No. _____

In The
Supreme Court of the United States

LUMMI TRIBE OF THE LUMMI RESERVATION,
LUMMI NATION HOUSING AUTHORITY,
FORT BERTHOLD HOUSING AUTHORITY,
AND HOPI TRIBAL HOUSING AUTHORITY,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN FREDERICKS III
Counsel of Record
FREDERICKS PEEBLES & MORGAN LLP
3730 29th Ave.
Mandan, ND 58554
303-673-9600
jfredericks@ndnlaw.com

JEFFREY S. RASMUSSEN
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, CO 80027
303-673-9600
jrasmussen@ndnlaw.com

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Does 28 U.S.C. § 1491 grant the court of federal claims jurisdiction over an action to recover grant-in-aid funds unlawfully recouped by the United States or is the action one for specific relief which must be brought under the Administrative Procedure Act, 5 U.S.C. § 702?

Does the court of federal claims have jurisdiction to enter a judgment on an illegal exaction claim when the United States had previously awarded money to a recipient under a grant-in-aid statute and then unlawfully recouped the funds?

Where a grant-in-aid statute mandates that the United States pay grant funds to a plaintiff, does the court of federal claims have jurisdiction to enter a money judgment for the failure to pay the grant funds even if there are conditions on the use of the grant funds after they are awarded?

CORPORATE DISCLOSURE STATEMENT

There are no corporate entities.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

The Lummi Tribe of the Lummi Reservation, Lummi Nation Housing Authority, Fort Berthold Housing Authority, and Hopi Tribal Housing Authority petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at 870 F.3d 1313 (Fed. Cir. Sept. 12, 2017). The Federal Circuit opinion was from an interlocutory appeal by the United States from a court of federal claims opinion issued on September 30, 2015.

JURISDICTION

The opinion of the Federal Circuit was issued on September 12, 2017. Because the United States was a party to the appeal, the due date for a petition for rehearing was 45 days. Fed. R. App. Proc. 40(a)(1)(A); Fed. Cir. R. 40(e). Plaintiffs/Appellees timely filed their petition for rehearing on October 27, 2017. The petition for rehearing was denied by order issued on January 5, 2018. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

The Federal Circuit decision stemmed from an appeal by HUD of a court of federal claims order issued on September 30, 2015. HUD sought and obtained permission for interlocutory appeal of that order. Federal Appellate Court jurisdiction was invoked under 28 U.S.C. § 1292(d)(2).

The jurisdiction of the court of federal claims was alleged under 28 U.S.C. § 1491(a). Whether that statute provides for jurisdiction over the complaint is the primary issue on appeal and would be the primary issue presented in merits briefing to this Court.

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 1491(a) states:

> (1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6[1] of that Act.

5 U.S.C. § 702 states:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed

> nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

STATEMENT OF THE CASE

This case and a companion case for which a petition for a writ of certiorari was docketed on March 27, 2018, *Fort Peck Housing Authority, et al. v. United States Department of Housing and Urban Development*, Sup. Ct. case 17-1353 (hereinafter "*Fort Peck*"),[1] both present an issue that has starkly divided federal circuit courts and enabled the United States to argue

[1] The Petition in *Fort Peck* is from a decision of the Tenth Circuit, in which the Fort Peck Petitioners and other parties were appellees. That decision is reported at *Modoc Lassen Indian Housing Authority v. United States Department of Housing and Urban Development*, 881 F.3d 1181 (10th Cir. 2017).

both sides of the same coin to the detriment of federal grant recipients. The issue in both cases involves the boundary or overlap between the jurisdiction of the court of federal claims and the federal district courts.

Fort Peck and the present matter both arose out of federal suits seeking relief from the unlawful deprivation of grant funds that Congress had appropriated to each Petitioner Tribe as part of a federal grant-in-aid program, the Native American Housing Assistance and Self-Determination Act ("NAHASDA"), 25 U.S.C. §§ 4101-4243. In *Fort Peck*, plaintiffs brought suit in the district court based upon the APA, 5 U.S.C. § 702; and in the present matter, Petitioners brought suit in the court of federal claims based upon Tucker Act jurisdiction, 28 U.S.C. § 1491(a).[2]

Congress enacted NAHASDA to assist Indian tribes with providing affordable housing for tribal members. NAHASDA is a "Self Determination Act" in which Congress stressed that "[t]here exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people." NAHASDA, 25 U.S.C. § 4101(2).

Under NAHASDA, Congress established an annual block grant system whereby Indian tribes would

---

[2] Petitioners filed suit after the 2008 amendments to NAHASDA, within the 45 day limitations period authorized by 25 U.S.C. § 4152(b)(1)(E). Petitioners filed in the federal court of claims because at the time the federal district court in *Fort Peck* held a suit to recover the grant funds was not cognizable under the APA. *See* note 7 *infra*.

receive direct grant funding in order to provide affordable housing to low income persons. The relevant sections of NAHASDA required HUD to "make grants" "directly to the recipient for the Tribe." 25 U.S.C. § 4111(a)(1)-(2).[3] Sections 4151 and 4152 require HUD to make the grants in accordance with the statutory formula which includes "the number of low income housing dwelling units owned or operated" by the Tribes on the effective date of NAHASDA, September 30, 1997. 25 U.S.C. § 4152(b)(1) (1998).[4] These dwelling units are called Formula Current Assisted Stock (FCAS). 24 C.F.R. § 1000.314. FCAS funding is taken off the top of each annual appropriation before other NAHASDA funding needs are met because FCAS funding is the only NAHASDA grant category for which Congress required that sufficient funds be set aside. 25 U.S.C. § 4152(b)(1) (1998).

For each of the relevant years, Congress allocated money to NAHASDA, and therefore the requirement to make the grants in the amount set by the mandatory allocation formula applied in each year. As relevant here, the amount required to be allocated to each Tribe is capable of exact calculation based upon that Tribe's number of eligible housing units, i.e., FCAS.

---

[3] Appellees Lummi Nation Housing Authority, Fort Berthold Housing Authority and Hopi Tribal Housing Authority are recipients of the direct funding on behalf of their respective Tribes. Appx. 2223-2224 (SAC ¶¶ 10, 12-13).

[4] All references to section 4152 are to the pre-2008 amendment version. *See* 25 U.S.C. § 4152(b)(1)(E) (2017).

From 1998 through 2002, HUD had determined the number of FCAS units owned and operated by each Tribe, and it provided each Tribe with the mandatory grant based upon that number of units. Beginning in 2002, HUD asserted that its prior determination of FCAS units for the Petitioners had been too high because it believed Petitioners had failed to correct their FCAS counts and remove ineligible units as required by the regulations. HUD then removed the disputed FCAS units from the funding formula going forward and also recouped the grant funds attributable to the disputed FCAS units for prior funding years. Petitioners' complaint alleged those FCAS reductions were unfounded and HUD had therefore removed units from FCAS funding which it was required to fund under the statutes. Petitioners also alleged that HUD had no legal right to recoup awarded grant funds for the years prior outside the parameters of 25 U.S.C. §§ 4161 or 4165 and the regulations promulgated thereunder, 25 C.F.R. §§ 1000.501-540. These provisions imposed procedural protections and conditions on the recoupment of grant funds that HUD has admittedly not met. The allegations in Petitioners' complaint are conclusively assumed under the current procedural posture.

This then resulted in Petitioners, in two different ways, currently receiving less than the amount of money that Congress had statutorily mandated. First, HUD applied its incorrect reduction in FCAS units retroactively, and it then unlawfully recouped approximately $1,600,000 that had previously been awarded to the Petitioners. Second, HUD applied the erroneous

reduction in FCAS units prospectively, resulting in the Tribes receiving smaller than the statutorily mandated amount for the years 2002 through 2009.

A. Court of Federal Claims proceedings

In 2008, Petitioners brought suit under the Tucker Act, seeking judgment for the exact amount that they claimed should be in their possession based upon the mandatory allocation formula. This included both the money that HUD had provided to the Tribes but then unlawfully recouped, and amounts that HUD, in violation of the mandatory allocation formula, refused to provide the Tribes for the years 2002 through 2009. For the money that HUD had recouped, the Tribes asserted a second theory for recovery – that HUD had taken the money back in violation of the conditions contained in 25 C.F.R. §§ 1000.530-532 which are the prerequisite for any recoupment. That claim is referred to throughout the case as the "illegal exaction" or "unlawful exaction" claim.

HUD repeatedly and redundantly sought to dismiss the Tribes' claims based upon HUD's assertion that NAHASDA was not money mandating and the Tribes' remedy was an action in the district court, not an action in the court of federal claims. Two senior judges of the court of federal claims rejected HUD each time it raised that issue. First, Judge Wiese rejected HUD's argument in *Lummi Tribe of the Lummi Reservation v. United States*, 99 Fed. Cl. 584, 594 (2011):

> NAHASDA provides that the Secretary "shall . . . make grants" and "shall allocate any amounts" among Indian tribes that comply with certain requirements, 25 U.S.C. §§ 4111, 4151 (emphasis added), and directs that the funding allocation be made pursuant to a particular formula, 25 U.S.C. § 4152. The Secretary is thus bound by the statute to pay a qualifying tribe the amount to which it is entitled under the formula. NAHASDA, in other words, can fairly be interpreted as mandating the payment of compensation by the government. Such mandatory language is sufficient to confer jurisdiction on this court.

(citation omitted).

Judge Wiese then rejected HUD's claim that Tucker Act jurisdiction was foreclosed by this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988). *Id.* at 594-97.

When a different judge was assigned to this case, HUD sought and obtained a second bite at the same apple; but the second judge, Judge Bruggink, agreed "in toto" with Judge Wiese: 25 U.S.C. §§ 4111, 51 and 52, are money mandating. App. 16 (Sept. 30, 2015). Notably, in a separate case a third senior judge also determined that NAHASDA was money mandating. *Yakama Nation Hous. Auth. v. United States*, 102 Fed. Cl. 478, 486-87 (2011).

On the illegal exaction claim, Judge Wiese concluded in a supplementary opinion that HUD's recapture of the grant funds without complying with 25

U.S.C. § 4165 and its implementing regulations was an illegal exaction within the court's Tucker Act jurisdiction. *Lummi Tribe of the Lummi Reservation v. United States*, 106 Fed. Cl. 623 (2012). Judge Bruggink held that the exaction claim was viable because NAHASDA was money mandating, but he further opined that an illegal exaction claim would not be viable if NAHASDA were not money mandating.

HUD was granted permission to appeal from Judge Bruggink's September 30, 2015 decision.

B. Circuit Court proceedings

There were two primary issues presented in the appeal to the United States Circuit Court for the Federal Circuit. First, HUD reiterated its argument that the relevant provisions of the NAHASDA were not money mandating. HUD asserted that even if it had unlawfully taken money from the Tribes or had unlawfully refused to provide money to the Tribes, the Tribes' remedy would solely be through an APA action. This was the argument that Judges Weise and Bruggink had both rejected. The argument was also directly contrary to the argument HUD was simultaneously making in the Tenth Circuit in *Fort Peck*. The Tribes argued that NAHASDA was money mandating based on the plain language of the statute stating that HUD "shall make grants" to the Tribes in accordance with the statutory formula, as interpreted by Judge Wiese. *Lummi*, *supra*, 99 Fed. Cl. at 594.

Second, the Tribes reiterated their argument that their illegal exaction claim was not dependent on

whether NAHASDA was money mandating. Regardless of whether NAHASDA was money mandating, the mandatorily presumed facts were that the Tribes had the money in their bank accounts. The Tribes argued that the illegal exaction occurred when HUD unlawfully took that money back from the Tribes. HUD argued, and the Federal Circuit agreed, that the Tribes would also have to establish that the Tribes had received the funds in the first instance via a money mandating statute.

The Circuit Court reversed the court of federal claims. It held that the provisions of the NAHASDA were not money mandating "as revealed by the ultimately equitable nature of the Tribe's claims." 870 F.3d at 1317. It stated that if the court of federal claims were to issue a judgement for the amount that the Tribes should have possessed under the mandatory allocation formula, the money came with "strings attached," and therefore the statute was not money mandating. *Id.* at 1318.

The Circuit Court then dismissed the Petitioners' illegal exaction claim because it concluded, incorrectly, that Petitioners' claim was based on "property left *unawarded* to the claimant" 870 F.3d at 1319 (emphasis original).

Significantly for current purposes, the Circuit Court recognized that HUD's argument to the Federal Circuit was contrary to HUD's simultaneous argument to the Tenth Circuit in the *Fort Peck* cases, and it noted that HUD appeared to even confirm that its arguments to the two circuits were in tension. App. at 14;

870 F.3d at 1319-20 (citing HUD's oral argument to Federal Circuit). While the Federal Circuit expressed concern about HUD whipsawing the Tribes between the district courts and court of federal claims, it ultimately concluded that "[o]f the government's two faces, we find the one presented to the Claims Court – the one arguing that this 'is not a suit for Tucker Act damages' – to be the correct one." *Id*. (quoting Appellant Br. 42). The Federal Circuit instructed the Claims Court to dismiss the action for lack of subject matter jurisdiction. *Id.*

REASONS FOR GRANTING THE PETITION

Which "of the government's two faces" is correct – the one that HUD presented to the court of federal claims in this case, or the one that it presented to the district court in *Fort Peck*? The Federal Circuit Court concluded that the one presented in the court of federal claims was correct. The Tenth Circuit concluded that the one presented in the district court was correct. Both circuits cannot be right, yet the decision of the Federal Circuit, if allowed to stand, will deprive the court of federal claims of what has heretofore been a substantial part of its case load. *See Bowen*, 487 U.S. at 919-20 (Scalia, J., dissenting, citing cases).

This Court is the only court that can force the United States to present an argument with only one face on this substantial issue. It should grant certiorari in this case and *Fort Peck*, and require the United States to provide a single position on the issue.

"Nothing is more wasteful than litigation about where to litigate, particularly when the options are all courts within the same legal system that will apply the same law." *Bowen*, 487 U.S. at 930 (Scalia, J., dissenting). In *Bowen*, this Court was seeking to prevent wasteful litigation stemming from the unclear jurisdictional boundaries between the court of federal claims and the federal district courts.

In his dissent in *Bowen*, Justice Scalia predicted that the majority decision would exacerbate, not solve, the problem. This case and *Fort Peck* illustrate that in this regard Justice Scalia was correct. The Federal Circuit itself had previously correctly noted that "the *Bowen* case has generated much confusion regarding the jurisdiction of the courts, as well as adverse commentary." *Suburban Mortg. Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1123 (Fed. Cir. 2007). *See also* Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 Geo. Wash. L. Rev. 602 (2003) (providing detailed discussion of that "confusion," including detailed discussion of this Court's at-times difficult to synthesize decisions citing *Bowen*).[5]

---

[5] The Tribes contend that a substantial part of the confusion, both generally and as applied to this particular case comes from the Governments and at times the courts failing to distinguish between cases which interpret the statute granting federal district court jurisdiction under the APA, *e.g.*, *Bowen*; and the cases which require interpretation of the statute defining the CFC's jurisdiction. *Lummi Tribe of the Lummi Reservation v. United States*, 99 Fed. Cl. 584, 597 (2011) (rejecting United States attempts to conflate the two separate issues); *Yakama Nation Hous.*

While there were three separate opinions in *Bowen*, all of the Justices agreed that at least one court would have jurisdiction to grant complete relief to a party wronged by federal refusal to provide grant-in-aid funding. 487 U.S. at 915 (Justice Scalia discussed that he and the majority agreed that there is not "a gap in the scheme of relief – an utterly irrational gap which we have no reason to believe was intended.").

In NAHASDA, Congress redundantly showed that there was not a gap in the scheme of relief. NAHASDA itself states that the funding "shall be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance by making such assistance available directly to the Indian tribes or tribally designated entities *under authorities similar to those accorded Indian tribes in Public Law 93-638 (25 U.S.C. 450 et seq.)*" (emphasis added). Courts routinely grant relief under Public Law No. 96-638, both in the CFC and district courts. *E.g., Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005); *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012); *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009); *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534 (D. Nev. 2014). More to the point, when Congress amended NAHASDA in 2008 to more clearly define which dwelling units were eligible for FCAS funding, it specifically made the amendments inapplicable to

---

Auth. v. United States, 102 Fed. Cl. 478 (2011) (same). U.S. Reply Br. at 10 (United States attempts to conflate the issues). Here we are dealing with the statute defining the CFC's jurisdiction.

tribes with FCAS claims "if a civil action relating to the claim is filed by not later than 45 days after the date of enactment of this subparagraph." 25 U.S.C. § 4152(b)(1)(E) (2009). The Petitioners filed suit under subsection (b)(1)(E). Yet, as things currently stand, the Petitioners are left without a remedy despite the congressional mandate.

But, as the present matter and *Fort Peck* illustrate, the circuit courts disagree in their interpretations of *Bowen*, and that disagreement results in the "utterly irrational gap," contrary to congressional intent and contrary to what this Court intended when it decided *Bowen*.

This Court, in *Bowen*, interpreted the competing jurisdictional statutes in a way that would be most efficient for the courts and parties. It held that the district court had jurisdiction because that was the only court that could provide *complete* relief to the plaintiff under the grant-in-aid statute there at issue. But that functional and pragmatic interpretation has now been stood on its head because of the conflicting decisions here and in the *Fort Peck*. In this case, the Federal Circuit held that *Bowen* precluded court of federal claims jurisdiction even though it knew that the Tenth Circuit, in *Fort Peck*, had decided that *Bowen* meant that *the district court cannot provide complete*, or even very substantial, relief.

This Court should grant certiorari and clarify the jurisdictional boundary and eliminate the utterly

irrational gap that has now developed at that boundary.[6] The Federal Circuit itself noted that it and the majority opinion in the Tenth Circuit were in disagreement, *Lummi*, App. at 14; 870 F.3d at 1319, but each court has steadfastly concluded that it was right and the other circuit wrong. This Court is the only entity which can eliminate this disagreement between the circuits.

HUD unlawfully "recaptured" funds from Petitioners and other tribal housing entities, and unlawfully refused to restore that money to Petitioners and the other tribal housing entities. In the present matter and in *Fort Peck*, the Tribes pled their claims related to this unlawful federal action consistent with the jurisdictional divide explicated in *Bowen*. In the present matter, the plaintiffs brought suit for money damages only. They did not seek the types of equitable relief which the court of federal claims cannot provide.[7] In *Fort*

---

[6] While the key point for current purposes is that at least one of the two circuit courts is wrong, Petitioners contend that both courts were wrong. In matters like the present, there is actually an overlap between the jurisdiction of the federal circuit and the jurisdiction of the district courts. In other words, an APA action seeking specific relief in the form of the payment of money does not necessarily oust the court of federal claims from asserting jurisdiction to issue a naked money judgment under the Tucker Act. *See Lummi*, 99 Fed. Cl. at 595-596.

[7] The *Lummi* plaintiffs filed suit after NAHASDA was amended, as was expressly allowed by 25 U.S.C. § 4152(b)(1)(E) (2009). The suit was filed in the court of claims because at the time the district court in the Fort Peck action held that it had no jurisdiction under the APA to order the restoration of the funds because the remedy constituted money damages. *Fort Peck Hous. Auth. v. United States HUD*, 2006 U.S. Dist. LEXIS 53203, *4-5 (D.

Peck, plaintiffs brought suit in 2007 primarily based upon the APA seeking both a restoration of the illegally recouped funds and prospective injunctive relief to bar the government from continuing its unlawful conduct. Plaintiffs then litigated for seven years, and prevailed in both of the trial courts. But HUD appealed from both sets of trial court decisions, and made inconsistent arguments in both courts, *Lummi*, App. at 14; 870 F.3d at 1319, and HUD somehow then won in both courts of appeals.

This case and *Fort Peck* present an issue of supreme importance in which there is divergence among federal circuit courts, and at least one of the two circuit decisions is in conflict with *Bowen*.

Moreover, HUD has been permitted to exploit the inconsistency among the circuits to evade its responsibilities to the detriment of federal grant recipients. *Lummi*, App. at 14; 870 F.3d at 1319 (referring to the proceedings in the Tenth Circuit below, the Federal Circuit stated that "the government has taken, essentially, the opposite position in at least one of our sister circuits in parallel litigation"). This issue must be resolved because it directly impacts a program that is crucial throughout Indian country to providing safe, affordable homes to low income people, and because it impacts numerous other matters where the lack of clarity between district court and court of claims jurisdiction results in years of wasteful litigation on

---

Colo. 2006). The district court later reversed itself in the action that is the subject of a cert. petition in *Fort Peck*.

jurisdiction. Moreover, the decisions insulate the United States from liability for wrongful withholding or recoupment of federal grant-in-aid funds, potentially affecting all grant-in-aid recipients.

The issue presented in merits briefing to this Court in this case will be difficult. It has divided the lower courts, and has even resulted in multiple dissenting and concurring decisions in the Tenth Circuit decision in *Fort Peck*. Similarly, in *Bowen*, this Court was divided.

But the issue in this petition for a writ of certiorari is simpler: should this Court grant certiorari to provide much needed clarity and to resolve the existing conflict between the circuits, by clarifying what it meant in *Bowen*?

In effect, the Federal Circuit is attempting to pass the buck to the other circuits, while the Tenth Circuit is attempting to pass it back, resulting in what the Federal Circuit court previously and accurately referred to as a "jurisprudential Flying Dutchman." *Nat'l Ctr. for Mfg. Scis. v. United States*, 114 F.3d 196, 199 (Fed. Cir. 1997). The Tribes and tribal organizations in the present matter, and more generally plaintiffs seeking to navigate these contradictory decisions, are the unlucky passengers on that Flying Dutchman.

I. THE FEDERAL CIRCUIT'S DECISION IS INCONSISTENT WITH *BOWEN* AND CREATES A CLEAR SPLIT AMONG THE CIRCUITS REGARDING THE PROPER JURISDICTION TO HEAR CLAIMS FOR THE UNLAWFUL RECOUPMENT OF FEDERAL GRANT-IN-AID FUNDS.

In *Bowen*, 487 U.S. at 882, this Court considered "whether a federal district court has jurisdiction to review a final order of the Secretary of Health and Human Services refusing to reimburse a state for a category of expenditures under its Medicaid program." The state of Massachusetts had brought actions in the federal district court seeking to overturn the Department of Health and Human Services' ("HHS") decision that certain services provided by the state did not qualify for reimbursement under the Medicaid program. The district court found in HHS' favor but was reversed by the court of appeals, which held that the district court lacked jurisdiction to order the Secretary of HHS to pay money to the state. The circuit court affirmed the district court's declaratory judgment in the state's favor but vacated the "money judgment." In its review of the case, this Court concluded that the district court did have jurisdiction over the cases based on "the plain language of the relevant statutes, their legislative history, and a practical understanding of their efficient administration." *Id*. at 883.

In *Bowen*, "[t]he basic jurisdictional dispute is over the meaning of the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704." *Id*. at 891. This Court

found that court-ordered payment of money by the federal government to the state under these circumstances was not "money damages," thus the district court's orders were not excepted from 5 U.S.C. § 702's grant of the power of judicial review by the limitations imposed by 5 U.S.C. § 704. *Id*. at 910. The Court further found that the district court's orders were for specific relief rather than money damages, thus the waiver of sovereign immunity found in 5 U.S.C. § 702 did not preclude the district court from issuing them. *Id*.

This Court's decision in *Bowen* noted that the 1976 amendment to 5 U.S.C. § 702, which added the restriction limiting its waiver of the United States' sovereign immunity to cases "seeking relief *other than money damages*" (emphasis added), "was intended to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by the amendment. . . ." *Id*. at 892.

In a lengthy and pointed dissent, Justice Scalia, along with Chief Justice Rehnquist and Justice Kennedy, disagreed with the majority's holding. The dissent concluded that, because the Claims Court's jurisdiction is limited to awarding damages, not specific relief, application of the majority's ruling would result in the deprivation of Claims Court jurisdiction over the vast majority of its cases.

In *Fort Peck*, the Tenth Circuit interpreted *Bowen* to preclude district court jurisdiction over claims for the repayment of the illegally recouped grant funds, finding such relief the equivalent of a suit for money

damages. In this case, by contrast, the Federal Circuit Court interpreted *Bowen* to bar court of federal claims' jurisdiction over the same action seeking repayment of the illegally recouped grant-in-aid funds. Relief has been foreclosed in both courts, leaving grant recipients with no remedy. Read in context, *Bowen* stands for the proposition that at least one court has jurisdiction over a claim for the government's wrongful refusal to award grant funds. Foreclosing relief in both the district court and the CFC is contrary to *Bowen*.

Although *Bowen* held that a suit for specific relief in the form of payment of grant funds owed by the government could be brought under the APA, it also acknowledged that CFC jurisdiction would lie after the grant funds at issue were recouped. 487 U.S. at 906-07. The Federal Circuit's holding that the CFC lacks jurisdiction over a claim for repayment of illegally recouped grant funds is directly contrary to this aspect of *Bowen*.

The Federal Circuit held: "The Tucker Act itself does not create a substantive cause of action; in order to come within the jurisdictional reach and the waiver of sovereign immunity in the Tucker Act, a plaintiff must identify a separate source of substantive law that creates a right to money damages." App. at 8, 870 F.3d at 1317. Quoting *Blueport Co., LLC v. United States*, 533 F.3d 1374, 1383 (Fed. Cir. 2008), the court explained that a "statute is money mandating if either: (1) 'it can be fairly interpreted as mandating compensation by the Federal Government for . . . damages sustained'; or (2) 'it grants the claimant a right to recover damages either expressly or by implication.'" *Id.* Emphasizing that the grant funding has strings attached

and could potentially be later reduced or "clawed back," the court found that because "the only alleged harm is having been allocated too little in grant funding," the Tribes were "not entitled to an actual payment of money damages, in the strictest terms. . . ." *Id*. at 1318. It found that because the claims were for "strings-attached NAHASDA grants," the Tribes were seeking equitable relief.

The Federal Circuit's most far-reaching error, and one which is contrary to United States Supreme Court's case law, is its holding that a grant-in-aid statute is not money mandating when there are "strings attached" to the grant. Nearly all grant funds have some "strings attached." *E.g.*, *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.,* 133 S. Ct. 2321, 2327-28 (2013). But these strings cannot change the fact that payment is mandated in the first instance when Congress directs that an agency "shall make" the grant. The circuit decision would eliminate jurisdiction over most, if not all grant-in-aid cases, a result that was certainly not intended by the Court's decision in *Bowen*. *Bowen* has put some jurisdiction over grant-in-aid funding disputes in the district courts, but it has never abdicated the CFC's jurisdiction over grant claims for money due in past funding years, and it certainly does not support the notion that a statute is not money mandating simply because Congress imposes restrictions on the use of the grant funds after they are awarded. The circuit court's decision abdicates the remainder of a formerly large category of CFC jurisdiction over grant funding claims like the one presented

here. This case, going to a large area of CFC jurisdiction, is exactly the type of case for which certiorari is appropriate.

The government has exploited an ambiguity in *Bowen* to present inconsistent arguments against jurisdiction in both the district courts and the CFC. It has effectively foreclosed relief for the repayment of wrongfully withheld or recouped grant funds in both courts. The Federal Circuit court expressed "severe misgivings about the incongruency of [the government's] stances in this and related litigation. In particular, it appears that the government has taken, essentially, the opposite position in at least one of our sister circuits in parallel litigation," referring to the Tenth Circuit's opinion in the instant case. *Id*. at 1319. This ability of the government to argue either side of this issue to its advantage and prevail is precisely why, in the interest of justice, this Court must resolve this issue.

The Federal Circuit instructed the Claims Court to dismiss the action for lack of subject matter jurisdiction, finding that "[o]f the government's two faces, we find the one presented to the Claims Court – the one arguing that this 'is not a suit for Tucker Act damages' – to be the correct one." *Id*. at 1321 (quoting Appellant Br. 42).

As noted above, which of the "two faces" that the United States has presented is correct is a difficult legal issue. It is also an important legal issue, and one that this Court should resolve.

II. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE.

As discussed above, the lack of clarity on the jurisdictional divide between the court of federal claims and the federal district courts creates substantial hardships on litigants. Petitioners here have had to litigate for ten years now. And as dramatically illustrated in the present matter, it allows the United States to exploit the uncertainty to obtain inconsistent results.

The Tenth Circuit and the Federal Circuit both believe they are right. Litigants should not have to be caught in the middle. This is exactly the type of case for which a writ of certiorari should be granted, because only this Court can resolve the issue and provide the needed clarity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN FREDERICKS III
Counsel of Record
FREDERICKS PEEBLES & MORGAN LLP
3730 29th Ave.
Mandan, ND 58554
303-673-9600
jfredericks@ndnlaw.com

JEFFREY S. RASMUSSEN
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, CO 80027
303-673-9600
jrasmussen@ndnlaw.com

Counsel for Petitioners