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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument next in Case 09-846, United States v. Tohono  
5 O'Odham Nation.  
6 Mr. Yang.

7 ORAL ARGUMENT OF ANTHONY YANG  
8 ON BEHALF OF THE PETITIONER

9 MR. YANG: Mr. Chief Justice, and may it  
10 please the Court:

11 This Court in Keene held that section 1500  
12 of Title 28 deprives the Court Of Federal Claims has  
13 jurisdiction when the plaintiff has a pending suit in  
14 another court based on substantially the same operative  
15 facts and left open the question whether some overlap in  
16 the relief requested is also necessary to trigger that  
17 bar. The Federal Circuit erred in holding that section  
18 1500 applies when both suits -- only when both suits  
19 seek the same relief, and that the critical distinction  
20 in this regard is whether the particular relief in the  
21 plaintiff's plea for relief is deemed legal or  
22 equitable.

23 Section 1500's text broadly bars CFC  
24 jurisdiction whenever any suit that the plaintiff has  
25 pending in any other court is a suit for the CFC claim

1 or is merely a suit in respect to that claim. In other  
2 words, another suit for a different but a related claim  
3 will trigger section 1500.

4 That provision was intended to protect the  
5 government from simultaneous duplicative suits against  
6 the United States and its agents by forcing plaintiffs  
7 to elect between those related suits.

8 JUSTICE GINSBURG: But you recognize that  
9 sequential suits could be brought. So that if the case  
10 in the district court went to final judgment, then it  
11 would be okay to go to the Court Of Federal Claims.

12 MR. YANG: That is correct. In some, in  
13 perhaps a good number of cases, it's possible to, if you  
14 are seasonably prompt in your Court Of Federal Claims  
15 case or your district court case first --

16 JUSTICE GINSBURG: But you don't have  
17 control over how long the district court case is going  
18 to take, and there is no mechanism to stop the running  
19 of the statute of limitations.

20 MR. YANG: Well, I think there is some  
21 control that you can exercise over the -- how promptly  
22 the suit proceeds. Particularly if we are talking about  
23 suits against the government, many suits proceed on an  
24 administrative record and go directly to summary  
25 judgment; that can be done in a relatively prompt

1 manner.

2 But even if not, the Congress that enacted  
3 section 1500 in 1868 knew that essentially what it was  
4 doing in many, many cases would prevent a second suit  
5 from going forward. That's because the Congress was  
6 concerned with the cotton claimants. The cotton  
7 claimants had authorization to bring suit in the Court  
8 of Claims, but there was a two-year statute of  
9 limitations. That statute ran from the end of the Civil  
10 War. And this Court in a case called U.S. v. Anderson  
11 at 76 U.S., and the relevant pages are 70 to 71, made  
12 clear that the end of the Civil War for the purposes of  
13 that statute was August in 1866.

14 Congress enacted section 1500 in June of  
15 1868. There was a two-month window, if that, to bring  
16 suit and Congress recognized, it would have recognized,  
17 that if you filed suit or were forced to elect at that  
18 point, that would be the end of the game.

19 There was also another statutory provision  
20 that Congress enacted during the Civil War that put a  
21 two-year statute of limitations on suits against  
22 officers. That was discussed in this Court's decision,  
23 Mitchell v. Clark, 110 U.S. 633 at pages 641 and 642.

24 So given the time at which Congress was  
25 enacting section 1500, it knew it was putting plaintiffs

1 to a very hard choice. You had to elect between the  
2 Court Of Federal Claims remedy and between a remedy in  
3 another court against an officer. That remedy would  
4 likely be the end of the game. And Congress did that in  
5 a very particular way. It did it in a targeted statute  
6 that limited the authority of the court that had its  
7 hands on the purse strings of the Federal Government,  
8 and that performed the very function that Congress just  
9 a few years earlier had itself exercised through the  
10 enactment of private bills through its appropriations  
11 power.

12 So section 1500 ultimately states in essence  
13 that if you are going to bring suit in this specialized  
14 court where Congress has vested the Court of Claims with  
15 the very special power of distributing money from the  
16 Federal fisc, that you could only bring one suit arising  
17 from the same operative facts in order to be in that  
18 court.

19 CHIEF JUSTICE ROBERTS: Well, but that's --  
20 you just --

21 JUSTICE SOTOMAYOR: In the cotton cases, why  
22 isn't my reading of it quite very simple, which is  
23 Congress was concerned with ensuring that a claimant  
24 didn't get double-recovered in two different suits.

25 MR. YANG: Well --

1 JUSTICE SOTOMAYOR: Isn't that a simple --  
2 you know, you've got people suing in different  
3 jurisdictions over getting the same pot of money or  
4 something close to it. Why isn't our view of 1500 just  
5 simply you can't have two suits that are seeking the  
6 same pot?

7 MR. YANG: Well, it wasn't the same pot of  
8 money. The Abandoned and -- Abandoned Property  
9 Collection Act -- we will call it APCA -- provided for a  
10 special statutory trust remedy. That remedy was for the  
11 net proceeds of anything -- any -- any auction sales  
12 that might have resulted from cotton. If the cotton was  
13 lost, it was damaged, it was destroyed, if the proceeds  
14 were paid but ultimately didn't make their way into the  
15 fisc, you got nothing or you got a substantially reduced  
16 fund. If you sued in court, you might be able to sue,  
17 as we explained in our reply brief, under certain  
18 doctrines that would give you the property in specie, or  
19 you could seek monetary relief. These are quite  
20 different things. And even in -- it's not --

21 JUSTICE GINSBURG: But you couldn't get  
22 both. I mean, that's I think Justice Sotomayor's point,  
23 about duplication. It's not -- even if you can say,  
24 yes, it's a different mode of relief, but you could --  
25 couldn't get -- I mean, suppose we didn't have 1500 and

1    you prevailed in your suit on the APCA or whatever you  
2    call the statute. You could not then turn around and  
3    sue the government official, because you have the -- the  
4    single claim, you've been compensated.

5                   MR. YANG: I don't know --

6                   JUSTICE GINSBURG: It's not here -- it's  
7    quite different. I mean, one suit is not precluded by  
8    the other. You -- you recognize that by saying you  
9    could bring the Claims Court suit after the district  
10   court suit. That's not so in -- in the cotton cases.

11                  MR. YANG: You may in certain instances.  
12   But particularly in the cotton cases, Congress knew that  
13   it -- what it was doing was forcing one path and only  
14   one path. It wasn't about duplicative recovery. You  
15   had to choose and you not -- you weren't going to have  
16   time to bring another suit, and Congress would have  
17   known that when it enacted the section 1500's  
18   predecessor two months before the statute ran in APCA  
19   and perhaps after the statute ran for bringing a tort  
20   suit against officials under the cases -- the statute  
21   that this Court construed in Mitchell.

22                  So it wasn't simply that duplicative relief  
23   was at issue, Congress was actually forcing you to make  
24   a choice in cases where the types of relief are quite  
25   different. And the type of relief, for instance, that



1 you would get in a suit against an agent of the United  
2 States, what you get out of that suit is not a pot of  
3 money; the court does not say at the end of the case,  
4 here you go, you asked for \$1,000, here it is. The  
5 court enters an order; it enters a judgment. It says,  
6 "Defendant, perhaps Tony Yang, officer of the  
7 government, you pay \$100 million, \$50 million."

8           It doesn't mean much to the plaintiff if  
9 they get at Tony Yang as an individual. This is very  
10 different relief than a money judgment against the  
11 United States. It's not the same relief. And in fact,  
12 we don't normally think of a claim as embodying a  
13 particular type of relief, which is the submission of  
14 the trial here.

15           JUSTICE GINSBURG: I -- I'm not sure I  
16 understand your answer to my question. Assuming you had  
17 a recovery under the -- for the -- confiscated cotton,  
18 under the one route you had a recovery. You could not  
19 sue again under the other route without -- leaving aside  
20 1500, because the claim would be precluded.

21           MR. YANG: That might have been true in one  
22 direction but maybe not in the other. And let me  
23 explain. The -- I'm not sure that there was an instance  
24 of this happening because of section 1500's existence,  
25 but if you had, for instance, obtained damages against

1 an individual agent in a suit and you still could have  
2 brought suit within the Abandoned -- Abandoned Property  
3 Collection Act, the Abandoned Collection Property Act  
4 provided a statutory trust for the owner of the cotton.  
5 It's not at all clear that that would have been  
6 precluded. There may well have been, but for the  
7 statute of limitations problem, the ability to get a  
8 double recovery.

9 But nevertheless, I mean, our submission  
10 ultimately turns on our understanding of the text of  
11 this statute, which is quite broad. The text not only  
12 precludes --

13 CHIEF JUSTICE ROBERTS: Well, but it's  
14 not -- it's not as broad as your test, "arising out of  
15 the same operative facts." It doesn't say that; it says  
16 "any claim for and respect to which." And it seems to  
17 me that the facts of this case draw that precise  
18 distinction. When you are asking for an accounting, you  
19 are not raising any claims about people doing anything  
20 bad at all. You are just saying, let me know what I've  
21 got. And then when you bring a claim for -- for money  
22 because of mismanagement of the trust, that's -- that's  
23 quite different.

24 MR. YANG: I -- that's -- that's true in  
25 some cases of an accounting. It's not true on these

1 complaints. The complaints here are -- they have the  
2 sense of a kitchen sink type of a pursuit of these  
3 claims against the United States. The district court  
4 case is not simply seeking an accounting of old money,  
5 as the Tribe submits. It actually alleges a whole slew  
6 of breaches, including the breach to -- to -- of failure  
7 to invest money properly, failing to put it to its  
8 highest use, says the true balances would be far greater  
9 but for these breaches.

10 It specifically seeks a --

11 CHIEF JUSTICE ROBERTS: Is that -- is that  
12 to assert the basis about why an accounting should be  
13 required?

14 MR. YANG: No, because back -- the counts --  
15 these are back on pages 90 and 91a of the petition  
16 appendix. The Tribe not only seeks an accounting, but  
17 it also seeks an order to comply with all other  
18 fiduciary duties determined by the court. This is  
19 paragraph 42.

20 It goes on to say that the tribe is not only  
21 entitled to object and essentially challenge the  
22 accounting, but it's entitled to any other equitable  
23 relief that might be appropriate in light of the -- the  
24 court's decision in the case.

25 So the tribe is in no way trying in the

1 district court simply to seek an accounting. Just like  
2 in the Court of Federal Claims, it's not simply looking  
3 to what they claim to be new money. The specific  
4 allegations in the CFC complaint say that there has been  
5 no money for the -- no accounting for the revenue  
6 collected.

7 CHIEF JUSTICE ROBERTS: Well, what is the --  
8 maybe I don't know enough about what an accounting is.  
9 But why would it be other equitable relief to which they  
10 are entitled if they simply say, we want to know what  
11 we've got?

12 MR. YANG: The tribe --

13 CHIEF JUSTICE ROBERTS: And they can get --  
14 and then it may be a basis for a further claim that, if  
15 that's all we've got, where did the rest of it go, and  
16 that might be the Court of Claims action. But it does  
17 strike me that they are different -- claims for  
18 different relief.

19 MR. YANG: It -- it should be that way if  
20 there were a narrowly tailored APA-type-like suit in  
21 district court, but that's not this. The tribe's  
22 complaints both invoke, for instance, the Cobell  
23 litigation which has been going on in -- in D.C. for  
24 quite some time, and are modeled on the same types of  
25 broad claims that are at issue at Cobell.

1           This is not a simple case where there is  
2   agency action withheld and a court says: Agency, you  
3   had X duty; do it. This is a -- a situation where the  
4   tribe is seeking to impose itself on age-old decisions  
5   that have been made a long time ago and to seek to  
6   revisit them and at the end of the day restate their  
7   accounts to reflect what they think should be in the  
8   trust fund.

9           This parallels in both the Federal  
10   Circuit -- the Court of Federal Claims and the district  
11   court suit. There is substantial overlap in the  
12   operative facts. As the two judges -- the only two  
13   judges to have addressed this --

14           CHIEF JUSTICE ROBERTS: Is it accounting  
15   what should have been in the trust fund or what actually  
16   is? You say give me an accounting of the trust fund.  
17   Does the officer go back and just add up the bank  
18   accounts and value the land and all that? Or --

19           MR. YANG: Well, there's a difference --

20           CHIEF JUSTICE ROBERTS: -- does he go back  
21   and say, well, this should be there but it's not?

22           MR. YANG: The -- there is a difference  
23   between the parties, and I don't think it's been fully  
24   fleshed out here, about what an accounting is. The  
25   statute at issue that the tribe invokes for the

1 accounting in our view provides a prospective obligation  
2 for the government to provide quarterly statements of  
3 what's coming in and out of the account going forward.

4 CHIEF JUSTICE ROBERTS: Going forward.

5 MR. YANG: Going forward, not going back,  
6 and only with respect to moneys that were deposited or  
7 invested under a specific statutory authority that  
8 involves deposits that were made in banks. So in our  
9 view -- you know, our view and the tribe's view I think  
10 are quite different in terms of what's at issue in the  
11 district court case. And unfortunately, that's not the  
12 case that's before you here. But what we're trying to  
13 do is say whether or not there is substantial overlap  
14 between the two. And --

15 CHIEF JUSTICE ROBERTS: Well, are you at  
16 cross-purposes on those two issues? When it comes to  
17 what an accounting is, you want to say, oh, that's just  
18 going forward; when it comes to this 1500 question you  
19 want to say they're the same as the money damages, which  
20 goes backward?

21 MR. YANG: No, I don't think we are at  
22 cross-purposes. What we are saying is what the  
23 complaint alleges. We don't control how the tribe seeks  
24 to assert rights. We think that the complaint may be  
25 overbroad, but that's not the correct question.

1           I mean, this Court in Keene, for instance,  
2   addressed suits which had been dismissed because they  
3   were improperly brought in district court, and those  
4   suits in district court were sufficient to trigger  
5   section 1500's jurisdictional bar simply because they  
6   were asserting claims that overlapped with the claims  
7   that were at issue in the CFC.

8           JUSTICE KENNEDY: Do you read the claim in  
9   section 1500 the same way that it should be -- or do you  
10   think we should read it the same way in 1500 and  
11   12(b)(6), failure --

12           MR. YANG: I think so. I mean --

13           JUSTICE KENNEDY: Whether or not you've  
14   stated a claim upon which relief can be granted?

15           MR. YANG: Right, which draws a distinction  
16   between the claim and the relief, right? If relief were  
17   the particular type of relief, as the tribe asserts, the  
18   rule would simply say "failure to state a claim,"  
19   because you would have failed to state a certain  
20   element, a necessary element, of the claim. Instead, it  
21   says "failure to state a claim upon which relief can be  
22   granted."

23           And I think that -- that keys into the other  
24   important provision of rule -- the Civil Rules for this  
25   purpose, which is Rule 54(c), which makes clear that the

1 relief that might be initially stated in a complaint is  
2 not the relief that is at issue in the case.

3 The relief that comes at issue in the case  
4 is the relief that the -- that is proven, whether it be  
5 at summary judgment or at trial. And even if, for  
6 instance, you ask for a dollar in damages in your  
7 complaint, it may well be that at trial you establish  
8 your entitlement to injunctive relief or damages far in  
9 excess.

10 JUSTICE GINSBURG: But not so, not so here,  
11 because of the way Congress has set up the authority of  
12 each court. You could never -- what is it, 54(c) or --

13 MR. YANG: (C).

14 JUSTICE GINSBURG: 54(c) is the relief to  
15 which you were entitled. The only relief to which you  
16 were entitled in the one court, the Court of Claims, is  
17 compensatory damages. So there isn't a question of some  
18 other form of relief. You have to go to another forum  
19 to get different relief.

20 MR. YANG: Well, yes and no. The district  
21 court complaint, for instance -- and again, we contest  
22 this, but they seek a restatement of their accounts.  
23 They seek remedies such as equitable disgorgement and  
24 the like. These are monetary remedies that go, again,  
25 to the same types of issues.



1 JUSTICE SCALIA: But I also thought that the  
2 Court of Claims could give --

3 MR. YANG: All of these claims could be  
4 brought --

5 JUSTICE SCALIA: Could be brought --

6 MR. YANG: -- in the Court of Claims.

7 JUSTICE SCALIA: They can give injunctive  
8 relief where that's necessary.

9 MR. YANG: That's correct, but if you have a  
10 claim, for instance -- taking the old money/new money  
11 framework, which we don't think is borne out by the  
12 complaints, but even if we were correct, if they were  
13 seeking so-called old money in district court -- that  
14 is, money that should have been there, but was  
15 improperly allocated and therefore didn't show up in  
16 their account -- they could also bring a claim under the  
17 Indian Tucker Act claiming that there was some breach of  
18 duty under a statute or regulation, clear and -- this is  
19 a Navajo Nation-type question -- and you could get an  
20 accounting through -- in order to determine the proper  
21 amount that should be there.

22 So this is a way -- the problem that we have  
23 here, particularly in these cases where there's an  
24 allegation of 100 years of trust duties going back, and  
25 simultaneously litigating these cases in courts that

1 might have different views on discovery obligations,  
2 different views of the law on various point cases.

3           One of the cases that we cite in the  
4 appendix to the petition, the Ak-Chin case, the CFC  
5 ordered discovery, for instance, that we have to conduct  
6 a review of 33,000 boxes of materials from the archives.  
7 Although we claim there is an APA case going on in  
8 district court, the plaintiffs are seeking discovery  
9 there. We are fighting it. But this type of  
10 duplicative legislation and burden on the government is  
11 precisely what Congress in 1868 said: If you are going  
12 to bring suit --

13           JUSTICE BREYER: Is there any instance  
14 you've been able to think of where an Indian tribe could  
15 have a claim for money of some kind and some other kind  
16 of relief that they seek where they couldn't get it all  
17 in the Court of Claims?

18           MR. YANG: A declaratory judgment, for  
19 instance. Some -- many -- some of these cases arise --

20           JUSTICE BREYER: Declaratory judgment. Is  
21 there anything else?

22           MR. YANG: Um -- well, I mean, you wouldn't  
23 be able to get injunctive relief.

24           JUSTICE BREYER: No injunctive relief.

25           MR. YANG: Not normally in the Court of

1     Claims.   There are exceptions.

2                   JUSTICE BREYER:   No matter what.   Okay.

3     Well, then they have a problem, because they might want  
4     -- they might want some money and they want an  
5     injunction.   So what are they supposed to do?

6                   MR. YANG:   There is no question that section  
7     1500 may put a plaintiff at a difficult choice.

8                   JUSTICE BREYER:   That's a big choice.

9                   MR. YANG:   It's a choice that has existed  
10    since 1868, when Congress --

11                   JUSTICE GINSBURG:   To test that choice --  
12    it's pretty stark in the Casman case, where Congress  
13    said back pay is for the Claims Court, reinstatement for  
14    the district court.

15                   But your position is that under your reading  
16    of Casman -- let's forget about Congress's amendment.  
17    Under your reading of the statute, the Casman decision  
18    was wrong and the plaintiff had to choose either back  
19    pay or reinstatement; there was no way to get both.

20                   MR. YANG:   That's correct.   And I think that  
21    was this Court's suggestion at the end of Keene, when  
22    the Court recognized that because there are complicated  
23    jurisdictional regimes that apply when you sue the  
24    government, the Court explained there may well be  
25    situations where this precludes a plaintiff from seeking

1 all the relief that you would otherwise be able to get  
2 if you could bring suit separately.

3 And the Court in Keene said: Look, if there  
4 is apparent hardship -- this is following its decision  
5 in Corona Coal, which is 1924. If there is a hardship  
6 in the statute, it is a question that must be directed  
7 to Congress, because Congress is the one that set this  
8 up, this jurisdictional limit. And the jurisdictional  
9 limit that existed in 1868, remember, was a very  
10 difficult choice.

11 JUSTICE BREYER: Your basic point is this:  
12 You're just saying it's too bad, go to Congress. But  
13 you don't deny the basic point, which is that an Indian  
14 tribe may think the Bureau of Indian Affairs has really  
15 mismanaged everything and what they would like is some  
16 money, and also they want an injunction so they won't do  
17 it again.

18 And now your view is, it's true, there is no  
19 way they can get that, because they have to go to two  
20 different courts, and really in your view they can't go  
21 to two different courts, period.

22 MR. YANG: Well, let me qualify --

23 JUSTICE BREYER: And hardship is definite.  
24 It's just you are saying, that's what Congress wanted.

25 MR. YANG: The hardship may be there. The

1 hardship is less now than it was in 1868 because of the  
2 language of the statute --

3 JUSTICE BREYER: Why isn't it just as bad as  
4 what I just said?

5 MR. YANG: Because you might be able to  
6 bring, for instance, an APA suit that completes before  
7 the six-year statute of limitations ends. And frankly,  
8 we don't think that that's an unusual thing, for an APA  
9 action to be brought promptly, even with an appeal. APA  
10 actions, again, if it's limited to the administrative  
11 record as they should, you can go straight to a summary  
12 judgment-like procedure --

13 JUSTICE SCALIA: You have to extend a case  
14 that I didn't agree with when it came out. You have to  
15 extend Bowen in order to achieve that. Does the  
16 government want to extend Bowen?

17 MR. YANG: No, no. I'm not suggesting that  
18 that was a proper suit. But what you could do is you  
19 could pursue it and it could complete and still be --  
20 there would still be time to bring a suit in the Court  
21 of Federal --

22 JUSTICE SCALIA: You could complete it to a  
23 denial of recovery?

24 MR. YANG: Perhaps, that's right.

25 We think these suits --

1 JUSTICE SCALIA: I don't think that's any  
2 comfort to the Indian tribe, do you?

3 MR. YANG: Well, but that's precisely what  
4 they are seeking to do here, and we just disagree  
5 whether that relief is available in district court. And  
6 the question here is whether you can simultaneously  
7 pursue it.

8 Let me be clear. These cases in our view  
9 should almost all be brought normally in the Court of  
10 Federal Claims. These cases are seeking money for past  
11 actions and that's precisely what the Court of Federal  
12 Claims should address.

13 However, a number of plaintiffs like to try  
14 their hand at more than one court and they bring  
15 simultaneous suits, just as Tucker -- the cotton  
16 claimants did in the 1860's, where Congress provided for  
17 a general statute, very broadly worded. It applies to  
18 any claim for and in respect to which any suit or  
19 process is pending in any other court against the U.S.  
20 or any person acting or professing to act as its agents.  
21 It's a very broad statute.

22 CHIEF JUSTICE ROBERTS: It's not -- I mean,  
23 you are putting a pejorative spin on what they are  
24 doing, saying, you know, many plaintiffs like to take a  
25 chance in more than one court. But your response to

1 Justice Breyer suggests that that's a tough choice if  
2 you have to choose between injunctive relief or damages.  
3 That's not them trying to, you know, get the same --  
4 take two bites at the apple.

5 MR. YANG: In some cases, it's is a tough  
6 choice. Casman would have been a very difficult choice.  
7 But as this Court suggested in Keene, the question goes  
8 to Congress, and when Congress addressed the question it  
9 decided relief of that sort should be brought all in the  
10 Court of Claims.

11 But in this case, this is not a case where  
12 we think particular hardship would be had, because the  
13 tribe could pursue its claims in the Court of Federal  
14 Claims and probably should be doing that if it simply --

15 JUSTICE SOTOMAYOR: So why isn't our rule  
16 simply -- what is so wrong with a rule that says if you  
17 can bring it in the Court of Claims you have to, but if  
18 there's relief that you can't secure there you can have  
19 two lawsuits? What is so irrational about that?

20 MR. YANG: Well, that doesn't square --

21 JUSTICE SOTOMAYOR: If there is no double  
22 recovery possible.

23 MR. YANG: But that doesn't square even with  
24 the history of what Congress is trying to target. The  
25 relief that was available in the Court of Claims in the

1 1860's in the Abandoned Property Collection Act was a  
2 very limited --

3 JUSTICE SOTOMAYOR: We have already gone  
4 through that because most of those claims would have had  
5 some element of double recovery, that might have  
6 precluded a second action. The point that I raised was  
7 if there is a chance of potential double recovery, you  
8 can't breach, what's wrong with that?

9 MR. YANG: I don't think it squares with the  
10 text of the statute, which is broader than, doesn't  
11 provide for a claim, it doesn't provide for relief, it  
12 doesn't speak to double recovery. If Congress was  
13 intending to target that specific problem it could have  
14 done so in a much direct manner.

15 Mr. Chief Justice, I would like to reserve  
16 the remainder of my time.

17 CHIEF JUSTICE ROBERTS: Thank you, Mr. Yang.  
18 Ms. Spinelli.

19 ORAL ARGUMENT OF DANIELLE SPINELLI

20 ON BEHALF OF THE RESPONDENT

21 MS. SPINELLI: Mr. Chief Justice, and may it  
22 please the Court:

23 Two suits are for or in respect to the same  
24 claim under Section 1500, only if they stem from the  
25 same operative facts and seek duplicative relief. And



1 in response to the Government's argument, I would like  
2 to explain why that's the best reading of Section 1500's  
3 text, as well as the only reading that harmonizes  
4 Section 1500 with the overall jurisdictional and  
5 remedial scheme.

6 Congress has made a broad range of remedies  
7 available to Plaintiffs wronged by the Government. And  
8 it's directed Plaintiffs to seek certain remedies only  
9 in the Court of Federal Claims, and certain remedies  
10 only in the district court.

11 The Government's reading of Section 1500  
12 assumes that Congress intended to penalize Plaintiffs  
13 for following that direction by barring them from the  
14 only forum where they can obtain money damages. But  
15 nothing in the statute's text or history suggests that  
16 Congress intended to create such a nonsensical scheme.

17 JUSTICE SCALIA: Your argument assumes that  
18 there is available in the district courts injunctive  
19 relief under the Administrative Procedure Act, and that  
20 is far from clear, even after Bowen, it's far from clear  
21 if you had any business being in the district court  
22 anyway. And so in a way we are resolving a very strange  
23 question, that is if as is not clear, you have a right  
24 to sue in the district courts for an injunction, can  
25 that suit proceed because of 1500 when there is a suit

1 pending in the Court of Claims and that is sort of an  
2 abstract question.

3 MS. SPINELLI: Justice Scalia, it is  
4 disputed whether or not the district court has  
5 jurisdiction to entertain the Nation's claims there.  
6 The Government has a move to dismiss on that ground,  
7 that motion is pending. We don't believe that the  
8 district court's jurisdiction over the claims raised in  
9 the district court is a question that this Court needs  
10 to face. Rather, the question here is whether the Court  
11 of Federal Claims has jurisdiction over the claims  
12 brought in the CFC. And that turns not on whether the  
13 district court has jurisdiction, but on whether  
14 duplicative relief is sought in both suits.

15 JUSTICE BREYER: The main thrust that I was  
16 raising was does this really get the Tribe into trouble?  
17 They have to forego one kind of relief for another. So  
18 what about injunctive relief, that's what he thought of,  
19 and Justice Scalia raises the point, well, they are not  
20 going to be entitled to injunctive relief anyway because  
21 the APA doesn't provide it, if I understand that  
22 correctly. So you are giving up the null set. You were  
23 giving up the null set.

24 MS. SPINELLI: No, not at all,  
25 Justice Breyer. First of all, we would contest that we

1 are not entitled to the relief that the Nation sought in  
2 the district court. We believe that the Nation is  
3 entitled to that relief.

4 JUSTICE BREYER: But it couldn't get that?

5 MS. SPINELLI: Correct.

6 JUSTICE BREYER: It couldn't get that kind  
7 of relief in the Court of Claims?

8 MS. SPINELLI: Correct.

9 JUSTICE BREYER: Yes, it could.

10 MS. SPINELLI: No, no, no. You are right  
11 that it could not. The relief that is being sought in  
12 the district court is primarily an accounting. An  
13 accounting is inherently an equitable remedy, a remedy  
14 that under trust law the trustee owes to the beneficiary  
15 to provide the beneficiary with all the information  
16 necessary for him to protect his rights.

17 JUSTICE KENNEDY: Isn't it well established  
18 that part of the jurisdiction of the equity court when  
19 it requires an accounting is to give damages for breach  
20 of the trustee's duty? That's Hornbook.

21 MS. SPINELLI: That may well be the case,  
22 Justice Kennedy, in common law trust suits. That wasn't  
23 requested --

24 JUSTICE KENNEDY: No, I'm talking about  
25 historically in equity. No. Historically in equity the

1 trustee who breaches the trustee's duty in the equity  
2 court is required to give damages.

3 MS. SPINELLI: You are correct that  
4 normally, that in the past --

5 JUSTICE KENNEDY: It's not common law, it's  
6 not common law, it's equity. It's old law, it's equity.

7 MS. SPINELLI: Correct. You are correct  
8 that in the days of the divided bench suit for breach of  
9 trust were brought in equity. I don't think we need to  
10 parse that finely here, because the question here is  
11 whether or not the Tribe has sought duplicative relief  
12 in both courts.

13 JUSTICE SCALIA: Isn't that unrealistic?  
14 You don't want an accounting for the sake of having an  
15 accounting so that you can put the accounting in your  
16 desk. Oh, look it, they stole \$1,000,000,000 from us.  
17 You want to get the \$1,000,000,000. If the suits are  
18 directed at the same object, and it is fanciful to think  
19 there is this separate suit for an accounting. The  
20 object of that suit is the same thing as the object of  
21 the suit in the Court of Claims.

22 MS. SPINELLI: With respect, Justice Scalia,  
23 that is not the case. The accounting has enormous  
24 benefit entirely apart from any monetary relief that it  
25 might ultimately lead to. The Nation, as well as other

1 tribes who have brought these kinds of suits, lack basic  
2 information about what they own, what the metes and  
3 bounds of their lands are, what leases have been  
4 granted, how long they last, what easements and rights  
5 of way have been granted over their land, what the  
6 status is of their mineral rights and timber rights.  
7 All of this is information that the Tribe needs and that  
8 Congress recognized in the Indian Trust Fund Management  
9 Reform Act that the Tribe needs in order to exercise its  
10 Federally granted right to decide how it's assets are  
11 best managed, and the longer that that accounting is  
12 delayed, the more the Nation is harmed by the inability  
13 to do that, the inability to decide whether certain  
14 funds should be withdrawn from trusts held by the United  
15 States, the inability to decide whether it should bring  
16 claims against third-parties. So there's real value to  
17 the accounting that's entirely separate from any  
18 monetary relief. And the accounting is not sought in  
19 the Court of Federal Claims. The Court of Federal  
20 Claims has long held that it lacks jurisdiction to grant  
21 that kind of pre-liability historical accounting.

22 Although --

23 CHIEF JUSTICE ROBERTS: Can you get the  
24 accounting in conjunction with the claim of damages?  
25 Maybe the Court of Federal Claims, you can't go there

1 and say, look, I want an accounting, but you can say I  
2 have been wronged over the century and I would like to  
3 find out to what extent, and before you can figure that  
4 out you actually have to have an accounting. Can't the  
5 Court of Federal Claims get an accounting in that  
6 context?

7 MS. SPINELLI: The Court of Federal Claims  
8 can order something called an accounting in aid of  
9 judgment. Despite the similar terminology, they are not  
10 at all the same. An accounting of the type that's being  
11 sought in the district court is a remedy by itself.  
12 It's a remedy that the beneficiary is entitled to once  
13 its received or denied, that's a final order that can be  
14 appealed.

15 CHIEF JUSTICE ROBERTS: Okay. It's a  
16 remedy, but is it terribly different from what the  
17 accounting the Court of Federal Claims would order to  
18 figure out how much --

19 MS. SPINELLI: It is because it requires the  
20 trustee to provide all information about the trust that  
21 might be relevant to the beneficiary, and it does so  
22 without requiring the beneficiary to prove any  
23 mismanagement. By contrast --

24 JUSTICE SCALIA: Were those accountings  
25 available before the Administrative Procedure Act was

1 passed? Is the jurisdictional basis for that the waiver  
2 of sovereign immunity that allows you to demand an  
3 accounting from the United States? Is that just the  
4 APA?

5 MS. SPINELLI: The waiver of sovereign  
6 immunity that is being asserted in the district court is  
7 the APA, that's correct.

8 JUSTICE KENNEDY: What about this --

9 JUSTICE SCALIA: So you didn't have a right  
10 to that before the APA was passed?

11 MS. SPINELLI: In the district court, no.

12 JUSTICE SCALIA: Either in the district  
13 court nor in the Court of Claims. So this is not an  
14 unthinkable situation, is it?

15 MS. SPINELLI: It's a little bit more  
16 complicated --

17 JUSTICE SCALIA: It was thought about for a  
18 century, anyway.

19 MS. SPINELLI: It's a little bit more  
20 complicated than that because prior to -- prior to the  
21 Court of Federal Claims in its current incarnation,  
22 certain claims for an accounting could have been brought  
23 before the Indian Claims Commission, but -- I mean  
24 that's going a little far afield. The -- at any rate  
25 Congress has now recognized specifically by statute that

1 this is something that Tribes need, and that's the right  
2 that the Nation is seeking to enforce in the district  
3 court action.

4 JUSTICE SCALIA: Well, why have -- you say  
5 Congress has specifically recognized it by statute.  
6 You're referring to the APA?

7 MS. SPINELLI: No, I'm referring to the 1994  
8 Indian Trust Fund Management Reform Act, which  
9 specifically required the Department of the Interior to  
10 provide Tribal beneficiaries with certain statements,  
11 certain accountings regarding their --

12 JUSTICE SCALIA: But did not provide for a  
13 lawsuit against -- against the government.

14 MS. SPINELLI: They did not -- they did not  
15 expressly do so, no.

16 JUSTICE KENNEDY: When you are in the CFC,  
17 don't you get -- you aren't you asking for compensation  
18 for losses and injuries from the commingling or the  
19 misappropriation of assets?

20 MS. SPINELLI: No, Justice Kennedy, in the  
21 Court of Federal Claims, as a close reading of the  
22 complaint will show, the Nation is requesting four  
23 specific kinds of relief. First it's asking for damages  
24 from the United States' failure to lease its mineral  
25 rights for fair market value. That's count 1. Count 2



1 is seeking damages from the United States' failure to  
2 obtain fair market value for leases of its land. Count  
3 3 is seeking damages from the United States' failure to  
4 invest judgment funds in a timely way and to obtain the  
5 maximum interest rate; and count 4 asserts a similar  
6 claim for damages with respect to the trust fund.

7 JUSTICE KENNEDY: But your brief makes the  
8 -- seems to make the point that that's all just interest  
9 on capital. It's not for lost capital. But even as you  
10 described it, it sounds to me that you get damages for  
11 loss of capital plus interest.

12 MS. SPINELLI: It's -- it's not just  
13 interest, you are correct. I mean, maybe if I give an  
14 example this will make things a little bit clearer. Say  
15 that the government sold a stand of timber belonging to  
16 the Nation for \$20, even though the stand of timber was  
17 worth \$40. It then deposited it into the trust account,  
18 \$10.

19 The suit in the district court seeks an  
20 accounting and a restatement of the accounts and to the  
21 extent appropriate and available, equitable restitution  
22 of the \$10 that was missing from the account.

23 The suit in the CFC seeks to recover the \$20  
24 that the United States should have earned, had it acted  
25 as a prudent fiduciary when it was selling the stand of

1 timber. And the Nation is entitled to both sums of  
2 money, but they are different, and because the money  
3 sought in the two courts is different, the relief is not  
4 duplicative.

5 JUSTICE KENNEDY: My problem is that I read  
6 the CFC complaint as including both. I will take a look  
7 at it. And I intruded on Justice Breyer's question.

8 JUSTICE BREYER: What I'm trying to work out  
9 still in my mind, is if you say, look, Indian Tribe:  
10 You have to go to the court of claims, period. Period.  
11 You can't go to these other courts, I mean unless you  
12 give up the court of claims. Is the Indian Tribe going  
13 to really lose something it needs?

14 MS. SPINELLI: Yes.

15 JUSTICE BREYER: I know you think yes. I  
16 realize that.

17 (Laughter.)

18 JUSTICE BREYER: And, what I want to ask you  
19 about --

20 MS. SPINELLI: Yes.

21 JUSTICE BREYER: -- is in section 2 --

22 MS. SPINELLI: I apologize.

23 JUSTICE BREYER: -- of 1491 there is a  
24 sentence which says, about the court of claims, in any  
25 case including the 1505 Tucker Act, the court shall have

1 the power to remand appropriate matters to any  
2 administrative or executive body or official with such  
3 direction as it is may deem proper and just.

4 Now that seems awfully broad, so I'm  
5 thinking now, if they want money, they can get the money  
6 from the court of claims. If they want something like  
7 an injunction, they could ask the court of claims, tell  
8 the executive branch to behave the way we think they  
9 have to under the law and there's your authority.

10 MS. SPINELLI: Justice Breyer --

11 JUSTICE BREYER: I'm just quoting. Now  
12 what's -- I want to know the response.

13 MS. SPINELLI: Justice Breyer, you're -- you  
14 are exactly right about what 1491(a)(2) provides, but it  
15 also provides that any such relief can be ordered only  
16 as an incident of and collateral to a judgment of a  
17 claim of which the Court of Federal Claims otherwise has  
18 jurisdiction.

19 JUSTICE BREYER: Well, you want money; that  
20 causes the problem. If you don't want any money, you  
21 don't have a problem. You Just forget about it.

22 MS. SPINELLI: And notwithstanding this  
23 language --

24 JUSTICE BREYER: Yes.

25 MS. SPINELLI: -- the court of claims has

1 continued to hold that it lacks jurisdiction to grant an  
2 equitable pre-liability accounting. All that it can do  
3 is after liability for certain acts of mismanagement has  
4 been proven, calculate damages for those specific acts  
5 of mismanagement. Now --

6 JUSTICE SOTOMAYOR: I'm not sure I  
7 understand. You could not bring in the court of claims  
8 the old money claims, and why? That the government  
9 mismanaged --

10 MS. SPINELLI: Well, two -- two things,  
11 Justice Sotomayor. We believe that the Nation could not  
12 bring the old money claims in the Court of Federal  
13 Claims because it has held repeatedly that it lacks  
14 jurisdiction to grant an equitable accounting. However,  
15 I don't believe the answer to that question matters,  
16 because the issue here is not --

17 JUSTICE SOTOMAYOR: It does, because why  
18 couldn't you simply have said, they owe us that original  
19 extra 10 bucks -- \$10, and we want it? What -- what --

20 MS. SPINELLI: Dividing -- well, it is clear  
21 that the accounting sought in the district court  
22 couldn't have been obtained in the court of claims. And  
23 it made sense to seek the old money as the court of  
24 appeals called it, in conjunction with the accounting,  
25 because the accounting is what should reveal what is

1 missing from the account. And that's the reason, and  
2 not for any manipulative or forum-shopping purpose, that  
3 the Nation split its complaint the way it did.

4 Now to be sure, there is some fuzziness  
5 about the jurisdictional line between the Court of  
6 Federal Claims and the district court. There is no  
7 doubt about that. The Nation did its best to negotiate  
8 that and filed its complaints in good faith. We believe  
9 that that question doesn't need to be addressed by this  
10 Court, because the only question section 1500 asks is  
11 whether the two suits are for or in respect to the same  
12 claim, by which we think it means are they for or in  
13 respect to the same demand for relief. Here --

14 JUSTICE GINSBURG: The government says the  
15 statute is simple. It says you can't have two suits  
16 simultaneously, or you can't when the CFC suit is the --  
17 the second one.

18 And Mr. Yang told me that yes, the  
19 government thinks that in the Casman case there was a  
20 choice, you can sue for reinstatement in the district  
21 court, you can sue for back pay in the claims court, but  
22 you cannot get both. And when Congress realized that  
23 that's what was happening, Congress did not adopt a  
24 two -- didn't bless the two-state -- two court solution.  
25 Congress said, there will be one lawsuit. It will all

1 be in the claims court, and they can grant both the back  
2 pay and the reinstatement.

3 So the two-suit approach was rejected, I  
4 guess, in -- in Congress's response to Casman.

5 MS. SPINELLI: With respect,  
6 Justice Ginsburg, I would disagree. I think that action  
7 by Congress in the 1972 Remand Act strongly supports the  
8 conclusion that Congress has implicitly acquiesced in  
9 this construction of section 1500.

10 Congress -- you are right, Congress decided  
11 not to say go ahead with your two suits in two different  
12 courts. It thought that was too burdensome for the  
13 plaintiff; rather it amended the Tucker Act to permit  
14 the plaintiff to pursue both remedies in the Court of  
15 Federal Claims. But that shows that Congress was well  
16 aware of the Casman holding, and it did not make any  
17 change to the statute to cast the holding into doubt,  
18 that where two remedies are available in two different  
19 courts, one can pursue them by bringing simultaneous  
20 suits in the two different courts.

21 All that it did is make it easier for  
22 plaintiffs in that specific situation to get full  
23 relief. Beyond that, in 1982 --

24 JUSTICE SCALIA: Well, excuse me, it didn't  
25 make it easier. You -- you had to bring them both in

1 the court of claims, no? You didn't still have the  
2 option of -- of still bringing two different suits, did  
3 you?

4 MS. SPINELLI: No, I think after -- after  
5 the amendment --

6 JUSTICE SCALIA: You had to go to the court  
7 of claims.

8 MS. SPINELLI: Yes. I mean, other --  
9 otherwise that would raise a claim-splitting problem.

10 JUSTICE SCALIA: No, but if they were just  
11 making it easier, they -- they would have said, you  
12 know, you can do either one.

13 MS. SPINELLI: Well, I mean, clearly the  
14 easier path is to have one suit. I don't think any  
15 plaintiff wants to be forced to bring two suits to  
16 obtain two different remedies, both of which it needs,  
17 at double the expense and, you know, double the anxiety.

18 But I think what's significant about the  
19 1972 action is that Congress did absolutely nothing to  
20 suggest that it disagreed with the Casman holding. And  
21 the same is true in 1982, when Congress completely  
22 revamped the entire jurisdictional scheme, changed the  
23 jurisdiction of the claims court very much, and yet left  
24 section 1500 entirely untouched. And that makes sense.  
25 I mean, just to turn to the text for a minute, the key

1 word, as I think this Court said in Keene, is the word  
2 "claim."

3 "Claim" can mean a lot of different things.  
4 It can sometimes mean the set of operative facts from  
5 which a right to relief arises, which I believe is at  
6 least implicitly what the government is saying. It can  
7 also mean a demand for relief; for instance, in this  
8 Court's cases regarding Article 3 standing, it's  
9 routinely said that plaintiff has to establish standing  
10 separately for each claim, which means for each form of  
11 relief sought.

12 The reason that is the correct reading of  
13 section 1500 is because of the nature of the  
14 jurisdictional scheme. The Court of Federal Claims has  
15 always been a court of limited jurisdiction. It can  
16 only grant certain remedies, primarily money damages.  
17 And the word "claim" in the Tucker Act and its  
18 predecessors, from the very beginning, prior to the  
19 enactment of section 1500, has been read by this Court  
20 to mean a demand for relief.

21 JUSTICE GINSBURG: That would be  
22 inconsistent with the definition of "claim" in the  
23 federal rules, I think.

24 MS. SPINELLI: Yes, I think the definition  
25 of "claim" in the federal rules -- I think that's a



1 different definition of "claim." I think what we have  
2 here is a narrower definition that was first established  
3 in the 19th century through this Court's decisions  
4 construing the Tucker Act and its predecessors.

5           Given that the word "claim" in the Tucker  
6 Act carries that narrow meaning, it certainly makes  
7 sense to construe the word "claim" in section 1500 as  
8 having the same meaning.

9           JUSTICE SCALIA: If you give it that narrow  
10 meaning, however, the government says you are  
11 contradicting what was the case with regard to the  
12 cotton suits. That, in fact, some of them were asking  
13 for funds from this -- money from this common fund, and  
14 others were seeking relief against the individuals who  
15 had taken the cotton or replanted the cotton. Those are  
16 different claims, as you define "claim," anyway.

17           MS. SPINELLI: I don't think that is our  
18 definition of "claim," but let me explain.

19           We don't dispute that certain cotton  
20 claimants, you know, brought writs of conversion of  
21 trespass. Some may have brought writs of replevin or  
22 detinue seeking the cotton itself back. The relevant  
23 fact is that the suit saying "I want my 100 bales of  
24 cotton back" and the suit saying "I would like money to  
25 compensate me for my loss of 100 bales of cotton" seek

1 duplicative relief. And --

2 JUSTICE SCALIA: That is different from the  
3 word "claim." I mean, if you are hanging the whole  
4 thing on the word "claim," you gave me a very plausible  
5 alternate definition of "claim." But your case does not  
6 follow that. Your case hinges on duplicative relief,  
7 which is something quite different. I don't know any  
8 definition of "claim" that is synonymous with  
9 duplicative relief.

10 MS. SPINELLI: The word "claim" in section  
11 1500 refers to claims over which the Court of Federal  
12 Claims has jurisdiction, just as it does in the Tucker  
13 Act. There is no express limitation in the Tucker Act  
14 on the relief that can be granted. The word "claim" has  
15 been read implicitly to incorporate a limitation on the  
16 kind of relief that can be granted.

17 Therefore, in section 1500, a suit for or in  
18 respect to a claim in the Court of Federal Claims must  
19 mean a suit for or in respect to a demand for relief  
20 that the Court of Claims can grant, and where  
21 duplicative relief is being sought, that falls within  
22 the language of the statute. It falls within the  
23 overall jurisdictional scheme which directs plaintiffs  
24 to bring suits for different relief in different courts,  
25 and it also appears with cotton claimants.

1           The cotton claimants were seeking  
2   duplicative relief, and that's the concern that Congress  
3   aimed at. Congress was not faced in 1868 with a  
4   situation in which plaintiffs had been directed to seek  
5   different non-duplicative remedies, remedies that  
6   weren't substitutes for one another but complimented one  
7   another in two different courts.

8           JUSTICE BREYER: I had under the impression  
9   that sometimes they sued for some money out of a fund,  
10   which would have been partial, and other times they sued  
11   for the value of the cotton, and other times they sued  
12   for the cotton itself, which in certain circumstances  
13   could have been worth a lot more. By the time of suit,  
14   it went up. I mean, do we know it was always  
15   duplicative in those cotton suits?

16           MS. SPINELLI: I believe we do know it was  
17   always duplicative, notwithstanding the fact that the  
18   amount that one might recover might differ.

19           JUSTICE BREYER: Well, if the amount  
20   differs, then, why do you suppose the cotton belonged to  
21   the Indian Tribe? On the one hand, they want an  
22   accounting out of the money ever earned out of this  
23   cotton in the past and on the other hand, they want what  
24   the cotton is worth in the future on the --

25           MS. SPINELLI: That is not --

1 JUSTICE BREYER: That's Justice Scalia's  
2 question.

3 MS. SPINELLI: That is not duplicative.  
4 What is duplicative is a remedy that is either the same,  
5 or a remedy that serves as a substitute for another  
6 remedy. And what this Court has said, though, is that  
7 even if it's not a completely full substitute -- even  
8 if, say, the damages sought in one court are less than  
9 the damages sought in another -- if they are duplicative  
10 relief for the same injury, they are barred by section  
11 1500. And I think that is completely consistent with  
12 the holding in Keene.

13 In Keene, the plaintiff was bringing  
14 multiple suits against the United States in different  
15 courts for duplicative relief, money, and compensation  
16 for funds it had paid out to asbestos claimants. And  
17 notwithstanding the fact that it brought some of those  
18 suits on a contract theory and some of those suits on an  
19 equitable tort theory of indemnification, the statute  
20 barred those. But Keene was not faced with a situation  
21 in which the plaintiffs were forced, as in Casman, to  
22 proceed in two different courts to obtain different  
23 relief.

24 And another particularly good example is an  
25 example of a regulatory taking suit, in which if a

1 plaintiff wants to challenge the legality of government  
2 regulation affecting his property, he needs to do that  
3 in the district court under the APA. And according to  
4 the government, he cannot bring a suit for just  
5 compensation in the Court of Federal Claims until that  
6 district court suit is completed and any appeal is  
7 completed and any cert petition is completed, by which  
8 time the six-year statute of limitations on the just  
9 compensation claim may very well have expired.

10 JUSTICE KENNEDY: But in your case -- now,  
11 let's assume the government prevails. You go to the  
12 CFC, and you prevail on everything. You get all the  
13 findings in your favor and so forth. There is some  
14 relief that you don't get.

15 I take it, unless I am missing something,  
16 that you could then, after the CFC suit is finished, go  
17 to district court and say: Now we want this added  
18 protection, this added relief.

19 MS. SPINELLI: The reason --

20 JUSTICE KENNEDY: And the statute wouldn't  
21 have run generally, because if you are seeking the  
22 injunction, it's only latches bars you, and you are not  
23 barred by latches because you couldn't have gone sooner.

24 MS. SPINELLI: There are a couple of reasons  
25 why that doesn't work, Justice Kennedy. First of all,

1 the Nation needs the accounting now. I mean, it's as if  
2 in Casman, Casman had been told, well, you know, first  
3 get reinstated -- I'm sorry -- first get your backpay;  
4 then go get reinstated. He needs his -- the Nation  
5 needs the accounting now, not later. In addition, if it  
6 were the case that the accounting uncovered additional  
7 mismanagement, this statute of limitations, the six-year  
8 statute of limitations might well expire while the  
9 district court suit for an accounting is pending, those  
10 suits tend to last a very long time. Indeed in the  
11 Indian Claims Commission they have been known to last  
12 for up to 50 years. And it would force the Nation to  
13 run the risk of losing its right to damages. We don't  
14 believe that's what Congress had in mind. It doesn't  
15 harmonize Section 1500 with the remainder of the  
16 statutory scheme. It's not mandated by the history of  
17 the statute, and it simply doesn't make sense.

18 Unless there are further questions, we ask  
19 for the judgment be affirmed.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Yang, you have four minutes remaining.

22 REBUTTAL ARGUMENT OF ANTHONY YANG

23 ON BEHALF OF THE PETITIONER

24 MR. YANG: Thank you, Mr. Chief Justice.

25 The Tribe is unable to identify a textual

1 basis for its same relief defense to the court of  
2 federal claims. If it's definition of claim is as  
3 narrow and circumscribed as it defines, it wouldn't  
4 capture the cotton claim. Moreover, putting aside the  
5 definition of claim, the statute applies when there is a  
6 pending suit or process in another court. That is not  
7 only for the claim, but in respect to the claim. That  
8 substantially broadens the statute.

9 Two, there are two problems with the same  
10 relief test that's as a practical matter. In order to  
11 determine whether the same relief is being sought in the  
12 other court, which is the relevant question under their  
13 test, you have to ask, what relief would be sought in  
14 district court. But Rule 54(c) makes clear that the  
15 relief which is available in district court is not  
16 specified by the complaint, it's whatever develops  
17 through the case. So you might not know until the very  
18 end whether duplicative relief is being sought.

19 Secondly, if you are going to limit the  
20 relief that is available in the district court based on  
21 what the court of claims' view is of the district  
22 court's jurisdiction to issue relief, you are inviting  
23 the court of federal claims and the federal circuit to  
24 be opining on the jurisdiction of the district court  
25 under the APA, in very complicated cases which involve

1 questions of Bowen, Utah Wilderness, this is not the way  
2 that you would construe normally a jurisdictional  
3 statute.

4 The specter of 50-year old suits proceeding  
5 simultaneously in the court of federal claims in  
6 district court certainly would have motivated, or spoken  
7 to the Congress that enacted Section 1500's predecessor  
8 in 1868.

9 CHIEF JUSTICE ROBERTS: Do you agree with  
10 your friend that there are differences between the  
11 accounting you can get in the district court and the  
12 accounting you can get in the court of federal claims as  
13 a prelude to monetary damages?

14 MR. YANG: I'm not exactly sure the  
15 differences that they are pointing to. There are  
16 differences in terms of the procedure and what is a  
17 relief. The other you would have to show that there was  
18 some kind of a breach and you get a full kind of  
19 accounting to quantify damages that relate -- in aid of  
20 judgment. But at the end of the day, the example,  
21 losing \$10 and you collect 20 but only debit -- put 10  
22 on the books, that is a claim which is cognizable in the  
23 court of federal claims if they have a money mandating  
24 statute of regulations.

25 JUSTICE SCALIA: They don't even know who



1 has hunting leases and --

2 MR. YANG: That's what discovery -- that's  
3 what discovery is for. The Ak-Chin case, for instance.  
4 33,000 boxes of discovery we have to go through in terms  
5 of a discovery request in the court of federal claims.  
6 This is done -- this is the way cases normally proceed.  
7 They do not proceed on dual tracks where the very  
8 premise of liability in the court of federal claims is  
9 being litigated in district court, or they are seeking  
10 to challenge, you know, an accounting. Accounting  
11 normally would be, you know, here's an account of  
12 your -- your assets, but they're seeking to challenge  
13 it. If you went back to equity, for instance. A  
14 trustee does, as an equitable matter, have a duty to  
15 account when requested. But the cost of the accounting  
16 is taken out of the trust corpus. That's not what is  
17 going on here. They are trying to seek to use the APA  
18 to force something which we don't think is authorized  
19 under statute as a secondary means of discovery for the  
20 same claims that are at issue in the court of federal  
21 claims. That type of duplicative litigation and the  
22 burden on the federal courts is precisely what Section  
23 1500 was intended to prevent against, and in the absence  
24 of a textual basis for the same relief test that the  
25 court of federal claims or federal circuit adopted here

1 I think is fatal to the case.

2 JUSTICE KENNEDY: But the accounting doesn't  
3 come out of the trust corpus if there is misfeasance,  
4 the trustee has to pay the damages for that?

5 MR. YANG: I can't speak to that,  
6 Justice Kennedy, that is possible. I'm just not that  
7 versed in equity jurisprudence to be able to give you a  
8 definitive answer.

9 JUSTICE GINSBURG: What about the Loveladies  
10 situation?

11 MR. YANG: In Loveladies, if I may answer.

12 CHIEF JUSTICE ROBERTS: Sure.

13 MR. YANG: Loveladies involved a district  
14 court claim for a declaration that the action wasn't  
15 taken. The district court taking declaration which was  
16 ultimately disposed of, but at the same time that  
17 Loveladies was seeking does assert a claim for just  
18 compensation in the court of federal claims.

19 CHIEF JUSTICE ROBERTS: Thank you, Mr. Yang,  
20 Ms. Spinelli. The case is submitted.

21 (Whereupon, at 12:05 p.m., the case in the  
22 above-entitled matter was submitted.)

23

24

25

<p><b>A</b></p> <p><b>Abandoned</b> 7:8,8 10:2,2,3 24:1</p> <p><b>ability</b> 10:7</p> <p><b>able</b> 7:16 18:14 18:23 20:1 21:5 50:7</p> <p><b>above-entitled</b> 1:11 50:22</p> <p><b>absence</b> 49:23</p> <p><b>absolutely</b> 39:19</p> <p><b>abstract</b> 26:2</p> <p><b>account</b> 14:3 17:16 33:17,22 37:1 49:11,15</p> <p><b>accounting</b> 10:18 10:25 11:4,12 11:16,22 12:1,5 12:8 13:14,16 13:24 14:1,17 17:20 27:12,13 27:19 28:14,15 28:15,19,23 29:11,17,18,21 29:24 30:1,4,5 30:8,10,17 31:3 31:22 33:20 36:2,14,21,24 36:25 43:22 46:1,5,6,9 48:11,12,19 49:10,10,15 50:2</p> <p><b>accountings</b> 30:24 32:11</p> <p><b>accounts</b> 13:7,18 16:22 33:20</p> <p><b>achieve</b> 21:15</p> <p><b>acquiesced</b> 38:8</p> <p><b>act</b> 7:9 10:3,3 17:17 22:20 24:1 25:19 29:9 30:25 32:8 34:25 38:7,13</p>	<p>40:17 41:4,6 42:13,13</p> <p><b>acted</b> 33:24</p> <p><b>acting</b> 22:20</p> <p><b>action</b> 12:16 13:2 21:9 24:6 32:3 38:6 39:19 50:14</p> <p><b>actions</b> 21:10 22:11</p> <p><b>acts</b> 36:3,4</p> <p><b>add</b> 13:17</p> <p><b>added</b> 45:17,18</p> <p><b>addition</b> 46:5</p> <p><b>additional</b> 46:6</p> <p><b>address</b> 22:12</p> <p><b>addressed</b> 13:13 15:2 23:8 37:9</p> <p><b>administrative</b> 4:24 21:10 25:19 30:25 35:2</p> <p><b>adopt</b> 37:23</p> <p><b>adopted</b> 49:25</p> <p><b>Affairs</b> 20:14</p> <p><b>affirmed</b> 46:19</p> <p><b>afield</b> 31:24</p> <p><b>agency</b> 13:2,2</p> <p><b>agent</b> 9:1 10:1</p> <p><b>agents</b> 4:6 22:20</p> <p><b>age-old</b> 13:4</p> <p><b>ago</b> 13:5</p> <p><b>agree</b> 21:14 48:9</p> <p><b>ahead</b> 38:11</p> <p><b>aid</b> 30:8 48:19</p> <p><b>aimed</b> 43:3</p> <p><b>Ak-Chin</b> 18:4 49:3</p> <p><b>allegation</b> 17:24</p> <p><b>allegations</b> 12:4</p> <p><b>alleges</b> 11:5 14:23</p> <p><b>allocated</b> 17:15</p> <p><b>allows</b> 31:2</p>	<p><b>alternate</b> 42:5</p> <p><b>amended</b> 38:13</p> <p><b>amendment</b> 19:16 39:5</p> <p><b>amount</b> 17:21 43:18,19</p> <p><b>Anderson</b> 5:10</p> <p><b>answer</b> 9:16 36:15 50:8,11</p> <p><b>ANTHONY</b> 1:15 2:3,9 3:7 46:22</p> <p><b>anxiety</b> 39:17</p> <p><b>anyway</b> 25:22 26:20 31:18 41:16</p> <p><b>APA</b> 18:7 21:6,8 21:9 26:21 31:4 31:7,10 32:6 45:3 47:25 49:17</p> <p><b>apart</b> 28:24</p> <p><b>APA-type-like</b> 12:20</p> <p><b>APCA</b> 7:9 8:1,18</p> <p><b>apologize</b> 34:22</p> <p><b>apparent</b> 20:4</p> <p><b>appeal</b> 21:9 45:6</p> <p><b>appealed</b> 30:14</p> <p><b>appeals</b> 36:24</p> <p><b>APPEARANC...</b> 1:14</p> <p><b>appears</b> 42:25</p> <p><b>appendix</b> 11:16 18:4</p> <p><b>apple</b> 23:4</p> <p><b>applies</b> 3:18 22:17 47:5</p> <p><b>apply</b> 19:23</p> <p><b>approach</b> 38:3</p> <p><b>appropriate</b> 11:23 33:21 35:1</p> <p><b>appropriations</b> 6:10</p>	<p><b>archives</b> 18:6</p> <p><b>argument</b> 1:12 2:2,5,8 3:4,7 24:19 25:1,17 46:22</p> <p><b>arises</b> 40:5</p> <p><b>arising</b> 6:16 10:14</p> <p><b>Article</b> 40:8</p> <p><b>asbestos</b> 44:16</p> <p><b>aside</b> 9:19 47:4</p> <p><b>asked</b> 9:4</p> <p><b>asking</b> 10:18 32:17,23 41:12</p> <p><b>asks</b> 37:10</p> <p><b>assert</b> 11:12 14:24 50:17</p> <p><b>asserted</b> 31:6</p> <p><b>asserting</b> 15:6</p> <p><b>asserts</b> 15:17 33:5</p> <p><b>assets</b> 29:10 32:19 49:12</p> <p><b>Assistant</b> 1:15</p> <p><b>assume</b> 45:11</p> <p><b>assumes</b> 25:12 25:17</p> <p><b>Assuming</b> 9:16</p> <p><b>auction</b> 7:11</p> <p><b>August</b> 5:13</p> <p><b>authority</b> 6:6 14:7 16:11 35:9</p> <p><b>authorization</b> 5:7</p> <p><b>authorized</b> 49:18</p> <p><b>available</b> 22:5 23:25 25:7,18 30:25 33:21 38:18 47:15,20</p> <p><b>aware</b> 38:16</p> <p><b>awfully</b> 35:4</p> <p><b>a.m</b> 1:13 3:2</p> <hr/> <p><b>B</b></p> <hr/> <p><b>back</b> 11:14,15 13:17,20 14:5</p>	<p>17:24 19:13,18 37:21 38:1 41:22,24 49:13</p> <p><b>backpay</b> 46:3</p> <p><b>backward</b> 14:20</p> <p><b>bad</b> 10:20 20:12 21:3</p> <p><b>balances</b> 11:8</p> <p><b>bales</b> 41:23,25</p> <p><b>bank</b> 13:17</p> <p><b>banks</b> 14:8</p> <p><b>bar</b> 3:17 15:5</p> <p><b>barred</b> 44:10,20 45:23</p> <p><b>barring</b> 25:13</p> <p><b>bars</b> 3:23 45:22</p> <p><b>based</b> 3:14 47:20</p> <p><b>basic</b> 20:11,13 29:1</p> <p><b>basis</b> 11:12 12:14 31:1 47:1 49:24</p> <p><b>beginning</b> 40:18</p> <p><b>behalf</b> 1:16,18 2:4,7,10 3:8 24:20 46:23</p> <p><b>behave</b> 35:8</p> <p><b>believe</b> 26:7 27:2 36:11,15 37:8 40:5 43:16 46:14</p> <p><b>belonged</b> 43:20</p> <p><b>belonging</b> 33:15</p> <p><b>bench</b> 28:8</p> <p><b>beneficiaries</b> 32:10</p> <p><b>beneficiary</b> 27:14,15 30:12 30:21,22</p> <p><b>benefit</b> 28:24</p> <p><b>best</b> 25:2 29:11 37:7</p> <p><b>Beyond</b> 38:23</p> <p><b>big</b> 19:8</p>
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