 U.S.C.).

44. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (2006).

45. On the "Big" and "Little" Tucker Acts, see generally SISK, *supra* note 34, § 4.02(b), (c), at 236–39.

The Tucker Act remains the "foundation stone" in the adjudication of non-tort money claims against the United States.[46] 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.[47] Among those matters falling under the purview of the CFC are government contract formation issues, military employment claims, Indian trust claims, vaccine claims, and takings of private property.[48]

Traditionally, the CFC was understood to have authority to award only monetary relief against the United States.[49] In recent decades, Congress has granted to the CFC meaningful and considerable, although limited, remedial powers beyond awarding a money judgment. Most importantly for present purposes, in 1972, Congress enacted the Remand Act[50] 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-type relief attached to a money judgment, including "correction of applicable records."[51] Thus, when a plaintiff has a meritorious claim for a money judgment, the CFC also has the remedial power to grant certain non-monetary relief that is "incident of and collateral to" the money judgment.[52]

Among the other matters on its diverse docket, 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 CFC—

> 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.[53]

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

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46. 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).

47. *See* SISK, *supra* note 34, § 4.02(a)(4), at 235.

48. *See id.* at 232–36; Seamon, *supra* note 38, at 548–49.

49. *See, e.g.*, United States v. King, 395 U.S. 1, 4 (1969); United States v. Jones, 131 U.S. 1, 9, 14–18 (1889).

50. Remand Act of 1972, Pub. L. No. 92-415, 86 Stat. 652 (codified at 28 U.S.C. § 1491(a)(2) (2006)).

51. 28 U.S.C. § 1491(a)(2).

52. *Id.*

53. 28 U.S.C. § 1505 (2006) (originally enacted as the Indian Claims Commission Act, ch. 959, Pub. L. No. 79-726, § 24, 60 Stat. 1049, 1055 (1946)).

other Indian property by Federal officials that might occur in the future."[54] The Supreme 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 predecessors.[55]

B. Jurisdiction in the Court of Federal Claims After the Supreme Court's Decision in Bowen v. Massachusetts

When considering amendments to the 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.[56] By providing that the APA applies only to actions "seeking relief other than money damages"[57] and where "there is no other adequate remedy in a court,"[58] Congress designed the APA to be complementary with the Tucker Act—not overlapping or conflicting.[59] In this way, as I have written previously, Congress has "woven a broad tapestry of authorized judicial actions against the federal government," which "fit together into a reasonably well-integrated pattern of causes of action covering most subjects of dispute between the government and its citizens."[60]

In *Bowen v. Massachusetts*,[61] decided in 1988, the Supreme 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 thereby blurred the lines between the APA and the Tucker Act,[62] which is also the jurisdictional border between the District Courts and the CFC.[63]

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54. 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 426–33 (Nell Jessup Newton et al. eds., 2005 ed.); Gregory C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity*, 39 TULSA L. REV. 313, 316–17 (2003).

55. *See, e.g.*, United States v. White Mountain Apache Tribe, 537 U.S. 465, 469 (2003); United States v. Navajo Nation, 537 U.S. 488, 500 (2003); United States v. Mitchell, 463 U.S. 206, 210 (1983); Seminole Nation v. United States, 316 U.S. 286, 288–89 (1942).

56. *See* Massachusetts v. Departmental Grant Appeals Bd., 815 F.2d 778, 782–83 & n.3 (1st Cir. 1987).

57. 5 U.S.C. § 702 (2006).

58. 5 U.S.C. § 704 (2006).

59. *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."); *see also* Delano Farms Co. v. Cal. Table Grape Comm'n, 655 F.3d 1337, 1348 (Fed. Cir. 2011) ("When Congress amended section 702 in 1976, it made it clear that it did not intend that amendment to have any effect on the exclusive jurisdiction of the Court of Claims over suits for money damages falling within the jurisdiction of that court."); 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.").

60. Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 603 (2003).

61. 487 U.S. 879 (1988).

62. *See, e.g.*, 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, 829–30 (2003) (describing *Bowen* as "upset[ting] . . . fundamental understandings" about CFC and District Court jurisdiction). For a detailed description and general critique of *Bowen*, see Sisk, *supra* note 60, at 618–27.

63. The APA does not provide an independent grant of subject-matter jurisdiction to the

In dissent in *Bowen*, Justice Scalia feared that "the jurisdiction of the Claims Court has been thrown into chaos."[64] The United States Court of Appeals for the Federal Circuit later observed that, through *Bowen*, "the barrier [between the APA/District Court and the Tucker Act/CFC] sprang a leak, a leak that has threatened to become a gusher."[65]

In *Bowen*, the Supreme Court examined a challenge filed by the State of Massachusetts in District Court to the federal government's disallowance of a reimbursement for certain health care expenditures under the matching payment provisions of the Medicaid statute.[66] The state invoked the authority of the District Court under the APA, to which the government objected by citing § 702, which explicitly excludes actions seeking "money damages."[67] The Supreme Court majority, however, held that the "money damages" exclusion in § 702 of the APA refers to claims seeking compensation for a loss.[68] By contrast, the *Bowen* majority held that when money is "the very thing" to which a party is entitled,[69] 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.[70]

In dissent in *Bowen*, Justice Scalia, joined by two other justices, relied on a distinction in the common law between a money judgment, which is "damages," and a non-monetary prospective remedy, thus concluding that a claim for retrospective monetary relief falls outside the scope of the APA.[71] Although leaving undisturbed the *Bowen* court's narrow definition of "money damages" for purposes of § 702 of the APA, Justice Scalia subsequently incorporated the common-law approach into the majority opinion for the Court in *Great-West Life & Annuity Insurance Co. v. Knudsen*,[72] a case arising under the Employment Retirement

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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 typically confers jurisdiction on the District Court. *See* 28 U.S.C. § 1331 (2006).

64. 487 U.S. at 930 (Scalia, J., dissenting).

65. Suburban Mortg. Assocs. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116, 1122 (Fed. Cir. 2007).

66. Title XIX of the Social Security Act, 42 U.S.C. §§ 1396–1396v (2006).

67. 5 U.S.C. § 702 (2006).

68. *Bowen*, 487 U.S. at 891–901.

69. *Id.* at 895.

70. *Id.* at 900 (emphasis in original); *see also* Colleen P. Murphy, *Money as a "Specific" Remedy*, 58 ALA. L. REV. 119, 131, 152 (2006) (explaining that because "the plaintiff had an original entitlement under [the] statute that the government pay money," the *Bowen* Court "correctly decided that the monetary remedy the plaintiff sought was specific relief," while maintaining that the author's purpose was "not to question whether the Supreme Court in *Bowen* interpreted the APA correctly with respect to district court jurisdiction over challenges to agency action").

71. *Bowen*, 487 U.S. at 913–14 (Scalia, J., dissenting).

72. 534 U.S. 204 (2002).

Income Security Act (ERISA).[73] In *Great-West Life*, Justice Scalia quoted from his *Bowen* dissent to reject a party's characterization of a request for an injunction to pay money as "equitable relief" authorized under ERISA:

> 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.[74]

In *Bowen*, the Court majority also rejected the government's argument based on § 704 of the APA, which authorizes judicial review under the APA only when "there is no other adequate remedy in a court."[75] The government contended that 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.[76] Highlighting the special nature of the Medicaid financial participation arrangement between the federal government and the State of Massachusetts, the Court majority stated:

> [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.[77]

Moreover, the Court found it "anomalous to assume that Congress would channel the review of compliance decisions to the regional courts of appeals . . . 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."[78]

On the § 704 "adequate remedy" exclusion, Justice Scalia dissented as well, saying that "even though a plaintiff may often prefer a judicial order enjoining a harmful act or omission before it occurs, damages after the fact are considered an 'adequate remedy' in all but the most extraordinary cases."[79] He questioned the majority's reasoning that a complex and ongoing federal-state relationship merited

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73. 29 U.S.C. § 1132(a)(3) (2006).

74. *Great-West Life & Annuity Ins. Co.*, 534 U.S. at 210 (quoting *Bowen*, 487 U.S. at 918–19 (Scalia, J., dissenting)).

75. 5 U.S.C. § 704 (2006).

76. *Bowen,* 487 U.S. at 901–08.

77. *Id.* at 907–08.

78. *Id.* at 908 (internal citation omitted).

79. *Id.* at 925 (Scalia, J., dissenting).

special consideration. Instead, Justice Scalia suggested that the area of law involved in the Medicaid program was no more complex than those subjects routinely handled in the then-Claims Court, that the federal government's relationship with the states was not peculiarly intricate, and that the dispute was one of federal law that did not implicate state-law questions.[80]

Whatever the merits of allowing APA review in district court in the federal-state Medicaid partnership context, the *Bowen* majority never suggested that the APA could be used to bypass the CFC for traditional money claims against the United States. Subsequently, in *Department of the Army v. Blue Fox*,[81] the 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" on funds held by the United States.[82] Holding that liens "are merely a means to the end of satisfying a claim for the recovery of money," the Court held that this remedy fell within the exclusion under the APA of actions for "money damages."[83] Thus, the Court has recognized that lawsuits and remedial devices that traditionally have been designed to recover money should be recognized for what they are in substance—money claims.

In essence, the Supreme Court in *Bowen v. Massachusetts* focused on a dispute over an ongoing public welfare program arising from a unique federal-state partnership relationship and held it was ill-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.[84] Accordingly, as Professor Cynthia Grant Bowman and other scholars suggest, the "most likely interpretation" of *Bowen* is that it does not "transfer matters traditionally within the exclusive jurisdiction" of the CFC.[85]

Writing nearly a decade ago, I characterized *Bowen* as "a notorious and remarkably far-reaching example" of a judicial decision that threatened to "unravel" the largely harmonious "tapestry" of statutes that authorized suits against the United States.[86] Surveying the legal landscape at that time, from military and civilian employment claims to government contract and Indian trust claims—all matters that traditionally had fallen under the Tucker Act or related statutes in the CFC and outside of the APA in District Court—I worried aloud that the lower

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80. *Id.* at 928–29.

81. 525 U.S. 255 (1999).

82. *Id.* at 261–64.

83. *Id.* at 262–63.

84. *Bowen,* 487 U.S. at 883.

85. 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 (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"); Michael F. Noone, Jr. & Urban A. Lester, *Defining Tucker Act Jurisdiction After* Bowen v. Massachusetts, 40 CATH. U. L. REV. 571, 603 (1991) (arguing *Bowen* should be "limited to those suits where a state claims that the Federal Government erred in ruling that a program was ineligible for grant-in-aid reimbursement").

86. Sisk, *supra* note 60, at 603.

courts were falling into disarray, with *Bowen* "creating confusion and inconsistency and enhancing the opportunity for forum-shopping by litigants."[87]

Fortunately, as explained above and in the immediately following subsection of this Article, my worst fears that *Bowen* would be widely misapplied by lower courts to slowly dissolve CFC authority proved pessimistic. Decisions by both the Supreme Court and the Federal Circuit have reaffirmed the institutional integrity of the CFC over money claims and largely stabilized the jurisdictional doctrine.[88] Even in the specific field of Indian breach of trust claims, where the most marked departure from established jurisdictional rules had occurred in the District Court,[89] the Supreme Court now has arrested the flow of duplicative litigation in both the district court and CFC while emphasizing the fullness of the CFC monetary remedy.[90] Together with the Federal Circuit's continued clarification of Tucker Act jurisdiction and the adequacy of a money judgment to resolve financially centered disputes with the federal government, the stage has been set for a return of Indian breach of trust litigation to the CFC for complete adjudication with an ample set of remedies for the meritorious case.[91]

In sum, the Supreme Court has never suggested that traditional Tucker Act claims—government contract disputes, military employment claims, or Indian breach of trust claims involving government management of assets—could be diverted from the CFC to the District Court as purported claims for specific relief under the APA. The *Bowen* court itself described the § 704 bar to judicial review in District Court 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."[92] For those types of claims that traditionally have fallen under the Tucker Act in the CFC an "adequate remedy" is available in the form of a money judgment and collateral equitable relief. For those claims the CFC has exclusive jurisdiction.

C. The Federal Circuit's Confirmation of Exclusive Jurisdiction in the Court of Federal Claims When a Money Judgment is Adequate

When the United States 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."[93] Specifically, 28 U.S.C. § 1295(a)(3) grants jurisdiction to the Federal Circuit over all appeals from the Court of Federal Claims.[94] Additionally, § 1295(a)(2) confers appellate jurisdiction upon the Federal Circuit over District Court decisions "if the jurisdiction of that

87. *Id.* at 606.
88. *See supra* Part I.B. and *infra* Part I.C.
89. *See infra* Part II.A.
90. *See* United States v. Tohono O'odham Nation, 131 S. Ct. 1723 (2011). *See generally infra* Part III.B.2.
91. *See infra* Parts II.B.2, III.B.2.a–b.
92. Bowen v. Massachusetts, 487 U.S. 879, 903 (1988).
93. S. REP. NO. 97-275, at 3 (1981).
94. 28 U.S.C. § 1295(a)(3) (2006).

court was based, in whole or in part, on section 1346[(a)(2)] of this title,"[95] that is, the Little Tucker Act.

In *United States v. Hohri*,[96] the Supreme 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.[97]

In 1988, in the immediate aftermath of and as a direct response to *Bowen v. Massachusetts*,[98] Congress authorized a special interlocutory appeal to the Federal Circuit when what should be framed as a Tucker Act claim arguably has been mis-filed in the District Court, thus potentially undermining the jurisdictional integrity of the CFC. In 28 U.S.C. § 1292(d)(4), Congress granted a right to 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.[99] 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.[100]

In a series of decisions, the Federal Circuit has emphasized "[r]espect for the exclusive jurisdiction of the Court of Federal Claims" over monetary claims.[101] In

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95. *Id.* § 1295(a)(2).

96. 482 U.S. 64 (1987).

97. *Id.* at 71–72 (alterations in original).

98. 487 U.S. 879 (1988); *see also* H.R. REP. NO. 100-889, at 52, 54 (1988) (describing *Bowen* as creating "an uncertain exception to the general principle that monetary claims against the United States must proceed under the Tucker Act").

99. Pub. L. No. 100-702, § 501, 102 Stat. 4652 (1988) (codified at 28 U.S.C. § 1292(d)(4)(A)). During my service as an appellate attorney in the Civil Division of the Department of Justice, I drafted this legislation enacted by Congress to encourage early resolution of questions about the respective jurisdiction of the District Court and the CFC. *See* Gregory C. Sisk, *Tucker Act Appeals to the Federal Circuit*, 36 FED. B. NEWS & J. 41 (1989).

100. H.R. REP. NO. 100-889, at 52 (1988).

101. Christopher Village, L.P. v. United States, 360 F.3d 1319, 1332 (Fed. Cir. 2004).

each of these cases, claimants against the United States sought to bypass the CFC by seeking injunctive or declaratory relief in District Court, even though the gravamen of the dispute was monetary and a money judgment would be an adequate remedy for a meritorious claim. Deprecating the post-*Bowen v. Massachusetts* development of "a sort of cottage industry among lawyers attempting to craft suits, ultimately seeking money from the Government, as suits for declaratory or injunctive relief without mentioning the money[,]"[102] the Federal Circuit has stabilized the jurisdictional doctrine and reaffirmed the integrity of the CFC in claims ultimately grounded in a financial dispute with the United States.[103]

First, in *Consolidated Edison Co. v. United States Department of Energy*,[104] 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.[105] The utilities sought a declaratory judgment that the statute was unconstitutional and an injunction against continued enforcement of the assessments.[106] 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 the plaintiff utilities were successful on the merits.[107] 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 § 1292(d)(4).[108]

In *Consolidated Edison*, the Federal Circuit concluded that the CFC could offer an adequate remedy, thus depriving the District Court of authority under the APA.[109] 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.[110] 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."[111] The court

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102. Suburban Mortg. Assocs., v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116, 1124 (Fed. Cir. 2007).

103. *See* Mary Ellen Coster Williams, *2007 Government Contract Decisions of the Federal Circuit*, 57 AM. U. L. REV. 1075, 1081 (2008) (describing *Suburban Mortgage*, one of the Federal Circuit's clarifying rulings, as "a watershed decision that should do much to eliminate wasteful litigation on the jurisdictional divide between district courts and the COFC").

104. 247 F.3d 1378 (Fed. Cir. 2001).

105. *Id.* at 1380–81.

106. *Id.* at 1381.

107. *See id.*

108. *Id.* at 1382.

109. *Id.* at 1380, 1382–86.

110. *Id.* at 1382–85.

111. *Id.* at 1384–85.

thus rejected the utilities' "blatant forum shopping to avoid adequate remedies in an alternative forum."[112]

With respect to *Bowen v. Massachusetts*,[113] the Federal Circuit in *Consolidated Edison* noted that the Supreme Court had "emphasized the complexity of the continuous relationship between the federal and state governments administering the Medicaid program."[114] The Federal Circuit explained that when a case does not involve "a complex ongoing federal-state interface,"[115] the CFC can supply an adequate remedy through a money judgment.[116]

Next, in *Christopher Village, L.P. v. United States*,[117] the Federal Circuit confirmed its *Consolidated Edison* precedent, giving it further emphasis and broader reach. The *Christopher Village* court declared void a ruling by another Court of Appeals in the same case as having been issued without proper jurisdiction. Owners of a federally subsidized, low-income housing project challenged the government's foreclosure of the federally insured mortgage on the property, which had substantially deteriorated, arguing that the Department of Housing and Urban Development (HUD) had breached contracts with the project by refusing to permit adequate rental increases.[118] The plaintiffs filed suit in District Court under the APA seeking a declaratory judgment that the government was liable for breach of contract.[119] After the District Court ruled in favor of the government, the United States Court of Appeals for the Fifth Circuit reversed, finding that the government had breached a contractual duty to entertain the request for rental increases.[120] The plaintiffs then turned around and filed suit for damages in the Court of Federal Claims, presenting the Fifth Circuit's ruling as establishing the existence of a breach as a matter of res judicata and thus leaving only the amount of damages to be determined.[121]

On appeal from a summary judgment ruling for the government in the CFC, the Federal Circuit in *Christopher Village* reiterated that "a litigant's ability to sue the government for money damages in the Court of Federal Claims is an 'adequate remedy' that precludes an APA waiver of sovereign immunity in other courts."[122] The court confirmed its understanding that the *Bowen v. Massachusetts* decision, which permitted an action against the government involving a monetary dispute to proceed in District Court, was tied to the specific circumstances of that case—an ongoing matter with the potential for prospective relief involving the sensitive relationship between the federal and state governments.[123]

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112. *Id.* at 1385 (citations omitted).
113. 487 U.S. 879 (1988); *see supra* Part I.B.
114. *Consolidated Edison*, 247 F.3d at 1383.
115. *Id.*
116. *Id.* at 1385.
117. 360 F.3d 1319 (Fed. Cir. 2004).
118. *Id.* at 1333.
119. *Id.* at 1323.
120. *Id.* at 1324.
121. *Id.*
122. *Id.* at 1327; *see also* Telecare Corp. v. Leavitt, 409 F.3d 1345, 1349 (Fed. Cir. 2005) ("The availability of an action for money damages under the Tucker Act or Little Tucker Act is presumptively an 'adequate remedy' for § 704 purposes.").
123. *Christopher Village*, 360 F.3d at 1328 n.2.

In *Christopher Village*, the Federal Circuit emphasized 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."[124] The court thereby rejected the relegation of the Court of Federal Claims into a paymaster certifying an award of damages as directed by another court. Because the District Court's exercise of jurisdiction in the prior related case (and thus that of the Fifth Circuit on appeal from that court) infringed upon the authority of another tribunal (the CFC), the Federal Circuit ruled in *Christopher Village* that neither it nor the CFC were bound to follow the earlier judgment in any respect.[125]

In *Suburban Mortgage Associates, Inc. v. United States Department of Housing and Urban Development*,[126] the Federal Circuit confirmed that if the plaintiff's claim, however framed, actually seeks a monetary reward from the government, such that a judgment in the Court of Federal Claims under the Tucker Act will give the plaintiff essentially the remedy he seeks, then the CFC is the only proper forum. In *Suburban Mortgage*, a lender sought to assign a note and mortgage, on which a nursing home had defaulted, to HUD under a federal mortgage guarantee program.[127] Because the government asserted fraud, given that the same individual allegedly owned or controlled both the lender and the nursing home, HUD refused to accept the assignment.[128]

The lender filed suit in District Court, asserting jurisdiction under 28 U.S.C. § 1331, the APA, and the Declaratory Judgment Act.[129] Essentially, the lender sought a declaratory judgment or specific performance on the mortgage guarantee agreement with HUD—that is, an order to HUD to accept assignment of the note and mortgage. The government moved to dismiss for lack of subject matter jurisdiction or alternatively for transfer under 28 U.S.C. § 1631 to the CFC, contending that the suit was a contract action under the Tucker Act.[130] The District Court ruled that the lender's claim was permissible under the APA as a request for specific relief in the form of money, citing to *Bowen v. Massachusetts*, and further that the CFC could not provide an adequate remedy because injunctive relief was necessary to redress the lender's concerns about possible bankruptcy, loss of reputation, and loss of future profits.[131]

On interlocutory appeal in *Suburban Mortgage*, the Federal Circuit rejected this attempt at an end-run around both the Tucker Act and the Court of Federal Claims.[132] To "thwart such attempted forum shopping,"[133] the court explained that if the substance of the claim is one for money, then the Tucker Act remedy in the Court of Federal Claims is presumptively adequate.[134] Accordingly, the District

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124. *Id.* at 1321.
125. *Id.* at 1329–33.
126. 480 F.3d 1116 (Fed. Cir. 2007).
127. *Id.* at 1118–19.
128. *Id.* at 1119 & n.6.
129. *Id.* at 1119.
130. *Id.*
131. *Id.* at 1119–21.
132. *Id.* at 1126.
133. *Id.* at 1124.
134. *Id.* at 1124–26.

Court lacked authority under § 704 of the APA (whether or not this type of monetary relief fell under the "money damages" exclusion in § 702 of the APA).[135] In the case at hand, the Federal Circuit had little difficulty concluding that the lender, in essence, was seeking the financial benefit of the agreement with HUD under the mortgage-guarantee contract.

The lender in *Suburban Mortgage* insisted that the CFC remedy was inadequate, because the CFC could not grant equitable relief. But the Federal Circuit reiterated its understanding from *Consolidated Edison* and *Christopher Village* that the *Bowen v. Massachusetts* adequacy of remedy holding turned on the complexity of a continuous relationship between two sovereigns—the United States and the State of Massachusetts.[136] The *Suburban Mortgage* case involved no complex or even ongoing relationship.[137] Moreover, any money judgment entered by the CFC would control the government's future related behavior through principles of collateral estoppel.[138] The Federal Circuit concluded the opinion by reminding the District Courts around the country that when it comes to the Tucker Act, the court that ultimately may decide the matter is the Federal Circuit.[139] Thus, while District Courts properly look to the law of the regional circuits for guidance, they may be well-advised to pay attention to the precedent of the Federal Circuit as well.[140]

The Federal Circuit's most recent ruling on the contours of CFC jurisdiction in a rather idiosyncratic context reflects no retreat from those earlier decisions that had emphasized the primacy of the CFC over money claims against the United States. In *Nebraska Public Power District v. United States* (*NPPD*),[141] the Federal Circuit sitting en banc held that review by the D.C. Circuit under the Nuclear Waste Policy Act of 1982[142] of the Department of Energy's failure to establish a repository site for spent nuclear fuel did not encroach on the jurisdiction of the CFC.[143] The Federal Circuit reached this conclusion even though the D.C. Circuit also issued a writ of mandamus directing the process of contractual remedies for nuclear utilities that had contracted with the Department to accept spent nuclear fuel.[144]

Critics of the *NPPD* decision fear that it "has the potential to reshape the jurisdictional landscape significantly by further diminishing the CFC's exclusive

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135. *Id.*; *see also* Thomas J. Madden, John F. Pavlick Jr., Rebecca E. Pearson, Terry L. Elling, Sharon A. Jenks, W. Patrick Doherty, Dismas N. Locaria & James Y. Boland, *2007 Year in Review: Analysis of Significant Federal Circuit Government Contract Decisions*, 37 PUB. CONT. L.J. 625, 666 (2008) (explaining that "[i]f the answer is yes" to the question of whether the CFC can provide an adequate remedy under the Tucker Act, "then the inquiry ends, as the district court will only have jurisdiction [under the APA] in the absence of an adequate remedy at COFC"); Williams, *supra* note 103, at 1080 (saying that by focusing on the adequate remedy factor of APA § 704 rather than the money damages exclusion of § 702, "the Federal Circuit deferred the inquiry on whether relief sought was for money damages *vel non* to a later, perhaps unnecessary phase of the analysis").

136. *Suburban Mortgage*, 480 F.3d at 1127.

137. *See id.*

138. *Id.*

139. *Id.* at 1128.

140. *Id.*

141. 590 F.3d 1357 (Fed. Cir. 2010) (en banc).

142. 42 U.S.C. §§ 10101–10270 (2006).

143. *NPPD*, 590 F.3d at 1368–76.

144. *Id.* at 1365–76.

jurisdiction."[145] Whenever "statutory provisions influence the interpretation of the government contracts they authorize," Daniel Thies warns that "[c]reative lawyers" may seek statutory review in other federal courts, thereby undermining the exclusive jurisdiction of the CFC over government contracts.[146] Judge Gajarsa dissented in *NPPD*, viewing the approval of the D.C. Circuit's ruling as "infring[ing] upon the Court of Federal Claims's exclusive Tucker Act jurisdiction over the administration of contract disputes, thereby impacting the sovereign immunity of the United States and undermining this court's duty to review the contract decisions of the Court of Federal Claims."[147] Given that agency statutes sometimes include special jurisdictional provisions for particular matters,[148] broad interpretation of such jurisdictional statutes to encompass contractual or money damages matters could progressively erode the CFC's Tucker Act jurisdiction.

Whatever the merits of the Federal Circuit's particular analysis in *NPPD*, the court's ruling is grounded in the singular and complicated nuclear waste legislation, which includes a specific jurisdictional provision for review in the regional Court of Appeals of the department's actions regarding a repository for spent nuclear fuel.[149] The Federal Circuit emphasized that the D.C. Circuit's ruling on contractual remedies was merely an "implementation of its statutory ruling"[150] and "did not impermissibly invade the jurisdiction of the Court of Federal Claims."[151]

Importantly, all members of the en banc Federal Circuit in *NPPD*—the majority, the concurrence, and the dissent—affirmed the continued force of the landmark *Consolidated Edison* and *Christopher Village* decisions, even though the judges disagreed on the application of those precedents to the unique context of review under the Nuclear Waste Policy Act.[152]

In sum, as the Federal Circuit has consistently confirmed, when a retrospective monetary remedy is available, it is "adequate" absent extraordinary circumstances, notwithstanding the unavailability of prospective or equitable remedies. Any judgment by the CFC awarding monetary relief for past breaches of a duty will deter the federal government from repeating that conduct in the future, both as a matter of issue preclusion (collateral estoppel) as to the particular litigants and as a matter of precedent as to other concerned entities, especially if the CFC judgment is reviewed by the Federal Circuit which has nationwide appellate jurisdiction and thus can establish Tucker Act jurisprudence with nationwide precedential effect.

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145. Daniel Thies, *The Decline of the Court of Federal Claims in* Nebraska Public Power District v. United States, *590 F.3d 1357 (Fed. Cir. 2010)*, 33 HARV. J.L. & PUB. POL'Y 1203, 1211 (2010).

146. *Id.* at 1213. *But see* Steven L. Schooner, *A Random Walk: The Federal Circuit's 2010 Government Contracts Decisions*, 60 AM. U. L. REV. 1067 (2011) (defending the *NPPD* decision).

147. *NPPD*, 590 F.3d at 1377 (Gajarsa, J., dissenting).

148. *See, e.g.*, 42 U.S.C. § 3612(i) (2006) (providing for review in the regional circuit of agency orders regarding alleged discriminatory housing practices).

149. *See NPPD*, 590 F.3d at 1371; *id.* at 1377 (Dyk, J., concurring); *id.* at 1379, 1384–85 (Gajarsa, J., dissenting).

150. *Id.* at 1365.

151. *Id.* at 1376.

152. *Id.* at 1371; *id.* at 1377 (Dyk, J., concurring); *id.* at 1379, 1384–85 (Gajarsa, J., dissenting).

II. DISTRICT COURT V. COURT OF FEDERAL CLAIMS: THE JURISDICTIONAL TUG-OF-WAR IN INDIAN BREACH OF TRUST CLAIMS

A. The Unprecedented Projection of District Court Authority Over Money Disputes in Cobell v. Babbitt

In 1996, a class action lawsuit on behalf of more than 300,000 Native Americans was filed as *Cobell v. Babbitt* in the U.S. 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 American Indians over a century ago but held in trust by the federal government.[153] When the government, during discovery, failed to turn over records for Indian trust accounts promised by Department of Justice lawyers, the district judge took the extraordinary step of holding several leading officials, including the Secretary of the Interior, in contempt.[154]

After a bench trial in 1999, the District Court found that the government had kept such poor records that it was incapable of determining what it owed each individual Native American or, for that matter, even which individuals owned which allotments of land.[155] The court concluded:

> The United States' mismanagement of the [Individual Indian Money] trust is far more inexcusable than garden-variety trust mismanagement of a typical donative trust. For the beneficiaries of this trust did not voluntarily choose to have their lands taken from them; they did not willingly relinquish pervasive control of their money to the United States. The United States imposed this trust on the Indian people.[156]

The District Court retained continuing jurisdiction over the matter, including periodic review of the government's ongoing efforts to prepare a full historical accounting of the trust.[157]

In 2002, still dissatisfied with the progress of the Department of Interior in performing an historical accounting of allotment accounts, the district judge issued a new contempt citation to another cabinet secretary in a new administration, based upon findings of deception and abject failure in continuing efforts to reform the trust system.[158] However, on this occasion, the U.S. Court of Appeals for the District of Columbia Circuit held that the district judge had overstepped his authority, reversing the contempt citation as improperly holding the Secretary responsible for the conduct of her predecessor in office and rejecting the finding that the secretary had committed fraud on the court through deceptive status

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153. *See* Cobell v. Babbitt, 30 F. Supp. 2d 24, 28 (D.D.C. 1998); Cobell v. Babbitt, 188 F.R.D. 122 (D.D.C. 1999).

154. Cobell v. Babbitt, 37 F. Supp. 2d 6, 38 (D.D.C. 1999).

155. Cobell v. Norton, 240 F.3d 1081, 1088–90 (D.C. Cir. 2001); Cobell v. Babbitt, 91 F. Supp. 2d 1, 6–12 (D.D.C. 1999).

156. *Cobell*, 91 F. Supp. 2d. at 6.

157. *Id.* at 58–59.

158. Cobell v. Norton, 226 F. Supp. 2d 1, 19–20 (D.D.C. 2002).

reports.[159] Moreover, the D.C. Circuit ruled that the District Court had clearly erred in reappointing a monitor who had been invested "with wide-ranging extrajudicial duties over the Government's objection."[160]

At this point, Congress intervened by enacting legislation to temporarily relieve the Department of Interior from conducting the expensive and burdensome historical accounting ordered by the District Court in *Cobell*—legislation that the D.C. Circuit upheld on appeal as constitutional[161]—while Congress sought to develop a comprehensive legislative solution to the trust account problem. When that legislative suspension expired by its own terms at the end of 2004 without congressional resolution, the district judge characterized the congressional action as "a bizarre and futile attempt at legislating a settlement of this case,"[162] promptly reinstated the structural injunction ordering the government to conduct a complete historical accounting of the trust fund accounts, and announced the intention to conduct further contempt proceedings related to the case.[163]

In 2006, the D.C. Circuit reversed additional orders by the district judge as exceeding judicial authority and then punctuated its ruling by ordering the action assigned to a different judge.[164] The D.C. Circuit ruled that the district judge had "exceeded the role of impartial arbiter," had leveled serious charges against Interior and its officials unrelated to the issue before the court, and had become so extreme in "professed hostility to Interior" as to display a clear inability to render a fair judgment.[165] In 2009, the D.C. Circuit once again overturned the District Court, which through a new judge had concluded that an accounting was not possible and had instead ordered payment by the government of $455 million as a "restitutionary award."[166]

Finally, in December 2010, Congress approved a $3.4 billion settlement that had been reached between the parties, of which $1.4 billion would compensate Indian

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159. Cobell v. Norton, 334 F.3d 1128, 1148–50 (D.C. Cir. 2003); *see also* Richard J. Pierce, Jr., *Judge Lamberth's Reign of Terror at the Department of Interior*, 56 ADMIN. L. REV. 235 (2004) (arguing that the district judge's propensity for threatening contempt citations against government employees that the judge regarded as misbehaving had initiated a "reign of terror" by a runaway federal judge, creating chaos within the Department of Interior, destroying morale throughout the agency, costing the government huge sums of money, abusing scores of federal employees, and inhibiting effective reform of the Indian trust system).

160. *Cobell*, 334 F.3d at 1142.

161. Cobell v. Norton, 392 F.3d 461, 465–68 (D.C. Cir. 2004).

162. Cobell v. Norton, 357 F. Supp. 2d 298, 306 (D.D.C. 2005).

163. *Id.*

164. Cobell v. Kempthorne, 455 F.3d 317 (D.C. Cir. 2006).

165. *Id.* at 335.

166. Cobell v. Kempthorne, 569 F. Supp. 2d 223, 226 (D.D.C. 2008), *rev'd sub nom*. Cobell v. Salazar*,* 573 F.3d 808, 809–10 (D.C. Cir. 2009).

trust account beneficiaries for their trust mismanagement claims.[167] The settlement was finalized by the District Court in July 2011.[168]

Even at its close, the case engendered controversy, when the *Cobell* plaintiffs' attorneys asked the District Court to award $223 million in fees to be paid from the settlement,[169] despite having signed a settlement agreement (which was presented to Congress in asking for legislative approval of the overall settlement) in which plaintiffs agreed that they "shall not assert that Class Counsel be paid more than $99,900,000.00."[170] Given that most individual Native American beneficiaries of the settlement would receive less than $2,000,[171] the fee request drew sharp criticism from many Native Americans. The National Congress of American Indians adopted a resolution supporting new legislation to cap the fees at $50 million in the *Cobell* case and declaring that the $223 million sought by the plaintiffs' lawyers "is considered outrageous by many in Indian Country and as a breach of their fiduciary duty to the class by putting their own interests ahead of the class, and has resulted in intense bipartisan scrutiny and criticism."[172] In the end, the District Court approved fees for the plaintiffs' attorneys of $99 million.[173]

As I have said previously about *Cobell*,

> [s]omewhat 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.[174]

Indeed, the course of the litigation and its ultimate resolution confirm that the case always was about *money*—how the United States was obliged as a fiduciary to manage Indian money accounts, how the government mishandled funds held in

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167. Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (2010); *see also Background on President Obama's Claims Resolution Act Signing Ceremony Today*, WHITEHOUSE.GOV, (Dec. 8, 2010), http://www.whitehouse.gov/the-press-office/2010/12/08/background-president-obamas-claims-resolution-act-signing-ceremony-today (describing the $3.4 billion settlement of the *Cobell* litigation).

168. Order Granting Final Approval to Settlement, Cobell v. Salazar, No. 1:96CV01285(TFH) (D.D.C. July 27, 2011), *aff'd,* 679 F.3d 909 (D.C. Cir. 2012).

169. Plaintiffs' Petition for Class Counsel's Fees, Expenses and Costs Through Settlement at 3, Cobell v. Salazar, No. 1:96CV01285(TFH) (D.D.C. Jan. 25, 2011).

170. Agreement on Attorneys' Fees, Expenses, and Costs ¶ 4.a, Cobell v. Salazar, No. 1:96CV01285-JR, (D.D.C. Dec. 7, 2009).

171. Rob Capriccioso, *Judge Grants Cobell Settlement Final Approval*, INDIAN COUNTRY (June 21, 2011), http://indiancountrytodaymedianetwork.com/2011/06/judge-grants-cobell-settlement-final-approval/.

172. Nat'l Cong. of Am. Indians, Resolution #MKE-11-019 Supporting the Native American Rights Fund's Request for Attorney's Fees and H.R. 887, at 2 (June 13-16, 2011), available at http://www.ncai.org/attachments/Resolution_ImcaJlXsxXplZObIyXugJUzxaEkKSFELNyuHVxVYRJiPgQGDKID_MKE-11-019_final.pdf.

173. Order Granting Final Approval to Settlement at 9–10, Cobell v. Salazar, No. 1:96CV01285(TFH) (D.D.C. July 27, 2011), *aff'd.*, 679 F.3d 909 (D.C. Cir. 2012).

174. Sisk, *supra* note 60, at 661.

trust, and how much the government should pay to restore funds to those accounts and compensate for its failures.

From the beginning, the District Court in *Cobell* asserted authority over the matter under the APA, claiming 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. 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."[175] In a terse paragraph, the D.C. Circuit later upheld this holding, with citation to *Bowen*, by ruling 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.[176]

Turning away the argument that the case belonged in the Court of Federal Claims as a money judgment claim under the Tucker Act, the District Court in *Cobell* said that 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."[177] Faced with questions about the amenability of the APA for their Indian breach of trust suit, the plaintiffs belatedly denied that they were asking for any "cash infusion" into the accounts "to recompense the plaintiffs for lost or mismanaged funds"[178] and "disavowed seeking an order for the payment of money in this case."[179] Because the complaint actually had sought broad financial relief, the District Court performed cosmetic surgery to strike from the complaint those allegations that explicitly sought monetary relief beyond the parameters of the APA.[180] "At most," the District Court concluded, "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."[181]

Writing nearly a decade ago, I maintained that the *Cobell* case ultimately was about money and, therefore, belonged in the Court of Federal Claims:

> 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.[182]

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175. Cobell v. Babbitt, 91 F. Supp. 2d 1, 28 (D.D.C. 1999) (citation omitted).
176. Cobell v. Norton, 240 F.3d 1081, 1094–95 (D.C. Cir. 2001).
177. Cobell v. Babbitt, 30 F. Supp. 2d 34, 39 (D.D.C. 1998).
178. *Id.* at 39–40.
179. *Cobell*, 91 F. Supp. 2d at 27.
180. *Cobell*, 30 F. Supp. 2d at 40 & n.17.
181. *Cobell*, 91 F. Supp. 2d at 28.
182. Sisk, *supra* note 60, at 664 (emphasis in original).

Like the "equitable lien" device that the Supreme Court refused to countenance under the APA in *Department of the Army v. Blue Fox, Inc.*,[183] the accounting of Native American trust accounts requested in *Cobell* was "merely a means to the end of satisfying a claim for the recovery of money."[184]

Time has served only to confirm that portrayal.

In the beginning, as the *Cobell* lawsuit got underway, the District Court declared that there was no evidence that the true nature of the plaintiffs' claims was to obtain eventual monetary reimbursement.[185] Accepting the plaintiffs' assertions that they sought no payment of money and no infusion of cash into Indian trust accounts, the *Cobell* court proclaimed that "[t]hese facts belie any claim that the plaintiffs' requested remedy is for money damages."[186]

In the end, however, with resolution of the litigation by the $3.4 billion settlement, the underlying pecuniary nature of the case became transparent. What the plaintiffs had repeatedly insisted they were not seeking—any cash infusion into the accounts or any order for the payment of money—proved to be exactly what the plaintiffs sought and received. Indeed, in the plaintiffs' petition for an award of attorney's fees as part of the final settlement of the *Cobell* case, they forthrightly relied on "[t]he size of the fund and number of class members benefited" to justify a request for $223 million in attorney's fees, characterizing "the $3.4 billion settlement [as] the largest class action award against the government."[187]

Moreover, although little noticed inside the legislation approving the *Cobell* settlement, the parties apparently recognized and took extraordinary steps to address the possible jurisdictional infirmity of the *Cobell* litigation, effectively conceding that the claim truly was one that otherwise would fall under the Tucker Act. In legislative language proposed by the parties and enacted by Congress, the Claims Resolution Act of 2010 provides that "[n]otwithstanding the limitation on the jurisdiction of the district courts of the United States in section 1346(a)(2) of title 28, United States Code, the United States District Court for the District of Columbia shall have jurisdiction of the claims asserted in the Amended Complaint for purposes of the Settlement."[188] The reference to § 1346(a)(2) is to the Little Tucker Act,[189] which allows claims for money judgments in the District Court only up to $10,000, while claims above $10,000 must be pursued in the CFC.

In this way, the settlement legislation acknowledges that the *Cobell* requests for relief under the settlement sought a money judgment under the Tucker Act, and the legislation then lifts the $10,000 limit on Tucker Act claims in District Court for this particular lawsuit.[190] Notably, no pretense was made in the final resolution of

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183. 525 U.S. 255, 262 (1999); *see also supra* notes 81–83 and accompanying text.

184. *Blue Fox*, 525 U.S. at 262.

185. *Cobell*, 91 F. Supp. 2d at 25–26.

186. Cobell v. Babbitt, 30 F. Supp. 2d 24, 41 (D.D.C. 1998).

187. Plaintiffs' Petition for Class Counsel's Fees, Expenses and Costs Through Settlement at 20, Cobell v. Salazar, No. 1:96CV01285(TFH) (D.D.C. Jan. 25, 2011).

188. Claims Resolution Act of 2010, Pub. L. No. 111-291, § 101, 124 Stat. 3064, 3066–67 (2010).

189. 28 U.S.C. § 1346(a)(2) (2006).

190. As part of the settlement proceedings in the District Court, the plaintiffs filed an amended complaint that expressly requested "restitution, damages, and other appropriate legal and equitable relief." Amended Complaint at 24, Cobell v. Salazar, No. 1:96 CV

the *Cobell* litigation that the monetary relief authorized by the special settlement statute could properly have been obtained within the parameters of the APA.

Thus, the *Cobell* lawsuit itself came to an end with a congressionally enacted jurisdictional reprieve, but one limited to that litigation. It was a legislative ticket good for the *Cobell* ride only. Unfortunately, in the decade since the original *Cobell* jurisdictional rulings, a growing number of other plaintiffs have tried to get on the District Court train for Indian breach of trust claims.[191] Through "an unprecedented projection of District Court authority into the province of the Court of Federal Claims over money-based claims by Indians against the United States,"[192] the *Cobell* decision set the stage for forum shopping, clever pleading of money claims as requests for equitable relief, jurisdictional confusion, and duplicative litigation. These parallel lawsuits led to a collision between the Court of Federal Claims and the District Court that eventually landed in the Supreme Court.[193]

B. The Adequacy of Remedies in the Court of Federal Claims and the District Court in Indian Breach of Trust Cases

1. Tucker Act and Indian Tucker Act Suits in the Court of Federal Claims for Breach of Trust

While individual Native American and tribal claimants may pursue constitutional and statutory claims for money under the Tucker Act in the same manner as others, the historical guardian-ward relationship between the federal government and indigenous peoples may give rise to a "breach of trust" cause of action.[194] When a genuine fiduciary relationship between the United States and an Indian tribe or individual American Indian is confirmed with respect to a particular category of Indian assets or resources, the Tucker Act[195] or Indian Tucker Act[196] authorize an action for money damages in the Court of Federal Claims.

In *United States v. White Mountain Apache Tribe*,[197] the Supreme Court explained that, although an unequivocal waiver of sovereign immunity is a predicate to any suit against the United States, the Tucker Act and the companion Indian Tucker Act operate to provide such consent.[198] Because the Tucker Act does not create a cause of action, the plaintiff must premise the substantive right on a statute or regulation that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."[199] The pertinent statute or

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01285-JR (D.D.C. Dec. 21, 2010).

191. *See infra* Part III.A.

192. Sisk, *supra* note 60, at 665; *see also* Reilly v. United States, 93 Fed. Cl. 643, 651 (2010) (describing *Cobell* as one of those "isolated cases" that mistakenly suggest money claims may be framed under the APA as seeking equitable relief).

193. *See infra* Part III.A.

194. On the trust responsibility of the federal government to Indian tribes and individuals and the enforcement of that trust, see generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 54, at §§ 5.04[4], 5.05.

195. 28 U.S.C. § 1491 (2006).

196. *Id.* § 1505.

197. 537 U.S. 465 (2003).

198. *Id.* at 472.

199. *Id.* (quoting United States v. Mitchell, 463 U.S. 206, 217 (1983)).

regulation need only "be reasonably amenable to the reading that it mandates a right of recovery in damages"; that is, "a fair inference will do."[200]

Neither the general trust relationship that historically existed between the United States and the Indian peoples nor the common law of trust alone can give rise to the type of fiduciary relationship that is enforceable by judicial action through the Tucker Act or Indian Tucker Act. A statutory- or regulatory-created fiduciary relationship remains indispensable to inferring a right to sue for breach of trust.[201] In looking for a substantive right in an Indian breach of trust case under the Tucker Act, the Supreme Court in *United States v. Navajo Nation*[202] said that "the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions."[203]

However, in some contrast with ordinary Tucker Act claims,[204] once a statutory- or regulatory-based fiduciary relationship is identified between the United States and Native Americans, the statutory or regulatory "prescriptions need not . . . expressly provide for money damages; the availability of such damages may be inferred."[205] Once the statutory "focus" of a specific fiduciary duty has been provided, then, as the Supreme Court ruled in *United States v. White Mountain Apache Tribe*,[206] the "general trust law [is to be] considered in drawing the inference that Congress intended damages to remedy a breach of obligation."[207] To demand an express statutory reference to money damages as the available remedy, the Court concluded, "would read the trust relation out of Indian Tucker Act analysis."[208]

Because, as I have described it previously, "a Native American claim for breach of trust against the federal government must be constructed upon a statutory foundation,"[209] successful claims typically arise from statutes that describe pervasive government control over, and establish management rules for, particular assets or resources that are being held in trust for individual Indians or tribes. Thus, in *White Mountain Apache*, the governing statute not only stated that the Fort Apache site would be held in trust for the tribe but granted discretion to the government to use the property, which the government had exercised by assuming "plenary" control through daily occupation.[210] In *United States v. Mitchell*,[211] the

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200. *Id.* at 473.

201. *See* United States v. Mitchell, 463 U.S. 206, 224 (1983) (holding that congressional enactments or administrative regulations must be adduced to "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities").

202. 537 U.S. 488 (2003).

203. *Id.* at 506.

204. *See* Sisk, *supra* note 54, at 340 (explaining that, in regular Tucker Act cases outside the fiduciary context of Indian breach of trust claims, "while the statute need not authorize judicial action or even contemplate the prospect of litigation—the Tucker Act expressly creates the right to file suit—the statute must speak in the dialect of lucre").

205. *Navajo Nation*, 537 U.S. at 506.

206. 537 U.S. 465 (2003).

207. *Id.* at 477.

208. *Id.*

209. Sisk, *supra* note 54, at 344.

210. *White Mountain Apache*, 537 U.S. at 475.

211. 463 U.S. 206 (1983).

pertinent statute was held to impose fiduciary duties on the United States with respect to timber harvesting on Indian lands because the government, by statute, had "assume[d] such elaborate control over forests and property belonging to Indians."[212]

When, however, the governing statute instead evidences a purpose to "yield[] management, supervision, and possession of Native American resources, and thereby restor[e] autonomous and independent control to the tribe or individual property owners," then, as I have explained, "the governmental fiduciary role fades accordingly."[213] In *Navajo Nation*, for example, the Court found that the Indian Mineral Leasing Act[214] was designed "to enhance tribal self-determination," giving the primary power to negotiate and transact coal mining leases to the tribes.[215] Thus, a particular statutory policy of encouraging Indian self-determination, together with withdrawal of government possession and management, tends to contradict an inference of a fiduciary responsibility on the part of the United States, enforceable by a damages remedy.[216]

In addition to statutes and regulations creating trust duties for the United States with respect to management of natural resources, a fiduciary duty creating an inference of a Tucker Act or Indian Tucker Act remedy may arise from statutes prescribing governmental duties in receiving, holding, investing, and distributing funds for individual Indians or tribes. Statutes such as the American Indian Trust Fund Management Reform Act of 1994,[217] which imposes certain duties on the United States in managing, investing, and accounting for funds "held in trust by the United States for the benefit of an Indian tribe or an individual Indian,"[218] and the Federal Oil and Gas Royalty Management Act of 1982,[219] which applies to royalties on oil or gas leases on Indian lands, do not create an express right of action in court for breach of these duties or provide that violation of the statutory terms should be compensated by damages. Again, however, that is where the Tucker Act and the Indian Tucker Act come into play, by allowing inference of a cause of action for breach of trust that may be remedied by a money judgment in the Court of Federal Claims.

Given the express statutory provision that the funds are held in trust, the pervasive control of the government over the funds, and the specific statutory directions as to how funds are to be managed, invested, and accounted for, a

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212. *Id.* at 225.

213. Sisk, *supra* note 54, at 348.

214. 25 U.S.C. § 396a.

215. United States v. Navajo Nation, 537 U.S. 488, 508 (2003); *see also* United States v. Navajo Nation, 556 U.S. 287, 288 (2009) (holding that "the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated").

216. *See* Sisk, *supra* note 54, at 348–52 (emphasizing that each distinctive set of statutory and regulatory rules must be evaluated to determine "whether the governmental role in a particular case is best described as one of engaged management of mineral resources or one of detached supervision of largely independent Indian management of their own resources," so that the government is held to "conscientious execution of those obligations that endure in the statutory text").

217. 25 U.S.C. §§ 161–162a, 4001–4061 (2006).

218. *Id.* § 4011(a).

219. 30 U.S.C. §§ 1715(a), 1732(b)(2) (2006).

fiduciary relationship plainly exists with respect to these tribal and individual Indian trust accounts.[220] Given further that mishandling of funds almost invariably will result in loss of funds from the accounts of those to whom they belong and additional loss of the investment value of those funds, a breach of these fiduciary duties by the United States would state a claim under the Tucker Act and the Indian Tucker Act.[221] Because it is doubtful that an allegation of breach of trust of these statutory fiduciary duties with respect to money accounts could arise without the fact of retrospective financial harm, a money judgment remedy is not only available, but provides an adequate remedy within the exclusive jurisdiction of the CFC.[222]

2. The Adequacy of a Money Judgment (and Collateral Relief) in the Court of Federal Claims in Indian Breach of Trust Cases

The Supreme 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 in managing Native American assets and resources. In *United States v. Mitchell*,[223] an Indian breach of trust case involving government management of Indian timber resources, the 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 observed, 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 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.[224]

In clarifying the state of the law pursuant to its national appellate jurisdiction over Tucker Act matters,[225] the Federal Circuit has specifically noted its disagreement with the federal courts in the District of Columbia on the proper jurisdictional venue for Indian breach of trust claims involving mishandling of funds in individual and tribal accounts. In *Eastern Shawnee Tribe v. United*

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220. For decisions inferring a fiduciary duty from statutes governing tribal trust accounts, which is enforceable by an action for damages under the Tucker Act and Indian Tucker Act, see Jicarilla Apache Nation v. United States, 100 Fed. Cl. 726, 731–38 (2011) (finding that statutory provisions on investment of tribal funds imposed a fiduciary duty of prudent investment on the United States); Osage Tribe of Indians of Okla. v. United States, 72 Fed. Cl. 629, 668 (2006) (same); Cheyenne-Arapaho Tribes of Indians of Okla. v. United States, 512 F.2d 1390, 1392–94 (Ct. Cl. 1975) (same).

221. *See supra* note 220.

222. *See* Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1605 (2002) ("If the defendant either has spent the plaintiff's money or still has the money, then the remedy at law is adequate—the plaintiff sues for a money judgment."). *See infra* Part II.B.2.

223. 463 U.S. 206 (1983).

224. *Id.* at 226–28.

225. *See supra* Part I.C.

States,[226] the Federal Circuit referred to the D.C. Circuit's *Cobell* decision[227] and then said:

> 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.[228]

a. Money Judgment for Indian Breach of Trust Claims

When an individual Native American or tribe has suffered past monetary loss as a result of a governmental breach of trust, a claim for a retrospective money judgment will remedy that harm. To be sure, the trust doctrine applies to disputes about governmental trust responsibilities beyond management of Native American resources and funds. Breach of trust may be alleged as a non-monetary claim for specific relief when the harm caused by the government's misconduct or dereliction of duty does not translate directly into economic terms and monetary relief is not sought.[229] Moreover, when the harm has not yet been realized and the claim is wholly forward-looking in effect, a claim for a money judgment would be premature.

In theory, perhaps, if supported by statutory authority and pursued under the APA, a request for an equitable accounting of Indian accounts or assets managed in trust by the federal government might be presented divorced from any pecuniary element if no economic harm has yet occurred or is entirely speculative. As a practical matter, however, an Indian trust dispute involving government management of tribal assets or funds will rarely, if ever, arise separately from existing financial injury.

In both the *Cobell*[230] and post-*Cobell* litigation in the District Court, Native American plaintiffs alleged a breach of trust with already-suffered financial consequences. Consider, for example, the Tohono O'odham Nation's lawsuit in District Court regarding the United States' management of tribal trust fund accounts, which later became the subject of a jurisdictional collision because of duplicative litigation in the CFC.[231] In that case, the Nation began its complaint by alleging "breaches of trust by the United States . . . in the management and accounting of trust assets, including funds and lands."[232] In the first paragraph of its District Court complaint, the Nation sought not only an accounting but also the

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226. 582 F.3d 1306 (Fed. Cir. 2009).

227. *See supra* Part II.A.

228. *Eastern Shawnee*, 582 F.3d at 1308–09.

229. On claims for equitable and injunctive relief to enforce the federal government's trust duties, see generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 54, at § 5.05[1][a].

230. *See supra* Part II.A.

231. *See infra* Part III.A.

232. Complaint at 1, Tohono O'odham Nation v. Kempthorne, No. 06-cv-02236-TFH (D.D.C. Dec. 28, 2006).

"correct[ion of] the balances of the Nation's trust fund accounts to reflect accurate balances."[233] Indeed, the Nation asked the District Court for remedies of "disgorgement" and "equitable restitution,"[234] that is, a transfer of money from the federal government to the Nation.

When the Tohono O'odham Nation's filing of simultaneous lawsuits in both the District Court and the CFC later was questioned before the Supreme Court,[235] the Nation attempted to distinguish the monetary relief sought in the two lawsuits. The Nation contended that the complaint in District Court sought "the return of 'old money' that belongs to the Nation but erroneously does not appear on its balance sheet";[236] that is, an infusion of cash if an equitable accounting showed that funds were missing from accounts. By contrast, the Nation insisted, its complaint in the CFC sought "damages in the form of 'new money' that the Nation should have earned as profit but did not";[237] that is, the financial consequences of lost investment opportunities.

In considering the adequacy of a money judgment under the Tucker Act or the Indian Tucker Act, however, purported distinctions between "particular pots of money as different relief"[238] are distinctions without a difference.[239] As the Supreme Court clarified in *Great-West Life & Annuity Insurance Co. v. Knudson*,[240] when a plaintiff seeks a supposed "restitution" remedy "'to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money,'" the claim is a legal one not substantively different from a claim for ordinary damages.[241] For that reason, as Professor Nora Pasman-Green and attorney Alexis Derrossett explain, "most restitution claims result in a money judgment, which is satisfied by the same enforcement procedures as a damage award."[242]

In any event, the CFC's authority under the Tucker Act does not turn on such dichotomies as old versus new money, equitable versus legal remedies, money "damages" versus other monetary relief, or specific versus substitutionary relief.[243]

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233. *Id.* at 2.

234. *Id.* at 18. On the availability of claims for "restitution" or "disgorgement," see *infra* Part II.B.3.d.

235. *See infra* Part III.A.

236. Brief for Respondent, *supra* note 18, at 25 (internal citations and quotations omitted).

237. *Id.* (internal citations and quotations omitted).

238. Tohono O'odham Nation v. United States, 559 F.3d 1284, 1295 (Fed. Cir. 2009) (Moore, J., dissenting) (disputing that the District Court and CFC complaints actually sought different relief), *rev'd*, 131 S. Ct. 1723 (2011).

239. *See* Craig A. Schwartz, *Footloose: How to Tame the Tucker Act Shuffle After* United States v. Tohono O'odham Nation, 59 UCLA L. REV. DISCOURSE 2, 20 (2011) (describing the "old money" versus "new money" distinction in *Tohono O'odham Nation* as "hairsplitting").

240. 534 U.S. 204 (2002).

241. *Id.* at 213 (quoting RESTATEMENT OF RESTITUTION § 160 cmt. a at 641–42 (1936)).

242. Nora J. Pasman-Green & Alexis Derrossett, *Twenty Years After* Bowen v. Massachusetts*—Damages or Restitution: When Does It Still Matter? When Should It?*, 69 LA. L. REV. 749, 761 (2009).

243. *Cf. Tohono O'odham Nation*, 131 S. Ct. at 1733 n.2 (Sotomayor, J., concurring in the judgment) (noting, for purposes of the jurisdictional bar on duplicative litigation against the United States in 28 U.S.C. § 1500, that "[t]he formal label affixed to the form of relief sought is irrelevant" where both the "equitable relief" claim and the damages claim "seek

Plainly and simply, the CFC may award money, without respect to label.[244] If a substantive right to action authorizes payment, the CFC has the power under the Tucker Act and Indian Tucker Act to enter a money judgment. As the CFC held with respect to the parallel *Tohono O'odham Nation* litigation in that forum, "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."[245]

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]."[246]

And, as noted, Native American plaintiffs bringing suit for breach of trust invariably do so because they already have suffered financial harm—the fact of real and present injury is what prompts the tribe or individual to resort to litigation.

b. Collateral Relief (Including Accounting Equivalent)

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."[247] Moreover, "[i]n any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just."[248] When this amendment to the Tucker Act was enacted, the House report explained: "[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."[249]

Through this statutory grant of limited equitable-type powers, 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, either directly or by

money to remedy the Government's alleged failure to keep accurate accounts").

244. *See* Bowen v. Massachusetts, 487 U.S. 879, 900–01 n.31 (1988) (explaining that, while the scope of the APA is limited by the exclusion of "money damages," "[t]he jurisdiction of the Claims Court . . . is not expressly limited to actions for 'money damages'"); Tohono O'Odham Nation v. United States, 559 F.3d 1284, 1295 (Fed. Cir. 2009) (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."); Kanemoto v. Reno, 41 F.3d 641, 646 (Fed. Cir. 1994) ("[T]he [Supreme] Court recognized that the Tucker Act is not limited to suits for money damages.").

245. Tohono O'odham Nation v. United States, 79 Fed. Cl. 645, 658 n.14 (2008), *rev'd*, 559 F.3d 1284 (Fed. Cir. 2009), *rev'd*, 131 S. Ct. 1723 (2011).

246. Amoco Prod. Co. v. Hodel, 815 F.2d 352, 367 (5th Cir. 1987).

247. 28 U.S.C. § 1491(a)(2) (2006).

248. *Id.*

249. H.R. REP. NO. 92-1023, at 3 (1972).

remanding the matter to the appropriate agency to reconcile trust accounts. As the Federal Circuit has observed in dicta, the CFC "appears to have the authority to order an equitable accounting as ancillary relief."[250]

In *United States v. Tohono O'odham Nation*,[251] a majority of the Supreme Court turned aside the Nation's claimed hardship of being precluded from filing simultaneous claims in District Court (for an accounting) and in the Court of Federal Claims (for a money judgment) by observing that the Nation "could have filed in the CFC alone and if successful obtained monetary relief to compensate for any losses caused by the Government's breach of duty."[252] The concurring Justices in *Tohono O'odham Nation* responded that "the CFC has held that it lacks jurisdiction to issue a preliability accounting."[253] The concurrence's response is correct as far as it goes—the CFC's authority to grant collateral equitable-type relief is triggered only by an underlying claim of past-due monetary liability under the Tucker Act or Indian Tucker Act. However, the allegation of a breach of trust arising from an enforceable fiduciary relationship typically transfigures a claim from a preliability to a postliability one, that is, from a purely prospective to a retrospective allegation.

As explained above, as a practical matter, Indian breach of trust suits involving government mismanagement of Native American assets invariably are or could be premised on past harm giving rise to monetary liability, rather than posing abstract future-looking claims divorced from existing financial injury. Notably, the *Tohono O'odham Nation* concurrence followed its statement with a "but see" citation to the Federal Circuit's suggestion that an equitable accounting may be ordered as collateral relief under the Remand Act.[254]

Even prior to the 1972 congressional grant of additional remedial authority ancillary to a money judgment, the CFC always had "the power to require an accounting in aid of its jurisdiction to render a money judgment on that claim."[255] Likewise, discovery in the CFC has always been available to secure government documents and records relevant to the claim.[256]

Although supplemental to a monetary remedy, the CFC's power to demand a complete, detailed, and accurate accounting (or its equivalent) of Indian assets that are the subject of a breach of trust claim should not be doubted. (In any event, the APA does not remain available in the District Court whenever the alternative

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250. E. Shawnee Tribe v. United States, 582 F.3d 1306, 1308 (Fed. Cir. 2009); *see also* 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.").

251. 131 S. Ct. 1723 (2011).

252. *Id.* at 1730–31. On the Tohono O'odham Nation decision and its implications for forum selection, see *infra* Part III.A & III.B.2.

253. *Tohono O'odham Nation*, 131 S. Ct. at 1735 n.5 (Sotomayor, J., concurring).

254. *Id.*; *see also infra* Part III.B.2.a.

255. Klamath & Modoc Tribes v. United States, 174 Ct. Cl. 483, 490 (1966).

256. *See* 28 U.S.C. § 2507(a) (2006) (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"); 28 U.S.C. § 2521(a) (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").

remedy afforded by Congress in another court is imperfect, awkward, or less than comprehensive; rather, § 704 withdraws the power of judicial review under the APA when the alternative remedy in another court for a general class of claimants is "adequate."[257]) In sum, when an individual American Indian or tribe presents a meritorious claim of breach of trust by the United States, that claim can be adequately remedied by a money judgment and collateral relief available in the CFC under the Tucker Act and Indian Tucker Act.

3. The Availability and Scope of a Claim for an Accounting and Equitable Remedies in Indian Breach of Trust Cases in the District Court

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, and at best limited, source of authority for relief in Indian breach of trust cases involving mismanagement of assets, such as tribal funds. In particular, a private right of action (if any exists) requiring the United States to prepare an accounting of Indian trust assets is now likely limited to obtaining information as specifically prescribed by statute (along with perhaps a basic reconciliation of account statements). Additional remedies such as restitution for monies missing from trust accounts are almost certainly outside the parameters of the APA.

In the *Cobell* litigation,[258] which opened the door to Indian breach of trust claims in District Court, the plaintiffs initially framed their claim for an accounting of Indian trust accounts as falling under the APA, both as a waiver of sovereign immunity and as the cause of action for review of agency action under the American Indian Trust Fund Management Reform Act of 1994.[259] Nonetheless, although the link never was fully severed, the tether to the APA's review provisions and thus to a statutory-based cause of action was always loose and became more so during the course of the litigation. For example, in an early appellate decision in *Cobell* in 2001, the D.C. Circuit emphasized that "the 1994 Act is not the source of plaintiffs' rights,"[260] saying instead that "an action for accounting is an equitable claim and that courts of equity have original jurisdiction to compel an accounting."[261] (Subsequently, the D.C. Circuit retreated somewhat, cautioning in a later *Cobell* appeal that the court should not too readily "abstract[] the common law duties from any statutory basis."[262])

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257. *See* 5 U.S.C. § 704 (2006); *see also* Reilly v. United States, 93 Fed. Cl. 643, 652 (2010) ("Generally speaking, this requirement [for APA authority under § 704] focuses not on the availability of a remedy to a particular plaintiff in a given case, but rather on the adequacy of a remedy to a category of claimants.").

258. *See supra* Part II.A.

259. 25 U.S.C. §§ 161–162a, 4001–4061 (2006). The D.C. Circuit held that the agency's performance of trust fund accounting duties had been "unreasonably delayed" under the APA right of action for judicial review as stated in 5 U.S.C. § 706(1). Cobell v. Norton, 240 F.3d 1081, 1108 (D.C. Cir. 2001).

260. *Cobell*, 240 F.3d at 1096.

261. *Id.* at 1104 (quoting Klamath & Modoc Tribes v. United States, 174 Ct. Cl. 483, 487) (1966)).

262. Cobell v. Norton, 392 F.3d 461, 471 (D.C. Cir. 2004).

In post-*Cobell* Indian breach of trust litigation in the District Court, most tribal plaintiffs wholly abandoned the APA as a source of a substantive right of action, while still asking the courts to recognize the APA as providing the necessary statutory consent to litigate against the federal government. In the breach of trust cases by the Tohono O'odham Nation and other tribes in consolidated litigation before the District Court for the District of Columbia, the tribes argued that they possessed an independent cause of action in equity for an accounting that can be enforced outside of the APA.[263] The tribes insisted they had stated a "non-APA claim for an accounting,"[264] denying that their accounting right was based on the 1994 statute and the judicial review provisions of the APA. They said that they have presented "a pure trust claim," which "in no way implicates the substantive or procedural standards of the APA."[265]

Rather, in this post-*Cobell* litigation, the tribes described their District Court complaints as stating "an independent, equitable cause of action by a trust beneficiary to enforce express and implied federal statutory trust responsibilities."[266] In so doing, they "invoke[d the District] Court's inherent equitable authority to enforce the terms of that statutorily-created trust."[267] And the tribes further sought from the District Court what they characterized as restitutionary remedies for any misplaced or lost tribal funds.[268]

a. The Requirement of a Waiver of Sovereign Immunity and a Substantive Cause of Action

For any plaintiff to bring a civil lawsuit against the United States in any federal court, the plaintiff must adduce three things: (1) subject matter jurisdiction, (2) a statutory waiver of sovereign immunity, and (3) a substantive cause of action.

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263. Plaintiffs' Principal Brief in Opposition to Defendants' Motion to Dismiss at 20, Tohono O'odham Nation v. Kempthorne, Civil Action No. 06-2236-JR (D.D.C. July 16, 2008). In similar breach of trust cases in the District Court for the Western District of Oklahoma, tribes also have asserted claims under federal common law, beyond the APA and other federal statutes. Tonkawa Tribe v. Kempthorne, No. CIV-06-1435-F, 2009 WL 742896, at *3 n.3, *4 (W.D. Okla. Mar. 17, 2009); Otoe-Missouria Tribe v. Kempthorne, No. CIV-06-1436-C, 2008 WL 5205191, at *5 (W.D. Okla. Dec. 10, 2008).

264. Plaintiffs' Principal Brief in Opposition to Defendants' Motion to Dismiss, *supra* note 263, at 15.

265. Plaintiffs' Joint Memorandum in Opposition to Defendants' Motion for Remand and Stay of Litigation at 52, Tohono O'odham Nation v. Kempthorne, Civil Action No. 06-2236-JR (D.D.C. Oct. 1, 2007). Despite the vehemence of the tribal plaintiffs' rejection of the APA as the source of their right of action, the tribes apparently wished to hold on to APA review as a fallback, saying, for example, "that the government has not even come close to complying with the 1994 Act's requirements." Plaintiffs' Principal Brief in Opposition to Defendants' Motion to Dismiss, *supra* note 263, at 40.

266. Plaintiffs' Principal Brief in Opposition to Defendants' Motion to Dismiss, *supra* note 263, at 24.

267. *Id.*

268. Complaint at 1, Tohono O'odham Nation v. Kempthorne, Civil Action No. 06-2236-JR (D.D.C. Dec. 28, 2006).

Unless superseded by another statute that directs exclusive jurisdiction in another forum, the general federal-question jurisdictional statute, 42 U.S.C. § 1331, confers authority on the District Court to review federal agency action.[269] In 1976, Congress amended the APA to expressly waive the sovereign immunity of the government, thereby allowing suits seeking judicial review of an agency's action to be brought directly against the government itself in federal District Court.[270] Section 702 of the APA thus provides:

> An action in a court of the United States . . . stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.[271]

Beyond waiving sovereign immunity, the APA itself creates a substantive right of action by outlining the right to review of final agency action under § 704 and the remedies available for judicial review of agency action in § 706.[272]

Although post-*Cobell* tribal plaintiffs in District Court cited to the general federal-question jurisdictional statute and to the APA's waiver of sovereign immunity, they declined the APA's express right of action for judicial review of agency action. Instead, the tribes wished to avoid the limitations of administrative law and secure a broader judicial investigation and evaluation of the government's handling of tribal trust accounts.[273] To succeed with that approach, however, the tribal plaintiffs had to find another private right of action in another statutory source. Failing to identify a statutory right of action, the tribes instead asserted an independent cause of action that arises in equity and requires the government to provide a broad-based accounting for all Indian assets held in trust.

b. The Non-Viability of an Independent Cause of Action for an Accounting in Equity

While the tribes' assertion of an independent equitable cause of action was always doubtful,[274] it plainly has been swept aside by Supreme Court rulings in

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269. *See* 28 U.S.C. § 1331 (2006).

270. Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721.

271. 5 U.S.C. § 702 (2006).

272. *Id.* §§ 704, 706.

273. *See* Plaintiffs' Joint Memorandum in Opposition to Defendants' Motion for Remand and Stay of Litigation, *supra* note 265, at 58 (saying that the tribes' "primary cause of action is a trust claim and not an administrative law claim").

274. *See* Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999) (stating that the APA should not be misunderstood "as waiving immunity from all actions that are equitable in nature"); Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 61–62 (2004) (stating the APA's limitations on review apply unless another "*statute* provides a private right of action" (emphasis added)); Alexander v. Sandoval, 532 U.S. 275, 287 (2001) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." (quoting Lampf, Pleva, Lipkind, Prupis & Petigrow v.

Indian breach of trust cases over the past few years. In those cases, decided in 2009 and 2011, the Supreme Court clarified and emphasized that duties based directly on the general law of trusts cannot give rise to legally cognizable rights by tribes to sue the United States government for breach of trust.

In *United States v. Navajo Nation*,[275] decided in 2009, the Court stated that a tribe alleging breach of trust must identify a statute that creates a specific fiduciary duty and allege that the government violated that statutorily defined duty.[276] While "principles of trust law might be relevant" to the next question of whether a remedy of damages is available for breach of trust, they play no role in the "threshold" question of whether an enforceable duty exists.[277]

In *United States v. Jicarilla Apache Nation*,[278] decided in 2011, the Court further emphasized the requirement of a statutory foundation for fiduciary duties and rejected the existence of a governmental duty to disclose information about tribal trust accounts beyond that specified in a statute. During Indian trust litigation brought in the Court of Federal Claims (CFC), the government objected to discovery requests by the Jicarilla Apache Nation as seeking documents protected by the government's attorney-client privilege.[279] The CFC and the Federal Circuit applied a common-law exception to the privilege based on the duty of a trustee to share all information with the beneficiary and not withhold attorney-client communications.[280] In rejecting the application of a common-law fiduciary exception to the attorney-client privilege in Indian breach of trust suits against the United States, the Court made two statements directly pertinent to the question of whether an independent cause of action for an accounting is available to the tribes based on the inherent equitable powers of the federal courts.

First, in a majority opinion by Justice Alito, the *Jicarilla Apache* Court held:

> Although the Government's responsibilities with respect to the management of funds belonging to Indian tribes bear some resemblance to those of a private trustee, this analogy cannot be taken too far. The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law.[281]

While general trust principles may play a role "to inform [the Court's] interpretation of statutes and to determine the scope of liability" for breach of trust, the trust duties imposed on the government are defined by statute.[282] In other words, common-law trust principles still have a robust role to play in constructing the meaning and specific application of a fiduciary duty that has been established

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Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in the judgment)).

275. 556 U.S. 287 (2009).
276. *Id.* at 290.
277. *Id.* at 291.
278. 131 S. Ct. 2313 (2011).
279. *Id.* at 2319–20.
280. *Id.* at 2318–20.
281. *Id.* at 2318.
282. *Id.* at 2325.

by a statute or regulation, but the existence of the fiduciary duty must arise directly from the statute or regulation and not be inferred from the common law.[283] In essence, then, the *Jicarilla Apache* Court ruled,"[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."[284]

The Supreme Court thereby disavowed any non-statutory source for a substantive right by an American Indian tribe or member against the United States under the trust doctrine. Whether described as a common-law theory or an inherent equitable right grounded in general trust law, the post-*Cobell* tribes' assertion of an independent, non-statutory right to a wide-sweeping equitable accounting of tribal assets in District Court no longer can be sustained. Because trust responsibilities must be grounded directly on the terms of a statute, an independent cause of action for an accounting does not survive after *Jicarilla Apache*.

Second, the Court in *Jicarilla Apache* held that the United States "does not have the same common-law disclosure obligations as a private trustee."[285] Rather, Congress has specified "narrowly defined disclosure obligations" in the trust accounting and management statutes, which may not be read "to incorporate the full duties of a private, common-law fiduciary."[286]

Accordingly, the government's duties to disclose information—which lie at the heart of any request for an accounting—are limited to those stated in the 1994 Act and other statutes. In contrast with the rulings in *Cobell* and post-*Cobell* litigation, which are now superseded by the Supreme Court's decisions in *Navajo Nation* and *Jicarilla Apache*, the parameters of the government's duties to provide an accounting and reconciliation are those detailed in the statutes and may not be augmented by judicially-fashioned equitable or common-law notions.

When Congress has intended to make the United States liable in court pursuant to common-law causes of action, it has done so expressly. Under the Federal Tort Claims Act, [287] which waives sovereign immunity for tort-based claims against the United States, the substantive cause of action is to be found in the law of "the place where the act or omission" giving rise to the claim occurred.[288] In this way, as the Supreme Court later explained, Congress determined "to build upon the legal

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283. Jicarilla Apache Nation v. United States, 100 Fed. Cl. 726, 738 (2011) (noting that Supreme Court decisions "have relied upon the common law to map the scope of enforceable fiduciary duties established by statutes and regulations").

284. *Jicarilla Apache*, 131 S. Ct. at 2325.

285. *Id.* at 2329.

286. *Id.* at 2330. Justice Ginsburg, joined by Justice Breyer, concurred that "the Government is not an ordinary trustee" and thus retained the attorney-client privilege over the sought documents, but saw it as "unnecessary to decide what information *other than* attorney-client communications the Government may withhold from the beneficiaries of tribal trusts." *Id.* at 2331 (Ginsburg, J., concurring in the judgment) (emphasis in original). Justice Sotomayor dissented, taking special issue with what she viewed as "the majority's disregard of [the Court's] settled precedent that looks to common-law trust principles to define the scope of the Government's fiduciary obligations to Indian tribes." *Id.* at 2331–32 (Sotomayor, J., dissenting).

287. Federal Tort Claims Act of 1946, ch. 753, 60 Stat. 843 (codified at 28 U.S.C. §§ 1346(b), 2671–2680).

288. 28 U.S.C. §§ 1346(b)(1), 2674 (2006).

relationships formulated and characterized by the States" rather than create new federal tort causes of action.[289] By contrast, Congress chose to provide a remedy to tribes for breach of trust through the Indian Tucker Act, which turns the focus on federal statutes and regulations as a source of rights.[290]

c. Contrasting the Scope of an APA Claim for Accounting with the Indian Tucker Act Claim for Breach of Trust

Setting aside for the moment the premise of this Article that the availability of a money judgment in the Court of Federal Claims (CFC) in an Indian breach of trust case precludes a claim for an accounting in District Court, the first obstacle presented to post-*Cobell* lawsuits by *Jicarilla Apache* could be (partially) overcome. Tribal plaintiffs seeking to hold on to District Court review could premise their claims fully and completely on the APA, both as a waiver of sovereign immunity and as a right of action. By restoring the APA to the center of the lawsuit, those Indian breach of trust claims would be cognizable—if at all—only as administrative law claims. In general, these tribal accounting claims would be subject to the same standards and limitations on APA review that apply to other cases involving court review of final agency action.

The second obstacle posed by *Jicarilla Apache* to a separate claim for accounting brought in District Court goes directly to the scope of the claim and the remedy. With particular relevance to accounting claims, the Supreme Court in *Jicarilla Apache* pointedly stated that a tribe's right to information about the government's management of trust funds is limited to those disclosure duties set forth in the trust fund accounting statutes.[291] Tribal plaintiffs prosecuting accounting claims in District Court henceforth will be restricted to identifying specific ways in which the government has failed to provide particular information that the statutes expressly required the government to disclose. Otherwise, under *Jicarilla Apache*, the government has no general duty to disclose records and thus, as a matter of substantive law, is not legally obliged to provide a broader accounting and reconciliation.

For example, the 1994 statute requires the government to provide quarterly statements of trust account performance and an annual audit letter with respect to tribal trust accounts,[292] as well as a report to Congress that reconciles the balances for each trust account.[293] Requests for additional records, for records about assets other than tribal trust accounts or royalties that are governed by statutory disclosure rules, and for information in a different form or on a different timetable than the periodic statements, letters, and reports specified in the statutes presumably will now be unavailing—at least in a direct claim for an accounting as such.

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289. Richards v. United States, 369 U.S. 1, 7 (1962).

290. *See supra* Part II.B.1–2.

291. *See supra* notes 285–286 and accompanying text.

292. 25 U.S.C. §§ 162a(d), 4011 (2006). In addition, Interior Department regulations direct certain information to be provided at the request of a tribe. 25 C.F.R. § 115.802 (2001).

293. 25 U.S.C. § 4044 (2006).

Importantly, tribal plaintiffs who sue—not for a mere accounting—but for a money judgment for breach of trust under the Tucker Act and the Indian Tucker Act in the CFC may be entitled to a broader remedy and to greater access to evidence.[294] If the tribes establish the necessary fiduciary relationship, prove a breach of the government's duties, and demonstrate they have suffered economic injury, then they may obtain a money judgment as well as correction of financial records.[295]

To be sure, even during discovery in a CFC case, which after all is where the *Jicarilla Apache* case arose, the government's duty to share particular documents and records about trust funds would be limited to what the governing information disclosure statutes provide, per *Jicarilla Apache*. However, when the issue is not merely the sharing of information but proving financial injury through mismanagement of trust accounts or other tribal resources by the government under an established fiduciary relationship, the tribes presumably remain entitled to directed discovery of certain kinds of additional evidence about the nature of the assets held in trust, the government's exercise of its duties, and the extent of harm—excluding, of course, any materials over which the government properly asserts the attorney-client privilege.

Moreover, as an essential aid to the CFC in granting a money judgment, the court presumably retains the power to secure the evidence needed to determine the proper size of that judgment. By express statutory provision, the CFC has authority 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"[296] and to issue "subpoenas requiring the production of books, papers, documents or tangible things."[297]

Consider, for example, the situation in *United States v. White Mountain Apache Tribe*,[298] which the Supreme Court decided in favor of the Tribe in 2003. There, Congress had declared that Fort Apache and other improvements on the site, such as a school, would be held in trust for the benefit of the White Mountain Apache tribe of east-central Arizona.[299] The government occupied and used the property, as allowed under the trust statute, but then allowed the property to fall into disrepair.[300] The Tribe sued in the CFC for breach of trust, seeking compensation for the projected costs of repairs and additional damages for economic loss.[301]

The pertinent Indian trust account statutes do not provide for an accounting of non-monetary trust assets, nor did the particular statute creating the Fort Apache trust create any specific duties about disclosure of information.[302] Accordingly, after *Jicarilla Apache*, a suit by the White Mountain Apache Tribe for an

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294. *See supra* Part II.B.2.
295. *See supra* Part II.B.2.
296. 28 U.S.C. § 2507(a) (2006).
297. *Id.* § 2521(a).
298. 537 U.S. 465 (2003).
299. *Id.* at 468–69.
300. *Id.* at 469.
301. White Mountain Apache Tribe v. United States, 46 Fed. Cl. 20, 22–23 (1999), *rev'd*, 249 F.3d 1364 (Fed. Cir. 2001).
302. Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8 (1960).

accounting under the APA in District Court would have been without purpose, for no independent duty of accounting or disclosure of particular information pursuant to statute existed.

But as part of the Indian breach of trust claim under the Tucker Act and the Indian Tucker Act, the White Mountain Apache Tribe surely was entitled to obtain evidence through discovery about how the property had been used, to establish the type and extent of damage to the improvements, to determine the economic benefit the government had obtained from its use, and so forth. And the CFC trial judge certainly needed access to government-controlled evidence so that the money judgment entered for the government's waste of the real property held in trust was not speculative.

Accordingly, while the *Jicarilla Apache* decision restricts access to particular trust account records to those which must be disclosed by statute, the decision should not be understood as a general immunity of the federal government from appropriate discovery in a liability proceeding, subject of course to protection for privilege. Evidence other than trust account records, such as answers to interrogatory questions, depositions of responsible government officials, and other documentary evidence of breach of trust or resulting harm, surely remains discoverable in breach of trust litigation.

In *White Mountain Apache*, the Supreme Court held that the tribe was entitled to damages for the government's waste of the property.[303] That declared right to a remedy would be meaningless without supporting evidence, at least some of which would likely be held only by the government.

In sum, an action for an accounting, separated from a claim for money damages, is now limited by *Jicarilla Apache* to securing only those records that the government is required to disclose by specific statutory direction. The scope of the claim consequently is limited and no longer may be augmented by judicially-fashioned duties. In any event, the remedy for an accounting claim in District Court under the APA certainly would be no broader (and perhaps narrower) than an accounting or its equivalent that could be obtained as collateral relief in a suit in the Court of Federal Claims for a money judgment or as part of discovery under the Tucker Act or the Indian Tucker Act.[304]

d. The Doubtful Availability of a Restitutionary Monetary Remedy under the APA

Plaintiffs with disputes against the federal government that are essentially economic in nature—and who wish not only to evade the Tucker Act jurisdiction of the Court of Federal Claims, but also to secure an order by the District Court for the payment of money under the APA—frequently frame their pleas as requests for restitution. By asking for what they characterize as an equitable restitutionary remedy, these plaintiffs seek to avoid the "money damages" exclusion of § 702 of the APA. In this way, these plaintiffs hope both to retain the District Court as the venue for their cause of action against the federal government and to obtain an award of money without resort to the Court of Federal Claims.

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303. *White Mountain Apache*, 537 U.S. at 478–79.

304. On the collateral equitable-type powers of the CFC, see *supra* notes 247–256 and accompanying text.

The "restitution" gambit for obtaining payment of past-due money under the APA has been tried repeatedly in the various federal courts, with decidedly mixed success.[305] And this restitution-as-not-money-damages argument became a central feature of the post-*Cobell* Indian breach of trust lawsuits in District Court.

Even if an accounting cause of action remains viable as a strict APA claim, tribal claims in the future for an accounting in District Court likely will be restricted to obtaining the disclosure of information and perhaps reconciliation of account balances as specifically mandated by statute or regulation. Claims for monetary relief for mistakes in trust accounts, whether styled as claims for "equitable restitution" or as other common-law or equity claims, likely are not cognizable in District Court.

Navajo Nation and *Jicarilla Apache* plainly preclude the creation of legal or equitable causes of action or remedies that are not grounded directly in a statute.[306] Especially since a monetary cause of action and money judgment remedy is directly and expressly available in the CFC through the Tucker Act and the Indian Tucker Act, inference of a supposed equitable monetary claim or remedy in the District Court is increasingly implausible.

To begin with, the suggestion that characterizing a remedy as "equitable" will bring it within the parameters of the APA is confused.[307] Lawyers and judges frequently describe the judicial review powers of the District Court under the APA as being "equitable" in nature, probably because a court may enforce an APA ruling overturning agency action by issuing an injunction, and to contrast APA relief from excluded "money damages,"[308] which traditionally was a legal remedy.

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305. *See, e.g.*, Hubbard v. EPA, 982 F.2d 531, 538–39 (D.C. Cir. 1992) (en banc) (rejecting claim that back pay in federal civilian employment dispute could be sought under the APA as "restitution"); Zellous v. Broadhead Assocs., 906 F.2d 94, 96–100 (3d Cir. 1990) (permitting low-income tenants to pursue "retrospective restitution" under the APA for having had to pay higher rents to housing projects under federal rent subsidy because the government failed to timely adjust the tenants' utility allowances); Witt v. U.S. Dep't. of Air Force, No. C06-519RBL, 2010 WL 3522519, at *1 (W.D. Wash. Sept. 7, 2010) (holding that back pay and retirement credits sought by discharged service member was beyond authority of the court under the APA); Holly Sugar Corp. v. Veneman, 355 F. Supp. 2d 181, 192–96 (D.D.C. 2005) (holding that sugar producers seeking reimbursement of money paid to the government in allegedly unlawful higher interest rate for sugar price support loans were "entitled to restitution under the APA" as specific relief rather than money damages), *rev'd on other grounds*, 437 F.3d 1210 (D.C. Cir. 2006); Leistiko v. Sec'y of the Army, 922 F. Supp. 66, 72 (N.D. Ohio 1996) (rejecting discharged National Guard technician's claim that his APA suit for lost wages and benefits was for "equitable restitution" and not for excluded money damages); Int'l Marine Carriers v. Oil Spill Liab. Trust Fund, 903 F. Supp. 1097, 1102 (S.D. Tex. 1994) (holding that operator of vessel challenging denial of claim for reimbursement for certain oil removal costs from a government-operated trust fund was seeking "restitution, not damages" and could proceed under the APA).

306. *See supra* Part II.B.3.b.

307. *See Hubbard*, 982 F.2d at 537 (explaining in a federal employment dispute that "reliance on cases calling back pay 'equitable' for other purposes is . . . misplaced," because the "crucial question" is not whether a remedy is equitable but whether it constitutes specific relief that falls outside the exclusion of "money damages" from the APA).

308. *See* 5 U.S.C. § 702 (2006).

However, "[w]hat may qualify as an 'equitable remedy'" in other contexts "is not synonymous with specific relief," which is available under the APA.[309]

As the Supreme Court emphasized in *Department of the Army v. Blue Fox, Inc.*,[310] the APA allows a court to grant "specific relief" that is not "substitute relief" and does "not turn on distinctions between 'equitable' actions and other actions."[311] A court's power of judicial review over agency action does not arise from inherent equitable (or common-law) powers, but rather from a grant of authority by the terms of the APA itself.

Even though an order issued by a court under the judicial review provisions of the APA sometimes may overlap with an equitable remedy, the APA remedy is properly characterized as one for specific relief and as focused on review of particular agency action. Thus, for example, in *Bowen v. Massachusetts*,[312] the Supreme Court approved an order of specific relief under the APA that reversed a federal agency's disallowance of a state request for reimbursement under the Medicaid federal-state financial participation program.[313] The specific relief allowed in *Bowen* bore some resemblance to the equitable remedy of restitution because it restored money to which the state was entitled by statute.[314] However, even the *Bowen* Court did not appear to regard the relief granted as having a past-due monetary effect, but rather as modifying prospective government practices through adjustments of future advances in revolving accounts for funding the federal-state Medicaid program.[315] Indeed, the *Bowen* Court regarded a money judgment as inadequate in that case, given the need "for prospective relief fashioned in the light of the rather complex ongoing relationship between" the federal government and the state.[316] As the bottom line in *Bowen*, the specific relief granted under the APA constituted the undoing of the agency's action in disallowing an expense, not a grant of a general restitutionary remedy for an equitable purpose.

And, lest there be any lingering questions about the nature and scope of APA relief, the Supreme Court in *Blue Fox* clarified that courts should not misunderstand *Bowen* or misconstrue the APA "as waiving immunity from all actions that are equitable in nature."[317]

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309. *Hubbard*, 982 F.2d at 537.

310. 525 U.S. 255 (1999).

311. *Id.* at 261–62.

312. 487 U.S. 879 (1988); *see supra* Part I.B.

313. *Bowen*, 487 U.S. at 892–901.

314. Indeed, the Medicaid statute at issue in *Bowen* labeled the reversal of a disallowance as "restitution," *id.* at 893, even though there is no suggestion that the Medicaid statute thereby incorporated general equitable remedies. In any event, because the state-plaintiff in *Bowen* was not seeking the return of its own wrongly appropriated funds from the federal government, specific restitution in equity would not have been available, as discussed below.

315. *See* Kanemoto v. Reno, 41 F.3d 641, 645 (Fed. Cir. 1994) (describing the relief involved in *Bowen* as "requir[ing] the Secretary to modify *future* Medicaid practices" (emphasis in original)).

316. *Bowen*, 487 U.S. at 905.

317. Dep't of the Army v. Blue Fox, Inc., 525 U.S. 255, 261 (1999) (explaining further that the term "equitable" is "found nowhere" in § 702 of the APA).

So understood, an equitable claim for "restitution" or "disgorgement," such as that raised by tribes in the post-*Cobell* litigation in District Court,[318] is difficult to shoehorn into the APA as a request for "specific relief." Indeed, the "equitable lien" device—which the Supreme Court refused to recognize under the APA in *Blue Fox*—is of the same equitable species as the equitable constructive trust device that gives rise to the remedy of specific restitution.[319] Whether characterized as an equitable lien, a constructive trust, or a specific restitutionary remedy, when the remedy sought is "merely a means to the end of satisfying a claim for the recovery of money," then the Supreme Court has confirmed that it is not a proper request for specific relief under the APA but instead falls into the exclusion for "money damages."[320]

Even if the APA did generally encompass equitable claims and remedies, tribal claims in breach of trust cases likely do not state a proper request for a restitutionary cause of action or remedy, unless strictly limited to the recovery of specifically identifiable funds that the government still possesses. When a tribal plaintiff contends that the government has lost funds that should have been held in trust for a tribe, the request for reimbursement probably would not be classified as specific restitution because the plaintiff's missing funds could not "clearly be traced to particular funds or property in the defendant's possession."[321] When "'the property sought to be recovered or its proceeds have been dissipated so that no product remains,'"[322] the claim may sound in restitution, but it is restitution at law and not equity and is remedied by an ordinary money judgment. As the Supreme Court said in *Great-West Life & Annuity Insurance Co. v. Knudson*, "not all relief falling under the rubric of restitution is available in equity."[323]

When the funds to which a plaintiff lays claim cannot be traced to a specific res (such that the court effectively finds the identifiable property to belong to the plaintiff), then specific restitution is not available.[324] When the defendant is the

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318. *See* Complaint at Prayer ¶¶ 1, 6, Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Norton, 527 F. Supp. 2d 130 (D.D.C. 2007) (No. 06-2236-JR) (D.D.C.).

319. *See* 1 DAN B. DOBBS LAW OF REMEDIES § 4.3(3) (2d ed. 1993) (explaining that "[t]he equitable lien . . . is essentially a special, and limited, form of the constructive trust"); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 56 cmt. a (2011) ("Equitable lien is sometimes described as a subspecies of constructive trust: whereas constructive trust (§ 55) transfers actual ownership of specific property from the holder of legal title to a person with a superior claim, equitable lien subjects the holder's property to a security interest in favor of the claimant.").

320. *See Blue Fox*, 525 U.S. at 262–63; *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 56 cmt. a (2011) (describing "the function of equitable lien" as being "to secure the defendant's obligation to make a money payment").

321. *See* Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 213 (2002).

322. *Id.* (quoting RESTATEMENT OF RESTITUTION § 215 cmt. a (1936)).

323. *Id.* at 212; *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 4 cmt. a (2011) ("The status of restitution as belonging to law or to equity has been ambiguous from the outset. The answer is that restitution may be either or both."); Douglas Laycock, *Restoring Restitution to the Canon*, 110 MICH. L. REV. 929, 931 (2012) (describing the new *Restatement (Third) of Restitution* as "correcting the common misconception that restitution is necessarily equitable").

324. *See* 2 DOBBS, *supra* note 319, § 6.1(3). The majority and traditional view under the law of restitution insists that "tracing of the plaintiff's funds into identifiable property" is

United States, the equitable concept of tracing is of doubtful application. With the federal government, unless the particular funds belonging to a claimant can be identified in a discrete account (even if commingled with other funds), monies to recompense for lost funds will come from the public treasury and ultimately be paid by taxpayers. Under the traditional law of restitution as applied to private defendants, when "the tracing is incomplete," then no res can be identified and no specific restitution is available, leaving the plaintiff instead in the position of a "simple debtor" who has a legal claim for money damages.[325]

Not surprisingly, then, "[t]he vast majority of restitution claims are both legal and substitutionary, with the plaintiff entitled to no more than a money judgment serving as the measured substitute of the defendant's unjustly retained benefit."[326] Indeed, even the *Cobell* District Court recognized that a claim by the Indian trust account claimants for reimbursement of lost trust funds would be compensatory in nature—and thus outside the scope of the APA—if "the money is missing from the trust."[327] Importantly, the United States has waived sovereign immunity for claims seeking such a money judgment—but only under the Tucker Act and in the Court of Federal Claims.

Whether characterized as equitable or legal in nature, "restitution" as an independent remedy simply is not available under the APA. The general law of restitution "is the law relating to all claims, quasi-contractual or otherwise, which are founded upon the principle of unjust enrichment."[328] No statutory waiver of

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essential, requiring more than showing merely that the defendant's assets were, at some point in time, "swollen or 'augmented' by the plaintiff's money." *Id.*; *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 58 cmt. e (2011) ("The doctrine [of swollen assets] is uniformly rejected in modern U.S. law. Even if the court is satisfied that the assets available for distribution have in fact been 'swollen' by an admixture of the claimant's property, the claimant's right to restitution from property is lost if the claimant's property cannot be traced."). When the defendant is the U.S. government, especially during an era of budgetary deficits and expanding national debt, the suggestion that a claimant's lost assets have enriched the United States in a meaningful way is difficult to sustain. And, unlike a private entity, the costs and liabilities of the United States ultimately are paid by the taxpayers, not individuals or constituents of a commercial enterprise that have been unjustly enriched. Importantly, aside from the law of restitution, the inability to trace lost funds hardly excuses the defendant from liability. Instead, the defendant remains liable at law for a money judgment, just as the United States remains liable for a money judgment in the CFC when it has taken and dissipated trust assets.

325. 1 DOBBS, *supra* note 319, § 4.3(2).

326. Pasman-Green & Derrossett, *supra* note 242, at 754; *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 49 (2011) (explaining that when a defendant has wrongly been enriched by a money payment and the claimant is entitled to restitution, the claimant "may obtain a judgment for money").

327. Cobell v. Babbitt, 91 F. Supp. 2d 1, 28 (D.D.C. 1999) ("At most, 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."), *aff'd sub nom.* Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001).

328. LORD GOFF OF CHIEVELEY & GARETH JONES, THE LAW OF RESTITUTION 3 (3d ed. 1986); *see also* Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1226 (1995) ("The simplest possible account of the law of restitution . . . will describe it as the branch of civil liability that is based on and measured by the unjust enrichment of the defendant at the expense of the plaintiff.").

federal sovereign immunity authorizes any general or independent cause of action for restitution or unjust enrichment against the United States. The United States has not subjected itself to liability under general theories of equity or law, divorced from a specific statutory cause of action and accompanying statutory remedy.

With the foregoing in mind, if a person or tribe alleged inaccurate trust account balances because funds mistakenly had been deposited into one account instead of another or had been misallocated between recipients, specific relief under the APA might be available to order the necessary and simple shifting of funds. In *Bowen*, the Supreme Court similarly described the specific relief in that case as merely "adjustments in the open account" by which the federal government reimbursed states for Medicaid expenses.[329] While the *Cobell* litigation ultimately was resolved with a broad-based monetary and compensatory settlement, the District Court earlier described the complaint as seeking merely a reconciliation of trust fund accounts, alleging that "the money is in the account but the ledger cannot be properly kept, so the stated balance is incorrect. In the plaintiffs' view, they only seek to balance the checkbook, not add any money to the checking account."[330] Although the true nature of the litigation was revealed at the end, the plaintiffs in *Cobell* insisted in the early stages that they did "not seek an additional infusion of money."[331]

By contrast, if the money owed to a Native American or tribe never had been properly deposited into any trust account or had been misplaced or misappropriated thereafter, the necessary infusion of cash from the public treasury—whether characterized as "restitution" or something else—would be much more difficult to characterize as "specific relief."[332] The relief sought would involve more than simply overturning an agency's erroneous decision under APA review provisions. And because the use of generally appropriated public funds to reimburse claimants for specific trust funds lost by the government would be a substitutionary remedy, it should be characterized as "money damages" and thereby excluded from the APA, even under the *Bowen* analysis.[333]

At the end of the day, such a supposedly "restitutionary" remedy for misplaced trust account funds is simply a type of money judgment, which readily could be heard in the Court of Federal Claims.[334] Moreover, no one contends that profits lost

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329. Bowen v. Massachusetts, 487 U.S. 879, 893 (1988).

330. Cobell v. Babbitt, 30 F. Supp. 2d 24, 39 (D.D.C. 1998).

331. *Id.*

332. *But see* Murphy, *supra* note 70, at 144 (arguing that monetary remedies are "specific relief" if "the plaintiff's original entitlement under the substantive law is that the defendant pay money to the plaintiff," but disavowing "any judgment about whether claims against the federal government for these types of specific monetary remedies fall within the jurisdiction of the federal district courts under the APA or, instead, within the jurisdiction of another court under these statutes").

333. *See supra* Part I.B.

334. *Bowen*, 487 U.S. at 900 n.31 (explaining that the jurisdiction of the Court of Federal Claims is not limited to "money damages" that are substitutionary in effect); *id.* at 917 n.2 (Scalia, J., dissenting) (agreeing that the CFC has jurisdiction over claims for restitutionary damages); Kanemoto v. Reno, 41 F.3d 641, 646 (Fed. Cir. 1994) (noting that the Supreme Court in *Bowen* "recognized that the Tucker Act is not limited to suits for money damages" and "reaffirmed the Court of Federal Claims' jurisdiction over causes of action for payment

by a tribe or individual because the federal government failed to properly invest trust funds would be anything other than "money damages," relief that is expressly excluded under the APA.[335] Again, while such requests for relief fall outside the scope of the APA and are beyond the authority of the District Court, the doors of the CFC courthouse have been open to those monetary relief claims.

In sum, a request for "restitution" or "disgorgement," whether sounding in equity or the common law, likely falls outside the parameters of the APA, which is limited to specific relief directed at final agency action reviewed under the standards of the APA. *Blue Fox* clarified that the APA does not waive immunity generally for equitable claims or remedies, and *Jicarilla Apache* confirmed that cognizable rights may not be judicially crafted but must be specified in the governing statute. For these reasons, an accounting claim under the APA may not encompass a request for restitution when such an award involves the substitution of new money to compensate for dissipated funds—even aside from the withdrawal of judicial review under the APA when a Tucker Act remedy is available.

Given that Congress has designed a specific monetary remedy for Indian breach of trust claims in the Tucker Act and the Indian Tucker Act, claims for money—whether framed as money damages, restitution, or disgorgement—must be pursued under that vehicle and in the CFC.

e. Inference of Remedy for Breach of Trust Claims Tied to the Special Nature of Indian Tucker Act

Somewhat ironically, in the post-*Cobell* litigation, tribal plaintiffs urged the District Court to infer the existence of an independent accounting claim in equity by citing Indian breach of trust decisions that had been pursued under the Tucker Act and comfortably within the exclusive jurisdiction of the Court of Federal Claims. Observing that the Supreme Court has recognized a right to sue for damages as implied in federal statutes establishing a fiduciary relationship, these tribal plaintiffs have cited[336] such decisions as *United States v. Mitchell*[337] and *United States v. White Mountain Apache Tribe*.[338] By invoking these decisions, which turn on the particular character of the Tucker Act and the Indian Tucker as statutory waivers of sovereign immunity, the tribes' argument proves too much and tellingly confirms the CFC as the proper venue.

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of money"); *see also* Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007 (Cl. Ct. 1967) (describing Tucker Act remedy in CFC when "the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation").

335. *See* Brief for Respondent, *supra* note 18, at 9, 45 (acknowledging that the government's alleged breach of the duty to maximize investment profits from trust accounts gives rise to a cause of action for money damages within the jurisdiction of the Court of Federal Claims).

336. Plaintiffs' Principal Brief in Opposition to Defendants' Motion to Dismiss, *supra* note 263, at 3, 22; Plaintiffs' Joint Memorandum in Opposition to Defendants' Motion for Remand and Stay of Litigation, *supra* note 265, at 44.

337. 463 U.S. 206, 214 (1983).

338. 537 U.S. 465 (2003).

As discussed earlier,[339] the foundation for landmark Indian breach of trust claims resolved by the Supreme Court has been the Tucker Act or the Indian Tucker Act. These two statutes waive federal sovereign immunity and expressly authorize litigation against the United States. Neither statute creates a substantive cause of action, which instead must be derived from another "money-mandating" statute or from the existence of a fiduciary relationship grounded in rights- or duties-creating statutory language.[340] However, and importantly, even a genuine right-creating statute does not give rise to a cause of action that is independent of the Tucker Act or the Indian Tucker Act.

As a general rule, for any civil suit against any defendant to proceed, the Supreme Court has said it must "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."[341] Thus, in most circumstances, that a reader might infer a substantive right from a statute gives rise to no enforceable legal claim, if the statute does not also include explicit language contemplating a remedy in court for a deprivation of that substantive right.

In the special context of the Tucker Act and the Indian Tucker Act, however, the federal statute from which the substantive right is inferred need not also include an express private right of action. The right to seek a judicial remedy has already been supplied by the Tucker Act and the Indian Tucker Act. In Indian breach of trust cases, such as *Mitchell* and *White Mountain Apache*,[342] when the right-creating statute confirms a fiduciary relationship, the Supreme Court not only has found a cause of action but also has drawn on general trust principles to imply a damages remedy. But, again, those decisions are anchored in the special nature of the Tucker Act and the Indian Tucker Act, which provide for adjudication of recognized claims in the special venue of the Court of Federal Claims.

The tribal plaintiffs in the post-*Cobell* District Court litigation are correct to this extent: there *is* a private right of action for Indian breach of trust claims against the United States and it *is* independent of the APA. But that independent private right of action is found in the Tucker Act and the Indian Tucker Act. And, in both the Tucker Act and the Indian Tucker Act, the very language that facilitates the enforcement of the right and remedy against the United States also reposits subject matter jurisdiction in the CFC.

The road for an Indian breach of trust claim arising from the federal government's management of Indian assets or funds runs directly through the Tucker Act and the Indian Tucker Act and leads without detour to the Court of Federal Claims.

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Whatever the theoretical viability or scope of a cause of action for an accounting of Indian trust assets, it hardly is surprising that such a claim does not fit comfortably under the APA. Instead, as the Supreme Court recognized nearly thirty

339. *See supra* Part II.B.1.
340. *See supra* Part II.B.1.
341. Alexander v. Sandoval, 532 U.S. 275, 286 (2001).
342. *White Mountain Apache*, 537 U.S. at 477; *Mitchell*, 463 U.S. at 226.

years 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.[343]

Because Congress designed a specially tailored remedy for Indian breach of trust claims in the Court of Federal Claims through the Indian Tucker Act, yet another limitation on APA review in District Court is implicated. Section 702 precludes APA review "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."[344] Thus, for example, "[t]he waiver of sovereign immunity in the Administrative Procedure Act does not run to actions seeking declaratory relief or specific performance in [government] contract cases" because "the Tucker Act and Little Tucker Act impliedly forbid such relief."[345] Likewise, the APA's waiver of sovereign immunity is withdrawn for Indian breach of trust claims when a money judgment could be sought under the Indian Tucker Act, which thus "impliedly forbids" bypassing the particular remedy created by Congress and the particular forum that Congress designated.

III. THE JURISDICTIONAL COLLISION IN *UNITED STATES V. TOHONO O'ODHAM NATION*

A. Duplicative Litigation in Both the District Court and the Court of Federal Claims

The projection of District Court authority over Indian breach of trust litigation in *Cobell v. Babbit*[346] 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 now pending before the District Court for the District of Columbia.[347] Setting the stage for a jurisdictional collision, in thirty-one instances, American Indian tribes filed pairs of breach of trust suits in both the CFC and in the District Court.[348] Although the United States reached a $1 billion settlement of breach of trust claims with forty-one tribes in April 2012,[349] dozens of other suits alleging mismanagement of tribal accounts by the federal

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343. *Mitchell*, 463 U.S. at 214 (quoting 92 CONG. REC. 5312 (1946) (statement of Rep. Jackson)).

344. 5 U.S.C. § 702 (2006).

345. Sharp v. Weinberger, 798 F.2d 1521, 1523 (D.C. Cir. 1986) (Scalia, J.); *see also* B.K. Instrument, Inc. v. United States, 715 F.2d 713, 727–28 (2d Cir. 1983); Sea-Land Serv., Inc. v. Brown, 600 F.2d 429, 432–33 (3d Cir. 1979).

346. 91 F. Supp. 2d 1, 24–28 (D.D.C. 1999), *aff'd*, 240 F.3d 1081, 1094–95 (D.C. Cir. 2001); *see supra* Part II.A.

347. *See* Assiniboine & Sioux Tribes v. Norton, 527 F. Supp. 2d 130, 133–34 (D.D.C. 2007) (listing cases). Indian breach of trust cases seeking an accounting have also been filed in the District Court for the Western District of Oklahoma. *See, e.g.*, Tonkawa Tribe v. Kempthorne, No. CIV-06-1435-F, 2009 WL 742896, at *3 (W.D. Okla. Mar. 17, 2009); Otoe-Missouria Tribe v. Kempthorne, No. CIV-06-1436-C, 2008 WL 5205191, at *4 (W.D. Okla. Dec. 10, 2008).

348. Petition for a Writ of Certiorari at 94a–99a, United States v. Tohono O'odham Nation, 131 S. Ct. 1723 (2011) (No. 09-846).

349. Timothy Williams, *U.S. Will Pay a Settlement of $1 Billion to 41 Tribes*, N.Y. TIMES, Apr. 14, 2012, at A12.

government continue forward, most of which are more complex and could require larger monetary payments to resolve.[350]

When lawsuits against the United States involving the same events or set of circumstances are pending simultaneously in both the Court of Federal Claims and another court, 28 U.S.C. § 1500[351] is implicated. Section 1500 prohibits the Court of Federal Claims from exercising 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."[352]

The predecessor to § 1500 was enacted by Congress in the aftermath of the Civil War to address duplicative litigation filed against the federal government and federal officers by the so-called Cotton Claimants.[353] The Supreme Court summarized the "lineage" of this statutory text in *Keene Corporation v. United States*:[354]

> [R]esidents of the Confederacy who had involuntarily parted with property (usually cotton) during the war sued the United States for compensation in the Court of Claims, under the Abandoned Property Collection Act. When these cotton claimants had difficulty meeting the statutory condition that they must have given no aid or comfort to participants in the rebellion, they resorted to separate suits in other courts seeking compensation not from the Government as such but from federal officials, and not under the statutory cause of action but on tort theories such as conversion. It was these duplicative lawsuits that induced Congress to prohibit anyone from filing or prosecuting in the Court of Claims "any claim . . . for or in respect to which he . . . shall have commenced and has pending" an action in any other court against an officer or agent of the United States. The statute has long outlived the cotton claimants . . . .[355]

Reading § 1500 in a manner that ameliorates perceived hardships for plaintiffs who wish to seek relief against the federal government in different courts, when

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350. *Id.* ("About 60 other similar lawsuits by tribes against the United States have not been settled, the government said."). *Compare Assiniboine & Sioux Tribes*, 527 F. Supp. 2d at 130–32 (listing consolidated tribal breach of trust suits pending in District Court in 2007) *with* Dep't of Justice Office of Pub. Affairs, *Attorney General Holder and Secretary Salazar Announce $1 Billion Settlement of Tribal Trust Accounting and Management Lawsuits Filed by More Than 40 Tribes* (Apr. 11, 2012), *available at* http://www.justice.gov/opa/pr/2012/April/12-ag-460.html [hereinafter Department of Justice, $1 Billion Settlement] (listing forty-one tribes with which settlement had been reached).

351. *See generally* Paul Frederic Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 AM. U. L. REV. 301 (1997).

352. 28 U.S.C. § 1500 (2006).

353. *See generally* Payson R. Peabody, Thomas K. Gump & Michael S. Weinstein, *A Confederate Ghost That Haunts the Federal Courts: The Case for Repeal of 28 U.S.C. § 1500*, 4 FED. CIR. B.J. 95 (1994); Schwartz, *supra* note 239, at 4, 7–8; David Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 GEO. L.J. 537, 574–80 (1967).

354. 508 U.S. 200 (1993).

355. *Id.* at 206 (citations omitted).

jurisdictional limitations preclude joining the claims in a single lawsuit,[356] the United States Court of Appeals for the Federal Circuit adopted two narrow interpretations (characterized by detractors as judicially crafted exceptions) that drained much of the force from the statute.[357]

First, the court held that a later-filed District Court suit does not oust the Court of Federal Claims of jurisdiction to hear a prior-filed Tucker Act claim.[358] Thus, under Federal Circuit precedent, the application of § 1500 turns entirely on the order of filing. If the CFC takes jurisdiction over a lawsuit at a point in time in which no parallel litigation is pending in another court, that jurisdictional authority is not lost by the subsequent filing, even just a day or perhaps hours later, in District Court of an action based on the same set of facts. Because this interpretation originated from a decision by the old Court of Claims in *Tecon Engineers v. United States*,[359] the order-of-filing holding is frequently called the *Tecon* rule or exception.

Second, the Federal Circuit did not regard a District Court lawsuit as "for or in respect" to an action in the CFC if the two lawsuits sought distinctly different relief. Thus, for example, if a lawsuit sought specific relief from the United States under the APA in District Court, while a simultaneous lawsuit sought money damages under the Tucker Act in the CFC, § 1500 would not bar the CFC from proceeding despite the pending District Court action.[360] The different-relief holding, which also originated under the old Court of Claims in *Casman v. United States*,[361] was sometimes called the *Casman* rule or exception.

In *United States v. Tohono O'odham Nation*,[362] an Indian Nation filed suit in the District Court, alleging that the government had breached its duties of trust by mismanaging tribal assets and money.[363] In the District Court, the Nation sought an accounting of the government's management of tribal assets, as well as equitable restitution of any assets not properly maintained for the tribe.[364] On the very next day, the Nation filed suit in the Court of Federal Claims, again alleging a breach of trust by the government, but here seeking the remedy of money damages.[365]

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356. *See* Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1557 (Fed. Cir. 1994) (en banc) (Mayer, J., dissenting) (arguing that "[t]he history of section 1500 is replete with instances where courts sought to temper perceived inequity by inventing exceptions to the rule").

357. *Compare* UNR Indus., Inc. v. United States, 962 F.2d 1013, 1021 (Fed. Cir. 1992) ("[S]ection 1500 is rife with judicially created exceptions and rationalizations to the point that it no longer serves its purposes . . . ."), *aff'd on other grounds*, 508 U.S. 200 (1993), *with Loveladies Harbor, Inc.*, 27 F.3d at 1551 (saying that the description of such a rule "as an 'exception' to § 1500 is inapt" but rather "reflect[s] a carefully considered interpretation of the statutory term 'claims,' a term undefined in the statute and subject to conflicting views as to its meaning").

358. Hardwick Bros. Co. II v. United States, 72 F.3d 883 (Fed. Cir. 1995). For a critique of the *Tecon* order-of-filing rule, see *infra* Part III.B.2.c.

359. 343 F.2d 943, 946 (Ct. Cl. 1965).

360. *Loveladies Harbor, Inc.*, 27 F.3d at 1547–52.

361. 135 Ct. Cl. 647, 650 (1956).

362. 131 S. Ct. 1723 (2011).

363. *Id.* at 1727.

364. *Id.*

365. *Id.*

Because both lawsuits arose out of the same factual circumstances—both complaints offered nearly identical allegations of breach of trust[366]—and because the Nation sought monetary relief in both courts, the CFC dismissed the suit under § 1500.[367] A divided Federal Circuit reversed, with the majority holding that, even though both lawsuits presumably arose out of the same underlying facts and both sought relief in the form of money, the District Court lawsuit was framed in equity to seek restitution of "old money" (lost trust funds) and the CFC lawsuit was framed in law to seek damages for "new money" (lost profits) and thus sought different relief.[368]

The Supreme Court granted certiorari in *Tohono O'odham Nation* to resolve "what it means for two suits to be 'for or in respect to' the same claim" within the meaning of § 1500.[369] Speaking for a five-justice majority, Justice Kennedy dispensed with comparisons of the types of relief sought or legal theories presented in the two lawsuits and ruled that § 1500 turns solely on the question of whether both lawsuits arise out of the same operative facts.[370] The statutory language of "for or in respect to" the same claim means simply that both suits have a substantial factual overlap—"based on substantially the same operative facts"[371]—regardless of whether the remedial requests overlap as well. Characterizing Congress as having made "a robust response to the problem first presented by the cotton claimants,"[372] the Court held the statute should be read broadly to protect the government from the "burdens of redundant litigation."[373]

Thus, in the Court's words, "a common factual basis" for both lawsuits "suffices to bar jurisdiction under § 1500."[374] By this standard, the Tohono O'odham Nation's lawsuit in the CFC inevitably had to be dismissed.[375] Because the CFC action had been filed after the District Court lawsuit, the Court noted that the *Tecon* time-of-filing question was not presented in the case.[376]

Concurring in the judgment in *Tohono O'odham Nation*, Justice Sotomayor (joined by Justice Breyer) would have reversed on the alternative ground that the two lawsuits by the Nation requested overlapping relief, as both sought monetary relief, thus requiring dismissal of the CFC lawsuit under § 1500.[377] The concurring justices would have reserved the question of whether § 1500 applies when both lawsuits involve the same operative facts but entirely different relief, although they indicated their belief that "Congress did not intend for § 1500 to put plaintiffs to a choice between two nonduplicative remedies that Congress has made available

366. *See id.*
367. *Id.* at 1731.
368. Tohono O'odham Nation v. United States, 559 F.3d 1284, 1289–90 (Fed. Cir. 2009).
369. *Tohono O'odham Nation*, 131 S. Ct. at 1727.
370. *Id.* at 1728–31.
371. *Id.* at 1731.
372. *Id.* at 1728.
373. *Id.* at 1730.
374. *Id*. at 1727.
375. *See id.* at 1731. Subsequently, the Tohono O'odham Nation's breach of trust claim was among those tribal claims settled by the United States in April 2012. Department of Justice, $1 Billion Settlement, *supra* note 350.
376. *Tohono O'odham Nation*, 131 S. Ct. at 1729–30.
377. *Id*. at 1732–33 (Sotomayor, J., concurring in the judgment).

exclusively in two forums."[378] Justice Ginsburg was the sole dissenter, arguing that the CFC should have disregarded the plaintiff's requests for relief that overlapped with that in the District Court or allowed the plaintiff to amend the complaint to do so.[379] Justice Kagan was recused.

B. The Aftermath of Tohono O'odham Nation

1. The General Implications of *Tohono O'odham Nation* for Election of Claim Theory and Remedies

The *Tohono O'odham Nation* interpretation of § 1500 has significant implications for claimants against the federal government in certain substantive and procedural contexts—potentially forcing an election of legal theory and even of remedy. Harsh consequences ordinarily can be avoided, and the practical implications of the jurisdictional bar thus are limited to a small set of claimants in certain circumstances. Nonetheless, when it does come into force, § 1500 may rather severely constrain the course of action or the remedies available to a claimant against the United States.

Interestingly, however, in the *Tohono O'odham Nation* case itself, the jurisdictional collision could and should have been avoided.[380] As emphasized throughout this Article, the Indian breach of trust action should have been filed in a single forum—the Court of Federal Claims—seeking both a money judgment and collateral relief for a correction of any errors in the government's accounting for trust funds.

Controversies involving § 1500 arise in cases in which a single occurrence or set of occurrences give rise to claims based on multiple legal theories that may be framed as different, alternative, or succeeding causes of action, one or more of which falls within the exclusive jurisdiction of the Court of Federal Claims and another for which jurisdiction is conferred upon the District Court. Consider a case in which a plaintiff's pleading for substantial damages could be formulated either as a contract claim against the federal government under the Tucker Act, or as a tort claim against the United States under the Federal Tort Claims Act (FTCA).[381] The District Court cannot hear contract claims under the Tucker Act seeking more than $10,000, authority over which is vested exclusively in the CFC.[382] And the CFC cannot hear tort claims against the federal government because the Tucker Act specifically excludes cases "sounding in tort,"[383] while the FTCA provides for jurisdiction in the District Court.[384] Accordingly, the plaintiff *cannot* join these claims together in a single suit in a single court, for that would defeat the singular prerogative of the other court to hear that type of claim. Neither the District Court

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378. *Id*. at 1735.
379. *Id*. at 1739–40 (Ginsburg, J., dissenting).
380. *See infra* Part III.B.2.
381. 28 U.S.C. §§ 1346(b), 2674–80 (2006).
382. *Id.* § 1346(a)(2).
383. *Id.* § 1491(a)(1).
384. *Id.* § 1346(b)(1).

nor the CFC may exercise supplemental jurisdiction over a claim that lies within the exclusive province of the other court.

This forum divergence between the Tucker Act and the FTCA describes the circumstances behind the Supreme Court's previous encounter with § 1500 in *Keene Corp. v. United States*[385] in 1993. In that case, asbestos manufacturers sought to shift liability to the United States for judgments and settlements paid by the manufacturers to shipyard employees. Arguing that the asbestos had been used pursuant to government specifications, the manufacturers asserted against the United States (1) contract indemnification theories based on a purported implied warranty (which stated a cause of action under the Tucker Act within the exclusive jurisdiction of the CFC), and (2) tort-based indemnification or reimbursement theories such as contribution (which came under the FTCA with jurisdiction only in the District Court).[386] Although the manufacturers could not join these two claims together in a single forum, the Supreme Court held in *Keene* that the CFC could not take jurisdiction when a lawsuit "based on substantially the same operative facts" had been pending in District Court.[387]

a. Section 1500 and Election of Legal Theory

Through the *Keene* decision, the Supreme Court interpreted § 1500 to force claimants in some circumstances to elect a particular legal theory (and abandon another) by which to pursue what is essentially the same claim for the same relief against the United States. Consider a plaintiff who is prosecuting a tort-based claim for damages against the federal government in District Court and then finds itself pressing against the statute of limitations for filing a contract breach or other non-tort money claim in the Court of Federal Claims. In such a circumstance, the plaintiff must decide whether to press forward with the pending FTCA claim in the District Court or to dismiss the FTCA vehicle for compensation to instead pursue the Tucker Act claim in the Court of Federal Claims—but not both.[388]

The impact of § 1500 in such instances is thus material, albeit limited as a practical matter to only a few cases:

First, given the unusually long limitations period for actions to be filed in the CFC—six years[389]—the odds are that most FTCA actions in District Court will have concluded before the plaintiff must initiate a timely suit in the CFC. However, given that the pendency of an FTCA claim for § 1500 purposes includes not only the period from the filing of a pleading through the final judgment in the District

385. 508 U.S. 200 (1993).

386. *Id.* at 202–05.

387. *Id.* at 210–14.

388. *Compare* UNR Indus., Inc. v. United States, 962 F.2d 1013, 1021 (Fed. Cir. 1992) ("[W]e see no harm in requiring a party to carefully assess his claims before filing and choose the forum best suited to the merits of the claims and the applicable statutes of limitations.") *with* Emily Schleicher Bremer & Jonathan R. Siegel, The Need to Reform § 1500, at 36 (Final Report, U.S. Admin. Conf., Sept. 19, 2012), at http://www.acus.gov/wp-content/plugins/download-monitor/download.php?id=749 (arguing that letting "a plaintiff with multiple claims against the United States arising out of a single incident . . . to pursue all such claims" is "consistent with fundamental principles of our legal system and is just").

389. 28 U.S.C. § 2501.

Court, but also the later disposition of any appeal, occasions may arise in which the FTCA matter is not concluded before the plaintiff must consider whether to file or waive the Tucker Act claim in the Court of Federal Claims (and *Keene* itself is an example of that scenario made real).[390]

Second, if the legal theories—such as tort versus contract—are equally strong or weak, forcing the plaintiff to a choice will not affect the ultimate outcome of obtaining or failing to obtain a full compensatory remedy. However, the viability of a legal theory is not always readily apparent on the front end, especially before discovery and preliminary rulings by a court. The legal theory initially selected may prove later to be flawed such that the other legal theory then looks more promising. Thus, an election of legal theory can affect the ability to obtain success. In most but not all cases, the comparative strengths of alternative legal theories will become apparent well before the six years have run, so, again, a forced choice of a legal theory may not be a major obstacle to the success of most meritorious claims.

b. Section 1500 and Election of Remedy

Section 1500 as interpreted in *Keene* could well force an election of a particular legal theory, depending upon whether the statute of limitations were to expire during the pendency of the first suit. However, if a plaintiff in a *Keene*-type scenario—choosing between a FTCA suit in District Court and a Tucker Act suit in the CFC—makes a wise choice of legal theory, the plaintiff would obtain a full recovery. Under both the FTCA and the Tucker Act, the remedy is a money judgment.

By contrast, forcing election of a remedy by barring simultaneous suits that seek different relief in separate forums with exclusive authority could preclude full recovery notwithstanding the merits of the case. For example, a party cannot obtain money damages in the District Court under the APA[391] and cannot obtain general equitable-type relief disconnected from a money claim in the CFC under the Tucker Act.[392] If the second suit cannot be brought because the statute of limitations will have run before conclusion of the first suit, then the second suit may be precluded along with the additional remedy available only in that second suit.

Through *Tohono O'odham Nation*, the Supreme Court has interpreted § 1500 in a manner that may, sometimes, force a plaintiff to a choice of remedies, thus impairing the prospect of a full recovery. As discussed above and below,[393] the *Tohono O'odham Nation* case itself was not an example of such a forced selection of remedies, because an Indian breach of trust claim may be fully remedied under the Tucker Act and the Indian Tucker Act. Other situations could arise, however, in which a party would be forced to elect a remedy, and not merely a legal theory, thus requiring not only a choice of means but of ends in litigation against the federal government.

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390. *See Keene Corp.*, 508 U.S. at 207–09 (holding that § 1500 barred CFC action when FTCA appeal was pending when CFC action was filed, even though the FTCA appeal later was dismissed).

391. 28 U.S.C. § 702 (allowing relief "other than money damages"); *see supra* Part I.A.

392. 28 U.S.C. § 1491(a); *see supra* Parts I.A–II.B.2.

393. *See supra* Part II.B.2–3; *see also infra* Part III.B.2.

This classic scenario presented itself in *Loveladies Harbor, Inc. v. United States*.[394] In that case, plaintiff landowners were aggrieved by federal administrative restrictions on the development of wetlands.[395] To challenge the denial of a development permit, the plaintiffs were obliged to seek APA review in the District Court of the agency's action.[396] The APA claim challenging the agency's refusal to grant the permit to develop the land could not have been pursued in the CFC because it was not a claim for money (nor was it merely a means to the end of monetary relief).[397] When it appeared that the APA challenge to the permit might be unsuccessful—but while that challenge was still pending on appeal—the plaintiff landowners sought compensation for a regulatory taking under the Tucker Act, which fell within the exclusive jurisdiction of the CFC.[398]

In *Loveladies Harbor*, the claims in the District Court to set aside the administrative restriction and in the CFC for compensation for the loss of beneficial use of the property were, in the words of legal scholar Craig Schwartz, "necessarily sequential,"[399] as is typical in the context of regulatory takings. In *Loveladies Harbor*, the Federal Circuit held that § 1500 did not bar the CFC action because the plaintiffs sought "distinctly different" relief in each suit—specific relief under the APA in District Court (essentially seeking an injunction to set aside the permit denial) and money damages under the Tucker Act in the CFC (seeking compensation for the government's taking of the property).[400]

The Supreme Court's ruling in *Tohono O'odham Nation* plainly overturns the Federal Circuit's "distinctly different" relief rationale for avoiding the application of § 1500, adopting instead the "same operative facts" trigger for the jurisdictional bar.[401] Whether the *Loveladies Harbor* scenario still triggers the jurisdictional bar henceforth will turn on questions about whether both the preceding District Court action and the subsequent CFC suit arise from "substantially the same operative facts"[402] and whether the invocation of a constitutional right to compensation requires a different analysis.

In such regulatory takings cases, the government will focus on the single fact of the administrative restriction on property use as giving rise both to the APA review action and the Tucker Act takings claim. The government will argue that § 1500 applies if both suits are pending simultaneously because "the same conduct gave rise to different claims based upon purportedly distinct legal theories."[403]

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394. 27 F.3d 1545 (Fed. Cir. 1994) (en banc).

395. *Id.* at 1547.

396. *See* SISK, *supra* note 34, § 4.02(d)(5), at 244–45.

397. *See id*.

398. *Loveladies Harbor, Inc.*, 27 F.3d at 1547.

399. Schwartz, *supra* note 239, at 5.

400. *Loveladies Harbor, Inc.*, 27 F.3d at 1551.

401. *See* United States v. Tohono O'odham Nation, 131 S. Ct. 1723, 1731 (2011).

402. In *Loveladies Harbor*, the Federal Circuit assumed "*arguendo*, that Loveladies' two suits arise from the same operative facts." 27 F.3d at 1552 (emphasis in original).

403. Trusted Integration, Inc. v. United States, 659 F.3d 1159, 1165 (Fed. Cir. 2011) (describing general basis for applying § 1500 to dismiss parallel CFC claim brought under a different legal theory); *see also* Coeur d'Alene Tribe v. United States, 102 Fed. Cl. 17 (2011) (ordering dismissal under § 1500 because, while the plaintiff attempted "to separate its claims into two different categories," the plaintiff was "seeking redress for injuries arising

Observing that the property at issue will be the same and government conduct involved will be substantially the same, the government will insist that § 1500 plainly applies.[404]

Claimants against the government will contend that the presence of an administrative restriction on property use is merely a background fact, while the operative facts for the claims and the material evidence to prove the claims are different.[405] They will argue that the APA challenge to the property restriction in District Court focuses on the statutory and regulatory constraints on agency action, while the Tucker Act claim in the CFC addresses whether the owner was deprived by the regulation of all economically beneficial use of the property and the just compensation due for a taking of property.

In addition, Craig Schwartz contends that, even after *Tohono O'odham Nation*, the CFC may stay and is not required to dismiss under § 1500 when the plaintiff has filed a "necessarily sequential" action in District Court to preserve a "substantial legal right."[406] In *Tohono O'odham Nation*, the Supreme Court rejected claims of hardship by "forcing plaintiffs to choose between partial remedies available in different courts," saying that "[a]lthough Congress has permitted claims against the United States for monetary relief in the CFC, that relief is available by grace and not by right."[407] By contrast, as the Federal Circuit stated in *Loveladies Harbor*, applying § 1500 there would place a plaintiff "in the position of having to give up a substantial legal right protected by the Takings Clause of the Constitution."[408]

Nonetheless, an exception for regulatory taking cases is not to be found in the text of § 1500 and was not suggested in *Tohono O'odham Nation*.[409] Concurring in the judgment, Justice Sotomayor observed that "[a]fter today's decision, § 1500 may well prevent a plaintiff from pursuing a takings claim in the CFC if an action to set aside the agency action is pending in district court."[410] The majority offered

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from the same transaction or occurrence"); Eric Bruggink, *A Model Proposal*, 28 PUB. CONT. L.J. 529, 538 (1999) (observing that a taking claim in the Court of Federal Claims may often be the "flip side of a case brought in district court under the APA and section 1331 to challenge the validity of administrative action").

404. *See* Kingman Reef Atoll Inv., LLC v. United States, 103 Fed. Cl. 660, 691 (2012) (holding that operative facts in quiet title suit in District Court and taking claim in CFC are "virtually indistinguishable," because "the allegations . . . as to . . . the asset at issue, are substantially the same" and the "complaints also describe similar conduct supporting the plaintiffs' legal theories," thus triggering § 1500).

405. *See* d'Abrera v. United States, 78 Fed. Cl. 51, 58 (2007) ("In short, if a material factual difference exists between two claims, they are not the same for purposes of Section 1500.").

406. Schwartz, *supra* note 239, at 5, 14 n.76, 18.

407. United States v. Tohono O'odham Nation, 131 S. Ct. 1723, 1730–31 (2011).

408. *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1555 (Fed. Cir. 1994) (en banc); *see also* United Keetoowah Band of Cherokee Indians v. United States, 104 Fed. Cl. 180, 187 n.8 (2012) (stating that "Section 1500 remains inapplicable to dual claims filed to preserve "a substantial legal right,'" and noting Schwartz's "necessarily sequential" test as possible way to identify such rights).

409. *See* Brandt v. United States, 102 Fed. Cl. 72, 80 n.8 (2011) (saying that "[n]either *Tohono* nor the text of section 1500 make any distinction based on the type of claim" and that both "govern equally Fifth Amendment takings claims").

410. *Tohono O'odham Nation*, 131 S. Ct. at 1734 (Sotomayor, J., concurring in the judgment).

no response or contradiction.[411] As the Federal Circuit explained in *Hair v. United States*,[412] in holding that taking claims are subject to the six-year statute of limitations, "there is no merit to plaintiff's argument that the constitutional right to just compensation is absolute, any more than any other right is absolute."[413]

Application of § 1500 to the sequential court filings in the regulatory taking scenario need not deprive a claimant of just compensation due by constitutional right, although it may sometimes require the claimant to surrender a statutory claim (which arguably counts as "relief [that] is available by grace and not by right"[414]) to preserve the constitutional claim. Filing suit in the CFC to seek compensation for a constitutional taking under the Tucker Act, without filing or being required to abandon a previous APA challenge to the agency's action in District Court, would constitute a concession that the agency's regulatory action was valid but would not undermine the claim to compensation for loss of property use.[415] To be sure, the forced election is a meaningful limitation on a plaintiff's course of action, but whether it crosses a constitutional line is less than certain.

Moreover, given the six-year statute of limitations period for CFC actions, a plaintiff acting promptly to seek judicial review of agency action in the District Court ordinarily will see its case rise or fall on the merits before needing to consider an alternative vehicle for monetary compensation.[416] Indeed, as pointed out by the dissenting judge in *Loveladies Harbor*, the APA action in that case, including the appeal, had been resolved in three years, meaning the plaintiff "still would have had three years in which to file its claim in the Court of Federal Claims . . . after the resolution of its challenge to the permit denial."[417]

In the immediate aftermath of *Tohono O'odham Nation*, however, some plaintiffs will get caught in the slamming door of § 1500, even though the jurisdictional bar could have been avoided by waiting to file in the CFC until after the final resolution of the parallel District Court litigation. For example, in *Central Pines Land Co. v. United States*,[418] the Court of Federal Claims noted that "had the plaintiffs understood the impact of section 1500 as has since been expressed in *Tohono*," they either would not have filed suit in the CFC or would have dismissed the original CFC action and waited until after completion of District Court litigation before returning to the CFC.[419] In such cases, the plaintiffs could have avoided simultaneously pending lawsuits by filing them sequentially within statutory time limitations. But, having instead assumed that duplicative litigation was permissible, the plaintiffs now face unavoidable dismissal of the CFC suit.

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411. *But see* Schwartz, *supra* note 239, at 20 n.116 (arguing that because Justice Kennedy's majority opinion did not cite or repudiate *Loveladies Harbor*, "[t]he 'substantial legal right' language from *Loveladies Harbor* remains good law").

412. 350 F.3d 1253 (Fed. Cir. 2003).

413. *Id.* at 1260.

414. *Tohono O'odham Nation*, 131 S. Ct. at 1731.

415. *See* Fla. Rock Indus., Inc. v. United States, 791 F.2d 893, 898–99 (Fed. Cir. 1986).

416. *But see* Bremer & Siegel, *supra* note 388, at 50 (arguing that "the speed of litigation . . . should not affect the ability to bring claims").

417. Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1558 (Fed. Cir. 1994) (Mayer, J., dissenting).

418. 99 Fed. Cl. 394 (2011).

419. *Id.* at 406.

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Importantly, in neither of the above scenarios—the possibility of a forced election of theory or a forced election of remedy—is the complicating factor of forum shopping directly implicated. In the *Keene* scenario, the plaintiffs could pursue the FTCA claim only in District Court and could pursue the Tucker Act claim only in the CFC—neither forum could hear the other claim as legally framed. In the *Loveladies Harbor* scenario, the plaintiffs could only pursue the APA claim in District Court and the Tucker Act claim in the CFC—again neither forum could hear the other claim seeking a distinctly different remedy. Precisely because plaintiffs in such circumstances are restricted to separate judicial venues for pursuing alternative theories or remedies arising from the same factual nucleus, § 1500 may have real bite, and thus is understandably criticized as unfairly depriving some claimants of a complete and just recovery.

A report for the Administrative Conference's Judicial Review Committee, prepared by Emily Schleicher Bremer and Jonathan Siegel, recommends that the Administrative Conference propose the repeal of § 1500.[420] Although Bremer and Siegel acknowledge that repeal would permit some duplicative litigation against the United States, they argue that plaintiffs should not be penalized for having to pursue related claims in different courts because of jurisdictional limitations.[421] When courts encounter such simultaneously pending cases, Bremer and Siegel suggest they may apply preclusion rules and manage their dockets, such as by staying one lawsuit until the resolution of the other, and thereby may "mitigate the costs of such duplication."[422] Section 1500 is a trap for the unwary (especially, but not only, pro se litigants and inexperienced lawyers) and does impose hardship in some cases, thus meriting legislative reconsideration of whether it should be retained in the modern litigation context.

But in the *Tohono O'odham Nation* case itself, the plaintiff brought the § 1500 problem on itself by engaging in forum shopping and fomenting a duplicative litigation problem where it was not necessary. The question of the proper jurisdictional home for an Indian breach of trust claim was not directly before the Supreme Court in *Tohono O'odham Nation*. However, as discussed in the next section of this Article, the Supreme Court's majority decision in *Tohono O'odham Nation* strongly suggests that the CFC was empowered to provide a full or at least

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420. Bremer & Siegel, *supra* note 388, at 7. As of the date this Article was completed, the Judicial Review Committee had approved a recommendation for the repeal of § 1500, proposing to replace § 1500 with a statutory provision for a presumptive stay to avoid simultaneous litigation of multiple cases arising out of the same operative facts. Comm. on Judicial Review, U.S. Admin. Conf., Reform of 28 U.S.C. § 1500, Proposed Recommendation, available at http://www.acus.gov/wp-content/plugins/download-monitor/download.php?id=748, adopted by Comm. on Judicial Review, Meeting, Oct. 17, 2012, available at http://acus.granicus.com/MediaPlayer.php?view_id=2&clip_id=59. The recommendation is on the agenda to be considered by the full Administrative Conference at its plenary session on December 6, 2012, available at http://www.acus.gov/wp-content/plugins/download-monitor/download.php?id=747.

421. Bremer & Siegel, *supra* note 388, at 7, 37–38.

422. *Id.* at 7.

adequate remedy by a money judgment and that duplicative litigation therefore was easily avoided without meaningful hardship.

2. The Specific Implications of *Tohono O'odham Nation* for Forum Selection in Indian Breach of Trust Cases

As discussed immediately above, by forcing an election of legal theory or remedy in a manner that could deprive a claimant of a full or perhaps any recovery, the Supreme Court's interpretation of § 1500 in *Tohono O'odham Nation* may have material and detrimental consequences for claimants against the federal government in certain discrete contexts. But in the very legal context in which it arose—Indian breach of trust claims—the *Tohono O'odham Nation* decision will not force American Indian tribal and individual claimants into an election that deprives them of a complete and healthy remedy against the federal government for any breach of fiduciary duties. Instead, the *Tohono O'odham Nation* case highlights the more fundamental question of the proper forum for a claim against the sovereign United States and the risks of attempting to bypass the jurisdictional limitations placed on claims against the United States.

a. *Tohono O'odham Nation* and the Proper Forum for a Breach of Trust Claim

The *Tohono O'odham Nation* case was an odd platform for deciding the § 1500 question.[423] The Indian Nation filed a duplicative suit in a forum that lacked jurisdiction to hear the claim at all—the District Court, which did not have proper authority to hear what was a disguised Tucker Act claim.[424] And the Nation could have obtained a complete remedy in the proper forum—the Court of Federal Claims, which could grant a money judgment with collateral equitable relief.[425]

With respect to the tribal claims in the two parallel lawsuits in *Tohono O'odham Nation*, the government's position has been that the breach of trust action filed in the CFC should be dismissed under § 1500, because of the pendency of the parallel breach of trust action in the District Court,[426] and that the Nation's action in the District Court should be dismissed on jurisdictional, sovereign immunity, and other grounds.[427] The government thereby sought to reduce the number of lawsuits from two to zero. The Nation responded that both the CFC and the District Court

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423. *See* Transcript of Oral Argument at 25–26, United States v. Tohono O'odham Nation, 131 S. Ct. 1723 (2011) (No. 09-846) (Scalia, J.) (noting that, since "it's far from clear if [the Tohono O'odham Nation] had any business being in the district court anyway," the Court was being asked to "resolv[e] a very strange question," that, if there is a right to sue in District Court for an injunction, "as is not clear," how does § 1500 apply "when there is a suit pending in the Court of Claims and that is sort of an abstract question").

424. *See supra* Part II.A, B.2–3.

425. *See supra* Part II.B.2.

426. *See* Brief for Petitioner at 14, 48, United States v. Tohono O'odham Nation, 131 S. Ct. 1723 (No. 09-846).

427. *See* Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss at 10–60, Tohono O'odham Nation v. Kempthorne, No. 06-2236-JR (D.D.C. June 16, 2008).

lawsuits should be permitted to proceed along separate courses and conclude with dual judgments.[428] Thus, the Nation had hoped to maintain two lawsuits.

The Supreme Court rejected the Tohono O'odham Nation's attempt to maintain two lawsuits and thus accepted the government's position, at least in part. The continued viability of the District Court action remained an open question. Throughout this Article, I have maintained that the District Court lacks authority under the APA to hear Indian breach of trust lawsuits and that claim-splitting between federal courts contradicts the congressional purpose to centralize monetary claims in general and Indian breach of trust claims in particular in the CFC and the Federal Circuit. Accordingly, while a tribe is entitled to maintain one lawsuit, that single lawsuit should be placed in or moved to the CFC. Indian breach of trust claims filed in District Court action should be transferred to the CFC for unified adjudication under the Tucker Act and the Indian Tucker Act.

In *Tohono O'odham Nation*, the Supreme Court reviewed a judgment by the CFC and necessarily focused on the § 1500 jurisdictional bar as applied to the CFC. Because the parallel District Court action was not before it, the Supreme Court did not directly address the District Court's jurisdiction over a breach of trust claim. Nonetheless, the Supreme Court majority opinion casts doubt on the viability of a District Court action for such tribal claims and confirms the propriety of the CFC remedy. In responding to the Nation's claim of hardship by supposedly being "forc[ed] . . . to choose between partial remedies available in different courts," the majority said: "The hardship in this case is far from clear. The Nation could have filed in the CFC alone and if successful obtained monetary relief to compensate for any losses caused by the Government's breach of duty."[429] The clear import of the statement, which arguably is not dictum because it was part of the reasoning behind the Court's construction of § 1500, is that a money judgment in the CFC would be a full and not merely "partial" remedy.

In response, the concurrence noted that the plaintiff sought an "equitable accounting" in the District Court and observed that, more than forty years ago, the CFC's predecessor had held it "lacks jurisdiction to issue a preliability accounting."[430] Importantly, however, the concurring justices acknowledged that, more recently, the Federal Circuit had suggested the availability of an accounting in the CFC through its "ancillary relief" authority.[431] (This additional remedial power was granted by Congress subsequent to that earlier Court of Claims decision disavowing power to order a preliability accounting.[432])

Moreover, given that the Nation was alleging a past breach of trust with past economic harm—in both the District Court and CFC—the availability of a "preliability" accounting remedy was beside the point. In typical Indian breach of trust litigation, tribes or tribe members do not contend that the government simply

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428. *See* Brief for Respondent, *supra* note 18, at 16–17.

429. United States v.Tohono O'odham Nation, 131 S. Ct. 1723, 1730–31 (2011).

430. *Id.* at 1735 n.5 (Sotomayor, J., concurring in the judgment) (citing Klamath & Moduc Tribes v. United States, 174 Ct. Cl. 483, 487–88, 490 (1966)).

431. *Id.* (citing Eastern Shawnee Tribe v. United States, 582 F.3d 1306, 1308 (Fed. Cir. 2009)).

432. *See* Remand Act of 1972, Pub. L. No. 92-415, 86 Stat. 652 (codified at 28 U.S.C. § 1491(a)(2) (2006).).

failed to provide a periodic statement or annual report, that is, they do not claim that the government's failure is merely one of omission in not disclosing information. Rather, Native American plaintiffs in trust account cases invariably argue that the government has breached its fiduciary duty by mismanaging the trust accounts such that the statements of balances do not accurately reflect the true amounts and that funds have not been properly invested, resulting in financial injury. In other words, the claims already are *post*-liability. And the ability of the CFC to account for the retrospective harm caused by the government's breach of fiduciary duties is not truly in dispute.

The question upon which the District Court's jurisdiction over an Indian breach of trust claim under the APA hinges is whether there is an "adequate remedy"[433] in another court, such as the CFC. The Supreme Court majority in *Tohono O'odham Nation* saw the money judgment remedy in the CFC for the breach of trust as dispelling any tribal claim of hardship by being left to a partial remedy. In sum, the monetary compensation due to a successful tribal plaintiff under the Indian Tucker Act (and collateral equitable relief available to the CFC under the Remand Act) plainly counts as an "adequate" remedy and thus supersedes an alternative recourse to the APA.

b. Implications for Tribes That Filed Breach of Trust Claims Only in Court of Federal Claims

What then lies ahead for Indian tribes and tribe members who wish to pursue breach of trust claims against the United States?

For those Native American plaintiffs who file or have filed breach of trust suits solely in the CFC, they have chosen the wiser course and the *Tohono O'odham Nation* decision confirms their wisdom. If their claims are successful on the merits (by establishing a fiduciary relationship and proving a breach and damages), they can obtain a full remedy in the CFC and do so in a single lawsuit. They may recover both (1) a money judgment for any financial harm, by reason of misallocation of funds, mismanagement of resources, failure to properly invest or seek a profit on funds or resources, etc.; and (2) an accounting or its equivalent of pertinent tribal assets through discovery and the CFC's collateral equitable powers to order the correction of records or remand the matter to administrative or executive bodies or officials with directions to reconcile accounts.[434]

Moreover, those tribes that have brought a single action in the CFC may rest easy that they have not thereby surrendered an accounting remedy of broader scope, which might have been available in the District Court. After the *Jicarilla Apache* ruling, a cause of action for an equitable accounting outside of statutory limits is no longer cognizable in District Court.[435] Indeed, even if viable in the District Court under the APA directly, a claim for accounting only, that is, a claim solely for information and reconciliation, is limited by *Jicarilla Apache* to the specific statutory guidelines governing disclosure of trust account information and

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433. *See* 5 U.S.C. § 704 (2006).
434. *See supra* Part II.B.2.
435. *See supra* Part II.B.3.b.

reconciliation of balances[436] and likely may not be augmented by restitutionary claims that seek an infusion of money.[437] By contrast, the CFC may well have broader authority to secure evidence about trust account handling or the government's actions with respect to non-monetary assets, when adjudicating a breach of trust action under the Tucker Act or Indian Tucker Act.[438] And, of course, the CFC may award a money judgment for past financial harm, however formulated in theory or remedy.[439]

c. Implications for Tribes Considering Forum in Which to File Breach of Trust Claims in the Future (Order-of-Filing Rule)

For those Native American plaintiffs who plan to file future Indian breach of trust suits, they would be well-advised to go directly to the CFC and file a single suit for a full remedy under the Tucker Act or the Indian Tucker Act. Attempting to bypass the CFC by an APA suit in the District Court is a risky course that is likely to be foreclosed altogether by the Supreme Court or the Federal Circuit, sooner or later. And, again, even if viable in District Court, an APA action for an accounting is now limited by the specific statutory guidelines on disclosure of information about trust funds. The scope of breach of trust litigation in the CFC is at least as broad and likely much broader.

Nor should tribes or tribe members in the future assume they may file simultaneous lawsuits in both the CFC and the District Court by simply reversing the order of filing (the so-called *Tecon* rule), attempting to rely on prior Federal Circuit precedent that the CFC does not lose jurisdiction to continue under § 1500 when a parallel District Court suit is filed afterward.[440] Although the Supreme Court in *Tohono O'odham Nation* did not reach the question,[441] many observers believe the handwriting for the *Tecon* exception is on the wall.[442]

Advocates for a time-of-filing interpretation of § 1500 observe that the predecessor statute "proscribed both filing and *prosecuting* any claim," but that subsequent amendments removed that language, so that "the statute no longer contains a proscription against *prosecuting* a claim."[443] Critics of the *Tecon* rule respond that the "prosecuting" phrase was replaced by jurisdictional language with the codification of Title 28 of the United States Code in 1948,[444] which the code reviser characterized as a mere change in "phraseology only" without substantive

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436. *See supra* Part II.B.3.c.
437. *See supra* Part II.B.3.d.
438. *See supra* Part II.B.3.c.
439. *See supra* Part II.B.1.a, 3.d.
440. *See supra* notes 358–359 and accompanying text.
441. United States v. Tohono O'odham Nation, 131 S. Ct. 1723, 1729–30 (2011).
442. *See* Bremer & Siegel, *supra* note 388, at 49 ("[T]he Supreme Court, in its recent *Tohono* decision, suggested (without holding) that it disapproves of the time-of-filing rule.").
443. UNR Indus., Inc. v. United States, 962 F.2d 1013, 1030 (Fed. Cir. 1992) (Plager, J., dissenting), *aff'd on other grounds sub nom.* Keene Corp. v United States, 508 U.S. 200 (1993). The original predecessor statute read that "no person shall file or prosecute any claim" in the then-Court of Claims if other suit or process on the same claim was pending in another court. Act of June 25, 1868, ch. 71, § 8, 15 Stat. 75, 77.
444. Act of June 25, 1948, ch. 646, 62 Stat. 942.

change.[445] With specific reference to § 1500, the Supreme Court has said that, in the "comprehensive revision of the Judicial Code completed in 1948, we do not presume that the revision worked a change in the underlying substantive law 'unless an intent to make such [a] chang[e] is clearly expressed.'"[446]

Supporters of the *Tecon* rule read the words "has pending" in § 1500[447] as "constitut[ing] a present participle which 'convey[s] the same meaning' as the present perfect tense and 'indicates action that was started in the past and has recently been completed or is continuing up to the present time.'"[448] On this line of reasoning, it is argued, the plain meaning "calls for a determination of the order in which two or more suits were filed."[449]

That, however, begs the question of what is the pertinent "present time." Is it the date of the filing of the suit in the CFC or the date on which a suit is later filed in District Court (prompting a government motion to dismiss under § 1500)?

Indeed, the opponents of the order-of-filing exception read the very same "has pending" language as barring continuing jurisdiction in the CFC without making any "distinction . . . concerning the time of filing of that other suit."[450] In addition, § 1500 directs that the CFC "shall not *have* jurisdiction,"[451] using a present tense verb for describing the CFC's authority to hear a matter when an action arising from the same claim has been filed in another court.[452]

Looking to the general law of subject matter jurisdiction, a plausible argument could be made for the order-of-filing exception. Under some other jurisdictional statutes, the pertinent point in time for determining federal court jurisdiction is the time of filing.[453] Thus, under the "well-pleaded complaint rule" that governs

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445. *UNR*, 962 F.2d at 1019 (citing Historical and Revision Notes, 28 U.S.C. § 1500 (2006)).

446. *Keene Corp.*, 508 U.S. at 209 (alterations in original) (quoting Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 227 (1957)); Anderson v. Pac. Coast S.S. Co., 225 U.S. 187, 198–99 (1912); *see also* Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 279 (2003) ("The legislative history described revisions of Title 28 in general as stylistic rather than substantive, aimed at ending needless searches into the Statutes at Large, eliminating anachronistic provisions, and simplifying language."); Gregory C. Sisk, *Lifting the Blindfold From Lady Justice: Allowing Judges to See the Structure in the Judicial Code*, 62 FLA. L. REV. 457, 464 (2010) (referring to "the general presumption that changes made during a codification are for purposes of clarification, unless clear indication is present that a change in meaning was intended").

447. 28 U.S.C. § 1500 (prohibiting the Court of Federal Claims from exercising 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 ") (emphasis added).

448. Nez Perce Tribe v. United States, 83 Fed. Cl. 186, 189 (2008) (alteration in original) (quoting WILLIAM A. SABIN, THE GREGG REFERENCE MANUAL §§ 1033–34, at 272–73 (10th ed. 2005)).

449. *Id.*

450. Schwartz, *supra* note 353, at 594.

451. 28 U.S.C. § 1500 (2006) (emphasis added).

452. *See* United Keetoowah Band of Cherokee Indians v. United States, 86 Fed. Cl. 183, 188 (2009) (describing the government's § 1500 argument that "the phrase 'have jurisdiction' is a present tense verb").

453. *But see* Smith v. Orr, 855 F.2d 1544, 1552–53 (Fed. Cir. 1988) (holding that, although the plaintiff's claim for back pay did not exceed $10,000 when filed in District Court, but then subsequently accrued above $10,000, "the district court lost jurisdiction over

federal-question jurisdiction, jurisdiction attaches or fails immediately upon the filing of the plaintiff's complaint, which must raise a federal law issue as part of the affirmative cause of action, without regard to federal law issues later raised by the defendant.[454] For diversity-of-citizenship jurisdiction, the domicile of the parties at the time the complaint is filed controls, such that jurisdiction is not created or lost even if the parties change domicile afterward.[455]

Extended to § 1500, then, if there is no other suit pending when the CFC action is filed, application of this general rule would mean that CFC jurisdiction attaches and will not be divested by subsequent events, such as a later-filed action in District Court. Moreover, as observed by one judge on the Court of Federal Claims in *Coeur d'Alene Tribe v. United States*,[456] this interpretation of § 1500 would preclude "forum manipulation" by a plaintiff who "becomes unhappy with the course of litigation" [457] in the CFC and then tries to divest the CFC of continuing jurisdiction by filing a parallel action in the District Court.

However, each jurisdictional statute must be read according to its own terms and congressional purpose. As a *withdrawal* rather than a *grant* of jurisdiction, § 1500 arguably should be approached from a different perspective. When a District Court assumes jurisdiction under the federal-question or diversity-of-citizenship statutes, the general rule that jurisdiction is not later lost because of a post-filing change of circumstances does not prevent those statutes from serving their fundamental purposes. By contrast, treating § 1500 as turning on timing converts the operation of the statute into a jurisdictional game and makes its application chimerical.[458] As Craig Schwartz writes, not only is the order-of-filing interpretation of § 1500 "entirely at odds with its intended purpose," but "[p]erversely, it encourages plaintiffs to double-file in order to preserve access to the CFC."[459]

As a contrasting statutory example, consider the supplemental jurisdiction statute, 28 U.S.C. § 1367, which authorizes the District Court to hear certain claims without an independent jurisdictional basis if those claims "form part of the same case or controversy under Article III of the United States Constitution" that is the basis for the federal court's original jurisdiction.[460] However, continuing exercise of jurisdiction by the District Court over supplemental claims may be declined based on events subsequent to filing, such as when "the district court has dismissed all claims over which it has original jurisdiction."[461] Thus, while the jurisdictional

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his claim when it exceeded this amount").

454. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908); *see also* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 2.4, at 23 (4th ed. 2005) ("Given the limited nature of federal subject-matter jurisdiction, it is essential that the existence of jurisdiction be determined at the outset, rather than being contingent upon what *may* occur at later stages in the litigation. By demanding that a federal issue be raised in the complaint, the [well-pleaded complaint] rule accomplishes this goal.").

455. Smith v. Sperling, 354 U.S. 91, 93 n.1 (1957).

456. 102 Fed. Cl. 17 (2011).

457. *Id.* at 24.

458. *See* Tohono O'odham Nation v. United States, 559 F.3d 1284, 1291 (Fed. Cir. 2009) (acknowledging that "merely require[ing] that the plaintiff file its action in the Court of Federal Claims *before* it files its district court complaint" is an "anomalous rule") (emphasis in original), *rev'd*, 131 S. Ct. 1723 (2011).

459. Schwartz, *supra* note 239, at 24.

460. 28 U.S.C. § 1367(a) (2006).

461. *Id.* § 1367(c)(3).

power to hear a supplemental claim "ordinarily was determined on the pleadings, the question whether to exercise that power remained open throughout the litigation."[462] Just as the efficiency raison d'être for adjudicating a state-law supplemental jurisdiction claim typically falls away when the underlying federal-question jurisdiction claim is dismissed before trial, the purpose of § 1500 in relieving both the federal government and the courts from the burdens of simultaneous, duplicative litigation may be triggered when a District Court action is later filed while a case arising from the same operative facts is still before the CFC.

In *Tohono O'odham Nation*, the Supreme Court rejected a "different remedy" exception to § 1500 by saying that it would turn the provision into "a mere pleading rule, to be circumvented by carving up a single transaction into overlapping pieces seeking different relief."[463] Treating § 1500 as "a mere time-of-filing rule" that could be "circumvented" by arranging to file the CFC lawsuit one day, or even a few hours, before filing the District Court lawsuit makes the provision arbitrary.[464]

Given the Court's description of the statute's manifest purpose to "save the Government from burdens of redundant litigation," notably including the costs of "[d]iscovery . . . and the preparation and examination of witnesses at trial,"[465] that purpose would be undermined if a party could maintain duplicative litigation against the United States whenever it carefully timed one lawsuit to start before the other.[466] And, while stopping short of deciding the issue in that case, the *Tohono*

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462. FRIEDENTHAL, ET AL., *supra* note 454 § 2.12, at 75 (describing pendent jurisdiction practice that was later codified in § 1367(c)).

463. *Tohono O'odham Nation*, 131 S. Ct. at 1730.

464. In the CFC, the majority rule is that the *Tecon* exception applies whenever the sequence of filing establishes that the CFC action was filed earlier on the same day as the District Court action was filed, proven by time stamps or testimony from filing clerks or paralegals. *See* United Keetoowah Band of Cherokee Indians v. United States, 86 Fed. Cl. 183, 190–91 (2009) (describing the division on this question among the judges of the CFC).

465. *Tohono O'odham Nation*, 131 S. Ct. at 1730.

466. *See* Keene Corp. v. United States, 12 Cl. Ct. 197, 215 (1987) ("Whether a suit on the same claim is filed before or after an action in the . . . Claims Court, the Government's defense of it involves duplicative effort."). However, in *Kaw Nation of Oklahoma v. United States*, 103 Fed. Cl. 613, 622 (2012), the court observed that "if jurisdiction here is not measured when a suit is filed, one must wonder why a plaintiff in this court cannot avoid section 1500 simply by dismissing the related district court action before defendant files a motion to dismiss." In *Keene*, the Supreme Court held that § 1500 applied when the District Court lawsuit was pending when the CFC suit was instituted, even though the District Court lawsuit was subsequently dismissed while the CFC litigation remained pending. Keene Corp. v. United States, 508 U.S. 200, 207–09 (1993). The strongest answer to this observation would be to interpret § 1500 as meaning that the CFC irrevocably loses jurisdiction at the point in time that duplicative litigation emerges in another court, whether that litigation arises immediately on the date of filing in the CFC or arrives subsequently. With the animating purpose of § 1500 being to avoid the burdens of duplicative litigation, those burdens are imposed whenever the District Court action is initiated and overlaps in time with the CFC action. The burden of duplicative litigation having been realized, the burden cannot be undone by a subsequent dismissal of the District Court action. Thus, having lost jurisdiction at the moment in time that duplication of litigation against the government occurs, the CFC cannot regain jurisdiction, even if the District Court action is dismissed before the CFC acknowledges its loss of jurisdiction by granting the motion to dismiss.

O'odham Nation Court faulted the Federal Circuit for relying on precedents, specifically noting the *Tecon* order-of-filing decision, "that left the statute without meaningful force."[467]

d. Implications for Tribes That Filed Duplicative Breach of Trust Claims in the District Court and the Court of Federal Claims

For those tribes that have filed duplicative lawsuits in the wake of *Cobell*, the path forward is not clearly marked. I am optimistic that by changing course and bringing those breach of trust claims home to the CFC, those tribes still may obtain a complete remedy, even if settlement with the United States is not forthcoming.[468]

The Supreme Court's ruling in *Tohono O'odham Nation* obviously requires dismissal of the CFC version of breach of trust claims when another version is pending in District Court. The question remains whether the District Court vehicle for a breach of trust claim remains viable, in one way or another. Even if the District Court action is not precluded by limitations in the APA or by the exclusivity of the Indian Tucker Act remedy in the CFC, the District Court likely lacks authority to award monetary relief, however framed, and certainly cannot award monetary relief that is compensatory in nature.

First, although uncertain to succeed, tribes in the position of previously having filed duplicative suits may decide to stick it out, await the conclusion of the District Court litigation, and then attempt to follow up with successive litigation in the CFC, despite the passage of time. In *Tohono O'odham Nation*, the Supreme Court majority raised the possibility that the statute of limitations for bringing an action in the CFC might be tolled, although the Court hedged that bet. The majority observed "Congress has provided in every appropriations Act for the Department of Interior since 1990 that the statute of limitations on Indian trust mismanagement claims shall not run until the affected tribe has been given an appropriate accounting."[469] However, in its concluding passage, the Court made plain that this was not a definitive ruling, saying that the tribe could re-file a claim in the CFC "*if* the statute of limitations is no bar."[470]

Given that the tribes have asserted failure by the government to provide an "appropriate accounting" in their District Court actions, if they were to succeed on

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467. *Tohono O'odham Nation*, 131 S. Ct. at 1729 (citing Tecon Engineers, Inc. v. United States, 170 Ct. Cl. 389 (1965)).

468. Of course, the matter may always be resolved by settlement. As discussed previously, in April 2012, forty-one tribes settled their claims with the United States, although more than sixty other tribal claims were still proceeding. *See supra* notes 349–350 and accompanying text. Prior to that settlement, seventy-six tribes that had filed breach of trust claims involving tribal trust fund accounts in the CFC and/or District Court were engaged in confidential settlement discussions with the United States. *See* Parties' Joint Stipulation and Order Regarding Confidentiality of Settlement Discussions and Communications, Tohono O'odham Nation v. Salazar, No. 06-CV-2236-JR (D.D.C. Aug. 25, 2011).

469. *Tohono O'odham Nation*, 131 S. Ct. at 1731 (citing, e.g., Act of Oct. 30, 2009, Pub. L. No. 111-88, 123 Stat. 2904, 2922; Act of Nov. 5, 1990, Pub. L. No. 101-512, 104 Stat. 1915, 1930).

470. *Id.* (emphasis added).

the merits, then by definition the statute of limitations would not run until the government has corrected those errors. In light of the Supreme Court's later ruling in *Jicarilla Apache*, which narrows the scope of information that a tribe may demand from the government to that which the trust account statutes specifically prescribe,[471] the government may respond that the periodic reports already provided to the tribes, perhaps even if they contain errors, constitute the "appropriate accounting" contemplated by Congress.[472] If the government's position is accepted, then the statute of limitations has long been running. Moreover, the concurring justices in *Tohono O'odham Nation* noted that the appropriations statute tolling the statute of limitations for CFC claims by tribes only applies to trust fund claims and "does not appear to toll the statute of limitations for claims concerning assets other than funds, such as tangible assets."[473]

Second, and the better course of action in my view, tribes that have filed duplicative lawsuits in both the District Court and the CFC should reconsider and change course in light of these new Supreme Court and Federal Circuit jurisdictional rulings. They now should seek to transfer the District Court actions to the CFC. In this way, the tribes would preserve their one remaining lawsuit and be able to prosecute it to a more complete judgment under the Indian Tucker Act. Even though the previous CFC action has been dismissed under § 1500, the pending District Court action could be transferred to the CFC under § 1631 of Title 28[474] and arrive as effectively a new filing (but with the statute of limitations having been tolled by the earlier filing of the District Court action).

To be sure, § 1631 is not a permissive transfer statute and thus allows movement of the case from the District Court to the CFC only if the District Court lacks subject matter jurisdiction. Based on the *Cobell* precedent in the District of Columbia federal courts, the tribes thus far have been insisting that jurisdiction properly lies in the District Court.[475] If they so choose, however, the tribes could fairly argue to the District Court that the jurisdictional landscape has changed with *Tohono O'odham Nation* and *Jicarilla Apache*.

Even if the District Court were unwilling to grant a transfer, feeling still bound by the *Cobell* precedent, the tribe and the government both could appeal the denial of a transfer under the special interlocutory appeal provision in § 1292(d)(4) of Title 28.[476] That appeal lies to the Federal Circuit, not to the D.C. Circuit, and the Federal Circuit almost surely would order the case transferred to the CFC.[477] In the end, however winding may be the path, a single lawsuit for breach of trust eventually should find its way to the CFC.

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471. *See supra* Part II.B.3.

472. *See* Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss at 2, 27, Tohono O'odham Nation v. Kempthorne, No. 06-2236-JR (D.D.C. June 16, 2008) (arguing that the government's specific duties to reconcile tribal trust accounts as required by the 1994 statute were satisfied in 1996).

473. *Tohono O'odham Nation*, 131 S. Ct. at 1735 n.5 (Sotomayor, J., concurring in the judgment).

474. *See* 28 U.S.C. § 1631 (2006).

475. *See supra* Part II.A.

476. 28 U.S.C. § 1292(d)(4) (2006).

477. *See supra* Parts I.C, II.B.2.

Under the Federal Circuit's ruling in *United States v. County of Cook*,[478] § 1500 would bar the CFC from taking jurisdiction if only part of the District Court action were transferred under § 1631, while the District Court retained another part. [479] The result of a partial transfer would be duplicative and simultaneously pending claims in both courts. Accordingly, the transfer option for restoring Indian breach of trust plaintiffs to a complete remedy would require transfer of the entire District Court proceeding to the CFC, to then proceed as the sole action, the nature and scope of which presumably could be clarified and supplemented by appropriate amendments to the pleadings in the CFC that would relate-back under civil procedure rules.

If the tribes are reluctant to take this course, the United States always has had the power to cut to the jurisdictional chase by filing a motion under § 1631 to transfer tribal suits 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 § 1292(d)(4)(A).[480] And because the Federal Circuit already has signaled its agreement that Indian breach of trust claims can be remedied by a money judgment and should be heard in the CFC, the transfer would be successfully accomplished.

CONCLUSION

The Supreme Court's decision in *United States v. Tohono O'odham Nation* well illustrates the dangers of seeking to bypass the Court of Federal Claims by seeking relief in the wrong place and by disguising what is essentially a claim for money as something else. By departing from established jurisprudence—that Indian breach of trust claims involving the federal 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 conducive to a jurisdictional conflagration. As dozens of American Indian tribes filed duplicative suits in both the District Courts and the Court of Federal Claims, a jurisdictional collision became inevitable and the impact will resonate for years to come.

Given that the CFC has ample powers to afford a rich set of remedies in Indian breach of trust and similar cases, including both a money judgment and collateral equitable-type relief, tribal plaintiffs' attempts at forum shopping were unnecessary and unwise. If the courts continue to confirm the traditional and exclusive jurisdiction of the CFC over claims that can be adequately remedied by a money judgment (and collateral relief), then claimants will have no reason to file parallel lawsuits purportedly seeking different relief in multiple courts. At least with respect

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478. 170 F.3d 1084 (Fed. Cir. 1999).

479. *Id.* at 1087, 1090.

480. *See* 28 U.S.C. § 1292(d)(4)(A). In fact, the United States did move for a transfer to the CFC in one of the multiple breach of trust claims filed by tribes in District Court for the District of Columbia. *See* Osage Tribe of Indians v. United States, No. CIVA04-0283(RCL), 2005 WL 578171, at *2 (D.D.C. Mar. 9, 2005). However, the government subsequently dismissed its appeal to the Federal Circuit, Order Dismissing Appeal, Osage Tribe of Indians v. United States, No. 05-1383 (Fed. Cir. July 8, 2005), thereby pretermitting early resolution of the jurisdictional question by the appellate court designated by Congress.

to Indian breach of trust cases, the jurisdictional fog will lift and the problem of duplicative litigation will evaporate.

Through this ongoing clarification of jurisdictional lines and respect for the institutional integrity of the CFC, the path to a single Tucker Act suit for claims grounded in financial disputes, such as Indian breach of trust claims, will be even more clearly marked. When "[a]t bottom it is a suit for money," then "the Court of Federal Claims can provide an adequate remedy, and it therefore belongs in that court."[481]

481. Suburban Mortg. Assocs., v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116, 1118 (Fed. Cir. 2007).