No. 15-_____

IN THE
Supreme Court of the United States

RESOURCE INVESTMENTS, INC., LAND RECOVERY, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 1500 of Title 28 bars the Court of Federal Claims from asserting jurisdiction over "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." In *United States v. Tohono O'odham Nation*, 563 U.S. 307, 317 (2011), this Court held that, for the purposes of § 1500, "[t]wo suits are for or in respect to the same claim, precluding jurisdiction in the [Court of Federal Claims], if they are based on substantially the same operative facts, regardless of the relief sought in each suit."

The questions presented are:

1. Whether the Federal Circuit impermissibly broadened the scope of § 1500's jurisdictional bar and deviated from settled precedent when it construed this Court's straightforward "substantially the same operative facts" standard to mean "arising out of the same transaction."

2. Whether, in the absence of clear congressional intent to bar constitutional claims, § 1500 should be construed to preclude Fifth Amendment takings claims and, if so, whether such an interpretation would be unconstitutional.

CORPORATE DISCLOSURE STATEMENT

Neither Resource Investments Inc. nor Land Resources Inc. has a parent company. No publicly held company owns 10% or more of either entity's stock.

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OPINIONS AND ORDERS BELOW

The opinion of the court of appeals is reported at 785 F.3d 660 (Fed. Cir. 2015) and is reprinted at Pet. App.[1] 1a-20a. The order of the Court of Federal Claims dismissing for lack of subject-matter jurisdiction is reported at 114 Fed. Cl. 639 (2014), and is reprinted at Pet. App. 21a-57a.

JURISDICTION

The court of appeals entered judgment on May 12, 2015, Pet. App. 1a-20a, and denied a timely petition for rehearing en banc on August 18, 2015, Pet. App. 57a-58a. On October 8, 2015, Chief Justice Roberts entered an order extending the time in which to file a petition for a writ of certiorari until December 16, 2015. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution and 28 U.S.C. § 1500.

The Fifth Amendment provides, in pertinent part, "nor shall private property be taken for public use, without just compensation."

28 U.S.C. § 1500 provides:

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[1] The appendix to this petition is cited as "Pet. App." The Joint Appendix filed in the Court of Appeals is cited as "C.A." and the Request for Judicial Notice as "RJN."

> 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.

Congress enacted the original version of § 1500 to curb duplicate legal actions brought by residents of the Confederacy following the Civil War. *United States v. Tohono O'odham Nation*, 563 U.S. 307, 311 (2011). As this Court explained in *Tohono*: "The so-called 'cotton claimants'—named for their suits to recover for cotton taken by the Federal Government—sued the United States in the Court of Claims under the Abandoned Property Collection Act, 12 Stat. 820, while at the same time suing federal officials in other courts, seeking relief under tort law for the same alleged actions." *Id*. at 311-12.

STATEMENT OF THE CASE

In the early 1980s, Pierce County, Washington was struggling with its waste disposal needs. C.A. 25. To address the problem, the County reached out to Petitioner Land Recovery, Inc. ("LRI")—a waste management company that has served Pierce County and the South Puget Sound area for decades—asking it to develop a state-of-the-art waste disposal

facility. C.A. 25, 70, 281-82. In response, Petitioners[2] undertook an extensive investigation for a site that would have minimal environmental impacts while allowing for development of a landfill that would serve the needs of the community. Pet. App. 25a; C.A. 25, 101, 281-82. As all experts agreed, including the Washington State Department of Ecology ("WDOE"), the chosen site was ideal due to its uniquely desirable geologic and hydrologic features. C.A. 281-82, 387.

Having acquired the land, Petitioners went about securing all the requisite permits to develop the site. Pet. App. 2a. But before they could finish doing so, the Army Corps of Engineers (the "Corps") interjected itself into the process. C.A. 95. The Corps insisted that Petitioners apply for a federal permit under § 404 of the Clean Water Act ("CWA"), Pet. App. 27a-28a; C.A. 95-96, even though jurisdiction for that permit resided in the Environmental Protection Agency (the "EPA"), which, in accordance with that Act, had delegated its permitting authority to the WDOE. *See Resource Invs., Inc. v. U.S. Army Corps of Eng'rs.*, 151 F.3d 1162, 1168-69 (9th Cir. 1998). After improperly asserting jurisdiction over the project, *id.*, the Corps then took over *six years* to evaluate and ultimately deny the permit application, despite WDOE's prior approval under the same standards. Pet. App. 27a-28a.

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[2] Resource Investments, Inc. purchased the land at issue here and LRI acquired a leasehold interest. C.A. 95. Because the distinction between the roles they played is irrelevant to the issues before the Court, throughout this petition, the two entities are referred to collectively ("Petitioners").

Following the Corps' decision, Petitioners had the right to bring an equitable action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*., challenging the Corps' assertion of jurisdiction as improper and its decisionmaking as legally erroneous and arbitrary and capricious. *Id*. §§ 702, 706. That challenge—seeking injunctive relief—could not, however, be brought in the Court of Federal Claims ("CFC"). Instead, it had to be filed in federal district court. *See Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988) (recognizing that "[t]he Claims Court does not have the general equitable powers of a district court to grant prospective relief").

Because the Corps' permitting decision resulted in either a temporary or a permanent taking of the value of the property, Petitioner also had a right to seek just compensation under the Fifth Amendment. Such a claim—being for more than $10,000—could, in contrast, only be brought in the CFC. 28 U.S.C. § 1491 (the "Tucker Act").[3] But as long as an APA action was pending and the nature of the taking—permanent or temporary—remained uncertain, the CFC would be incapable of assessing the appropriate monetary award.

Accordingly, Petitioners brought an APA action in Federal District Court for the Western District of Washington. C.A. 380. They claimed that the Corps improperly asserted jurisdiction to make a permitting determination and the process employed by the Corps was arbitrary and capricious in numerous re-

[3] *Compare* 28 U.S.C. § 1346(a)(2) (granting district court jurisdiction to hear "claim[s] against the United States, not exceeding $10,000 in amount").

spects. Pet. App. 28a-29a; C.A. 425-86. The district court denied relief and Petitioners appealed to the Ninth Circuit. Pet. App. 4a, 29a.

While the appeal was pending, concerns arose that the six-year statute of limitations, which is not subject to equitable tolling, was approaching for Petitioners' takings claims. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008). Under prevailing law at the time, the pending APA action did not preclude bringing a takings claim in the CFC at the same time. As long as the takings claim was filed within the limitations period, the CFC had jurisdiction under § 1500 because, at a minimum, the relief requested between the two actions differed. *See Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (en banc) (holding that § 1500 does not foreclose actions predicated upon different forms of relief), *overruled, in part, by Tohono*, 563 U.S. 307.

Thus, on May 4, 1998, Petitioners filed a claim for monetary relief in the CFC under 28 U.S.C. § 1491 while their APA action was pending on appeal at the Ninth Circuit.[4] Pet. App. 29a; C.A. 70-92. In the CFC complaint, Petitioners asserted that the Corps' barring Petitioners from developing their land was a taking of property without just compensation in violation of the Fifth Amendment. C.A. 86-92. Petitioners stated their claim as a permanent takings claim, but made clear that if the Ninth Circuit held the Corps acted without jurisdiction, the CFC claim

[4] If the limitations period began to run as of the date Petitioners secured all of the necessary permits, the six years would have soon expired.

would then be for a temporary taking. C.A. 86 ("Even in the event the Corps' action is overturned by the federal courts, plaintiffs have suffered a temporary taking of property which requires compensation.").

Three months after Petitioners filed their CFC complaint, the Ninth Circuit reversed the district court's rejection of the APA claim. *See Resource Invs.*, 151 F.3d at 1169. The court of appeals held that the Corps improperly and unreasonably asserted jurisdiction. *Id.* As Petitioners had argued, the authority rested, not with the Corps, but with the EPA, which had delegated its authority to the State. *Id.* Petitioners had already secured the relevant CWA permit from the WDOE. C.A. 109-11. Therefore, with the Ninth Circuit's repudiation of the Corps' assertion of regulatory power, Petitioners were, finally, able to develop their land and move forward with this important project. *Id.*

The Corps' improper assertion of jurisdiction and blocking of the project approved by the State had, however, deprived Petitioners of the use of their land for *more than a decade*. C.A. 98-100. To recover for that prolonged deprivation, Petitioners continued to diligently pursue their Tucker Act claim in the CFC. *Id.* The case, however, moved at a snail's pace, with five different judges presiding over its 17-year life span. Pet. App. 25a, 31a. The CFC eventually ruled in Petitioners' favor on most summary judgment issues relating to the temporary takings claims with the exceptions of causation and damages, which would have to be resolved at trial. C.A. 361. As those last loose ends were headed for resolution at trial, this Court issued its decision in *Tohono*. 563 U.S. 307.

In *Tohono*, this Court rejected the Federal Circuit's interpretation of § 1500 set out in *Loveladies Harbor, Inc.*, 27 F.3d at 1554, and held instead that two suits "are for or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts, regardless of the relief sought in each suit."[5] 563 US. at 317.

Seizing upon *Tohono* and its rejection of the distinction between claims based on the remedies sought, in 2011, the Government filed a motion to dismiss Petitioners' CFC complaint. C.A. 362. On February 5, 2014, the CFC granted the Government's motion. Pet. App. 21a-56a. Though the CFC expressed serious concerns regarding the modern-day efficacy of § 1500, Pet. App. 22a-24a, it held that (1) Petitioners' APA appeal was pending before the Ninth Circuit at the time they filed their complaint in the CFC and (2) the presence of a single fact—the denial of a permit—operative as to both the APA and CFC takings claims was sufficient to deprive the court of jurisdiction under § 1500. Pet. App. 33a-47a.

The Federal Circuit affirmed. Pet. App. 1a-20a. It suggested that the CFC found two overlapping operative facts relevant to both the APA and takings cases: the denial of the permit and an assertion of

[5] As we discuss below (p. 19), *Tohono* did not involve a constitutional claim—a point the Government readily acknowledged there and was careful to use as a point of differentiation. *See* Reply Brief for the United States, *United States v. Tohono O'odham Nation*, No. 09-846, 2010 WL 4114158, at *16-17 (U.S. Sept. 27, 2010).

"economic injury."[6] Pet. App. 7a. Then, addressing whether the presence of those facts constituted a substantial overlap under *Tohono*, the Federal Circuit explained that it was required to "apply the res judicata test approved by *Tohono*." Pet. App. 9a. The court read *Tohono* as not focusing on substantial overlap, but rather requiring the lower courts to examine whether the CFC action "would have been barred by res judicata," putting aside the fact that res judicata does not generally apply where a litigant is precluded from advancing a particular theory in the first case. Pet. App. 10a.

As for the particular form of the res judicata test it would apply, the court of appeals drew upon the modern transactional test. Pet. App. 12a-13a. That test, the court explained, prohibits any subsequent litigation "with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Pet App. 13a. "Applying th[o]se principles," the court concluded that the facts of the APA claims and the CFC claims "are the same." Pet. App. 16a.

The Federal Circuit rejected Petitioners' argument that the court's failure to abide by *Tohono*'s "substantial overlap" test would deprive the CFC of jurisdiction to hear constitutional claims and improperly deny litigants a forum in which to adjudicate such claims. Pet. App. 18a-19a. The court of appeals responded that there is no such deprivation for constitutional taking claims because litigants can

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[6] As explained below (p. 16 n.11), contrary to the Federal Circuit's characterization, the CFC did not find "economic injury" an overlapping operative fact.

generally side step the negative impact of § 1500 by simply filing in the CFC first. Pet. App. 19a. In so holding, the court relied upon the order-of-filing rule set out in *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965)—a case it characterized as binding precedent notwithstanding that the Federal Circuit sitting en banc previously overruled *Tecon* (though that decision was later vacated by this Court on other grounds). Pet. App. 18a-19a. The court acknowledged, however, that the Government has steadfastly and consistently maintained that *Tecon* was wrongly decided and not good law. Pet. App. 19a n.8.

Petitioners sought rehearing en banc, which was denied. Pet. App. 57a-58a.

REASONS FOR GRANTING THE WRIT

In the last 25 years, this Court has twice addressed the jurisdictional bar set out in 28 U.S.C. § 1500. *Tohono*, 563 U.S. 307; *Keene Corp. v. United States*, 508 U.S. 200 (1993). The statute bars the Court of Federal Claims from asserting "jurisdiction [over] any claim for or in respect to which the plaintiff … has pending in any other court any suit or process against the United States." 28 U.S.C. § 1500. The key question under § 1500 is whether two claims, in simultaneously pending actions, are essentially the same.

This Court has answered that question: Under § 1500, two suits "are for or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts." *Tohono*, 563 U.S. at 317; *see also Keene*, 508 U.S. at

212 & n.6 ("the comparison of the two cases for purposes of possible dismissal would turn on whether the plaintiff's other suit was based on substantially the same operative facts as the Court of Claims action"). In *Tohono*, this Court clarified that the "substantially the same operative facts" test applies "regardless of the relief sought in each suit." 563 U.S. at 317.

Flouting this Court's straightforward standard, mandating an examination for substantial overlap by looking at all of the operative facts, the Federal Circuit embraced a transactional test that inquires whether the cases arise from the same initial transaction. Pet. App. 12a-16a. That is a far broader reading of the statute, which will serve to bar claims, as it did here, even if two cases have little in common except that they share a single seed fact. This misguided expansion of the scope of § 1500's jurisdictional bar is plainly contrary to the rule announced in *Tohono*.

And it is just as sweeping as it is erroneous. The Federal Circuit's unsupported interpretation of § 1500 stands to cut off large swaths of constitutional takings claims. Absent clear Congressional intent, courts should be loath to interpret a statute in a manner that serves to deprive parties of their fundamental, constitutional rights. Plainly, this Court's review is warranted.

I. The Federal Circuit Has Flouted This Court's Test For When Claims Are To Be Deemed The Same Under § 1500, And Improperly Adopted A Much Broader Construction Of This Statutory Jurisdictional Bar.

In *Keene*, this Court reviewed the history of § 1500. The Court recognized that for at least the past 76 years, the basic test for ascertaining whether claims should be considered the same for purposes of § 1500's jurisdictional bar was straightforward: The CFC must examine whether the claim in the suit before it and the claim in another pending action are "based on substantially the same operative facts." *Keene*, 508 U.S. at 212. Though the *Keene* Court embraced the "substantial overlap" test, it did not resolve the question of whether claims could avoid § 1500 by seeking distinct relief. *Id.* In *Tohono*, this Court addressed that question and held that § 1500 is implicated whenever there is substantial overlap of operative facts, irrespective of the relief sought.[7] *Tohono,* 563 U.S. at 317 ("Two suits are for or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts, *regardless of the relief sought in each suit*") (emphasis added).

Following *Tohono*, the CFC's task is now readily apparent. When presented with a case involving claims that are alleged to contain facts similar to those in a pending action, the court must first isolate

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[7] The Federal Circuit first addressed the question in *Loveladies Harbor, Inc.* 27 F.3d at 1554.

the facts deemed "operative" in the two cases. From there, it must determine whether there is overlap between them and, if so, decide whether that overlap is substantial. If so, § 1500 bars jurisdiction, regardless of the relief sought. If not, the CFC has jurisdiction.

There was no lack of clarity to this Court's rulings in *Keene* and *Tohono*. Yet, the Federal Circuit took the Court's decisions as an empty label and, believing (mistakenly) it was doing this Court's bidding, adopted a test that looks to whether the claims arise out of the same transaction. Pet. App. 12a-16a. Under that test, the focus is not on substantial overlap of operative facts; indeed, substantial overlap of operative facts becomes irrelevant. Nor does that approach serve the purposes of § 1500. As this Court explained in *Tohono*, § 1500 was designed to avoid double recovery and redundant factual development—neither of which is served by a test that focuses on minimal overlap. 563 U.S. at 311-12, 314-15. Pulling from modern res judicata principles, the Federal Circuit now looks instead to whether the cases arose from a single seed fact or transaction.[8] Pet. App. 13a.

The Federal Circuit justified its departure from this Court's "substantial overlap of operative facts"

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[8] Even under the Federal Circuit's test, which focused on the denial of the permit, there is no overlap between Petitioners' APA claims and their temporary takings claim based on extraordinary delay because the denial of a permit is not a fact that is operative as to the latter. *See, e.g., Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1352 (Fed. Cir. 2002) ("[A]bsent denial of a permit, only extraordinary delays in the permitting process ripen into a compensable taking.")

test by reading *Tohono* as "approv[ing]" a "rest judicata test." Pet. App. 9a. But this Court did no such thing. To be sure, in holding that the application of § 1500 does not depend on the nature of the relief sought, this Court observed that the doctrines of claim preclusion and res judicata similarly do not turn on the nature of the relief being pursued. *Tohono*, 563 U.S. at 315-16. But the Federal Circuit pulled that collateral observation out of context and read it as a command to employ a broad res judicata standard instead of the "substantial overlap of operative facts" test. Pet. App. 10a. In so holding, the Federal Circuit fundamentally misunderstood this Court's ruling in *Tohono*.

Far from rebuffing the "substantial overlap of operative facts" test, *Tohono* unambiguously embraced it. This Court expressly read *Keene* as adopting the "substantial overlap of operative facts" test: *Keene* "held that two suits are for or in respect to the same claim when they are '*based on substantially the same operative facts* ..., at least if there [is] some overlap in the relief requested.'" *Tohono*, 563 U.S. at 311 (quoting *Keene*, 508 U.S. at 212) (emphasis added); *see also id.* ("[t]he *Keene* case did not decide whether the jurisdictional bar also operates if the suits are based on the *same operative facts* but do not seek overlapping relief.… Either it requires substantial factual and some remedial overlap, or *it requires substantial factual overlap without more*.") (emphasis added). Then this Court unequivocally and repeatedly embraced the same test. *Id.* at 315 ("The conclusion that two suits are for or in respect to the same claim *when they are based on substantially the same operative facts* allows the statute to achieve its

aim.") (emphasis added); *id*. at 317 ("Two suits are for or in respect to the same claim, precluding jurisdiction in the CFC, *if they are based on substantially the same operative facts*, regardless of the relief sought in each suit.") (emphasis added).

The effect of this misinterpretation dramatically expands the scope of the jurisdictional bar imposed by § 1500 and threatens to strip property owners of their constitutional rights. This Court's "substantial overlap of operative facts" test is analogous to the approach of analytic dating websites. Those dating sites claim to collect and examine full detailed profiles of their members, and then assess compatibility by finding a substantial overlap of key traits (i.e., operative facts) that are most likely to provide long-term compatibility. Similarly, this Court's test for like claims under § 1500 looks to the totality of legally relevant, "operative" facts as to each claim and examines whether there is a substantial overlap. Under that test, the § 1500 jurisdictional bar does not operate unless there is a true match.

In contrast, the Federal Circuit's approach finds a "match" whenever the two cases arise from one shared, initial operative fact. In the dating website analogy, that would be similar to pairing two people up simply because they are both from California. The residing-in-the-same-state standard plainly will make exponentially more matches when employed to the exclusion of all other factors. Maybe some will find love, but most will be as incompatible as night and day. For instance, some may be Giants fans, others Dodgers fans. Some may prefer the urban bustle of LA or San Francisco whereas others may enjoy the more mellow confines of Arcata or the

beaches of Sausalito. And what of religious or political beliefs? They could be dealbreakers before two people ever meet. The point is the mere fact two individuals are from the same state is a common seed fact, but it is no substitute for the more rigorous analysis required to determine if there is a substantial overlap of operative facts. It is only after engaging in a detailed comparison of *all* the prospective couples' key operative attributes that a likely match can be identified.

The context presented by this case is illustrative of the difference in the standards. APA claims and constitutional takings claims will often, as here, involve few shared operative facts.[9] *See Klamath Irrigation Dist. v. United States*, 113 Fed. Cl. 688, 710 (2013) (finding takings claims had "little in common" with the allegedly corresponding APA claims). The former focused on the scope of the Corps' jurisdiction and the improper procedures employed while adjudicating Petitioners' application,[10] RJN 27-74, while

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[9] In discussing the claimed ongoing significance of § 1500 and the need to save the Government from the cost of redundant litigation, this Court explained: "Developing a factual record is responsible for much of the cost of litigation. Discovery is a conspicuous example, and the preparation and examination of witnesses at trial is another." *Tohono*, 563 U.S. at 315. There is no concern with duplicative discovery here. The APA action in this case was relegated to a relatively slim administrative record while the CFC takings action required lengthy and broad discovery outside the administrative record including production of over 100,000 documents, 50 depositions and over a dozen expert reports.

[10] At the time Plaintiffs filed their CFC complaint, their district court action was pending before the Ninth Circuit. Accordingly, the relevant pleading from the APA action to be

the latter inquired as to the economic impact flowing from Petitioners' deprivation.[11] C.A. 94-126. Because there will rarely be substantial overlap of the operative facts, under this Court's approach, such claims will not generally be considered the same for the purposes of § 1500. Under the Federal Circuit's far more expansive transactional test, however, such claims will typically be deemed the same simply because they arose from a common fact. As we discuss below, that broad reading of the statute will have the effect of barring adjudication of numerous constitutional takings claims.

This Court's precedent is clear and its test straightforward. The Federal Circuit's dramatic and unwarranted deviation from this Court's test requires the Court's intervention and correction.

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used for § 1500 comparison purposes is the opening brief submitted at the Ninth Circuit, which was attached to Plaintiffs' Request for Judicial Notice filed below.

[11] Though the Federal Circuit characterized the CFC as finding both the denial of the permit and "economic injury" to be overlapping operative facts, Pet. App. 7a, the CFC did not identify the latter. In fact, in its reconsideration order, the court expressly recognized that the denial of the permit was the sole operative fact it seized upon. C.A. 42. In any event, any assertion that "economic injury" was present in both actions simply establishes that Petitioners had standing to sue in both cases. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000) (standing requires a showing of a particularized and concrete injury). If that "shared" fact were sufficient to trigger the statutory jurisdictional bar, then the limits set by this Court would have no meaning.

II. Section 1500 Should Not Be Read To Bar Adjudication Of Constitutional Takings Claims.

At issue in *Tohono* were suits seeking redress of breaches of trust by the United States concerning the management and accounting of the Tohono O'odham Nation's assets. 563 U.S. at 309. In contrast with a takings claim, those damages were "available by grace and not by right." *Id.* at 317. In opposing the Government's interpretation of § 1500, the Respondent and amici in *Tohono* identified as a grave concern the impact a ruling for the Government would have on property owners who suffer a regulatory taking. Brief for Respondent, *United States v. Tohono O'odham Nation*, No. 09-846, 2010 WL 3426284, at *15, *33 (U.S. Aug. 27, 2010); Brief of the Nat'l Ass'n of Home Builders As Amicus Curiae in Support of the Respondent, *United States v. Tohono O'odham Nation*, No. 09-846, 2010 WL 3501192 at *7-24 (U.S. Sept. 3, 2010). The Government sought to quash those concerns by explaining that the Court "need not decide here whether an appropriately tailored APA action seeking to set aside agency action would preclude a simultaneous claim for just compensation in the CFC." Reply Brief of the United States, *United States v. Tohono O'odham Nation*, 09-846, 2010 WL 4114158, at *16-17 (U.S. Sept. 27, 2010). And so the Court did just that: declined to address the issue. That question left open in *Tohono* is now squarely presented here. Certiorari is warranted to address it.

A. Constitutional claims are different.

Whether Congress may deprive the Judiciary of the power to adjudicate a constitutional claim raises difficult and foundational questions under Article III. *See generally* Richard H. Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and the Federal System* 300-03, 308-14 (6th ed. 2009). To that end, this Court has long expressed a strong preference for avoiding "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim" by "requir[ing] [a] heightened showing." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen v. Mich. Acad. of Physicians*, 476 U.S. 667, 681, n.12 (1986)). Thus, this Court has consistently held that absent "clear" evidence of Congressional intent, courts should not read statutes to "preclude judicial review of constitutional claims." *Id.*

As in *Webster*, § 1500 should not be read to apply to constitutional claims. The statute at issue in *Webster* broadly precluded judicial review of certain CIA employment decisions. *Id.* Because there was no indication Congress intended to curtail judicial review of constitutional rights, however, the statute was construed to exclude substantial constitutional claims. *Id.* The same rationale applies to § 1500. It speaks to claims in general, but does not express a clear intent to bar constitutional claims. Therefore, it should not be construed to bar substantial constitutional claims, such as those presented here.

Johnson v. Robison, 415 U.S. 361, 367 (1974), further supports reading § 1500 to exclude substantial

constitutional claims. There, Congress enacted a provision barring judicial review of Veterans' Administration "decisions … on any question of law or fact." *Id.* Finding no clear legislative intent to "preclude judicial cognizance of constitutional challenges to veterans' benefits legislation," this Court concluded that the statutory prohibition did not extend to constitutional questions. *Id.* at 373-74; *see also Bowen*, 476 U.S. at 680-81 & 681 n.12 (same as to constitutional claims arising under the Medicare program). Likewise, § 1500 does not manifest the requisite clear intent to bar constitutional claims.

Indeed, in *Tohono* itself, the Government acknowledged that where constitutional rights are at stake, the inquiry requires a much different calculus. Specifically, the Government explained that were a takings claim at issue, that

> would raise a number of issues, not presented in this case, concerning, *inter alia*, Section 1500's application to money-mandating constitutional claims in the CFC when the underlying agency action may be set aside.

Reply Brief of the United States, *United States v. Tohono O'odham Nation*, 09-846, 2010 WL 4114158, at *17 (U.S. Sept. 27, 2010).

Notwithstanding that this case *does* involve the very constitutional claims identified by the Government in *Tohono*, the Federal Circuit swept past these issues by adopting an exceedingly broad reading of § 1500 that bars adjudication of constitutional takings claims—in this case and every takings case where there is overlap of a single seed fact with an

APA action brought by the plaintiff to redress a regulatory wrong. This Court should grant review to examine the propriety of applying § 1500 to bar judicial review of constitutional claims.

B. The Federal Circuit's holding serves to deprive property owners of their Fifth Amendment right to just compensation.

Section 1500 has been frequently described as a "trap for the unwary." *d'Abrera v. United States*, 78 Fed. Cl. 51, 56 n.10 (2007).[12] The Federal Circuit's broad reading of § 1500 would transform the statute from a trap, which can perhaps be sidestepped by a careful practitioner, to a chasm that cannot be avoided or escaped. The Federal Circuit's approach will, as a practical matter, strip numerous property owners of their Fifth Amendment right to just compensation.

Even before the Federal Circuit's ruling here, Judge Taranto detailed the ways in which the intersection of the applicable jurisdictional and limitations rules create a perfect storm that threatens to bar relief for constitutional taking claims:

> The combination of three statutes—(1) § 1500 as construed in *Tohono*; (2) the Tucker Act's six-year statute of limita-

[12] Moreover, this arcane statute serves little to no useful purpose today. As Judge Plager explained: "Due to the evolving law of pleading and jurisdiction, including doctrines such as res judicata and collateral estoppel, § 1500 has long outlived its purpose…." *Griffin v. United States*, 621 F.3d 1363, 1364-65 (Fed. Cir. 2010) (Plager, J., dissenting from denial of rehearing en banc).

> tions, 28 U.S.C. § 2501, which is jurisdictional and not subject to general equitable tolling; and (3) the Little Tucker Act's $10,000 cap on just-compensation claims in district courts, 28 U.S.C. § 1346(a)(2)—threatens to deprive [property owners] of the opportunity to secure complete relief for what [would] be a taking of its property.

Ministerio Roca Solida v. United States, 778 F.3d 1351, 1357 (Fed. Cir.) (Taranto, J., concurring), *cert. denied*, No. 14-1413, 2015 WL 2473106 (U.S. Nov. 9, 2015); *see also Tohono*, 563 U.S. at 323-24 (Sotomayor, J., concurring) (identifying same conundrum regarding impact of the *Tohono* decision). The import of the concerns identified by Judge Taranto is multiplied exponentially by the court of appeals' ruling here, which vastly expands when claims are to be considered the same for purposes of § 1500. If the Federal Circuit's interpretation is allowed to stand, property owners subject to a regulatory taking will often be precluded from pursuing constitutional claims for just compensation if they are for more than $10,000.

Before seeking just compensation for a taking of property valued at more than $10,000 under the Tucker Act, an aggrieved property owner often must first pursue a separate action, which cannot be heard in the CFC. For example, as in the present case, a property owner is required to establish his property interest in the land or to stem the underlying taking by challenging the governmental action that effected it through an APA action. *See Klamath*, 113 Fed. Cl. at 700-02 & 701 n.32 (discussing what

has been termed the "Tucker Act Shuffle"). That predicate APA action, however, must be brought in district court because the CFC "cannot grant non-monetary equitable relief such as an injunction [or] a declaratory judgment." *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1294 (Fed. Cir. 1999). Here, for example, it was only upon the conclusion of Petitioners' APA proceedings that the theory of their takings claim (permanent or temporary) could become clear, such that their Tucker Act claim could be adjudicated.

Of course, the takings claim for just compensation over $10,000 must be brought in the CFC under the Tucker Act. That claim must be filed within the applicable six-year limitations period, 28 U.S.C. § 2501, which this Court has held is not subject to equitable tolling. *See John R. Sand*, 552 U.S. 130. So awaiting the conclusion of the district court action, and any related appeals, to bring a Tucker Act claim frequently is not an option.

The Federal Circuit's holding here extending *Tohono* to the takings claims arising from the same transaction as the APA claims puts property owners to an untenable choice "between securing judicial just compensation for a taking of property and pursuing constitutional and other legal claims that challenge, and if successful could reverse, the underlying action alleged to constitute a taking." *Ministerio Roca Solida*, 778 F.3d at 1360 (Taranto, J., concurring). Either way, they are deprived of their right to adjudication of claims to which they are entitled.

In the former, they are denied the right to pursue their constitutional takings claims. As discussed

above (p. 18), however, because there is no clear congressional intent to deny judicial review of constitutional claims, it is erroneous to read the statute to preclude such claims. And barring constitutional takings claims would itself raise serious constitutional issues. *See Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 148-49 (1974) (deprivation of a takings claim under the Tucker Act would "raise serious constitutional questions"); *Marozsan v. United States*, 852 F.2d 1469, 1477-78 (7th Cir. 1988) (en banc) ("it would be surprising and profoundly troubling if federal courts had no jurisdiction to consider whether a federal agency violated the Constitution"); *Bartlett v. Bowen*, 816 F.2d 695, 705 (D.C. Cir. 1987), *opinion reinstated by,* 824 F.2d 1240 (D.C. Cir. 1987) ("most scholars agree that 'under the due process clause of the fifth amendment Congress may not exercise Article III power over the jurisdiction of the [federal] courts in order to deprive a party of a right created by the Constitution'").

In the latter, the property owner is deprived of his APA claim, which is problematic in its own right. *Pennsylvania R.R. Co. v. United States*, 363 U.S. 202, 205 (1960) (requiring Claims Court to stay proceedings pending adjudication of claim in district court because "the Railroad was entitled to have this Commission order judicially reviewed").[13] For exam-

[13] Moreover, APA claims often include a constitutional component, such as a due process or equal protection based claim. *See, e.g.*, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-74 (2001) (considering, in an APA action against the Army Corps of Engineers, whether agency action would be unconstitutional, and applying the doctrine of constitutional avoidance).

ple, here, absent the APA action, the Corps' wholly improper assertion of jurisdiction over the CWA permit would have been left unchallenged. Denial of the right to overturn such a clearly unlawful and baseless exercise of agency authority would be wholly untenable. *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803) ("[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws."); *see also United States v. Nourse*, 34 U.S. (1 Pet.) 8, 28-29 (1835).

In short, under the Federal Circuit's reasoning here, where a property owner who is subjected to a regulatory taking pursues his "constitutional and other claims for relief in district court—claims that it cannot bring and consolidate in the Court of Federal Claims—the combination of § 1500, § 2501, and § 1346(a)(2), under the governing general standards and considered by themselves," improperly operates to eliminate his "access to a judicial forum for obtaining just compensation for what may be a taking." *Ministerio Roca Solida*, 778 F.3d at 1359 (Taranto, J., concurring).

Not only does this run headlong into *Webster* and the doctrine of constitutional avoidance, subjecting property owners to the untenable choice between pursuing their takings claims (within the governing statute of limitations period) or advancing an APA action, it also runs afoul of the unconstitutional conditions doctrine. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). "[T]he government may not deny a benefit to a person because he exercises a constitutional right." *Id.* (quoting *Regan v. Taxation With Representation of Wash.*,

461 U.S. 540, 545 (1983)). Nor may the Government do the converse: coerce him "into giving … up" his constitutional right so that he may pursue an APA action to reacquire his land. *Id.* No matter how the issue is framed, it poses serious constitutional problems that both support rejection of the Federal Circuit's overly expansive transactional test, and, more broadly, a construction of the statute that does not bar jurisdiction over constitutional claims.

C. *Tecon* is no answer.

In response to the concerns raised by Judge Taranto and to Petitioners' argument that there was no clear congressional intent to bar constitutional claims, the court of appeals said that the asserted constitutional dilemma is nothing but a mirage. The court explained that a plaintiff could always protect his constitutional claim by filing it first in the CFC. Citing *Tecon Engineers, Inc.*, 343 F.2d 943, the court said that even when claims are otherwise exactly the same, the claims do not implicate § 1500 if the CFC case is filed before the identical case is filed in another court. Pet. App. 18a-19a.

The Federal Circuit's invocation of *Tecon*'s order-of-filing rule is a thin reed to stand on given its status as the three-dollar bill of precedents—not worth the paper it is printed on. Indeed, just a few years before Petitioners filed their district court complaint, the Federal Circuit sitting en banc expressly overruled *Tecon*. *See UNR Indus., Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992). While that portion of the en banc ruling was later set aside on other grounds, *see Keene*, 508 U.S. at 216, the en banc

court's rationale for overruling *Tecon*, *see UNR*, 962 F.2d at 1023 (*Tecon* is "an aberrational case which stands astride the path to a proper interpretation of section 1500"), has never been repudiated by this Court or the court of appeals. There can be little doubt that *Tecon* is a dead man walking.

Notably, the Government agrees that *Tecon*'s order-of-filing rule is not good law and it has consistently asserted that *Tecon*'s prior overruling in *UNR* should be reinstated. *Ministerio Roca Solida*, 778 F.3d at 1361 n.4 (Taranto, J., concurring) ("The government has argued that Tecon's order-of-filing rule is no longer good law…. "); *see also* Brief for the Petitioner, *United States v. Tohono O'odham Nation*, No. 09-846, 2010 WL 2662746, at *37 (U.S. July 1, 2010) (asserting that the "order-of-filing rule is incorrect"). And, members of the Federal Circuit remain committed to that view. *See, e.g., Brandt v. United States*, 710 F.3d 1369, 1382 (Fed. Cir. 2013) (Prost, J., concurring) ("We should take this opportunity to overrule *Tecon* and finally dispense with the ill-conceived order-of-filing rule.").

Accordingly, no reasonable litigant would sensibly rely on the *Tecon* order-of-filing exception as the salvation for his constitutional claim.[14] The panel's

[14] Moreover, at the time Petitioners filed their APA claim, there was a pressing need for injunctive relief and the path Petitioners sensibly followed—seeking that equitable relief in the district court first—was amply supported by existing law. *See Loveladies Harbor, Inc.*, 27 F.3d at 1554 (§ 1500 does not foreclose actions predicated upon different forms of relief). Any suggestion by the court of appeals that after the APA litigation was complete Petitioners should have dismissed their CFC action and refiled is unfounded and disregards the risk that the

suggestion that its reading of § 1500 does not sacrifice those rights is simply a fiction. By all accounts, the constitutional life raft identified by the Federal Circuit has little buoyancy.

III. The Questions Presented Are In Urgent Need Of Resolution And This Case Presents An Excellent Vehicle For Resolution.

Since this Court issued its decision in *Tohono*, a veritable landslide of dismissals has ensued. Pet. App. 22a n.1; *see Emily S. Bremer & Jonathan R. Siegel, Clearing the Path to Justice: The Need to Reform 28 U.S.C. § 1500*, 65 Ala. L. Rev. 1, Appendix B (2013) (tracking post-*Tohono* cases). Some cases arguably fall within the heartland of the *Tohono* ruling, particularly those involving virtually identical complaints.[15] Others, such as Petitioners', present

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statute of limitations may have barred the refiled action. Until *Tohono* came down, there was no impetus for Petitioners to dismiss and refile. Indeed, given the law at the time, it would have been inexplicable and irksome to the CFC judge for Petitioners to dismiss and refile, particularly given that the Government had never challenged the court's jurisdiction. And by the time this Court decided *Tohono* and Petitioners learned their claims would be subject to unanticipated scrutiny under § 1500, the statute of limitations had long since expired for the takings claim. Accordingly, it is utter fiction to suggest Petitioners were not involuntarily stripped of their constitutional right to adjudication of their takings claim and instead "chose" to forgo them. Pet. App. 18a-19a.

[15] *See, e.g.*, *Ministerio Roca Solida*, 778 F.3d 1351 (CFC and district complaints both advanced Tucker Act claims); *Cent. Pines Land Co. v. United States*, 697 F.3d 1360, 1365 (Fed. Cir. 2012) (takings claim brought in both CFC action and district court action); *Skokomish Indian Tribe v. United States*, 115 Fed. Cl. 116, 128 (2014) (dismissing takings claim in light

more challenging questions.[16] But with the Federal Circuit's decision here, those similarly situated to Petitioners (whose statutes of limitations have already run and have no options available to them) face the prospect of being denied their constitutional rights. Many already have. And for those whose statutes of limitations have not yet run but soon will, they have to make critical and potentially unforgiving decisions regarding dismissal and refiling of their claims. Those decisions may place considerable stock in *Tecon*, as discussed (pp. 25-27)—an opinion that may be on its last legs. The point is that with each passing day, claims are being defaulted in a host of ways.

Those affected by the Federal Circuit's decision here run the gamut: from individuals and businesses, both large and small, to non-profit organizations and state, county, and municipal governments. Indeed, anyone who needs a federal permit could find himself stuck in the "trap for the unwary," with little understanding as to whether he can challenge the

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of pending APA claim because "[a]ll that differs between them is the nature of the relief requested"); *Omaha Tribe of Neb. v. United States*, 102 Fed. Cl. 377, 382 (2011) ("the two complaints are virtually the same as the complaints at issue in *Tohono*"); *Prairie Band of Potawatomi Indians v. United States*, 101 Fed. Cl. 632, 638 (2011) ("Both suits challenge the same underlying conduct—the government's management failures and breaches of fiduciary duties owed the tribe.")

[16] *See, e.g.*, *Stockton E. Water Dist. v. United States*, 101 Fed. Cl. 352, 358 (2011) (dismissing CFC takings action on account of district court due process claim); *Klamath Irrigation Dist.*, 113 Fed. Cl. at 710 (declining to dismiss where APA and takings claims had minimal overlap of operative facts).

government decision, secure just compensation as a consequence of it, and, if so, what avenues are available for doing so.

This case presents a highly suitable vehicle for offering clarity. The issue was squarely presented and ruled upon below. Pet. App. 1a-20a, 21a-56a. In fact, it was thoroughly discussed by both the CFC and the Federal Circuit. *Id.* Moreover, it meets the criteria the Government previously identified as counseling in favor of this Court's intervention. In *Ministerio Roca Solida*, the Government told this Court it would be "premature to decide how to address circumstances in which Section 1500 and the statute of limitations for CFC claims *might prevent* a plaintiff from asserting a constitutional claim because such circumstances ha[d] not developed [t]here." Brief of the United States, *Ministerio Roca Solida, Inc. v. United States*, No. 14-1413, 2015 WL 5834164, at *16 (U.S. Oct. 5, 2015) (emphasis added). There is nothing premature about addressing that question here. To the contrary, it is undisputed that the statute of limitations passed many years ago and there is no possibility that a "district court action may conclude before the limitations period runs," allowing the petitioner to "properly refile his takings claims in the CFC." *Id.*

If the Court does not intervene, after 19 years of costly litigation that was on the doorstep of victory, this would appear to be the end of the line for Petitioners. After proceeding as cautiously and efficiently as any litigant could under existing precedent at the time, Petitioners will nonetheless be denied their constitutional right to just compensation for the taking of their property. Without a judicial forum to

hear the constitutional takings claim, the Corps' denial of Petitioners meaningful use of their land for the better part of a decade will remain forever unredressed.

***

Because the statutory and constitutional issues presented by this case can only arise in the Federal Circuit, there is no means by which a circuit conflict can develop. This Court should therefore take this opportunity to correct the Federal Circuit's gross deviation from the Court's clear precedent—adopting a "substantial overlap of operative facts" test—and should further hold that the statute does not and cannot bar constitutional takings claims.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 16, 2015

APPENDIX A

United States Court of Appeals for the Federal Circuit

RESOURCE INVESTMENTS, INC., LAND RECOVERY, INC.,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

2014-5069

Appeal from the United States Court of Federal Claims in No. 1:98-cv-00419-LB, Judge Lawrence J. Block.

Decided: May 12, 2015

MARK S. PARRIS, Orrick, Herrington & Sutcliffe LLP, Seattle, WA, argued for plaintiffs-appellants. Also represented by DAVID S. KEENAN, DANIEL D. SYRDAL; MARC SHAPIRO, New York, NY.

LANE N. MCFADDEN, Environment and Natural Resources Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by SAM HIRSCH.

Before PROST, *Chief Judge*, DYK, and O'MALLEY, *Circuit Judges*.

DYK, *Circuit Judge*.

Resource Investments, Inc. and Land Recovery, Inc. (collectively, "Resource Investments") appeal the Court of Federal Claims' ("Claims Court") dismissal of their Fifth Amendment takings claim pursuant to 28 U.S.C. § 1500. We affirm.

BACKGROUND

This case requires that we again consider § 1500, which limits the Claims Court's jurisdiction when at the time of the Claims Court filing there was a pending action against the United States in another court involving the same subject matter. Section 1500 provides: "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…" 28 U.S.C. § 1500. The question here is whether Resource Investments' takings claim in the Claims Court based on the denial of a federal permit under Section 404 of the Clean Water Act ("CWA permit"), 33 U.S.C. § 1344, was barred by an earlier district court suit under the Administrative Procedure Act ("APA") challenging the permit denial.

In 1987, Resource Investments purchased a 320-acre property in the State of Washington which it sought to use as a landfill. Beginning in 1989, Resource Investments applied for various state permits to construct the landfill. Because the proposed landfill

project involved the fill of wetland areas, Resource Investments filed an application on August 8, 1990, for a CWA permit from the United States Army Corps of Engineers ("Corps"). *See* 33 U.S.C. § 1344. The requisite state permits were ultimately issued in 1996 on the condition that Resource Investments obtain, *inter alia*, a federal CWA permit from the Corps. On March 4, 1994, as part of the CWA permitting process, the Corps determined that it would require a federal Environmental Impact Statement ("EIS") for the proposed landfill site. After the Corps' draft EIS preliminarily concluded that Resource Investments had not fully demonstrated that there were no practicable alternatives to the proposed landfill project (as required by 40 C.F.R. § 230.10(a)), Resource Investments requested that the Corps terminate the federal EIS process, which the Corps did on June 7, 1996. The Corps formally denied Resource Investments' CWA permit on September 30, 1996.

On October 31, 1996, Resource Investments filed suit in the United States District Court for the Western District of Washington under the APA, challenging the denial of the CWA permit. Resource Investments alleged, *inter alia*, that the Corps' permitting process and ultimate denial of the permit violated the Clean Water Act and was arbitrary and capricious under the APA, 5 U.S.C. § 500 *et seq.* ("count IV"). Count IV alleged "a cost to [Resource Investments] of several millions of dollars," J.A. 474, and that Resource Investments stood to "lose the large sums already invested in the project, as well as the economic value of its investment in the project site," J.A. 483.

The district court upheld the Corps' denial of the permit under the APA, but the Ninth Circuit reversed, finding that the Corps lacked authority to require a CWA permit because, under the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6941-6949a, the regulation of municipal solid waste in landfills constructed on wetlands areas lies solely with the Environmental Protection Agency ("EPA") or states (such as Washington) with solid waste permit programs approved by the EPA. *See Res. Invs., Inc. v. U.S. Army Corps of Eng'rs*, 151 F.3d 1162, 1167-69 (9th Cir. 1998). Under the Ninth Circuit's holding, no CWA permit was required, and Resource Investments began construction of its landfill in October 1998. The landfill became operational in 1999.

On May 4, 1998, while the Ninth Circuit appeal was pending, Resource Investments filed a complaint in the Claims Court alleging that the Corps' denial of the CWA permit was a taking in violation of the Fifth Amendment.[1] The Claims Court complaint alleged that "[i]n denying the Section 404 permit, the Corps has deprived plaintiffs of their valuable property interests in the Site without just compensation." J.A. 86. And the prayer for relief sought judgment against the United States "for just compensation and damages equal to the value of the Site but for the Corps' Section 404 Permit denial." J.A. 91. On October 13, 2005, several years after the Ninth Circuit's decision in the appeal of the district court action, Resource Investments

[1] Interestingly, Resource Investments did not allege that the taking resulted from the assertion that a permit was required even though no permit was, in fact, necessary.

filed an amended complaint in the Claims Court action alleging that the Corps' denial of the permit was a temporary taking under various legal theories.

While the Claims Court action was pending, the Supreme Court decided *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011), holding that "[t]wo suits are for or in respect to the same claim, precluding jurisdiction in the [Claims Court], if they are based on substantially the same operative facts, regardless of the relief sought in each suit." *Id.* at 1731. On June 10, 2011, after the Claims Court action had been pending for several years, the United States, in light of *Tohono*, filed a motion to dismiss the action for lack of subject matter jurisdiction.

The Claims Court granted the government's motion to dismiss, finding that count IV of the district court action and the Claims Court action shared substantially the same operative facts, in particular because the denial of the CWA permit was central to both suits.[2] The Claims Court found that "the facts underlying the Corps' *decision to deny the permit* were material to plaintiffs' claim that the Corps violated applicable regulations because the denial of the

[2] The Claims Court also found that count III of the district court suit, which alleged violations of the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*., shared substantially the same operative facts as the Claims Court action. Resource Investments argues that because count III was not appealed to the Ninth Circuit, it was not pending when they filed the Claims Court action. Because we find that count IV of the district court action arises from substantially the same operative facts as the Claims Court action, we need not address count III.

permit was the culmination of a series of allegedly improper acts taken by the Corps." J.A. 34. The Claims Court also denied Resource Investments' motion for reconsideration, rejecting Resource Investments' argument that the denial of the permit was merely the "impetus" for bringing the two lawsuits, rather than an operative fact, because "the denial of the permit was in fact not only operative but also dispositive—as the court pointed out, but for the denial of the permit, plaintiffs would not have been able to argue these claims." J.A. 44-45.

Resource Investments appeals. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3). We review the Claims Court's dismissal for lack of subject matter jurisdiction de novo. *Brandt v. United States*, 710 F.3d 1369, 1373 (Fed. Cir. 2013).

DISCUSSION

I

As we held in *Brandt*, "[t]o determine whether § 1500 applies, a court must make two inquiries: (1) whether there is an earlier-filed 'suit or process' pending in another court, and, if so, (2) whether the claims asserted in the earlier-filed case are 'for or in respect to' the same claim(s) asserted in the later-filed Court of Federal Claims action." 710 F.3d at 1374. Resource Investments does not dispute that the district court action constitutes an earlier-filed suit for purposes of the first § 1500 inquiry.

In undertaking the second inquiry, we compare count IV of the district court action with the Claims

Court action to determine whether they are "for or in respect to" each other. 28 U.S.C. § 1500. The Supreme Court held in *Keene Corp. v. United States*, 508 U.S. 200 (1993), that the relevant comparison under § 1500 analyzes whether the two suits were "based on substantially the same operative facts." *Id.* at 212. In *Tohono*, the Court addressed an issue expressly left unresolved by *Keene*: whether the § 1500 bar applied to two actions based on the same operative facts that sought completely different relief. *Tohono*, 131 S. Ct. at 1727-28. The Court held that the § 1500 bar still applied in that scenario: "Two suits are for or in respect to the same claim, precluding jurisdiction in the [Claims Court], if they are based on substantially the same operative facts, regardless of the relief sought in each suit." *Id.* at 1731. Here, the Claims Court held that the same operative facts test was satisfied because both suits were based on the denial of the CWA permit and the economic injury to Resource Investments that the permit denial allegedly caused.

Resource Investments first argues that the denial of the permit was not an "operative fact" in the Claims Court action, but rather merely a "background fact." In support of this argument, Resource Investments relies on language in *Central Pines Land Co. v. United States*, 697 F.3d 1360 (Fed. Cir. 2012), suggesting that overlap in background facts does not require dismissal under § 1500. *Id.* at 1365. But as the Claims Court found, the denial of the permit was not merely a background fact. The basis for each of the actions was, in significant part, the Corps' denial of the permit. The allegations that the Corps denied the permit, and the alleged economic loss attributable thereto, were central to both count IV of

the district court action and the Claims Court action. The Claims Court complaint alleged:

> The Section 404 Permit denial furthers no legitimate government interest; it wholly frustrates plaintiffs' investment backed expectations, denies all practical, beneficial and economic use of the Site, and wholly destroys the economic value of plaintiffs' property rights in the Site. Accordingly, the action of the [Corps] …constitutes a taking of plaintiffs' property ….

J.A. 71. The Claims Court action's prayer for relief specifically sought damages "equal to the value of the Site but for *the Corps' Section 404 permit denial*." J.A. 91 (emphasis added). Similarly, count IV of the district court action, challenging the Corps' conduct in denying the permit application, was clearly based on the denial of the permit. Count IV alleged that "[t]he Corps' decision to deny the permit application was the product of its systematic bias, prejudgment and bad faith in reviewing the permit application," and complained "of the Corps' misconduct in reviewing the permit application." J.A. 473. Count IV further alleged that the denial of the permit "must be reversed and remanded with instructions that defendants reconsider the permit application in good faith under the proper standards as ordered by the Court." J.A. 486. And the prayer for relief in the district court action "re-quest[ed] a determination that the Corps' decision denying the permit was unlawful, arbitrary and capricious because it was the product of systematic bias, prejudgment and bad faith." Complaint for Judicial Review of Administrative Action at

103, *Res. Invs., Inc. v. U.S. Army Corps of Eng'rs*, No. C96-5920 (W.D. Wash. Oct. 30, 1996).

Resource Investments argues that even if the permit denial and economic injury are operative facts common to the two actions, additional—and different—operative facts are necessary to establish each claim. For example, Resource Investments points to the character of the government action and investment-backed expectations in the landfill site as operative facts in the Claims Court action that were irrelevant to the district court action.

To determine whether the overlap as to the permit denial and economic loss is sufficient we apply the res judicata test approved by *Tohono*. In determining whether two suits were "based on substantially the same operative facts," 131 S. Ct. at 1731, the Supreme Court analogized § 1500 to res judicata (or claim preclusion), explaining that "the principles of preclusion law [are] embodied in" § 1500. *Id.* at 1730; *see also Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1164 (Fed. Cir. 2011). Thus, the Court referenced "[t]he now-accepted test in preclusion law for determining whether two suits involve the same claim or cause of action," which "depends on factual overlap, barring 'claims arising from the same transaction.'" *Tohono*, 131 S. Ct. at 1730 (quoting *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482 n.22 (1982)). The Court explained that although "[t]he transaction test is …much younger than the rule embodied in § 1500, …even in the 19th century it was not uncommon to identify a claim for preclusion purposes based on facts rather than relief." *Id.* (citing J. Wells, *Res Adjudicata and Stare*

Decisis § 241, p. 208 (1878); 2 H. Black, Law of Judgments § 726, p. 866 (1891)).

Under *Tohono*, the question is whether the second Claims Court takings suit would have been barred by res judicata if it had been brought in a district court. Although there is an exception to res judicata where "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts," Restatement (2d) of Judgments § 26(1)(c), that exception does not apply to § 1500 in light of *Tohono*'s holding that the statute bars suit on the same claim regardless of the relief sought. *See Tohono*, 131 S. Ct. at 1731; *see also id.* at 1737-38 (Sotomayor, J., concurring).

In light of *Tohono* and *Trusted Integration*, the relevant res judicata inquiry under § 1500 looks to res judicata principles as of 1868, when the predecessor to § 1500[3] was first enacted. *See* Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77; *see also Keene*, 508 U.S. at 206-07. In *Trusted Integration*, we explained that *Tohono* "made clear that it is the [res judicata] tests in place at the time the predecessor to § 1500 was enacted by which we must be guided." 659 F.3d at 1168 n.4 (citing *Tohono*, 131 S. Ct. at 1730). The res judicata bar to "issues that were or could have been raised" in a prior action, *San Remo Hotel, L.P. v. City & Cnty. of S.F., Cal.*, 545 U.S. 323, 336 n.16 (2005),

[3] Section 1500 is "identical in most respects to the original statute." *Tohono*, 131 S. Ct. at 1727.

dates back to the mid-nineteenth century. In *Aurora City v. West*, 74 U.S. 82 (1868), decided the same year as the predecessor to § 1500 was enacted, the Court articulated the res judicata standard as follows:

> [W]here every objection urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed *in rem judicatam*, and the former judgment in such a case is conclusive between the parties. Except in special cases, the plea of *res judicata*, says Taylor, applies *not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation*, and which the parties, exercising reasonable diligence, might have brought forward at the time.

Id. at 102 (citing, *inter alia*, 2 John Pitt Taylor, *A Treatise on the Law of Evidence* § 1513 (3d ed. 1858)) (emphasis added); *see also Beloit v. Morgan*, 74 U.S. 619, 622 (1868) (Res judicata "extends not only to the questions of fact and of law, which were decided in the former suit, but also to the grounds of recovery or defense which might have been, but were not, presented.").

Also at the time when the predecessor to § 1500 was enacted, there were two governing tests for determining whether claims were precluded by an ear-

lier litigation: the act or contract test, and the evidence test. *Trusted Integration*, 659 F.3d at 1169. Since we conclude that the act or contract test is satisfied here, we need not address the evidence test. *See id.* at 1170 n.5 ("If two suits are determined to arise from the same claim under either of these res judicata tests, however, application of the bar of § 1500 is likely compelled.").

In *Tohono*, the Supreme Court articulated the nineteenth century "act or contract test" as follows: "The true distinction between demands or rights of action which are single and entire, and those which are several and distinct, is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts." 131 S. Ct. at 1730 (quoting J.C. Wells, *A Treatise on the Doctrines of Res Adjudicata and Stare Decisis* § 241 (1879)); *see also Trusted Integration*, 659 F.3d at 1169. The nineteenth century act or contract test is narrower than the modern transactional test. *See* Restatement (2d) of Judgments § 24 cmt. a; *Cent. Pines*, 697 F.3d at 1365 (distinguishing background facts that should not be considered in a § 1500 analysis from operative facts that were "critical to plaintiffs' claims in both actions").

Because there are some similarities, however, it can be informative to refer to authorities on the modern transactional test when determining whether claims are based on substantially the same operative

facts. *See Trusted Integration*, 659 F.3d at 1168 n.4.[4] Under the transactional test, "[t]he claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. What factual grouping constitutes a 'transaction', and what groupings constitute a 'series', are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation …" Restatement (2d) of Judgments § 24. And, contrary to Resource Investments' argument, the bar to subsequent litigation applies "even though the plaintiff is prepared in the second action …[t]o present evidence or grounds or theories of the case not presented in the first action." *Id.* § 25. Different legal theories do not create separate claims for res judicata purposes even though "the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call

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[4] *See also Beloit*, 74 U.S. at 623 ("A party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction."); *Washington, Alexandria, & Georgetown Steam-Packet Co. v. Sickles,* 65 U.S. 333, 338, 343, 345-46 (1860) (reversing a holding of estoppel where the defendant argued that different counts "represent[ed] distinct and independent transactions"; the Court noted that "transactions have become more complicated and numerous, and law and fact have become more closely interwoven, so as to render their separation more embarrassing"); Wells, § 231, p. 201 ("But the various items must be connected with the same transaction …."); *id.* at § 239, p. 206 ("all the consequences are but the unavoidable result of a single act").

for different measures of liability or different kinds of relief." *Id.* § 24 cmt. c.

Thus, in *Harbuck v. United States*, 378 F.3d 1324 (Fed. Cir. 2004), we determined that an Equal Employment Act claim in the Claims Court was based on the same operative facts as a district court Title VII sex discrimination claim, thus barring the Claims Court suit under § 1500. *Id.* at 1328. This was so even though the appellant argued "that the two suits involved different claims because the Title VII complaint 'centered on' her non-selection for promotion, and the Equal Employment Act claim 'centered around' her 'assuming the position of a male employee …and not receiving the same pay.'" *Id.* at 1329. In affirming the dismissal under § 1500, we held that "[t]he difference between the two theories upon which she relies are but different manifestations of the same underlying claim that the Air Force discriminated against women by paying them less than men." *Id.*

Other circuits have come to similar conclusions. In *Hagee v. City of Evanston*, 729 F.2d 510 (7th Cir. 1984), the Seventh Circuit, in a case similar to this one, held that res judicata barred a federal suit alleging, *inter alia*, a takings claim due to the revocation of a building permit because of a prior state lawsuit seeking to enjoin the revocation of that same permit. *Id.* at 511, 514. The Seventh Circuit applied the transactional test and found that "[t]he appellants' current suit is for damages allegedly flowing from the very same conduct complained of in the appellants' first suit, Evanston's obstruction of the appellants' construction project." *Id.* at 515.

In *Hayes v. City of Chicago*, 670 F.3d 810 (7th Cir. 2012), a police officer challenged his termination for misconduct in state court. *Id.* at 812. He later filed a Title VII complaint in federal district court. *Id.* at 813. On appeal, the Seventh Circuit applied the transactional test and held that the two suits arose from the same operative facts "because the underlying transaction of both actions [wa]s not only related in time, space, origin, and motivation, but the underlying transaction—Hayes's termination from the Chicago Police Department—[wa]s identical." *Id.* at 814. *See also Sutliffe v. Epping Sch. Dist.*, 584 F.3d 314, 327 (1st Cir. 2009) ("The fact that a second suit contains some additional factual allegations does not mean it does not arise from the same factual transaction.").

So too in *Trusted Integration*, where both the district court complaint and the Claims Court complaint alleged that the government failed to adequately offer or promote plaintiffs' security compliance product and replaced that product with a government-developed alternative. 659 F.3d at 1161, 1165. In the Claims Court, the plaintiff alleged a breach of an implied agreement. *Id.* at 1165. In the district court, the plaintiff alleged a breach of fiduciary duty. *Id.* Applying the act or contract test, we concluded that both actions were based on the same conduct. *Id.* at 1165, 1169. We "compar[ed] the conduct pleaded" in the two actions, and found that "it [was] apparent that each count involve[d] nearly identical conduct." Id. at 1165. The appellant "was, therefore, alleging that the same conduct gave rise to different

claims based upon purportedly distinct legal theories." Id.[5]

Applying these principles, it is clear that the operative facts outlined in count IV of the district court action and the Claims Court action are the same, in particular the allegations with respect to the denial of the CWA permit and Resource Investments' economic loss attributable thereto. Thus, the two actions relate to the same underlying transaction and § 1500 bars the Claims Court action here.

II

Resource Investments additionally argues that even if its permanent takings claim in the Claims Court complaint was barred, its temporary takings claim still survives the § 1500 bar. According to Resource Investments, the denial of the permit was not an operative fact with respect to the temporary takings claim because that claim was based on the delay in the permitting process rather than the ultimate denial of the permit. We need not reach this issue for two reasons.

First, under Supreme Court pleading standards, Resource Investments did not sufficiently allege a

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[5] We distinguished this circumstance from those—also at issue in *Trusted Integration*—where, despite an overlap of certain background facts, those facts necessary to establish two different causes of action, i.e., the legally operative facts, differ, and the two claims do not merely represent alternative legal theories premised on a single set of facts. 659 F.3d at 1168-70. Those latter circumstances are not at issue here.

temporary takings claim in the original complaint. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (quotations and alteration omitted)); *see also ABB Turbo Sys. AG v. TurboUSA, Inc.*, 774 F.3d 979, 984 (Fed. Cir. 2014). The sole reference to a temporary takings claim in Resource Investments' original Claims Court complaint alleged: "Even in the event the Corps' action is overturned by the federal courts, plaintiffs have suffered a temporary taking of property which requires compensation." J.A. 86. This passing reference is no more than a conclusory assertion of a temporary taking, which fails to satisfy the *Twombly* pleading standard.

Second, we cannot consider the more extensive temporary takings allegations in Resource Investments' amended Claims Court complaint.[6] The relevant comparison focuses on whether count IV of the original district court action arises from substantially the same operative facts as the original Claims Court complaint. The amended Claims Court complaint is irrelevant because of "the longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Keene*, 508 U.S. at 207 (internal quotation marks omitted). As we held in *Central Pines*, "[t]ogether, the plain language of the statute and legislative history leave

[6] Contrary to Resource Investments' argument, the Claims Court did not order it to file an amended complaint. *See* J.A. 93.

no doubt that at least a time-of-filing rule applies such that jurisdiction under § 1500 is dependent on the state of things when the action is brought, and cannot be rescued by subsequent action of either party or by resolution of the co-pending litigation." 697 F.3d at 1367 (internal quotation marks and alteration omitted); *see also Dico, Inc. v. United States*, 48 F.3d 1199, 1203 (Fed. Cir. 1995) ("[T]he § 1500 bar rises, if at all, at the time the [original] complaint is filed in the Court of Federal Claims.").

III

Finally, Resource Investments argues that § 1500 should be construed to avoid constitutional difficulties which arise because under the Claims Court's § 1500 analysis Resource Investments is precluded from obtaining relief on its constitutional takings claim. *See SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1349 (Fed. Cir. 2009) (relying on "our well established obligation to construe statutes to avoid constitutional difficulties"). But under current Federal Circuit law there is no significant constitutional issue raised by requiring the Claims Court action to be filed before the district court action in order to secure compensation for a takings claim against the government.

In *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), our predecessor court found that the § 1500 bar operates "*only* when the suit shall have been commenced in the other court *before* the claim was filed in [the Claims Court]." *Id.* at 949. That rule continues to be followed in the Claims Court. *See, e.g.*, *Otoe-Missouria Tribe of Indians,*

Okla. v. United States, 105 Fed. Cl. 136, 138-39 (2012); *United Keetoowah Band of Cherokee Indians in Okla. v. United States*, 104 Fed. Cl. 180, 187 (2012); *Nez Perce Tribe v. United States*, 101 Fed. Cl. 139, 142-43 (2011). We are bound by *Tecon*,[7] which "remains the law of this circuit." *Brandt*, 710 F.3d at 1379 n.7. In light of *Tecon*, we see no constitutional problem with the first-to-file rule. Resource Investments could have sought relief for its takings claim had it filed its Claims Court action before its district court action, and we need not consider what constitutional issues might be presented if *Tecon* were to be overruled.[8] Similarly, the fact that Resource Investments could have dismissed and refiled its Claims Court action following the Ninth Circuit's decision without facing a limitations problem[9] also eliminates any constitutional concerns.

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[7] In *Tohono*, the Supreme Court expressly declined to overrule *Tecon*, noting that "[t]he *Tecon* holding is not presented in this case because the [Claims Court] action here was filed after the District Court suit." 131 S. Ct. at 1729-30.

[8] "The government has argued that *Tecon's* order-of-filing rule is no longer good law …." *Ministerio Roca Solida v. United States*, 778 F.3d 1351, 1361 n.4 (Fed. Cir. 2015) (Taranto, J., concurring).

[9] The six-year statute of limitations on the Claims Court takings claim (28 U.S.C. § 2501) did not bar Resource Investments from dismissing and refiling because the July 27, 1998, Ninth Circuit decision was less than two years following the September 30, 1996, permit denial.

IV

Count IV of the earlier-filed district court action and the Claims Court action were based on substantially the same operative facts. Under these circumstances, the Claims Court correctly dismissed Resource Investments' complaint as barred by § 1500.

AFFIRMED

APPENDIX B

United States Court of Federal Claims

No. 98-419 L
February 5, 2014

RESOURCE INVESTMENTS, INC. and LAND RECOVERY, INC.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA

Defendant.

Fifth Amendment Takings; 28 U.S.C. § 1500; RCFC 12(b)(1), Subject Matter Jurisdiction

Daniel D. Syrdal, Orrick, Herrington & Sutcliffe, LLP, Seattle, WA, for plaintiffs.

Frank J. Singer, Environment & Natural Resources Division, Natural Resources Section, United States Department of Justice, Washington, DC, for defendant.

OPINION *and* ORDER

Block, *Judge*.

Before the court is defendant's motion to dismiss for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims ("RCFC") and 28 U.S.C. § 1500. This motion is among a myriad[1] brought by defendant based on *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1731 (2011), which clarified the limitations of this court's jurisdiction contained in 28 U.S.C. § 1500. Although the Tucker Act confers jurisdiction upon this court to hear certain types of monetary claims against the United States, § 1500 curtails that jurisdictional grant by prohibiting the court from entertaining "any claim for or in respect to which" the plaintiff "has pending in any other court any suit or process against the United States ...."

Although the purpose of § 1500 is to protect the United States against double recovery, this law has created a tremendous burden on plaintiffs because Congress frequently requires certain claims against the United States to be heard in one particular court.[2]

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[1] For instance, the Court of Federal Claims issued only 8 published § 1500 opinions in 2008, only 5 in 2009, and only 6 in 2010. In contrast, between June and December 2011—*i.e.*, the months following the publication of *Tohono O'Odham* in April 2011—the Court of Federal claims issued 18 published § 1500 opinions. *See also Klamath Irrigation Dist. v. United States*, 1-5910L, 2013 WL 6139925 (Fed. Cl. Nov. 22, 2013), at *1 ("[I]n recent years, [§ 1500] has experienced a *risorgimeneto*, triggered by the Supreme Court's decision in …*Tohono O'Odham*").

[2] Congress imposes these jurisdictional limits to safeguard its sovereign immunity and to promote uniformity. *See, e.g.*, *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1079 (Fed. Cir. 2001) (observing that Congress limited jurisdiction over "procurement protest jurisdiction to the Court of Federal

Since § 1500 prohibits plaintiffs from contemporaneously suing under different theories of relief that are based on the same or similar operative facts, § 1500 frequently compels plaintiffs with multiple claims "to pursue only one claim and abandon the others." *See* Administrative Conference Recommendation 2012-6, *Reform of 28 U.S.C. Section 1500*, http://www.acus.gov/recommendation/reform-28-usc-section-1500, at 1 (recommending that § 1500 be reformed or repealed altogether). Section 1500 has been

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Claims" in order to "prevent forum shopping and to promote uniformity in government procurement award law"). *See also* Gregory C. Sisk, *The Jurisdiction of the Court of Federal Claims and Forum Shopping in Money Claims Against the Federal Government*, 88 IND. WASH. L. J. 83 (2013).

described as a "trap for the unwary"[3] that calls to mind the old formal rules of pleading.[4]

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[3] *Klamath Irrigation Dist. v. United States*, 01-591L, 2013 WL 6139925 (Fed. Cl. Nov. 22, 2013), at *1; *Low v. United States*, 90 Fed. Cl. 447, 455 (2009). A prospective plaintiff with multiple claims must be careful to file suit in the correct order. For instance, this court has ruled on several occasions that the plain language of § 1500 does allow plaintiffs to escape its strictures by filing their Court of Federal Claims suit prior to filing their district court suit. *See, e.g.*, *Otoe-Missouria Tribe of Indians, Okla. v. United States*, 105 Fed. Cl. 136, 139 (2012) ("The plain meaning of pending in court is that there is some action going on in the court. All of the dictionary references refer to something ongoing …"). *See also United Keetoowah Band of Cherokee Indians in Oklahoma v. United States*, 104 Fed. Cl. 180, 185 (2012); *Nez Perce Tribe v. United States,* 101 Fed. Cl. 139, 142 (2011). However, this court is divided on the treatment of same day filings. *See Passamaquoddy Tribe v. United States*, 82 Fed. Cl. 256, 268 (2008) *aff'd*, 426 F. App'x 916 (Fed. Cir. 2011) (holding that "same-day filings in a district court are per se pending for the purposes of § 1500, and the order of filing of the two complaints on the day in question is of no consequence"); *c.f. United Keetowah Band*, 86 Fed. Cl. at 190 (holding that the order of filing *does* apply to same-day filings).

[4] Since prospective plaintiffs may not sue in multiple courts on the basis of the same operative facts, they must first identify "whether the government's conduct is best characterized as a tort, a breach of contract, a taking, a violation of statute, or some combination of these. No single court has jurisdiction over all these kinds of claims against the government, so the plaintiff cannot combine the claims into a single lawsuit." Emily S. Bremer & Jonathan R. Siegel, *Clearing the Path to Justice: The Need to Reform 28 U.S.C. § 1500*, 65 ALA. L. REV. 1, 5 (2013). If the plaintiff errs, the plaintiff must request that the case be transferred and hope that the applicable statute of limitations has not run.

The facts of this case date back to the mid-1980s, when Pierce County, Washington, sought to address an acute shortage of landfill space by contracting with plaintiffs to locate and develop a new waste disposal site. Plaintiffs purchased a 320-acre site in 1987 after conducting extensive research, and eventually succeeded in securing a host of permits, including twelve state and local permits and four quasi federal-state permits. Pls.' Dist. Ct. Compl. at 1. However, after considering the matter for nearly seven years, the U.S. Army Corps of Engineers denied their application on September 30, 1996. *Id.* at 5. Protracted litigation ensued.

Litigation over plaintiffs' takings claim has been ongoing in this court since May 4, 1998, when plaintiffs filed their original complaint. Four other judges on this court have presided over this case. The parties have spent significant time and resources on this matter, and this court has issued numerous opinions, including opinions concerning the parties' discovery requests and denying the parties' cross-motions for summary judgment. However, in April 2011, the course of this litigation took a sudden turn. "[A]lter[ing] decades of Court of Claims and Federal Circuit jurisprudence,"[5] the Supreme Court clarified the scope of § 1500 by holding that the provision precludes jurisdiction as long as a suit shares "substantially the same operative facts" with the claims in an-

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[5] Daniel P. Graham *et al., Federal Circuit Year-in-Review 2011*: *Certainty and Uncertainty in Federal Government Contracts Law*, 41 PUB. CONT. L.J. 473, 485 (2012).

other suit that is pending before another court, *regardless* of whether the suits seek the same relief. *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1731 (2011). The Court held that § 1500 applies even if the various jurisdictional statutes passed by Congress over the years have the cumulative effect of compelling an aggrieved party to seek equitable relief in one court and monetary relief in another court. *Id.* at 1731. In so ruling, the Court directly overturned the opinion of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") that § 1500 does not apply unless "the claim pending in another court" also requests "the same relief" *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1551 (Fed. Cir. 1994).

On June 10, 2011—over thirteen years after plaintiffs filed their original district court complaint—defendant seized upon the Court's ruling in *Tohono O'Odham* by filing, for the first time,[6] a motion to dismiss on the ground that § 1500 deprives this court of subject matter jurisdiction. Defendant alleges that plaintiffs' Court of Federal Claims and district court complaints are based on the same operative facts and that § 1500 accordingly precludes the court from hearing this case, notwithstanding the fact that plaintiffs cannot possibly obtain complete relief in any one court.

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[6] Under the rule created by *Loveladies Harbor*, § 1500 clearly did not apply because both of plaintiffs' complaints sought different remedies: the district court complaint asked the court to find that the Corps had no jurisdiction over their case, whereas the complaint before this court sought monetary compensation.

For the reasons set forth below, the court agrees that § 1500 applies. Despite the anachronistic nature of the statute and the harsh outcome for plaintiffs, because of § 1500 the court has no choice but to GRANT defendant's motion to dismiss.

I. BACKGROUND[7]

Plaintiffs Resource Investments, Inc. and Land Recovery, Inc.[8] are in the lucrative but heavily regulated business of municipal solid waste management. In 1987, plaintiffs purchased a 320-acre site in Pierce County, Washington, for the purpose of constructing a 168-acre solid waste landfill. Pls.' Dist. Ct. Compl. at 1; Def's Mot. Dismiss at 24, ECF No. 234.[9] Plaintiffs applied for the necessary permits in 1990, including one permit they did not actually need from the U.S.

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[7] The court has extensively discussed this matter's background in an earlier opinion. *Res. Investments, Inc. v. United States*, 85 Fed. Cl. 447, 455-66 (2009). The background set forth here includes only those facts most pertinent to adjudicating this motion.

[8] Plaintiffs in this case are two corporate affiliates in the business of managing municipal solid waste disposal. Since the ownership of both companies is nearly identical, the court hereafter will refer to the two companies collectively as "plaintiffs," for the sake of convenience. *See Res. Investments, Inc. v. United States*, 85 Fed. Cl. 447, 456 (2009).

[9] Page 1 of Plaintiff's District Court Complaint corresponds to Page 24 of Defendant's Motion to Dismiss. It is available on ECF as Document Number 234. Any allegations made in plaintiff's district court complaint are cited as "Pls.' Dist. Ct. Compl." Any allegations mentioned in plaintiff's CFC complaints are cited as "Pls.' CFC Compl." or "Pls.' Am. CFC Compl."

Army Corps of Engineers ("Corps") under § 404 ("section 404 permit") of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, to fill approximately 33.3 acres of wetlands on the site. Pls.' Dist. Ct. Compl. at 1; *see Res. Investments, Inc. v. United States*, 85 Fed. Cl. 447, 460-63 (2009) (discussing plaintiffs' dispute with the Corps). In 1993, three years after plaintiffs applied for their section 404 permit, the Corps decided that plaintiffs must consider "long hauling … solid waste to out-of-county disposal sites as an 'action' alternative to the [landfill] project, despite the fact that such alternative was not available to [plaintiffs] and was not legally permissible due to binding provisions of the Tacoma-Pierce County Solid Waste Management Plan." Pls.' Dist. Ct. Compl. at 5. After several years of administrative wrangling, the Corps ultimately denied plaintiffs' permit application on September 30, 1996. *Id.*

Undeterred, plaintiffs filed a complaint one month later in the United States District Court for the Western District of Washington seeking to set aside the Corps' decision under the Administrative Procedure Act ("APA"). Def s Mot. Dismiss at 3. Plaintiffs had no choice but to file in federal district court because the Court of Federal Claims ("CFC") lacks the equitable power to grant such injunctive relief. *See* 28 U.S.C. § 1491(a)(2) (limiting the equitable power of the court to granting relief that is "an incident of and collateral to" a judgment for money damages); *Bowen v. Massachusetts*, 487 (sic) U.S. 879, 905 (1988) (holding that "[t]he Claims Court does not have the general equitable powers of a district court to grant prospective relief"). The basis for the district court suit was

that the Corps' jurisdiction was preempted by the Resource Conservation and Recovery Act of 1976 ("RCRA"), Pub. L. No. 94-580, 90 Stat. 2795 (codified in sections of 42 U.S.C. §§ 6901-81). Pls.' Dist. Ct. Compl. at 103. In the alternative, plaintiffs requested a declaration that the Corps had violated the CWA and the APA by "unlawfully, arbitrarily and capriciously" concluding that the project would create unacceptable environmental effects. *Id*. at 102.

In their jointly-filed district court complaint, plaintiffs alleged that they had carefully selected the 320-acre site for purchase due to its "uniquely desirable geologic and hydrologic features," which could provide "superior natural protection to any underlying aquifers," and because there were "no other suitable sites in Pierce County." *Id*. at 2-4. The landfill was also subjected to intense public and regulatory scrutiny. *See id.* at 4. Plaintiffs argued that under these facts, "the Corps'[s] decision denying [plaintiffs'] permit application, if allowed to stand, would destroy [plaintiffs'] reasonable business expectancy from the project." *Id*. at 6. On September 16, 1997, the district court ruled in favor of the Corps. Def's Ex. 2 at 19, ECF No. 234-1. Plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit on September 25, 1997. *See* Def's Mot. Dismiss at 3.

While its appeal was pending in the Ninth Circuit, plaintiffs filed a complaint in this court on May 4, 1998, seeking monetary relief pursuant to the Takings Clause of the Fifth Amendment. *Id*. Such relief is available only in this court because the Tucker Act grants this court exclusive jurisdiction over suits

seeking compensation for takings unless the relief demanded by plaintiff is $10,000 or less. *See* 28 U.S.C. § 1391(a)(1); *c.f.* 28 U.S.C. § 1346(a)(2). The facts alleged in plaintiffs' CFC complaint are strikingly similar to those alleged in its district court complaint. *See* Def's Mot. Dismiss Appx. A at 1-6, ECF No. 234. Both complaints allege that Pierce County's landfill was nearing capacity; both complaints allege that plaintiffs sought to solve Pierce County's garbage disposal needs by developing a new landfill; both complaints allege that plaintiffs invested substantial financial resources in their search for a landfill site; both complaints allege that plaintiffs applied for a number of permits, including the section 404 permit, to operate its proposed landfill within the complex regulatory scheme set up by federal, state, and local laws; both complaints allege that after extensive public hearings, plaintiffs obtained the necessary state and local permits by 1995; both complaints allege that the Corps was slow in processing their section 404 permit application; and both complaints allege that the Corps denied plaintiffs their section 404 permit, thus giving rise to their suit to set aside the Corps' decision under the APA in district court and their suit for monetary relief under the Takings Clause here in the Court of Federal Claims. *See id.*

Three months after plaintiffs filed their CFC complaint, the Ninth Circuit reversed the district court's dismissal of plaintiffs' permit challenge. *Res. Investments, Inc. v. U.S. Army Corps of Engineers,* 151 F.3d 1162, 1168 (9th Cir. 1998) (holding that plaintiffs did not need a section 404 permit because the CWA did not confer jurisdiction over plaintiffs' landfill project to the Corps). Plaintiffs then amended

their complaint to reflect the Ninth Circuit's holding that the Corps' assertion of jurisdiction was "erroneous." Pls.' Am. CFC Compl. at 1; *Resource*, 151 F.3d at 1169. Extensive litigation followed. *See generally Resource,* 97 Fed. Cl. 545 (2011) (granting in part plaintiffs' motion to require the Corps to pay an expert witness more than that required by statute); 93 Fed. Cl. 373 (2010) (ruling on discovery motions); 85 Fed. Cl. 447 (2009) (denying cross-motions for summary judgment). As of today, this lawsuit's life spans nearly 17 years.

Like this litigation, section 1500 is far from new. The statute's predecessor was enacted in 1868 "to curb duplicate lawsuits brought by residents of the Confederacy following the Civil War." *Tohono O'Odham*, 131 S. Ct. at 1728. At that time, the common practice was for so-called "cotton claimants" to sue the United States in the Court of Claims under the Abandoned Property Collection Act, ch. 120, 12 Stat. 820 (1863), and simultaneously seek relief against federal officials in other courts based on the same set of facts. *Id*. The only difference between the suits was that one would assert a contract theory in the Court of Claims, while the other would assert a tort theory in district court. And although the statute's roots are quite old, "Congress reenacted it even as changes in the structure of the courts made suits on the same facts more likely to arise." *Tohono O'Odham,* 131 S. Ct. at 1729.

Under prior precedent, two claims were considered "for or in respect to" each other only if there was some overlap in the relief requested *and* they arose from the same operative facts. *Loveladies Harbor, Inc.*

v. United States, 27 F.3d 1545, 1551 (Fed. Cir. 1994) ("For the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from *the same operative facts,* and must seek *the same relief*"). But in April 2011, the Supreme Court decided *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, which held that two claims are "for or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts, regardless of the relief sought in each suit." *Id*. at 1731.

With section 1500's application clarified in *Tohono O'Odham,* defendant filed the instant motion to dismiss, arguing (1) that the Corps' denial of a section 404 permit constitutes the critical operative fact connecting plaintiffs' two suits and (2) that the district court action was pending when its CFC suit was filed. Def's Mot. Dismiss at 2.

II. DISCUSSION

A. Applicable Legal Standard

Plaintiffs have the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Alder Terrace, Inc. v. United States,* 161 F.3d 1372, 1377 (Fed. Cir. 1998) (citing *McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)). "In determining jurisdiction, a court must accept as true all undisputed facts asserted in the plaintiffs complaint and draw all reasonable inferences in favor of the plaintiff." *Trusted Integration, Inc. v. United States,* 659 F.3d 1159, 1163

(2011) (citing *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995)).

B. Subject Matter Jurisdiction

The authority of lower federal courts to hear cases is defined by Congress. *Keene Corp. v. United States,* 508 U.S. 200, 207 (1993). *See* U.S. Const. Art. III, § 1, cl. 1. ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish") (granting Congress the power to create—and thus define the jurisdiction of—lower courts). The Tucker Act provides that the Court of Federal Claims "shall have jurisdiction to render any judgment upon any claim against the United States founded …upon the Constitution …[for] damages …not sounding in tort." 28 U.S.C. § 1491(a)(1). The Tucker Act, however, is itself only a jurisdictional statute; it "does not create any substantive right enforceable against the United States for money damages." *United States v. Testan,* 424 U.S. 392, 398 (1976). The Tucker Act confers jurisdiction only if a plaintiff can "identify a separate source of substantive law that creates the right to money damages." *Fisher v. United States,* 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc). Claims seeking relief under the Takings Clause of the Fifth Amendment fall under this jurisdictional grant because they are founded upon the Constitution. *See Williams v. United States,* No. 10-880, 2011 WL 3891124, at *2 (Fed. Cl. Sept. 2, 2011) (noting that the Tucker Act's jurisdictional grant includes claims for just compensation under the Fifth Amendment); *see also* U.S. Const. amend. V, cl. 4

("[N]or shall private property be taken for public use, without just compensation.").

At first blush, it would appear that jurisdiction over the instant takings case is proper under 28 U.S.C. § 1491. However, as noted several times above, the jurisdictional grant created by the Tucker Act is limited by 28 U.S.C. § 1500, which provides as follows:

> 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.

Applying this rule "is more straightforward than its complex wording suggests." *Tohono O'Odham,* 131 S. Ct. at 1727. This "straightforward" application contemplates a two-pronged inquiry: (1) whether the "claim" filed in the CFC was "for or in respect to" a claim (2) "pending against the United States or its agents" in another court when the CFC's jurisdiction was invoked. "Whether another claim is 'pending' for purposes of section 1500 is determined 'at the time at which the suit in the Court of Federal Claims is filed, not the time at which the Government moves to dismiss the action.'" *Low v. United States,* No. 10-811C, 2011 WL 2160880, at *5 (Fed. Cl. June 1, 2011) (quoting *Loveladies Harbor*, 27 F.3d at

1548). Claims are "for or in respect to the same claim when they are 'based on substantially the same operative facts.'" *Tohono O'Odham,* 131 S. Ct. at 1727 (quoting *Keene Corp.,* 508 U.S. at 212). *See also Trusted Integration,* 659 F.3d at 1165-70 (applying the statute to two of the three claims at issue, and holding that those two claims arose out of identical conduct as that alleged in a pending district court suit); *Central Pines Land Co. v. United States*, 99 Fed. Cl. 394, 399-401 (2011) (holding that a suit seeking a declaration of mineral rights in district court and a suit brought under the Takings Clause arise from the same operative facts because they arise from the same government conduct), *aff'd*, 697 F.3d 1360 (Fed. Cir. 2012); *Yankton Sioux Tribe*, 84 Fed. Cl. 225, 231-33 (2008) (holding that two suits that allege breaches of duty arising from the same trust relationship and involving the same trust property share the same operative facts).

C. Plaintiffs' Complaints Share the Same Operative Facts

1. An "operative fact" is a fact that is material to proving a claim.

The court must now consider whether the CFC complaint alleges substantially the same operative facts as the suit brought before the federal district court. Before proceeding further, the court must consider what an "operative fact" is.

The definition of an "operative fact" is an issue of controversy among the parties. According to plaintiffs, operative facts are limited to "those facts that

are material in determining the claims at issue." Pls.' Resp. at 2. Defendant, in contrast, insists that the sweeping language in *Johns-Manville* stands for the proposition that the court should compare the facts of the two complaints without any reference whatsoever to the legal theories advanced. Def.'s Reply in Support of Mot. Dismiss at 6-7. *See Johns-Manville Corp. v. United States,* 855 F.2d 1556, 1564 (Fed. Cir. 1988) ("the term 'claim' in section 1500 'has *no reference* to the legal theory upon which a claimant seeks to enforce his demand.' Since the legal theory is *not relevant*, neither are the elements of proof necessary to present a prima facie case under that theory") (emphasis added); *Brandt v. United States*, 710 F.3d 1369, 1374 (Fed. Cir. 2013) ("the legal theories underlying the asserted claims are *irrelevant* to this inquiry") (emphasis added). In *Johns-Manville,* the Federal Circuit found that § 1500 precluded the Court of Federal Claims from hearing plaintiff's contract claim, despite the fact that the elements of proof for the plaintiff's tort action in district court were different from the elements in the contract theory advanced in the CFC.

However, defendant takes the language of *Johns-Manville* too far. In that case, the Federal Circuit simply held that the word "claim" in § 1500 "has no reference to the legal theory *upon which claimant seeks to enforce his demand*." 855 F.2d at 1564 (emphasis added). Thus, in *Johns-Manville*, the Federal Circuit never went as far as to state that the legal claims advanced by plaintiff are wholly irrelevant in the § 1500 context, but simply held that the *type of relief sought* is irrelevant. This view is consistent

with the Supreme Court's position that a § 1500 analysis should take into account the principles of res judicata. *See Tohono O'Odham*, 131 at 1730 (emphasizing that the "principles of preclusion law [are] embodied in the statute [§ 1500]"); *Klamath Irrigation Dist. v. United States,* 01-591L, 2013 WL 6139925 (Fed. Cl. Nov. 22, 2013), at *14-17 (stating that the meaning of "operative fact" in the context of § 1500 should be interpreted with reference to the Court's civil procedure and res judicata opinions). Moreover, it is consistent with the Supreme Court's holding that "the form of relief" does not matter *"except insofar as it affects what facts parties must prove." Tohono O'Odham,* 131 at 1730 (emphasis added). In fact, the very use of the word "operative" suggests that the relationship between the facts and the legal theory argued by the plaintiff must necessarily be relevant. *See* BLACK'S LAW DICTIONARY 670 (9th ed. 2009) (defining an "operative fact" as "1. A fact that *affects* an existing legal relation, especially *a legal claim*," and "2. A fact that constitutes the transaction or event *on which a claim or defense is based"*) (emphasis added).

In sum, two claims arise from substantially the same operative facts if the facts material to supporting a claim in one complaint are also necessary to support a claim in another complaint. In order to make that determination, the court must necessarily take into consideration the nature of the legal arguments made in each complaint.

2. Plaintiffs' district court and CFC complaints share substantially the same operative facts.

Having considered what an operative fact is, the court must now consider whether plaintiffs' CFC and district court complaints share substantially the same operative facts. As explained above, although the court is barred from taking into account the theories of relief requested by the plaintiffs in the two complaints, the claims articulated by the plaintiff are relevant in determining whether a fact is operative. Hence, "determining whether two claims are 'based on substantially the same operative facts' requires more than a side-by-side comparison of the two complaints to see how much verbiage is in common." *Petro-Hunt*, 105 Fed. Cl. 37, 43 (citing *Trusted Integration*, 659 F.3d at 1165).

a. *Trusted Integration* requires a claim-by-claim approach to determining whether plaintiffs' claims arise out of substantially the same operative facts.

Trusted Integration is an especially instructive opinion because the Federal Circuit addressed the issue of "operative facts" in detail. Notably, in that case, the facts alleged by the plaintiff in the CFC complaint were nearly the same as those alleged in the district court complaint. Plaintiff Trusted Integration, a commercial supplier of information security services, had contracted with the Department of Justice ("DOJ") to help DOJ meet the information security standards imposed by the Federal Information Security Management Act ("FISMA") by providing a product known as "TrustedAgent." Apparently, DOJ hoped to use this service to win the designation of "Center of Excellence" ("COE") from the Office of

Management and Budget ("OMB"), which would allow DOJ to sell FISMA compliance solutions to other agencies. *Trusted Integration*, 659 F.3d at 1161-62.

Although DOJ represented that it would include Trusted Integration in the submission to the COE Committee, DOJ submitted its own alternative to TrustedAgent, which it developed by accessing and studying—without permission—the TrustedAgent database. *Id*. Trusted Integration sued first in federal district court, asserting "(1) a Lanham Act claim for false designation of origin[,] (2) a common law unfair competition claim[,] and (3) a breach of fiduciary duty claim." *Id*. Trusted Integration then sued in this court, asserting "(1) breach of an oral or implied-in-fact contract[,] (2) breach of the TrustedAgent license agreement[,] and (3) breach of the duty of good faith and fair dealing." *Id*. The government moved to dismiss all of plaintiffs' CFC claims on the ground that § 1500 precluded this court from exercising jurisdiction. The Court of Federal Claims granted the motion, and Trusted Integration timely appealed. *Id.*

In *Trusted Integration*, the Federal Circuit proceeded by identifying which government conduct was material to stating a cause of action for each claim made in the CFC case. *See id*. at 1165-68. The court found that § 1500 precluded plaintiffs from asserting that the DOJ had breached an implied-in-fact contract to engage in a joint venture because the conduct essential to that claim—*i.e.*, the DOJ's failure to promote or offer Trusted Integration's network security solution—was also material to the breach of fiduciary duty claim brought by plaintiff before the federal district court. *Id*. at 1165-66. Similarly, the court

found that § 1500 precluded plaintiffs from arguing that the DOJ had breached the duty of good faith and fair dealing because the conduct essential to that claim—*i.e.*, the DOJ's failure to advise Trusted Integration that it was developing a competing product—was also material to the breach of fiduciary duty claim brought before the district court. *Id*. at 1166.

In contrast, the Federal Circuit found that § 1500 did *not* preclude plaintiffs from asserting a breach of license agreement claim before the Court of Federal Claims. Although it acknowledged that the conduct at issue in the breach of license agreement claim—the DOJ's unauthorized *access* of plaintiff's database—was also alleged in the district court case, the Federal Circuit found that it was not material to any claim made by the plaintiff in the district court complaint. *Id*. at 1167-69. Applying the "evidence test" endorsed by the *Tohono O'Odham* Court, which determines that two suits involve the same claim if "the same evidence support[s] and establish[es] both the present and the former cause of action," the Federal Circuit found that evidence relating to the breach of license agreement claim supported but did not establish a cause of action in the district court "because it was insufficient to entitle the plaintiff to relief in the prior suit." *Id*. at 1169; *Tohono O'Odham*, 131 S. Ct. at 1730. Accordingly, the court held that plaintiff's breach of license agreement claim was not based on substantially the same operative facts as any claim brought before the district court, and concluded that § 1500 did not apply. *Trusted Integration*, 659 F.3d at 1170.

b. Plaintiffs' CFC claim and counts III and IV of plaintiffs' district court complaint arise out of the same operative facts.

Following the example set by *Trusted Integration*, the court now turns to an examination of the claims and facts alleged by plaintiffs in the two complaints. To do this, the court must first identify which facts are operative, and then examine whether there is a substantial overlap, "on a claim-by-claim basis." *Klamath Irrigation District*, 01-591L, 2013 WL 6139925, at *19; *Trusted Integration*, 659 F.3d at 1165.

In its original CFC complaint, plaintiffs posited only one claim—that the Corps had taken plaintiffs' land without paying just compensation, as required by the Fifth Amendment of the U.S. Constitution. Pls.' CFC Compl. ¶¶ 47-64. Plaintiffs argued that the Corps' denial of the permit did not advance any legitimate governmental interest and interfered with their investment-backed expectations. *Id.* Clearly, the conduct that is material or operative to that takings claim is the *denial of the permit* by the Corps, for had the Corps granted the permit, plaintiffs would have no takings claim. Therefore, applying *Trusted Integration*, § 1500 does not preclude this court from considering plaintiffs' takings claim unless the facts underlying the Corps' denial of the permit were also material to one of the claims brought by plaintiffs before the district court.

In counts I and II of the district court complaint, plaintiffs contended that the Corps' assertion of jurisdiction under § 404 of the CWA was

preempted by the Resource Conservation and Recovery Act and by the Corps' own regulations, respectively. Accordingly, the operative conduct at issue in counts I and II of the district court complaint was the Corps' assertion of jurisdiction under § 404. As plaintiffs point out, the Corps' decision to assert jurisdiction is separate from the Corps' denial of the permit (the operative conduct in the CFC claim), for plaintiffs could have, hypothetically, challenged the Corps' assertion of jurisdiction in federal district court before the Corps had decided whether or not to grant the permit. This court accepted a similar distinction in *McDermott, Inc. v. United States*, 30 Fed. Cl. 332 (1994), one of the cases cited by the plaintiffs. Accordingly, the court finds that the facts operative to asserting counts I and II before the district court were different from the operative facts in the CFC case.

However, the jurisdiction by the Corps was not the only issue in the district court case, even if it was the only issue considered on appeal by the Ninth Circuit. In count III of the district court complaint, plaintiffs alleged that the Corps' *denial of the permit* violated the National Environmental Policy Act (NEPA). Specifically, the plaintiffs argued that the Corps violated NEPA by unlawfully denying a permit on environmental grounds without performing an Environmental Impact Statement. Clearly, the facts underlying the denial of the permit are not mere background facts, but are operative or material to the claim made in count III—but for the denial of the permit, plaintiff could not have alleged a NEPA violation. *See* Pls.' Dist. Ct. Compl. ¶¶ 152-170. Accordingly, the court finds that plaintiffs' CFC claim and count III of the

district court complaint arise from substantially the same operative facts, and thus implicate § 1500.

Similarly, in count IV of the district court complaint, the operative facts at issue were the facts underlying the Corps' *decision to deny the section 404 permit*. According to plaintiffs, the denial of the permit violated section 404 of the CWA as well as the Corps' own internal regulations by improperly considering long haul waste disposal as a practicable alternative, by considering Horn Creek as a practicable alternative, by improperly disregarding the certification by the Washington State Department of Ecology under § 401 of the CWA, and by failing to elevate the decision on the permit application to a higher level within the Corps. Pls.' Dist. Ct. Compl. ¶¶ 219-311. Here too, the facts underlying the Corps' *decision to deny the permit* were material to plaintiffs' claim that the Corps violated applicable regulations because the denial of the permit was the culmination of a series of allegedly improper acts taken by the Corps. *C.f.* Pls.' Opp'n at 12 ("Plaintiffs alleged that the Corps violated [§] 404 and the Corps' own internal regulations when it denied Plaintiffs' permit application"). Therefore, the court finds that plaintiffs' taking claim and count IV of plaintiffs' district court complaint arise from substantially the same operative fact, and thus implicate § 1500.

3. The cases cited by plaintiffs are consistent with the court's finding that § 1500 applies.

The case before the court is clearly distinguishable from the precedents cited by plaintiffs because, in those cases, none of the facts that were material to

supporting any claim made before the district court were material to supporting the claim made before the CFC. For instance, in *McDermott*, the only issue before the CFC was plaintiff's breach of contract claim. In contrast, the issues before the federal district court were the constitutionality and applicability of 10 U.S.C. § 2405, under which the Navy had sought to limit the ability of shipbuilders to raise contract claims. 30 Fed. Cl. at 334-35. As defendant points out, the plaintiff's district court complaint "required legal determinations that did not implicate the specific contract or conduct at issue" in the action before the Court of Federal Claims. Def's Rep. at 9-10. Unlike *McDermott*, the plaintiffs' district court action challenged not only the jurisdiction of the Corps, but also the conduct of the Corps in denying the permit, which was the operative fact in both the takings claim before the Court of Federal Claims and counts III and IV of the district court complaint.

Plaintiffs' reliance on *d'Abrera* is similarly misplaced. Pls.' Resp. at 21-22 (citing *d'Abrera*, 78 Fed. Cl. at 58). In *d'Abrera*, the court began by observing that "claims involving the same general factual circumstances, but distinct material facts, can fail to trigger Section 1500." *Id*. at 58 (quoting *Branch v. United States*, 29 Fed. Cl. 606, 609 (1993)). The *d'Abrera* court, like the Federal Circuit in *Trusted Integration*, proceeded to identify which *conduct* by the government was material to the claims made in the CFC and the district court cases. *Id*. The court found that § 1500 did not apply because the conduct material to the plaintiff's copyright infringement claim—namely, the unauthorized reproduction and distribution of the plaintiff's photographs—was distinct from

the conduct material to the plaintiff's Lantham Act claim—namely, the government's passing off the photographs as its own. Plaintiffs argue that *d'Abrera* stands for the proposition that "there is no jurisdictional bar when transactionally related claims depend upon different operative facts. This statement is accurate but does not apply to plaintiffs' case. As explained above, the facts underlying the Corps' denial of the section 404 permit were operative in both counts III and IV of the district court complaint and in the takings claim brought before the CFC.

Plaintiffs' reliance on *Lucas* is also unavailing. As in *Trusted Integration*, it was irrelevant in *Lucas* that the two suits shared similar background facts because the claims in each court arose out of *separate* breaches of two *separate* contracts. *See Lucas*, 25 Cl. Ct. at 305 ("These are two entirely separate contracts with distinct terms and purposes. The materials before the court indicate that … the material facts supporting each claim are largely dissimilar."). Again, and in contrast, the denial of the permit by the Corps is the central operative fact in both the CFC and counts III and IV of the district court complaint.

Lastly, *Whitney Benefits* is wholly inapposite. In that takings case, the CFC had already granted plaintiffs' judgment, the Federal Circuit had already affirmed the judgment of the CFC, and the Supreme Court had already denied cert. *Whitney Benefits, Inc. v. United States*, 31 Fed. Cl. 116, 117 (1994). In a subsequent dispute over the apportionment of the award of just compensation, the government moved to set aside the judgment as void for lack of subject matter jurisdiction under § 1500. *Id*. The court observed

that, although the government had failed to argue the § 1500 issue, both the CFC and the Federal Circuit raised the issue of the CFC's subject matter jurisdiction and found that the CFC had jurisdiction. The court held that regardless of the merits of the government's argument, it was powerless to reopen a case in which there was a final judgment. *Id*. at 119. Although the court did discuss the merits of defendant's § 1500 argument, this discussion was unnecessary to the judgment and thus had no precedential value.

And even to the extent that *Whitney Benefits* applied an operative facts analysis, the case is distinguishable. In that case, the plaintiffs sued in district court to compel the government to accede to a statutory exchange of coal tracts pursuant to the Surface Mining Control and Reclamation Act. That act had deprived plaintiffs' land of value by forbidding strip mining on their land, but mitigated the cost to preexisting owners by allowing them to swap land subject to mining prohibitions for Federal land free of such restraints. *Id*. at 120. The court found that the operative facts in the district court case were "merely the conditions set forth in the statute" that had to be met to qualify for a land swap. *Id*. This set of conditions was not a prerequisite to establishing a takings claim in the suit brought before the CFC. Accordingly, the CFC found that the two suits did not arise from substantially the same operative facts. *Id*. In contrast, the facts underlying the Corps' denial of the section 404 permit were operative in both counts III and IV of the district court complaint and in the takings claim brought before the CFC.

In conclusion, plaintiffs' cited authorities are clearly distinguishable from the case before the court. In contrast to the cases cited by plaintiffs, the operative facts in the case before us—namely, the facts underlying the Corps' decision to deny the permit—were also material in the district court suit.

D. Plaintiffs' District Court Suit Was "Pending" for Purposes of 28 U.S.C. § 1500

As explained above, 28 U.S.C. §1500 does not preclude this court from hearing a case merely because the claim asserted in this court arises from the "same operative facts" as the claim asserted in district court. Section 1500 also requires that the suit be "pending" when this court's jurisdiction is invoked. Plaintiffs argue that "there was no suit or proceeding 'pending' that would implicate § 1500" for the following three reasons. First, plaintiffs argue that § 1500 only applies to their amended complaint, which was filed after the litigation in the district court had been resolved. Pls.' Resp. at 4. Second, plaintiffs argue that some of the claims made in the amended complaint (such as their extraordinary delay claim) accrued only after the Ninth Circuit reversed the district court. *Id*. at 11 n.5, 12, 16, 20-21, 34. Such claims, plaintiffs maintain, were not pending in district court for § 1500 purposes because they could not have been asserted prior to the Ninth Circuit's reversal. *Id*. at 11 n.5. Thus, any minimal overlap in these facts is irrelevant because the overlap did not exist until after there was no longer another 'pending' action." Pls.' Resp. at 11 n.5; *id*. at 35. Third, plaintiffs argue that "any conceivable impediment to this Court's jurisdiction has long since been cured.… Had Plaintiffs

simply voluntarily dismissed and refiled after the Ninth Circuit issued its mandate in *Resource I*, there would not even be a colorable ground for Defendant's motion." Pls.' Resp. at 35.

Plaintiffs first argue that the operative time for determining when their district court suit was pending was when their amended complaint was filed. This position is misguided because the court's jurisdiction over a case depends on the factual circumstances alleged at the time its jurisdiction was invoked. *Keene*, 508 U.S. at 207 (holding that the jurisdiction of the Court of Federal Claims depends "upon the state of things at the time of the action brought") (quoting *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)); *Low v. United States*, 90 Fed. Cl. 447, 451 (2009) (holding that the filing date of an amended complaint is "irrelevant" for purposes of § 1500 because only the filing date of the original complaint is relevant). Additionally, RCFC Rule 15(c)(2) provides that "[a]n amendment of a pleading relates back to the date of the original pleading when the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." *See Hall v. United States*, 74 Fed. Cl. 391, 394 (2006). Clearly, the takings claims in both the original and amended complaint are based on the same transaction or occurrence because in both the case before this court and counts III and IV of plaintiffs' district court case, the transaction or occurrence at issue is the Corps' denial of the section 404 permit and the facts underlying that decision. Accordingly,

under RCFC Rule 15(c)(2), plaintiffs' amended complaint relates back to the filing date of their original complaint.

A better argument would have been for the plaintiffs to characterize their amended complaint as a supplemental complaint under RCFC Rule 15(d), which provides that the court "may permit supplementation even though the original pleading is defective in stating a claim or defense" if the supplemental pleading "set[s] out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." *See Walton v. United States*, 80 Fed. Cl. 251, 265 (2008) (stating that, "[b]ecause the Amended Complaint included allegations regarding events that happened after the first complaint, technically it is a supplemental complaint, not an 'amended complaint.'"). However, a supplemental complaint can only cure a jurisdictional defect if a plaintiff fails to meet some statutory prerequisite to filing, such as a statute's exhaustion requirements. *Cent. Pines Land Co.*, 697 F.3d 1360, 1365-66 (Fed. Cir. 2012). Such lenience is not available "if a statute contains an express prohibition against filing suit." *Id.* In *Central Pines*, the Federal Circuit held that § 1500 serves as an "express prohibition" for purposes of RCFC Rule 15(d) rather than a statutory prerequisite to filing that can be cured by supplemental pleading because the statute "explicitly states that the Claims Court 'shall not have jurisdiction' over 'any claim' that a party has pending in another court. This language creates a mandatory prohibited period—the duration of the district court action for the same claim—during which the Claims Court cannot have jurisdiction over any action initiated by plaintiff for

the claim." *Id*. at 1366 (citing *Keene*, 508 U.S. at 209). Accordingly, not even RCFC Rule 15(d) allows plaintiffs to escape the strictures of § 1500.

Second, plaintiffs argue that the pending requirement could not possibly be met in the case of the extraordinary delay claim, which was made for the first time in their amended CFC complaint, because that claim could not have existed until after the Ninth Circuit had issued its opinion. Pls.' Resp. at 11 n.5, 12, 16, 20-21, 34. This argument is unavailing because in the post-*Tohono O'Odham* legal universe, the relevant comparisons under § 1500 are not the claims themselves but rather the operative facts that give rise to those claims. *Tohono O'Odham*, 131 S. Ct. at 1731; *see Keene*, 508 U.S. at 210-11 ("After noting that the causes of action 'arose out of' the same factual setting, we applied [the statute] and dismissed the appeal." (citations omitted)); *id*. at 212 ("[T]he word 'claim,' as used in [the statute] has no reference to the legal theory upon which a claimant seeks to enforce his demand."). The Ninth Circuit's reversal in favor of plaintiffs changed the *legal consequences* of the Corps' assertion of jurisdiction, requiring plaintiffs to amend their complaint so as to plead a temporary takings claim rather than a permanent takings claim, and to introduce an extraordinary delay claim. However, the reversal does not alter the *identity of the operative facts* at issue—namely, the facts underlying the denial of the permit by the Corps.

Lastly, plaintiffs argue that any jurisdictional defect that might have existed at the time of filing has since been cured. Pls.' Resp. at 36 (citing *Richmond, Fredericksburg & Potomac R.R. Co. v. United*

States, 75 F.3d 648, 653 (Fed. Cir. 1996) ("*RF&P*")). Plaintiffs argue that the court should not dismiss their case for lack of jurisdiction at this late stage because they could have, hypothetically, obtained a voluntary dismissal of their original suit before this court and then refiled it at a time when their district court litigation was no longer pending. Pls.' Resp. at 35. The case most supportive of their assertion is *RF&P*. That case, however, is inapposite. Its holding that an amended complaint alleging new theories of recovery can cure a § 1500 defect is no longer relevant after *Tohono O'Odham* because the entire jurisdictional inquiry is now limited to the operative facts asserted, regardless of the form of relief requested. Here, plaintiffs have amended their complaint to take into account the Ninth Circuit's legal conclusions. As discussed above, such an amendment does not change the operative facts of plaintiffs' claims in this court.

E. The Court May Not Strictly Construe § 1500 or Make a Saving Exception

Finally, plaintiffs make two additional arguments that the court must address. First, plaintiffs describe § 1500 as a "relic of the Reconstruction area" and argue that it should be strictly construed. Pl.'s Opp'n at 3, 5. However, the Supreme Court has expressly rejected this argument. In *Tohono O'Odham*, the Court commands that the statute be given a *broad reading* to prevent it from "be[ing] rendered useless by a narrow concept of identity." 131 S. Ct. at 1728 (quoting *Keene*, 508 U.S. at 213) (emphasis added). Moreover, the role of the court is not to construe a statute narrowly or broadly depending on the

circumstances or the judge's policy preferences, but to construe it according to its ordinary meaning. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994).

Second, plaintiffs observe that their right to obtain just compensation for government takings is protected by the Fifth Amendment of the Constitution, and that the doctrine of constitutional avoidance requires the court to interpret § 1500 to avoid depriving them of their constitutional rights. However, the doctrine of constitutional avoidance applies "only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction," and one of those constructions avoids constitutional issues. *Clark v. Martinez*, 543 U.S. 371, 385 (2005). In this case, even if the § 1500 were susceptible to another interpretation that favors the plaintiffs, this court is not at liberty to apply it because the precedent of the Supreme Court and Federal Circuit require this court to apply § 1500 when both suits arise from substantially the same operative facts, as is the case here.

Moreover, there are no serious doubts that Congress, having elected to establish the Court of Federal Claims, may limit its jurisdiction without running afoul of the Constitution. *John R. Sands & Gravel Co. v. United States*, 457 F.3d 1345, 1346-47 (Fed. Cir. 2006) (holding that the Court of Federal Claims lacked jurisdiction of a Takings Clause claim past the six-year limitations period); *see also Block v. North Dakota*, 461 U.S. 273, 292 (1983). Indeed, this court has rejected the contention that § 1500 "cannot be interpreted to restrict the jurisdiction of this court to decide a claim founded on the Constitution, namely

a Fifth Amendment inverse condemnation claim." *Donnelly v. United States*, 28 Fed. Cl. 62, 64-65 (1993) (finding no serious constitutional doubt about the applicability of § 1500 to a Takings Clause case).

Before concluding, it is worth recognizing that this case, like *Central Pines*,[10] "presents exactly the type of incomplete relief and hardship the Supreme Court noted could result from application of section 1500." *Cent. Pines*, 99 Fed. Cl. at 407.[11] Mindful of this hardship, the court must nevertheless stay faithful to its jurisdictional grant, for "there is no basis for finding saving exceptions [to jurisdictional statutes] unless they are made explicit." *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 390 (1953). "If indeed the statute leads to incomplete relief," as it has here, plaintiffs "are free to direct their complaints to Congress." *Tohono O'Odham*, 131 S. Ct. at 1731.[12]

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[10] The hardship suffered by the plaintiffs in *Central Pines* was significantly worse than that inflicted upon plaintiffs in the instant case. The court was already "considering the plaintiffs' claim for attorneys' fees and costs [when] the Supreme Court issued its opinion in *Tohono* and the government moved to dismiss." *Central Pines*, 99 Fed. Cl. at 397. The motion to dismiss was filed after plaintiff won a judgment for $1,667,042.86 plus interest under the Takings Clause. *See id*. at 397 (citing *Central Pines*, 95 Fed. Cl. 633, 635 n.1, 652 (plaintiffs awarded a $1.6 million judgment)).

[11] In *Tohono O'Odham*, the Court recognized that its interpretation of § 1500 might force "plaintiffs to choose between partial remedies available [only] in different courts." 131 S. Ct. at 1730.

[12] On December 6, 2012, the Administrative Conference of the United States formally recommended replacing § 1500 with a measure that merely stays proceedings in the Court of Federal

In both *Keene* and *Tohono O 'Odham*, the Supreme Court rejected policy arguments based on a litigant's interpretation of § 1500's purpose. In *Keene*, the Court held that:

> We have said nothing until now about Keene's several policy arguments, and now can only answer that Keene addresses the wrong forum. It may well be, as Keene argues, that § 1500 operates in some circumstances to deprive plaintiffs of an opportunity to assert rights that Congress has generally made available to them "under the complex legal and jurisdictional schemes that govern claims against the Government." The trial judge in this case was not the first to call this statute anachronistic, and there is a good argument that, even when first enacted, the statute did not actually perform the preclusion function emphasized by its sponsor. But the "proper theater" for such arguments, as we told another disappointed claimant many years ago, "is the halls of Congress, for that branch of the government has limited the jurisdiction of the

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Claims until a pending dispute in other federal courts are resolved. *See* Administrative Conference Recommendation 2012-6, *Reform of 28 U.S.C. Section 1500*, http://www. acus. gov/recommendation/reform-28-usc-section-1500. The ABA followed suit with a similar recommendation on February 11, 2013. *See* ABA Resolution 300, http://www.americanbar.org/content/dam/aba/administrative/house_of delegates/2013_hod_mid year meeting_daily_journal.authcheckdam.pdf. However, Congress has not yet taken any action on any of these recommendations.

> Court of Claims." We enjoy no "liberty to add an exception to remove apparent hardship," and therefore enforce the statute.

Keene, 508 U.S. at 217 (citations and quotations omitted). For that reason, this case, like *Central Pines*, may be appropriate for a congressional reference, "wherein a bill is referred to the chief judge of the Court of Federal Claims by either house of Congress for review by a three judge panel." *Central Pines*, 99 Fed. Cl. at 407; *see* 28 U.S.C. §§ 1492, 2509(a).

The Court of Federal Claims, like any other federal court, may adjudicate claims against the United States *only* with the United States' consent. *Transamerica Ins. Co. v. United States*, 31 Fed. Cl. 602, 604 (1994) ("Absent congressional consent to adjudicate a claim against the United States, [the CFC] lacks authority to grant relief."). When Congress has withdrawn jurisdiction, as it has done here under 28 U.S.C. § 1500, it has also withdrawn the United States' consent to suit. *See Winnebago Tribe of Nebraska v. United States*, 06-913L, 2011 WL 5042385, at * 1 (Fed. Cl. Oct. 25, 2011). The judiciary is said to be the "least dangerous" of the three branches because even in the face of manifest injustice, its duty is to abide by the law—regardless of the harsh effects such obedience might occasion on litigants—and defer the litigants to the political branches for redress. *The Federalist No. 78* (Alexander Hamilton), *available at* http://www.constitution.org/fed/federa78.htm. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact

and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868).

III. CONCLUSION

For the foregoing reasons, defendant's **MOTION** to dismiss for lack of subject matter jurisdiction pursuant to RCFC 12(b)(1) and 28 U.S.C. § 1500 is **GRANTED**. The Clerk is directed to take the necessary steps to dismiss this matter.

IT IS SO ORDERED.

s/ Lawrence J. Block
Lawrence J. Block
Judge

APPENDIX C

NOTE: This disposition is nonprecedential.

United States Court of Appeals
for the Federal Circuit

RESOURCE INVESTMENTS, INC., LAND RECOVERY, INC.,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

2014-5069

Appeal from the United States Court of Federal Claims in No. 1:98-cv-00419-LB, Judge Lawrence J. Block.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES AND STOLL, *Circuit Judges*.

PER CURIAM.

O R D E R

Plaintiffs-Appellants Resource Investments, Inc. and Land Recovery, Inc. filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for en banc is denied.

The mandate of the court will issue on August 25, 2015.

FOR THE COURT

August 18, 2015
Date

/s/ Daniel E. O'Toole
Daniel E. O'Toole
Clerk of Court