

## **28 United States Code 1500**

**The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.**

# History of Section 1500

- **Section 1500 Was Enacted to Deal With “Cotton Claimants” Following Civil War**
- **Cotton (and Other Property) Was Seized From Southern Citizens by Union Army During the War**
- **After Civil War, Southerners Sought Recovery by Simultaneous Suits in Court of Claims Against United States and in State Court by Common-Law Claims Against Individual Federal Officers**
- **Section 1500 Addressed Attempt to Evade Limitation on Court of Claims Recovery to Those Who Had Not Supported Rebellion Against United States**



## *United States v. Tohono O'odham Nation*

The text of 1500 reflects a robust response to the problem first presented by the cotton claimants. It bars jurisdiction in the CFC not only if the plaintiff sues on an identical claim elsewhere—a suit “for” the same claim—but also if the plaintiff’s other action is related although not identical—a suit “in respect to” the same claim. \* \* \*

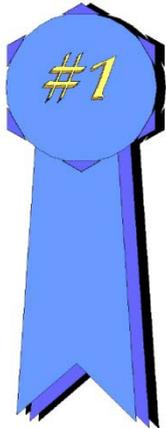
Of the two constructions of “for or in respect to” the same claim that *Keene* permits—one based on facts alone and the other on factual plus remedial overlap—the former is the more reasonable interpretation \* \* \*.

An interpretation of 1500 focused on the facts rather than the relief a party seeks preserves the provision as it was meant to function, and it keeps the provision from becoming a mere pleading rule, to be circumvented by carving up a single transaction into overlapping pieces seeking different relief. \* \* \*

## *United States v. Tohono O'odham Nation (B)*

There is no merit to the Nation's assertion that the interpretation adopted here cannot prevail because it is unjust, forcing plaintiffs to choose between partial remedies available in different courts. 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.

# Order of Filing of Suits



- **First Suit is Filed in Court of Federal Claims — So No Other Suit is Pending When Tucker Act Suit Begins**



- **The Second Suit is Filed in District Court — Before Court of Federal Claims Suit is Concluded**
- ***Tecon* Rule — Section 1500 is Implicated Only if the Conflicting Suit is Pending When the Court of Federal Claims Suit is Filed**  
**Hardwick Bros. II v. United States, 72 F.3d 883 (Fed. Cir. 1995)**

## *United States v. Tohono O'odham Nation (C)*

The panel of the Court of Appeals could not identify “any purpose that 1500 serves today,” in large part because it was bound by Circuit precedent that left the statute without meaningful force. For example, the panel cited *Tecon Engineers, Inc. v. United States*, 170 Ct. Cl. 389, 343 F. 2d 943 (1965), which held that 1500 does not prohibit two identical suits from proceeding so long as the action in the CFC, or at that time the Court of Claims, is filed first. The *Tecon* holding is not presented in this case because the CFC action here was filed after the District Court suit.

Still, the Court of Appeals was wrong to allow its precedent to suppress the statute’s aims. Courts should not render statutes nugatory through construction. In fact the statute’s purpose is clear from its origins with the cotton claimants—the need to save the Government from burdens of redundant litigation—and that purpose is no less significant today.

*United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313 (2011)

- Procedural Posture:
  - Differs procedurally from the previous federal trust relationship decisions in that the appeal to the Supreme Court came as a writ of mandamus by the United States to vacate an order requiring the United States to release certain documents in a breach of trust claim brought against the federal government in the Court of Federal Claims.
  - At issue in the underlying litigation is the federal government's management of the Nation's trust accounts from 1972 to 1992. Asserting the attorney-client privilege and attorney work-product doctrine, the federal government declined to turn over 155 documents requested by the Nation.



*United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313 (2011)

- Issue:
  - Whether the common-law fiduciary exception to the attorney-client privilege applied to the United States when acting in its capacity as trustee for tribal trust assets.
  - In concluding that the fiduciary exception did not apply, the Court explained that the federal government resembles a private trustee in only limited instances.
  - Furthermore, the Court reasoned that “[t]he Government, of course, is not a private trustee. Though the relevant statutes denominate the relationship between the Government and the Indians a ‘trust,’ see, *e.g.*, 25 U.S.C. 162a, that trust is defined and governed by statutes rather than the common law.” Jicarilla Apache Nation, 131 S.Ct. at 2323.
  - Ultimately, the Court concluded that while common law principles may “inform our interpretation of statutes and to determine the scope of liability that Congress has imposed ... the applicable statutes and regulations ‘establish [the] fiduciary relationship and define the contours of the United States’ fiduciary obligations.” Id. at 2325 (citing *Mitchell II*).

*United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313 (2011)

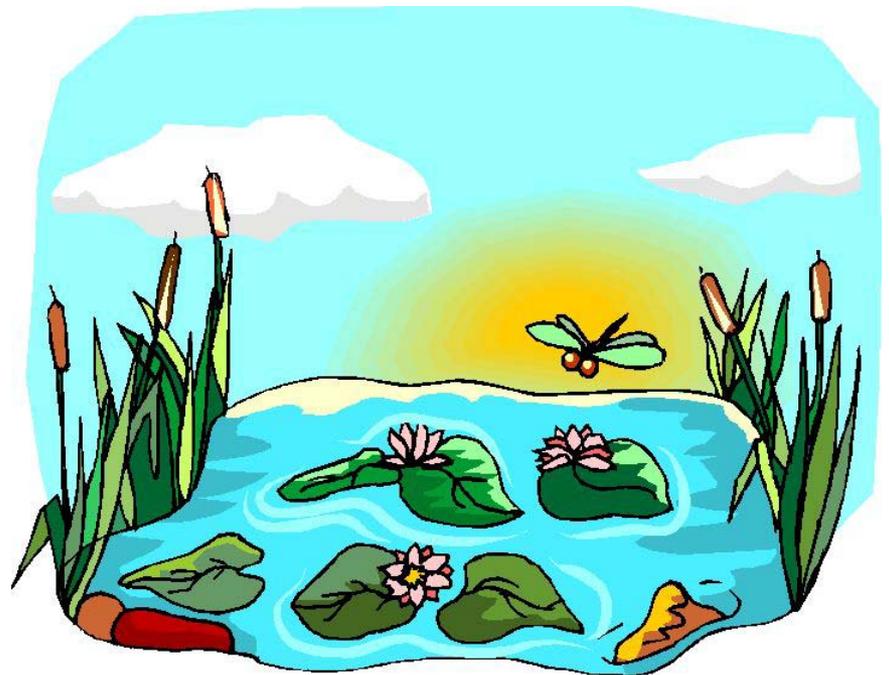
- When Does the Fiduciary Exception Apply:
  - Two features must exist in order for the common-law fiduciary exception to apply:
    - 1) a “real client” and
    - 2) duty to disclose information regarding the trust.
  - The Court concluded that both factors were lacking.
    - First Factor: a “real client”
      - The Court determined that the Jicarilla Apache Nation was not a real client of the federal government’s attorneys as the Nation did not pay the attorneys.
      - Additionally, the federal government sought advice from its attorneys in its role as a sovereign and not as a fiduciary for the Nation.
      - Moreover, the Court determined that the federal government has an interest in its capacity as a sovereign in the administration of the Indian trust accounts separate from the interests of the beneficiaries.

*United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313 (2011)

- Second Factor: duty to disclose information
  - The Court rejected the Nation’s argument that the federal government had a duty to disclose under the applicable statutes, finding instead that “[w]hatever Congress intended, we cannot read the clause to include a general common-law duty to disclose all information related to the administration of Indian trusts. ... Reading the statute to incorporate the full duties of a private, common-law fiduciary would vitiate Congress’ specification of narrowly defined disclosure obligations.” Id. at 2330.

# Loveladies Harbor, Inc. v. United States

- **Loveladies Wished to Develop a Tract of Wetlands, But Army Corps of Engineers Denied Permit**
- **Suit 1: Loveladies Filed Administrative Procedure Act Suit in District Court Challenging Denial of Permit; Loveladies Lost**
- **Suit 2: While District Court APA Suit Was Still Pending, Loveladies Filed Tucker Act Suit in Court of Federal Claims for Taking Under 5th Amendment; Loveladies Won \$2.6 Million**



## Historical Development of Federal Trust Responsibility to Federally-Recognized Tribes

- Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)
- Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)
- United States v. Kagama, 118 U.S. 375 (1886)
- United States v. Mitchell, 445 U.S. 535 (1980) (Mitchell I)
- United States v. Mitchell, 463 U.S. 206 (1983) (Mitchell II)

# United States v. White Mountain Apache Tribe

- **In 1870, the U.S. Army Established Fort Apache in Indian Territory in Arizona**
- **Subsequently, the Facility was Converted to the Theodore Roosevelt Indian School**
- **In 1960, Congress by Statute Put Fort Apache in Trust for the White Mountain Apache Tribe, Subject to Government Right to Use Property**
- **United States Allegedly Has Allowed the Property to Fall into Disrepair**
- **White Mountain Apache Tribe Filed Suit in Court of Federal Claims for Breach of Trust Under the Indian Tucker Act**



*United States v. Navajo Nation*, 537 U.S. 488 (2003)

- The Navajo Nation alleged that the Secretary of the Interior acted inappropriately in his role in the negotiation of mineral leases on the Navajo Nation.
- At issue in the case was the Mineral Leasing Act of 1938 and other related regulations.
- Ultimately, although the Court acknowledged the unprofessional behavior of the Secretary of the Interior, the Court held that the Navajo Nation had failed to establish a full trust. This is because the Mineral Leasing Act of 1938 gave the tribe the right to negotiate leases and, as a result, the Secretary of the Interior did not have full authority over management of the resources in question.



# APA (1976 Amendments) : Limitations on Scope

## § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than **money damages** \* \* \* 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. \* \* \*

## § 704. Actions reviewable

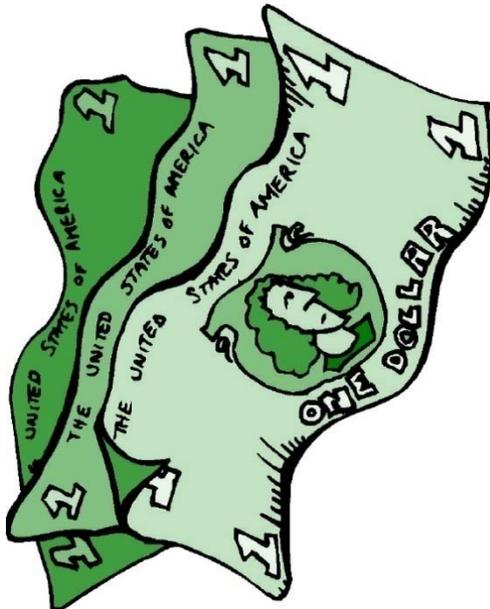
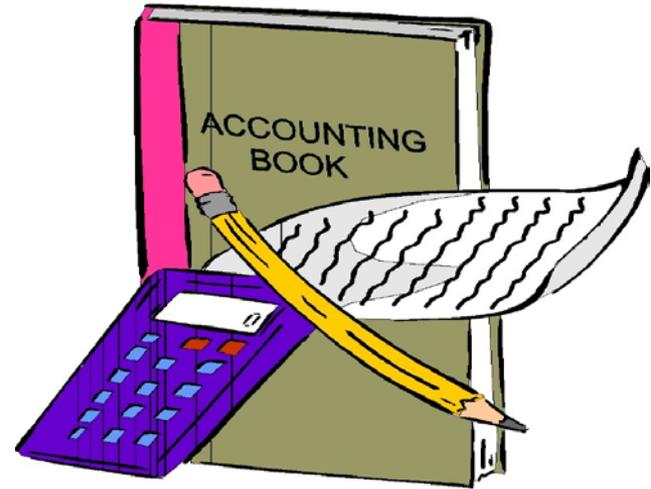
Agency action made reviewable by statute and final agency action for which there is no **other adequate remedy in a court** are subject to judicial review. \* \* \*



# Cobell: Tucker Act or APA?

## Judge Lamberth:

- **Claim for Historical Accounting is Request for Specific Relief**
- **Claim May Be Heard in District Court Under APA**



## Practical Evaluation:

- **Case is About Past-Due Money**
- **Purpose of Accounting is to Determine Amount of Money Owed**
- **Accounting is Means to End of Satisfying Claim for Recovery of Money**

# Consolidated Edison v. U.S. Dept. of Energy

## Facts and Proceedings

- **Utilities Sued in District Court Under APA to Enjoin Assessments to Decontaminate Uranium Facilities**
- **Government Moved to Transfer to Court of Federal Claims**

## Federal Circuit Holding

- **Money Damages Remedy in Court of Federal Claims Under Tucker Act Would Be Effective**
- **Retrospective Relief Operates by Res Judicata to Relieve From Future Obligations**
- **Bowen v. Massachusetts Limited to Context of Complex Inter-Relationship Between States and Federal Government**



# **History of Indian Claims Under Tucker Act**

- **Court of Claims Originally Precluded From Hearing Claims by Indian Tribes**
- **Congress Then Passed Series of Special Legislative Provisions for Indian Claims Over Several Decades**
- **The Indian Tucker Act, 28 U.S.C. § 1505, Enacted in 1946, Gives Jurisdiction to Court of Federal Claims Over Claims by Indian Tribes Under the Constitution, Laws, and Treaties of the United States**
- **In Sum, Indian Tribes Now Have Same Access to Money Remedies in the Court of Federal Claims as Do Others Under the Tucker Act – and Indeed Potentially More Access Through the Trust Doctrine**
- **Under the Trust Doctrine in Indian Law, the Government May Have the Responsibilities of a Guardian Over Indian Assets – If the Government is Found to Have a Full Fiduciary Relationship with an Indian Tribe**