IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SOLENEX, LLC a Louisiana Limited Liability Plaintiff-Appellant, v. THE UNITED STATES Defendant-Appellee.	)	Case No: 2023-1353

APPELLANT'S OPENING BRIEF

CERTIFICATE OF INTEREST

Appellant Solenex, LLC ("Solenex") is a limited liability company organized under the laws of the State of Louisiana with its principal place of business in Baton Rouge, Louisiana. Solenex has no parent companies, subsidiaries, or affiliates that have any outstanding securities in the hands of the public. Solenex owns Federal Oil and Gas Lease M-53323 that is the subject of the underlying case and was the plaintiff in the appealed-from action below.

Counsel for Solenex who appeared before the United States Court of Federal Claims ("CFC") below and/or who are expected to appear before this Court, who have not yet filed an appearance include:

1. Zhonette M. Brown of Mountain States Legal Foundation; and
2. Ivan London of Mountain States Legal Foundation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

STATEMENT OF RELATED CASES

Nine years prior to initiating suit in the Court of Federal Claims ("CFC"), Solenex filed an action seeking a writ of mandamus and later amended that action to challenge the cancellation of its oil and gas lease under the Administrative Procedure Act ("APA") in the United States District Court for the District of Columbia. *Solenex v. Haaland*, No. 13-993 (RJL), 2022 WL 4119776 (D.D.C. Sep. 9, 2022). The court granted summary judgment in favor of Solenex, and that decision has been appealed and is pending in the United States Court of Appeals for the District of Columbia Circuit. *Solenex v. Haaland*, No. 22-cv-5296 (D.C. Cir. Nov. 4, 2022).

JURISDICTIONAL STATEMENT

Solenex has asserted a breach of contract and an unconstitutional taking of real property without compensation in violation of the United States Constitution. Jurisdiction existed in the CFC under 28 U.S.C. § 1491. On November 29, 2022, the Honorable Thompson M. Dietz issued an order granting the Government's motion to dismiss pursuant to 28 U.S.C. § 1500. Opinion and Order, JA__ [ECF No. 16]. On January 3, 2023, Solenex noticed its appeal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Generally speaking, the issue in this appeal is whether Solenex's CFC lawsuit is duplicative or otherwise redundant. It is not. But the CFC dismissed Solenex's lawsuit without prejudice, reasoning that 28 U.S.C. § 1500, which prohibits the CFC

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 [or agent thereof]." The issues presented to this Court for review are:

1. Whether Solenex's CFC claim for an uncompensated taking in violation of the Fifth Amendment is "for or in respect to" challenges asserted by Solenex in an Administrative Procedure Act ("APA") suit alleging that the government agent acted in excess of authority and arbitrarily, such that the CFC claim is jurisdictionally barred by 28 U.S.C. § 1500.
2. Whether Solenex's CFC common law breach of contract claim is "for or in respect to" challenges raised by Solenex in its APA suit and therefore jurisdictionally barred by 28 U.S.C. § 1500.

STATEMENT OF THE CASE

A. Legal Background: Section 1500

The Court of Claims was established in 1855, to create a tribunal for the investigation of claims made against the United States. Act of February 24, 1855, 10 Stat. 612. Eight years later, Congress passed an act that allowed persons whose property was seized during the Civil War to assert claims for payment under certain conditions. Abandoned Property Collection Act, ch. 120, 12 Stat. 820 (1863). By 1868, over one hundred plaintiffs ("cotton claimants") were seeking damages for

their seized property, most commonly cotton, both in the Court of Claims and elsewhere in duplicative suits against government agents. *See* 81 Cong. Globe, 40th Cong., 2d Sess. 2769 (1868). To stop this practice, Congress passed a law barring redundant claims. The statute provided:

> That no person shall file or prosecute any claim or suit in the court of claims…for or in respect to which he…shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time of the cause of action alleged in such suit or process arose, was…acting…under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days….

Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77.

Without this statute, the Civil War claimants with duplicative claims could "put the Government to the expense of beating them once in a court of law [and] turn around and try the whole question in the Court of Claims." 81 Cong. Globe, 40th Cong., 2d Sess. 2769 (1868). Res judicata, which otherwise prevented redundant litigation, applied only after a conclusive judgment was rendered on the merits; it did not prevent simultaneous litigation. *See G. & C. Marriam Co. v. Saalfield*, 241 U.S. 22, 28 (1916) ("[I]t is familiar law that only a final judgment is res judicata…."); J.C. Wells, *A Treatise on the Doctrines of Res Judicata and Stare Decisis* § 14, p. 8 (1879) ("the judgment must be final; that is, it must settle the matter which it purports to conclude").

Even when one judgment was obtained, res judicata was narrowly applied in the late 1800s and often would not bar a second suit brought in a different capacity or against a different defendant under a different theory. *See Gaines v. Hennen*, 65 U.S. 553, 579 (1860) (holding res judicata not applicable where plaintiff sued in different capacity and the "object of the judgment" was not the same); *Land v. Dollar*, 330 U.S. 731 (1947) (a judgment against the U.S. Maritime Commission for recovery of stock would not be res judicata against the United States); *see also* J.C. Wells, *A Treatise on the Doctrines of Res Judicata and Stare Decisis* § 13, p. 8 (1879) ("For example, if the foundation of a suit is the right to property, and the matter actually adjudicated relates only to a particular form of remedy, it is evident that the real question of the right of property is still *res integra*, not being adjudicated."); s*ee Richardson v. City of Boston*, 60 U.S. 263, 268 (1856) ("In actions for torts, nothing is conclusively settled but the point or points put directly at issue.").

The statute barring redundant claims in the Court of Claims was slightly revised in 1874[1] and reenacted in 1911.[2] As relevant here, the 1911 reenactment

[1] Revised Statutes of the United States, Title 13, § 1067, ch. 21, 18 Stat. 197 (1874); *see also Tecon Eng'rs, Inc. v. U.S.*, 170 Ct. Cl. 389, 397 (1965).

[2] "No person shall file or prosecute in the Court of Claims….any claim for or in respect to which he…has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit arose, was…acting…under the authority of the United States." § 154 of the Judicial Code

narrowed the bar to a "claim," striking the "or suit" expansion. The statute was revised again in 1948, converting the language from a bar on plaintiffs bringing claims to a jurisdictional bar, and extending the statute to apply to other suits brought directly against the United States, not just its agents.[3] In 1982[4] and 1992,[5] the statute was amended to accommodate the Court of Claims becoming the United States Claims Court and then the CFC. *See Keene Corp. v. U.S.*, 508 U.S. 200, 207 (1993). Today the statute reads:

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

28 U.S.C. § 1500. For ease of reference this statute, in each of its iterations, will be referred to as "Section 1500" or "§ 1500."

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of 1911, Act of Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1138, 28 U.S.C. § 260 (1940 ed.); *see also Corona Coal Co. v. U.S.*, 263 U.S. 537, 539–40 (1924).

[3] "The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff...has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was…acting…under the authority of the United States." Act of June 25, 1948, ch. 646, 62 Stat. 942, 28 U.S.C. § 1500.

[4] Federal Courts Improvement Act of 1982, Pub. L. No. 97–164, Apr. 2, 1982, 96 Stat 25.

[5] Federal Courts Administration Act of 1992, Pub. L. No. 102–572, Oct. 29, 1992, 106 Stat 4506.

While § 1500 has a straightforward legislative history, judicial application of the statute has shifted repeatedly, with some precedents being overruled, or even overruled, revalidated, and then overruled again. *Compare Corona Coal*, 263 U.S. at 537 (dismissal of appeal granted where plaintiff filed later suit on the same cause of action in district court against government agent), *with Brandt v. U.S.*, 710 F.3d 1369, 1380–81 (Fed. Cir. 2013) (J. Prost, concurring) (noting adoption, overruling, and then revival of "order of filing" rule that permits duplicative litigation so long as first filing is in the CFC). *Compare Casman v. U.S.*, 135 Ct. Cl. 647 (1954) (holding §1500 not applicable because claim for monetary backpay was "entirely different" from suit seeking restoration of prior position) *with UNR Indus. Inc. v. U.S.*, 962 F.2d 1013, 1022 n. 3 (Fed. Cir. 1992) (*Casman* and "cases like" it overruled); *with Loveladies Harbor, Inc. v. U.S.*, 27 F.3d 1545, 1549 (Fed. Cir. 1994) (noting statements about *Casman* in *UNR Industries* were dictum, not entitled *stare decisis* effect and adopting test based, in part, on *Casman*); *with U.S. v. Tohono O'Odham Nation*, 563 U.S. 307, 315 (2011) (rejecting reliance on relief sought to define "claim" and overturning *Casman*).

Courts' analyses of whether a "claim" is "for or in respect to" a "cause of action alleged in [another] suit or process" has shifted over time and even now lacks consistent articulation. *See Acetris Health, LLC. v. U.S.*, 138 Fed. Cl. 43, 58–59 n.15 (Fed. Cl. 2018) (noting conflict between *Trusted Integration, Inc. v. U.S.*, 659 F.3d

1159, 1164 (Fed. Cir. 2011) and *Resource Investments, Inc. v. U.S.*, 785 F.3d 660, 665 (Fed. Cir. 2015) and finding *Trusted Integration* controlling as the earlier decision).

B. Legal Background: The Administrative Procedure Act

In 1946, approximately 78 years after passing the precursor to § 1500, Congress passed the Administrative Procedure Act ("APA"). Administrative Procedure Act of June 11, 1946, 60 Stat. 237, Ch. 324. The APA was a bipartisan response to the rise of the administrative state, which was birthed during the New Deal era. *See Buffington v. McDonough*, 143 S. Ct. 14, 16 (2022) (Gorsuch, J., dissent from denial of certiorari) (observing "the administrative state spread its wings in the 1940s"); G. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1662–1666 (1996).

Its proponents promoted the APA as a "widely heralded advance in democratic government" aimed at the "new field of legislation" addressing the "'administrative' area of government." Legislative History, Administrative Procedure Act, S. Doc. No. 258, 79th Cong., 2d Sess. 35 (Foreword). They further characterized it as "a comprehensive charter of private liberty and a solemn undertaking of official fairness," to "lighten the burdens of those on whom the law may impinge." *Id.* Thus, the APA created causes of action not previously available.

See Hyatt v. U.S. Pat. and Trademark Off., 904 F.3d 1361, 1368–69 (Fed. Cir. 2018) ("The APA is a federal statute that provides a cause of action for persons 'suffering legal wrong because of agency action.'"); *Columbus Reg'l. Hosp. v. U.S.*, 990 F.3d 1330, 1350 (Fed. Cir. 2020) ("[T]he APA creates a cause of action giving a person 'suffering legal wrong because of agency action'….the right 'to review thereof'"); *Trudeau v. Fed. Trade Commn.*, 456 F.3d 178, 185 (D.C. Cir. 2006) ("The Supreme Court has clearly indicated that the [APA] itself….does supply a generic cause of action in favor of persons aggrieved by agency action.") (citations omitted).

Section 10 of the APA allowed for judicial review of agency actions, but it wasn't until 1976 that the APA was amended to waive sovereign immunity as a defense to those actions. *See Suburban Mort. Assocs. v. U.S.*, 480 F.3d 1116, 1122 (Fed. Cir. 2007) (noting APA provided for judicial review, but did not waive sovereign immunity until 1976); Pub. L. No. 94-574, 90 Stat. 2721 (1976).

The APA precludes claims for money damages. 5 U.S.C. § 702. As a result, it was recognized early on that APA claims seeking injunctive correction to agency action were not within the jurisdiction of the CFC. *See Patterson v. U.S.*, 115 Ct. Cl. 348, 353–54 (1950) (because Court of Claims "has jurisdiction only to award a money judgment" and not to remand a decision to an agency, the Court of Claims did not have jurisdiction over APA action). Nonetheless, the legislative history of the APA expressly states that contract and quasi-contract claims "are not affected by

the procedure recognized" for judicial review under the APA. Legislative History, Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 36.

Finally, this Court and other courts have historically recognized the separation between APA causes of action and claims brought pursuant to the Tucker Act. *See Del-Rio Drilling Programs, Inc. v. U.S.*, 146 F.3d 1358, 1363 (Fed. Cir. 1998) (distinguishing between unlawful and unauthorized conduct by a government agent and noting that "a court's conclusion that government agents acted unlawfully does not defeat a takings claim if the elements of a taking are otherwise established); *id.* ("if the government has taken property and has done so in a legally improper manner, it has committed two violations of the property-owner's rights."); *Rith Energy, Inc. v. U.S.* 347 F.3d 1355, 1365 (Fed. Cir. 2001) (plaintiff could not use takings claim to collaterally attack agency action, "an uncompensated taking and an unlawful government action constitute 'two separate wrongs [that] give rise to two separate causes of action'") (quoting *Del-Rio Drilling*, 146 F.3d at 1364); *Acadia Tech. Inc. v. U.S.*, 458 F.3d 1327, 1330–31 (Fed. Cir. 2006) (plaintiff could not use allegation of counter-statutory seizure of property to establish a takings claim, "a taking does not result simply because the government acted unlawfully").

C. Factual Background

On April 6, 1982, the Bureau of Land Management ("BLM") advised Sidney M. Longwell that his application for an oil and gas lease in Montana obtained a

priority at a lease drawing. Complaint, JA__ [ECF No. 1 at 3]. The BLM further advised that the application would become an offer to lease upon payment of the first year's rent for $1 per acre, *i.e.*, $6,247.00 (worth approximately $19,182.00 in July 2022). JA__ [ECF No. 1 at 3]. On May 24, 1982, after receiving Mr. Longwell's payment of the first year's rental, the BLM accepted Mr. Longwell's offer to lease and issued oil and gas lease MTM53323 to Mr. Longwell ("the lease"). *Id*. The lease was located in the area of the Montana Thrust Belt and provided a high potential for discovery of natural gas and a somewhat lesser potential for discovery of oil. *Id*. The lease became effective on June 1, 1982 and covers 6,247 contiguous acres in Glacier and Flathead Counties, Montana. *Id*. Issuance of the lease was never appealed, and the lease became a final agency action. *Id.* Rentals were paid pursuant to the lease until the BLM placed the lease in suspension in 1985. *Id*. At all times the lessee complied with the terms of the lease and associated regulations. *Id*.

As an oil and gas lease issued pursuant to the Mineral Leasing Act ("MLA"), the lease constituted a contract between Sidney Longwell and the United States that conveyed valuable property rights and interests that are protected by the Fifth Amendment to the United States Constitution.

In November 1983, an application for permit to drill an exploratory well on the lease was submitted. *Id*. Beginning in 1985 and at various times since then, the application for permit to drill was approved, appealed, deferred, and withdrawn. *Id.*

Effective October 1, 1985, after the first approval of the application was appealed, the primary ten-year term of the lease was suspended. *Id*. The lease remained in suspension for nearly two decades.

In 2013, Solenex sought a writ of mandamus from the United States District Court for the District of Columbia to compel the United States to act on its multi-decade suspension of the lease. JA__ [ECF No. 1 at 4]. Solenex was granted summary judgment and the court ordered the United States to act on the suspension of the lease. JA__ [ECF No. 1 at 5]. In response, in 2016 the United States provided notice that it was "cancelling" the lease. *Id.*

The United States claimed its decision was justified under the Secretary of the Interior's inherent authority to manage the public lands of the United States and regulatory authority to cancel "improperly issued" leases, asserting that its own environmental and cultural reviews from the early 1980s, prior to the issuance of the lease, were inadequate.

Solenex appealed the cancellation, amending its complaint in the United States District Court for the District of Columbia ("APA action*"). Id*. The 2016 Amended Complaint asserted that the cancellation violated the APA and is a nullity because, among other things, the Secretary of the Department of Interior lacked authority to administratively cancel the lease and the cancellation decision misconstrued the law, failed to consider appropriate factors, and considered

inappropriate factors. Solenex sought declaratory and injunctive relief setting aside the cancellation as unlawful and recognizing the validity of Solenex's lease.

Solenex was again granted summary judgment in the district court, now in 2018, but the United States appealed and the summary judgment was reversed in 2020. *Id*. On remand Solenex amended its complaint to add claims concerning the evaluation of Solenex's application for permit to drill under the National Historic Preservation Act, and, in 2022, was again granted summary judgment. *Id.* The United States appealed, and that case is pending in the United States Court of Appeals for the District of Columbia Circuit. *Id.*

D. Procedural History

On March 14, 2022, while its third motion for summary judgment was pending in district court and faced with a statute of limitations for its potential takings and breach of contract claims, Solenex commenced its action in the CFC to preserve its ability to seek just compensation for the taking of its property should the D.C. Circuit reverse the district court, and decide that the Secretary lawfully and otherwise reasonably cancelled the lease. JA__ [ECF No. 1]. The United States declined to voluntarily toll the statute of limitations and sought dismissal of this action under Section 1500 in an effort to deprive Solenex of its Constitutional takings claim. Mot. to Dismiss, JA__ [ECF No. 13]. On November 29, 2022, the

CFC granted the Government's motion to dismiss. JA__ [ECF No. 16]. Solenex appeals to this Court for redress.

SUMMARY OF THE ARGUMENT

Section 1500 states that the CFC "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 agent thereof]." 28 U.S.C. § 1500. To determine whether Section 1500 applies, "a court must make two inquiries: (1) whether there is an earlier-filed 'suit or process'…, 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" CFC action. *See Brandt*, 710 F.3d at 1374 (emphasis added); *Petro-Hunt, LLC v. U.S.*, 862 F.3d 1370, 1381 (Fed. Cir. 2017). Here there is no dispute that Solenex had a pending earlier-filed suit. But the Government errs when it blithely assumes that Solenex's APA action asserts "claims" that trigger § 1500. When the original version of Section 1500 was enacted in the 1800s, a "claim" against the federal government meant a claim for money damages. In 1946, the APA created an entirely new cause of action allowing plaintiffs to seek prospective relief in the form of an order setting aside and declaring unlawful agency action that is arbitrary, capricious, or otherwise not in accordance with law. Solenex's two suits involve different causes of action, depend on different sets of

operative facts, and are not duplicative in the way Section 1500 was designed to prohibit.

STANDARD OF REVIEW

This Court reviews de novo the CFC's dismissal for lack of subject matter jurisdiction and other questions of statutory interpretation. *See Trusted Integration*, 659 F.3d at 1163 (jurisdictional dismissal reviewed de novo); *Indian Harbor Ins. Co. v. U.S.*, 704 F.3d 949, 954 (Fed. Cir. 2013) (statutory interpretation reviewed de novo).

As plaintiff, Solenex "bears the burden of establishing the court's jurisdiction over its claims by a preponderance of the evidence." *Id.* In determining jurisdiction, however, the Court "must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Id.*

I. SOLENEX'S ADMINISTRATIVE PROCEDURE ACT SUIT DOES NOT CREATE A JURISDICTIONAL BAR FOR ITS TAKINGS AND BREACH OF CONTRACT CLAIMS

The claims Solenex asserted before the CFC are not for or in respect to its APA cause of action or suit. As a result, § 1500 does not deprive the CFC of jurisdiction over Solenex's constitutional takings or breach of contract claim. First, as used § 1500, "claim" referred to demands for money and cases where money provided adequate relief, not to injunctive suits.

Second, courts routinely recognize that the rights protected and the wrongs prohibited under the APA are distinct from, not for or in respect to, other claims. Here in particular, Solenex's APA cause of action seeking prospective relief in the form of the continuation of its lease and asserting extra-statutory and arbitrary government action under the APA is not "for or in respect to" a taking or a common law breach of contract claim.

Third, in interpreting §1500 courts must note that by the time the APA provided a waiver of sovereign immunity and the last two times § 1500 was amended, courts construed claims for money damages as "completely different" from demands for equitable relief. Thus, when Congress amended the APA in 1976 and amended § 1500 in 1982 and 1992, Congress would not have understood § 1500 to force an election between an APA claim and a takings or breach of contract claim brought under the Tucker Act.

Finally, the Supreme Court's reasoning in *Tohono* does not mandate the application of § 1500 here. *Tohono* focused on whether two suits *must* seek the same relief for the same "claim" to be at issue. *Tohono* did not address the facts here, where a plaintiff brings separate suits to remedy separate wrongs. History and the facts of this case demonstrate that § 1500 does not bar Solenex's claims.

A. "Claims" in Section 1500 Referred to Actions for Money, Where Money Provided Adequate Relief

"Claim" as used by Congress in the predecessor to § 1500 meant claims for money to be paid as compensation for a past wrong. In the aftermath of the Civil War—the context in which the statute originated—the only causes of action statutorily available against the United States were suits for money damages. A so-called "cotton claimant" seeking compensation for seized assets could either file a monetary claim against the United States or sue individual federal officials in state court under various tort or equity theories. *See Keene*, 508 U.S. at 206. Equitable and injunctive relief against (an agent of) the federal government would not be available *at all* until 80 years later, with the enactment of the APA in 1946.

When examining "claim" under § 1500, it is a "'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, *contemporary*, common meaning…*at the time Congress enacted the statute*.'" *Wisconsin Cent. Ltd. v. U.S.*, 138 S. Ct. 2067, 2074 (2018) (quoting *Perrin v. U.S.*, 444 U.S. 37, 42 (1979)) (emphases added). Allowing the meaning of a statute to evolve with modern language usage would create a "fog of uncertainty" and disregard the fundamental structure of our government that gives Congress "alone" the "institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes…." *Id.*

In common usage and legal parlance, "claim," when used as a noun in the mid to late 1800s, generally referred to a claim for money or property. For example, an American Dictionary of the English Language, dated 1860, defined "claim" as, "A demand of a right or supposed right; a calling on another for something due or supposed to be due; as a *claim* of wages for service," and as "a right to claim or demand; a title to any debt, privilege, or other thing in possession of another." C. Goodrich, N. Porter, N. Webster; An American Dictionary of the English Language, p. 209 (1860). Similarly, Black's first Dictionary of Law defined "claim" as: "A challenge of the property of ownership of a thing which is wrongfully withheld from the possession of the claimant." H.C. Black, A Dictionary of Law, p. 209 (1891).

It is true that despite this narrow background, the word "claim" is sometimes interpreted vaguely enough to admit to multiple meanings. *See U.S. v. Cohn*, 270 U.S. 339, 345–46 (1926) (noting "claim" may be used in "broad juridical sense," or, as in that case, "solely as to the payment or approval of a claim for money or property to which a right is asserted against the Government"); *Keene*, 508 U.S. at 210 ("claim" "can carry a variety of meanings"), *see also Rockwell Intern. Corp. v. U.S.*, 549 U.S. 457, 469 (2007) ("Nothing prevents Congress from defining the 'category' of excluded suits in any manner it wishes.") (citing 28 U.S.C. § 1500). And the meaning of "claim," even in judicial settings, has expanded over time. *See Blonder-*

Tongue Labs., Inc. v. U. of Illinois Found., 402 U.S. 313, 327 (1971) (noting the "expansion of the definition of 'claim' in bar and merger contexts").

Heeding this caution, one must construe § 1500 in context—both in its historical context and in the context of its statutory scheme. *See Facebook, Inc. v. Windy City Innovations, LLC*, 973 F.3d 1321, 1330 (Fed. Cir. 2020) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)); *see Ross v. Doe ex dem. Barland*, 26 US. 655, 661 (1828) ("In order to arrive at the true interpretation of a statute…the Court will refer to, and judicially notice the historical facts which are essential to their correct interpretation.").

Within the statutory scheme, the only "claims" that could be brought in the Court of Claims were claims for money. *See U.S. v. Alire*, 73 U.S. 573, 575 (1867) ("[T]he only judgments which the Court of Claims are authorized to render…are judgments for money found due from the government to the petitioner"; denying ability to order issuance of land warrant); *Bonner v. U.S.*, 76 U.S. 156, 159 (1869) ("[T]he Court of Claims has no equitable jurisdiction given it…"). Even after 1887, when the Court of Claims jurisdiction was expanded to include claims "in respect of which claims the party would be entitled to redress against the United States either

in a court of law, equity, or admiralty, if the United States were suable," the Court of Claims was limited to providing *monetary damages* for claims made. *See U.S. v. Jones*, 131 U.S. 1, 18 (1889) ("[I]n the point of providing only for money decrees and money judgments, the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal demands.").

Similarly, the term "claim" as used in other mid-1800 statutes related to "claims" against the government permitted only claims for money. *See Cohn*, 270 U.S. at 345–46 ("claim" in earlier version of False Claims Act meant "a claim for money or property to which a right is asserted against the Government"); *cf. U.S. v. Neifert-White Co.*, 390 U.S. 228, 233 (1968) ("claim" under later False Claims Act included "all fraudulent attempts to cause the Government to pay out sums of money"). "Claim" in 28 U.S.C. § 1500 is thus properly understood to be a claim for money.

In its historical context, therefore, § 1500 prevented plaintiffs from bringing claims for money in the Court of Claims when they had a cause of action pending elsewhere seeking *money* or its equivalent in the form of property. That is different from this case.

The United States dismisses this analysis and argues that the relief sought is irrelevant to the application of § 1500. JA__ [ECF No. 13 at 18–20]. But that argument is an oversimplification that substitutes headnote-type sound bites for

rigorous statutory analysis it is inconsistent with the text and purpose of § 1500 and the APA.

B. The APA Created New, Distinct Causes of Action

Solenex's APA causes of action are not "for or in respect to" Solenex's takings or breach of contract claim. To determine the relationship between Solenex's APA cause of action and its claims before the CFC, one must start with an understanding of what a cause of action is under the APA and how courts have evaluated APA causes of action.

1. Causes of Action under the APA

The APA created new causes of action, that did not previously exist: the right to judicial review of a final agency action that wrongs the petitioner. *See Columbus Reg'l. Hosp.*, 990 F.3d at 1350 ("[T]he APA creates a cause of action giving a person 'suffering legal wrong because of agency action'….the right 'to review thereof'"); *see also Hyatt*, 904 F.3d at 1368–69 ("The APA is a federal statute that provides a cause of action for persons 'suffering legal wrong because of agency action.'"); *Trudeau*, 456 F.3d at 185 ("The Supreme Court has clearly indicated that the [APA] itself….does supply a generic cause of action in favor of persons aggrieved by agency action.") (citations omitted).

Specifically, the APA states that "[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action…is entitled to

judicial review thereof" and "final agency action[s] for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. §§ 702, 704. Moreover, Congress reinforced the importance of the APA cause of action when it explicitly waived sovereign immunity for APA petitions. The legislative history for the 1976 amendment states that "[c]ourts can make a useful contribution to the administration of Government by reviewing the legality of official conduct which adversely affects private persons." H.R. Rep. 94-1656. Further, it is a "fundamental concept of the APA that a person adversely affected by administrative action is presumptively entitled to judicial review of its correctness." *Id.* In amending the APA, Congress intended to "make federal agencies and officials more accountable to the public." *Id.*; *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019) (Congress enacted the APA in 1946 to serve as a "charter of the administrative state").

2. APA Causes of Action are Separate and Distinct from Other Claims Available Against the Federal Government

Because the APA did not come into existence for over seventy years after § 1500, Congress could not have intended § 1500 to force a choice between a claim for money in the Court of Claims and a then non-existent cause of action for judicial review. Even by the time the most recent substantive version of § 1500 was passed in 1948, *Keene Corp.*, 508 U.S. at 212, the APA had only been in existence for two years and did not provide an express waiver of sovereign immunity; thus routine judicial challenges to agency actions were decades in the future. *See Suburban Mort.*

Assocs., 480 F.3d at 1121–22 (discussing separation of Tucker Act and APA waivers of sovereign immunity, noting APA was "amended in 1976 to expressly waive sovereign immunity").

Judicial precedent and legislative history confirm that a cause of action under the APA is distinct from other claims. Indeed, this Court has stated and repeated that "an uncompensated taking and an unlawful government act constitute 'two separate wrongs that give rise to two separate causes of action.'" *Rith Energy*, 247 F.3d 1355, 1365 (Fed. Cir. 2001) (quoting *Del-Rio Drilling*, 146 F.3d at 1364); *Lion Raisins, Inc. v. U.S.*, 416 F.3d 1356, 1369 (Fed. Cir. 2005) ("We have made clear that a claim premised on a regulatory violation does not state a claim for a taking."). Stated differently, "a takings claim is separate from a challenge to the lawfulness of the government's conduct." *Acadia Tech.*, 458 at 1330.

Further, as the Supreme Court recognized in *Bowen v. Massachusetts*, 487 U.S. 879, 889 (1988), there is an important distinction between an APA action, directed to the future relationship, and a case seeking "wholly retrospective" monetary relief. An APA challenge to agency action addresses "an ongoing policy that has significant prospective effect," as opposed to a takings or contract claim for damages. *Id.* Further, the APA distinguished between "money damages"—what would be issue in "claims" before the Court of Claims—and injunctive and declaratory claims, including those that would result in the specific monetary relief.

See id. at 899–901. Thus, the APA *excluded* suits for damages while waiving sovereign immunity "in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." *Id.* at 899 (quoting H.R. Rep. No. 94–1656, p. 9 (1976)); *see also* H.R. Rep. 94-1656, p. 5 ("Since [the APA amendment] would be limited only to actions of this type for specific relief, the recovery of money damages contained in the Federal Tort Claims Act and the Tucker Act governing contract actions would be unaffected.").

Taking all these considerations into account, the Supreme Court held that the "limited relief available in the Claims Court is not an adequate substitute for review [under the APA] in the District Court." *Bowen*, 487 U.S. at 901. The Court rejected the government's argument that the availability of monetary relief from the Claims Court precluded APA review in the district court in light of the Claims Court's inability to provide declaratory or injunctive relief that would modify the agency's future practices. *Id.* at 905.

The decision by Judge Kaplan in *Griffin & Griffin Expl., LLC v. United States*, 116 Fed. Cl. 163, 171–72 (2014), also illustrates that APA review and claims in the CFC do not address the same issues. In *Griffin*, as here, an oil and gas lessee sought damages for the cancellation of a lease. *Id.* at 167. There the government sought to dismiss the case because an administrative appeal had confirmed that the lease at issue was "void ab initio" and "properly cancelled." *Id.* at 171. The government

argued that the CFC's jurisdiction would not permit it to "review and reverse" the agency ruling. *Id.* at 171–72. Judge Kaplan agreed she could not review the agency action under the APA, but found the CFC had jurisdiction in any event. *Id.* The Judge held that under contract principles not at issue in the agency ruling, a contract had been formed, notwithstanding the agency's ruling that the contract was void. *Id.* at 172–73. Judge Kaplan found that in ruling on the contract cancellation, the agency concluded a leasehold interest had not been conveyed, not that a contract had not been formed. *Id.* at 173. Judge Kaplan's opinion highlights the difference between regulatory considerations involved in the government conveying a valid interest in oil and gas and contract principles concerning the lease itself.

The APA's legislative history explicitly states Congress' expectation that the APA *would not* impact the ability to bring contract or Tucker Act claims. *See* H.R. Rep. 94-1656, p. 5 ("Since [the APA amendment] would be limited only to actions of this type for specific relief, the recovery of money damages contained in . . . the Tucker Act governing contract actions would be unaffected."); Legislative History, Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 36. ("Contract or quasi-contract claims are reviewable *de novo* in the Court of Claims or district courts and hence, under subsection 10(b), are not affected by the procedure recognized in this section."). The CFC's holding that injunctive APA causes of action bar CFC contract and takings claims is contrary to the history and purpose of

the APA and this Courts' prior recognition that unlawful government action and an uncompensated government takings give rise to two separate causes of action for two separate wrongs.

C. Section 1500 Was Not Intended to Preclude Jurisdiction Here

In addition to the text and purpose of § 1500 when contrasted to the APA, other principles support the conclusion that § 1500 does not bar Solenex's CFC claims. For example, when the APA was expanded and during the last two § 1500 amendments, prevailing judicial interpretation would not have barred the CFC from considering monetary claims when related exclusively equitable claims were pending elsewhere. Congress is assumed to be aware of and have adopted these interpretations. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"); *Champagne v. U.S.,* 35 Fed. Cl. 198, 209 (1996) ("Congress is presumed to be aware of an administrative or judicial interpretation" when it amends a statute).

As set forth above, the APA was significantly amended in 1976 to waive sovereign immunity for equitable claims and § 1500 was amended in 1982 and 1992. From at least 1956 through at least early 2011, the CFC and its predecessors held that § 1500 did not bar a claim when the other pending litigation sought only equitable relief beyond the jurisdiction of the CFC. In *Casman*, the court rejected

the government's argument that a former employee who sought an injunction reinstating him to a position from which he was wrongfully separated was precluded by § 1500 from simultaneously seeking backpay in the Court of Claims. 135 Ct. Cl. at 648–49. The court observed that "the same facts" were alleged in both cases and that the purpose of § 1500 was to prevent the same claims from proceeding against the United States in two courts at the same time. *Id.* at 648. The court further took heed of an interpretation by the United States Supreme Court that the purpose of § 1500 was "to require an election between" suits. *Id.* at 649 (quoting *Matson Nav. Co. v. U.S.*, 284 U.S. 352, 355–56 (1932)). Nonetheless, the court found that due to jurisdictional limitations, the plaintiff there "had no right to elect between courts." *Id.* The court stated that "The claim in this case and the relief sought in the district court are entirely different," and that a claim for backpay was exclusively within the jurisdiction of the Court of Claims while the ability to restore the plaintiff to his prior position was beyond the jurisdiction of that court. The court held that because plaintiff had no ability to "elect" a forum that could provide complete relief, § 1500 was inapplicable. *Id.* at 649–50; *see also City of Santa Clara v. U.S.*, 215 Ct. Cl. 890, 891 (1977) (holding § 1500 not applicable where remedy sought was not available in pending district court action); *cf. Brown v. U.S.*, 175 Ct. Cl. 343, 348 (1966) ("Section 1500 was designed to require an election between two forums both of which could presumably grant the same type of relief").

For decades the CFC consistently followed this reasoning. *See Pitt River Home & Ag. Co-op Ass'n v. U.S.*, 215 Ct. Cl. 959, 960–61 (1977) ("Because the district court has the power to offer equitable relief to the plaintiff, if appropriate, while this court has the power to compensate the plaintiff for damages in excess of $10,000, 28 U.S.C. § 1500 (1970) is inapplicable as a bar to this petition."); *Deltona Corp. v. U.S.*, 222 Ct. Cl. 659, 659 n.1 (1980) (addressing other pending claim concerning scope of the Clean Water Act; "We can, of course, not grant declaratory or injunctive relief, and the district court cannot grant the very large amount of monetary relief requested from us. This difference between the two actions and the types of relief demanded removes this case from § 1500."); *Truckee-Carson Irr. Dist. v. U.S.*, 223 Ct. Cl. 684, 685 (1980) ("It is settled law that § 1500 does not bar a proceeding in this court, asking monetary relief, if the other pending suit seeks only affirmative relief such as an injunction or a declaratory judgment."); *see Gary Aircraft Corp.*, 226 Ct. Cl. 568, 571–72 (1981) (holding § 1500 not applicable and claims not duplicative when court in other matter "did not address and could not award a claim for monetary relief").

Thus when Congress amended the APA to waive sovereign immunity in 1976 and in the last two instances when Section 1500 received technical amendments in 1982 and 1992, Congress understood that a plaintiff could, at the same time, bring

an action for wholly injunctive relief under the APA simultaneously with bringing a related claim for monetary damages in the CFC under the Tucker Act.

D. The Supreme Court's Holding and Reasoning in *Tohono* do Not Make § 1500 Applicable Here

The government would have this Court ignore the text and purpose of § 1500 and reduce its inquiry to whether Solenex's lease underlies its APA suit as well as its CFC claims. JA__ [ECF No. 13 at 11–13]. The United States' argument that underlying facts alone govern § 1500, without regard to differences in the legal wrongs or causes of action at issue, would inappropriately strip property owners of a right conferred either by the Constitution or by Congress and must be rejected.

1. The context and limits of Tohono.

The government's attempt to rely on *Tohono* to establish a bright line rule that § 1500 applies whenever claims can be associated with an underlying contract is ironic given that *Tohono* arose as the Supreme Court's rejection of previous inappropriately strict application of a supposed bright line rule.

In the early 2000s and 2010s, Indian tribes across the country were bringing claims against the United States for breach of fiduciary duty, asserting that the government violated responsibilities owed to the tribes. *See, e.g.*, *Tohono*, 563 U.S. at 309–310; *Ak-Chin Indian Community v. U.S.*, 80 Fed. Cl. 305, 314 (Fed. Cl. 2008) ("plaintiff's Court of Federal Claims complaint and District Court complaint involve the same parties, the same trust corpus, and the same allegations that the government

breached its trust responsibilities"). Frequently the tribes would bring claims for monetary damages in the CFC while simultaneously pursuing nearly identical claims in district courts, but seeking equitable relief, including an accounting. *See Tohono*, 563 U.S. at 310; *Tohono O'Odham Nation v. U.S.*, 79 Fed. Cl. 645, 656 (Fed. Cl. 2007) ("there can be no meaningful dispute [that]…the operative facts asserted in the complaints are, for all practical purposes, identical").

The United States sought to bar claims brought in the CFC under § 1500 while the tribes argued that § 1500 did not apply because the tribes did not seek the same relief in the two separate suits. *See Tohono*, 563 U.S. at 310. The CFC rejected the tribe's proffered law and equity distinction, found § 1500 applicable, and dismissed the redundant CFC case. *Id.*; *Tohono*, 79 Fed. Cl. at 658 ("However characterized, the calculus involved in determining how much money the plaintiff is owed would be the same in both courts."). The Federal Circuit reversed, relying on historical consideration of the same or overlapping relief to identify a "claim" in the context of §1500, declining to consider the existence or extent of duplicative operative facts in the cases, and holding that two suits are only in respect to the same claim if they seek the same relief. *Tohono*, 559 F.3d 1284, 1287–88. The Supreme Court, having previously left open the question of whether "overlapping relief" was a necessary requirement for cases to present the same "claims" under § 1500, now held that it was not. *Tohono*, 563 U.S. at 312–313; *see Keene*, 508 U.S. at 212 (holding claims

were for or in respect to one another if they were based on the same operative facts and there is overlap in the relief requested).

The Supreme Court distilled § 1500, stating that under that statute, "The CFC has no jurisdiction over a claim if the plaintiff has another suit pending for or in respect to that claim pending against the United States or its agents." *Tohono*, 563 U.S. at 311. Construing the phrase "for or in respect to" in light of the fact that the existence of a cause of action does not mandate the form of relief, the Court found that § 1500 does not require "remedial overlap." *Id.*

The Supreme Court held that interpreting § 1500 such 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." *Tohono*, 563 U.S. at 315. The Court further found that "[c]oncentrating on operative facts" was consistent with the Congressional goal of providing the United States with a remedy to the lack of claim preclusion that stemmed from the separate defendants in the cotton claimant cases—agents of the United States versus the United States itself. Section 1500 was thus meant to "operate in a similar fashion" as claim preclusion. *Id.* at 315–16.

What the Supreme Court did NOT do in *Tohono* was establish a test for identifying operative facts that in turn define whether a "claim" is "for or in respect to" a "cause of action." The Court noted that the current transactional test for claim preclusion is "much younger than the rule embodied in § 1500," but that even in the

late 1800s "it was not uncommon to identify a claim for preclusion purposes based on facts rather than relief." *Id.* at 316.

In supporting this statement, the Supreme Court cited two treatises, one of which focused on whether "demands or rights of action" "arise out of on and the same act or contract" and one of which focused on whether "the same evidence [would] support and establish both the present and the former cause of action." *Id* (Citing J. Wells, Res Adjudicata and Stare Decisis § 241, p. 208 (1878) and 2 H. Black, Law of Judgments § 726, p. 866 (1891)). The Court did not prioritize one over the other or exclude other tests, nor did the Court apply either test when it held that § 1500 barred the tribe's CFC action. Rather, the Court agreed with the CFC's prior finding that both actions "allege that the United States holds the same assets in trust for the Nation's benefit"' both "describe almost identical breaches of fiduciary duty": "self-dealing and imprudent investment" and that the United States "failed to provide an accurate accounting of the assets held in trust." *Id.* at 318. Thus like the cotton-claimants who may have sought monetary damages in the Court of Claims and replevin in a state court, the Tribes were barred from pursuing redundant litigation arising out of the same wrongdoing.

2. *The Government's and the lower court's misapplications of* Tohono

The government's reading of *Tohono* is wrong. In the proceeding below, the government prefaced its argument for dismissal with the assertion that, "[t]he

Supreme Court has made clear that § 1500 bars claims which 'arise out of one and the same act or contract.'" JA__ [ECF No. 13 at 5] (citing *Tohono*). But that comment, extracted from a parenthetical supporting the consideration of facts and not relief, is *not* what the Supreme Court held. *Tohono* held that claims are the same when they are based on the same operative facts. The government again attempts to water down the standard articulated in *Tohono*, when it claims that § 1500 bars claims that are merely "related." JA__ [ECF No. 13 at 9]. Straying further from the *Tohono* decision, the government implies that consideration of legal theories is irrelevant to the "operative facts" determination. *Id*.

Moreover, the government's arguments take any force out of the term "operative." By the government's reckoning, because each case alleges that a contract exists, that Solenex had an ownership interest in the contract, the contract was cancelled, and Solenex was harmed, the cases are the same. JA__ [ECF No. 13 at 7–8, 10–11] (arguing that because "Solenex's claims before each Court rely on the same action of the United States: the March 2016 cancellation of Solenex's" lease, § 1500 applies). These facts are not the operative facts in each case.

Unfortunately, the CFC adopted some of the government's errant stretching of *Tohono*. Setting the table for its analysis, the CFC stated, "Section 1500 restricts the jurisdiction of this Court when *related actions* against the United States are pending in other courts." JA__ [ECF No. 16 at 3] (emphasis added). The CFC also

stated that "legal theories underlying the asserted claims are irrelevant" to the "operative facts" inquiry. JA__ [ECF No. 16 at 4] (quoting *Brandt*, 710 F.3d at 1374). This statement, however, is irreconcilable with the CFC citation of *Acetris Health*, 138 Fed. Cl. at 59–60, for its definition of "operative facts" as "those that satisfy or help satisfy an element of a legal claim." *Id*. An element of a legal claim is determined by the legal theory being asserted.

Nevertheless, the CFC concluded that because two facts were "critical" to each of Solenex's claims, the claims before the CFC were for or in respect to the claims before the district court. JA__ [ECF No. 16 at 4–5].

This holding, however, cannot be reconciled with this Court's clear and repeated statements that "an uncompensated taking and an unlawful government act constitute 'two separate wrongs [that] give rise to two separate causes of action.'" *Rith Energy,* 347 F.3d at 1365 (quoting *Del-Rio Drilling*, 146 F.3d at 1363); *El-Shifa Pharm. Indus. Co. v. U.S.*, 378 F.3d 1346, 1353–54 (Fed. Cir. 2004); *Acadia Tech.*, 458 F.3d at 1330–31. A "cause of action arises from an invasion of a right or a violation of a duty or obligation." *Ball v. U.S.*, 137 F. Supp. 740, 742 (Ct. Cl. 1956); *see Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 13 (1951) ("A cause of action does not consist of facts, but the unlawful violation of a right which the facts show."); *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927) (same); *Baltimore S.S.*, 274

U.S. at 321("The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear.").[6]

Here Solenex suffered several rights violations arising from separate duties and obligations of the United States or its agencies. The Secretary of the Interior and the federal agencies owed Solenex a duty to act within the constraints of the APA. They violated that duty by exceeding their authority, acting contrary to law, and acting arbitrarily, thus Solenex brought its APA claims.

The United States owed *a separate duty* to Solenex not to take its property without just compensation or to breach its contract. The breach of those duties gave rise to Solenex's claims before the CFC. Nothing in the history of § 1500 indicates that Congress intended to put its citizens to an election of *rights*. And everything in the history of the APA indicates that Congress intended to promote judicial review of agency action. Dismissing Solenex's claims before the CFC is not justified by either of these statutes.

Similarly, CFC's holding that Solenex's separate actions fall within the claim preclusion measure of "operative facts" is inconsistent with prior holdings by this Court that one claim will not establish nor preclude the other. *See Lion Raisins*, 416

[6] Solenex is not arguing that the existence of an APA claim itself bars the application of § 1500. Where both the APA and another statute provide relief for a violation of the same wrong, § 1500 could logically be applicable. *See A.C. Ceeman Inc. v. U.S.*, 5 Cl. Ct. 386, 388 (1984) (discussing co-existent rights to judicial review).

F.3d at 1369 ("We have made clear that a claim premised on a regulatory violation does not state a claim for a taking."); *Acadia Tech.*, 458 F.3d at 1330–3 ("a taking does not result simply because the government acted unlawfully, nor does a takings claim fail simply because the government's conduct is subject to challenge as unlawful"); *Davis v. U.S.*, 123 Fed. Cl. 235, 243 (2015) (plaintiff alleging improper government conduct failed to state a takings claim).

In sum, the existence of a couple of common facts does not inevitably lead to the conclusion that the claims have "substantially the same operative facts," as required by *Tonoho* and *Keene*. *See Tohono*, 563 U.S. at 317; *Keene*, 508 U.S. at 206.

II. THE OPERATIVE FACTS AT ISSUE DO NOT SUBSTANTIALLY OVERLAP

A. The CFC Erred by Failing to Distinguish Between Operative and Background Facts

The two Solenex suits concern two distinct sets of operative facts, rendering § 1500 inapplicable. But the CFC failed to distinguish operative facts central to Solenex's claims from mere background facts providing context or standing for those claims, essentially declaring that *any* two suits that share some factual predicate are "for or in respect to" the same claim for Section 1500 purposes. *See* JA__ [ECF No. 16 at 4–5] (using the fact that Solenex "references the existence of the lease, its rights under the lease, and the damages it suffered due to the

cancellation of the lease," to establish that this suit shares operative facts with Solenex's APA action).

But the claims in this case are not "in respect to" the counts asserted in the APA lawsuit, and they *do not* rely on the same set of operative facts. This is apparent from comparing the two complaints: the district court complaint is 63 pages long, compared to the 8-page complaint in this case; not a single count is shared between the two; and the only potentially operative facts that overlap are that Solenex had an interest in the lease and that the Secretary purported to cancelled the lease.[7]

The CFC missed the important distinction "between 'operative' facts and 'background' facts" or *res gestae*. *Klamath Irrigation Dist. v. United States*, 113 Fed. Cl. 688, 699 (2013); *Acetris Health*, 949 F.3d at 730 (noting that, while there was some factual overlap between the two cases at issue, "it largely involve[d] the 'res gestae,' not the 'operative facts,' of the claims) (citing *Trusted Integration*, 659 F.3d at 1170).

"Operative facts in a lawsuit are those on which the legal theories or causes of action are founded." *McDermott*, 30 Fed. Cl. at 334 (citing *Johns-Manville Corp.*

[7] Though it is important that the APA action alleges the cancellation was a legal nullity and the claims in this Court require that the cancellation be a valid government action. *See* JA__ [ECF No. 13-1; ECF No. 1]. *See also McDermott Inc. v. U.S.*, 30 Fed. Cl. 332, 334–37 (1994) (comparing details of CFC complaint and district court complaint to determine whether the two actions shared substantially the same operative facts).

v. U.S., 855 F.2d 1556, 1563 (Fed. Cir. 1988)). It is therefore possible for two cases lacking a substantial overlap of operative facts to nevertheless share some—even many—background facts, and it is important for courts to carefully analyze such cases to ensure operative and background facts are identified correctly. *Compare Johns-Manville*, 855 F.2d at 1563–64 (finding application of § 1500 appropriate after determining that the two complaints at issue contained ten identical allegations, with three important allegations requiring the exact same facts to be proven) *with McDermott*, 30 Fed. Cl. at 334–37 (finding the "factual similarity [between the two complaints at issue] is insufficient to trigger Section 1500" because, while "[t]here is some overlap in the materials . . . . [t]he district court complaint . . . does not discuss the numerous factual allegations that support the [plaintiff's] contract claims. Where so few facts apply to both lawsuits the overlap is tangential.").

In *McDermott*, the court carefully examined each allegation in both complaints, as well as the factual assertions made in support, before reaching its decision. It found that while the plaintiff's contract-based claims for damages brought in the CFC rested on a factual determination regarding the terms of the contract, the district court complaint "attack[ed] the legitimacy and validity of [the laws and regulations under which the contract was entered into]," and "require[d] legal determinations as opposed to resolution of factual issues." *McDermott*, 30 Fed. Cl. at 337–38. Ultimately, the court concluded that "[t]he factual assertions made in

the claims before the Court of Federal Claims are of little consequence in determining" the questions at issue in the district court. *Id.* at 338.

A similar dynamic is present here: Solenex's APA suit attacks the legitimacy of the Secretary of the Interior's claims to inherent and statutory authority, and the validity of the Secretary's actions under the procedures mandated by the APA, requiring a primarily legal determination rather than resolution of factual issues. Solenex's contract and takings claims asserted in this suit, by contrast, seek monetary relief for the government's breach of the lease and, alternatively, just compensation for a lawful taking of private property for public use. The claims here center around factual questions regarding the terms of, and performance under, the lease, as well as the value of the property taken and the extent of any damages associated with the breach of contract. The factual assertions central to one are "of little consequence in determining" the answer to questions central to the other.

Klamath and *Acetris* are similarly instructive in providing a post-*Tohono* roadmap for determining whether two cases share the same set of operative facts for purposes of Section 1500. The court in *Klamath* describes a situation where plaintiffs object to an Army Corps of Engineers decision not to issue a Clean Water Act permit and seek to overturn it in district court pursuant to the APA and contract claims, but alternatively are prepared to pursue a takings claim should the district court find the agency decision valid. *Id.* at 701. The court goes on to explain that "the facts

underlying both disputes might overlap significantly, and might be portrayed as such in the complaints, but the facts that are relevant to whether a permit was properly denied might be very different than those relevant to whether, under the *Penn Central* test, the Corps effectuated a regulatory takings." *Id*.

Acetris, while not as directly analogous, also serves as a helpful model. In *Acetris*, the Federal Circuit echoed *Klamath* and *Tohono*'s distinction between operative facts and background (or *res gestae*) facts, and also held that where the plaintiff challenged two different government agencies in its respective suits, it demonstrated that the suits did not arise out of the same act, and Section 1500 therefore did not bar the CFC from exercising jurisdiction over the second suit. *Acetris*, 949 F.3d at 730. As here, the tribunal in the first suit (the Court of International Trade in *Acetris*) entirely lacked authority to opine on the claims at issue in the second suit, the two suits had substantial variation in their operative facts, and the plaintiff relied on different evidence to support the claims in the two suits. *See id.* at 729.

Circuit precedent on what an "operative" fact *is* has been a "mixed bag," *Klamath*, 113 Fed. Cl. at 702 (emphasis added), but these precedents are again instructive in how to structure the analysis. Borrowing from relevant post-*Tohono* precedent—particularly *Trusted Integration*—as well as cases interpreting similar phraseology in various joinder contexts, the court in *Klamath* identified four

questions to ask when determining whether two cases share the same set of operative facts for Section 1500 purposes:

> (i) Are the issues of fact and law raised by the two claims largely the same?
>
> (ii) If an adverse merits decision were rendered on the earlier claim, would the doctrine of *res judicata* bar a subsequent suit on the later-filed claim?
>
> (iii) Will the plaintiff rely on substantially the same evidence to support each of the two claims?
>
> (iv) Is there any other logical relationship between the two claims?
>
> Reflecting the majority view of the circuits (including that of the Federal Circuit), the court believes that an affirmative answer to any one of the questions should lead to two claims being viewed as the same for purposes of Section 1500.

Klamath, 113 Fed. Cl. at 708. Also, as stated by the *Klamath* court, "this multi-pronged approach's use of *res judicata* principles, outlined above, makes perfect sense in light of *Tohono*." *Id.* at 709. While the legal theories between the two cases need not be the same for Section 1500 to bar jurisdiction, consideration of the legal theories at issue is necessary to determine which facts are operative with respect to which claim.

Applying the *Klamath* framework here, the issues of fact and law raised in this action and in the APA action are not substantially the same. The primary issues of fact and law in the district court litigation are related to the statutory and regulatory authority invoked by the Secretary to cancel Solenex's lease, specifically whether the Secretary lacked authority (either under the Mineral Leasing Act

("MLA") or via some vestigial inherent authority that survived the APA) to cancel Solenex's lease; whether the issuance of the lease in 1982 comported with the requirements of the MLA, the National Environmental Policy Act, and the National Historic Preservation Act as they then existed; whether a Traditional Cultural District was properly established; whether drilling a well on the lease will have an adverse effect on the Traditional Cultural District; whether any such adverse effect can be mitigated, and whether Solenex is a bona fide purchaser as that term is used in the MLA. The circumstances surrounding the "cancellation" of Solenex's lease that are the core of the APA action are either irrelevant or merely incidental to the takings claim brought in this suit. The two claims assert different allegations and require different evidentiary support.

The primary issues of law and fact raised by the claims at issue in this litigation concern whether a federal oil and gas lease is property (including a contract) subject to the Takings Clause, the economic impact of the cancellation on Solenex, the extent to which the Government interfered with Solenex's investment-backed expectations, whether the Government's actions constituted a breach,[8] and the extent of any damages resulting from said breach. Facts and issues that are essential to resolving the district court suit—whether the Secretary has the power to

[8] The Government has admitted that Solenex performed its obligations under the lease. Fed. Defs.' Answer, ECF No. 152 § 196, *Solenex v. Haaland*, No. 13-cv-993 (D.D.C. Nov. 8, 2021).

cancel a lease decades after it was issued and whether the BLM violated NEPA in issuing the lease, for example—are irrelevant to the claims at issue here. These are exactly the sort of differences courts have long found to be dispositive. *See Klamath,* 113 Fed. Cl. at 710–711 (finding takings suit raised different questions of law and fact from earlier-filed APA suit, in part because the takings complaint did not "mention, let alone rely upon, the provisions of NEPA and ESA that were the focal point of the district court injunctive action," and declaring that "the affected plaintiffs here did not transgress section 1500 in seeking, first, to challenge the validity of the Bureau's plan and, alternatively, to obtain damages for a takings if the plan was upheld."); *Whitney Benefits, Inc. v. U.S.*, 31 Fed. Cl. 116, 120 (1994) (rejecting § 1500 motion because the plaintiffs' district court suit seeking administrative remedies "required no demonstration by the plaintiffs that the government had unlawfully taken the plaintiff's property without just compensation, operative facts which must be demonstrated for a plaintiff to succeed in a lawsuit brought under the fifth amendment to the Constitution.").

B. The CFC Erred in its Application of Res Judicata Principles

The CFC also erred in holding that *res judicata* principles council in favor of barring jurisdiction of Solenex's claims, ignoring a key part of the necessary analysis and focusing only on whether the suits in question "involve the same acts and

contract" in order to reach a result that is at odds with what a court engaging in a *res judicata* analysis in 1868 would have found.

1. A judgment in the APA action would be res judicata for the claims here

As recognized by the Supreme Court in *Tohono*, jurisdictional analysis under Section 1500 "can be informed by how claims are defined for *res judicata* purposes." *Trusted Integration*, 659 F. 3d at 1164 (citing *Tohono*, 563 U.S. at 315). The doctrine of *res judicata* "bar[s] the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit." "Res judicata," BLACK'S LAW DICTIONARY (11th ed. 2019).

This Circuit has identified two tests to determine whether *res judicata* would bar a second suit: the "act or contract test" and the "evidence test." *Klamath*, 113 Fed. Cl. at 712 (quoting *Trusted Integration*, 659 F.3d at 1168–69); *Acetris*, 949 F.3d at 729. The act or contract test asks whether the two claims "*arise[] out of* one and the same act or contract, or whether the several parts arise from distinct and different acts or contracts," *id.* at 713 (quoting Corpus Juris Secondum § 1000 (2013) (emphasis added)), while the evidence test asks whether "the same evidence [will] support and establish both the present and the former cause of action." *Id.* (quoting

Tohono, 563 U.S. at 315).[9] In *Klamath*, the court held that *res judicata* was not a bar to the plaintiffs' takings claim because, while there was significant overlap of background facts between the two cases, the *operative* facts "needed to prove the takings action . . . overlapped only slightly with those needed to prove the validity and breach of contracts claims . . . , and *vice versa*." *Id.* at 714. The court further remarked that "it would seem unlikely that the legally determinative facts in a case that challenges, under the APA, the validity of government action would also suffice to establish that the same action, presumed to be valid, effectuated either a physical or regulatory takings under the Fifth Amendment." *Id.* This describes the situation at issue here perfectly. Because the legally determinative facts in Solenex's APA lawsuit in the district court barely overlap with the facts needed to determine whether the Government effectuated a taking or breached the terms of its contract with Solenex, the doctrine of *res judicata* is no bar to this Court's jurisdiction.

And unlike in *Klamath*, *res judicata* also does not bar Solenex's breach of contract claim. That is because, unlike in *Klamath*, Solenex's breach of contract claim here does not duplicate a claim brought in the district court litigation. That key element of duplicativeness—a second attempt to win that which one was previously unable to win in another forum—which is present in so many of the cases where

[9] The court in *Trusted Integration* emphasizes the "and establishes" half of "supports and establishes," distinguishing between facts that are merely relevant to either claim and those facts necessary to prove both claims. *See* 659 F.3d at 1169–70.

CFC jurisdiction was denied, *see Tohono*, 563 U.S. at 317 (the facts in the Nation's two suits were, 'for all practical purposes, identical.'") (quoting *Tohono*, 79 Fed. Cl. at 656), is entirely absent here.

Moreover, the elements needed to establish contract formation and prove a breach of contract are different from the elements needed to show that an agency action was arbitrary and capricious in violation of the APA. *See Griffin*, 116 Fed. Cl. at 176–77 (recognizing that an oil and gas lease "improperly issued" and therefore subject to cancellation under an incorporated MLA regulation could still support a breach of contract claim). The legal issues in the APA action and this case do not overlap and the facts needed to establish a violation of the APA have virtually nothing in common with the facts that will establish Solenex's takings and breach of contract claims.

2. The CFC privileged a single shared "act or contract" over operative facts, misinterpreting the Supreme Court's analysis in Tohono

In the proceeding below, the United States attempted to shortcut the § 1500 analysis by focusing heavily on the idea that since Solenex's lease is a factual predicate to both the APA action and the claims here, they "arise out of one and the same act or contract" and so § 1500's jurisdictional bar applies. JA__ [ECF No. 13 at 5]. Unfortunately, the CFC acceded to this ill-supported interpretation, ignoring the focus and the nature of the inquiry applicable to § 1500.

The CFC's Order states that "[u]nder the act or contract test, Solenex's breach of contract and Fifth Amendment taking claims in the Court of Federal Claims are based on the same act or contract as its APA claims in the DDC—the government's cancellation of the lease or the lease itself," and therefore, "the Court need not also consider whether they are barred under the evidence test." JA__ [ECF No. 16 at 6, 6 n.5] (citing *Res. Invs.,* 785 F.3d at 666). Under the CFC's reasoning, because two disputes concern the same oil and gas lease—the same "act or contract"—the § 1500 jurisdictional bar applies, and it is unnecessary to even consider the extent to which the operative facts in the two cases overlap. Solenex's district court APA suit is not, however, substantially concerning the lease/contract. The existence of the lease is what confers on Solenex standing to assert its APA claims, but the dispute does not "arise out of" the terms of the lease. What Solenex is challenging in the APA suit is the reasoning and methodology behind the Secretary's decision to cancel the lease. The terms of and performance under the lease, while central to this suit, are not operative facts for the APA suit.

Moreover, the primacy of this "act or contract" test is not supported by the Supreme Court decision in *Tohono*. The "act or contract" concept is mentioned only once and only in a parenthetical in *Tohono*; there is not any "clear" statement or holding that cases touching on the same contract are *per se* barred by § 1500. Further,

when it is mentioned parenthetically, the "act or contract" consideration is, at best, of tertiary concern.

The *Tohono* decision starts with § 1500's statutory language of "for or in respect to" a claim. 563 U.S. at 310–311. The *Tohono* majority then reiterates the holding in *Keene*, that suits are for or in respect to the same claim "when they are 'based on substantially the same operative facts….'" *Id.* at 311. The *Tohono* opinion goes on to its purpose, to answer the open question from *Keene* as to whether there must be some overlap in relief sought for § 1500 to apply. *Id.* at 311–12. The Court ultimately holds that overlapping relief is not required to trigger § 1500. *Id.* at 311–315. The Court later bolsters its focus on operative facts as the key to § 1500 by reference to claim preclusion and *res judicata* since these doctrines are consistent with the goal to eliminate duplicative litigation. *Id.* at 315–16. The Court goes on to state that the "now-accepted test" for preclusion "depends on factual overlap, barring 'claims arising from the same transaction.'" *Id.* at 316. Finally, the Court notes that while the "transactional test" is younger than §1500, it was "not uncommon" in the 19th century "to identify a claim for preclusion purposes based on facts rather than relief." *Id.* It is in support of this statement that the Court cites an 1878 source mentioning the consideration of whether demands or rights of action "arise out of one and the same act or contract." *Id.*

Proper consideration of the *Tohono* Court's reasoning, particularly when combined with the Court's prior holdings that facts are but the means to an end, confirms that the relevance of a single contract in two cases, an arguable single operative fact, does not mandate that one case is *res judicata* for the other. *See Am. Fire & Cas. Co.*, 341 U.S. at 13; *Baltimore S.S. Co.*, 274 U.S. at 321. It is only with the Federal Circuit's decision in *Resource Investments* that the "act or contract" test began to gain prominence; earlier decisions like *Trusted Integration* properly place the focus on a substantial overlap of operative fact.[10]

Like *Tohono*, *Resource Investments* takes the approach that Section 1500 is essentially a codification of *res judicata* principles as of 1868, when the predecessor of § 1500 was first enacted. *See Resource Investments*, 785 F.3d at 666; *Tohono*, 563 U.S. at 316–17. Moreover, *Resource Investments* reiterated the test used twice by the Supreme Court: are the suits "'based on substantially the same operative facts.'" *Resource Investments*, 785 F.3d at 664 (quoting both *Keene* and *Tohono*). Further like *Tohono*, *Resource Investments* comes to the "act or contract" analysis after multiple layers of reasoning, from operative facts, to *res judicata*, to the transactional test, to 1800's analogies to the transactional test such as the act or contract test and

[10] As the earlier of two conflicting panel decisions, *Trusted Integration* should be given precedential primacy over *Resource Investments*. *See Acetris Health*, 138 Fed. Cl. at 58–59 n.15 (When there is direct, irreconcilable conflict between two panel decisions of the [Federal Circuit], the earlier decision is controlling precedent.) (internal quotation marks omitted)

the evidence test. *Id.* at 664–65. The Government's myopic focus on a common contract, a single overlapping fact, disregards the more important analysis of "substantially the same operative facts." *See Klamath Irr. Dist.*, 113 Fed. Cl. at 712 (noting the Federal Circuit "made clear that the consideration of *res judicata* principles is a secondary inquiry," designed to test rather than establish that § 1500 applies); *U.S. Home Corp. v. U.S.*, 108 Fed. Cl. 191, 196 (2012) ("The Federal Circuit made it clear, however, that the *Keene* test for determining whether two suits are based on substantially the same operative facts is the primary tool to be used by this court, and that the consideration of res judicata principles is merely a secondary inquiry.").

When analyzing this Court's decision in *Resource Investments*, it is vitally important to examine the case's discussion of operative facts closely, rather than to simply assume the case stands for the broad proposition that any suit involving the same parties, government conduct, and property precludes CFC jurisdiction over a government taking, as demonstrated by a recent CFC decision addressing this very question. *See Bailey-Johnson v. U.S.*, 155 Fed. Cl. 166, 168 (Fed. Cl. 2021), *aff'd*, 2021-2351, 2021 WL 7162534 (Fed. Cir. Nov. 23, 2021), *cert. denied*, 212 L. Ed. 2d 581 (Apr. 18, 2022).

In *Bailey-Johnson*, a property owner alleged that the denial of a Clean Water Act permit constituted a taking, while already having a lawsuit pending in a district

court challenging the same actions under the APA. *Id.* at 167. The government moved to dismiss under Section 1500, arguing that the case was indistinguishable from *Resource Investments*. *Id.* at 168. The court first rejected the government's unreasonably broad interpretation of *Resource Investments*, stating that "[t]o the extent that the government argues that, for Section 1500 purposes, it is sufficient that the district court claims involve the same parties, the same conduct by the government and the same property as this suit, the Court cannot agree. Although the decision from our court in *Resource Investments* found that Section 1500 applied because claims in both lawsuits involved the same permit denial, the Federal Circuit based its decision on allegations that the Corps denied the permit, *and the alleged economic loss attributable thereto*." (internal citation and quotation marks omitted, emphasis in original).

Resource Investments, contrary to the arguments of the government and the court below, did not deny CFC jurisdiction solely because the two suits at issue involved the same act or contract; and in fact, the case "suggests that for there to be sufficient overlap of operative facts for an earlier-filed claim to be considered the same as a takings claim for Section 1500 purposes, the claims must have more in common than the same permit denials or same ordered action by the federal agency." *Id.* While the court in *Bailey-Johnson* ultimately dismissed the action because "central to the claims against the federal government that were pending in the district

court were the economic impact of the Corps' decisions and the necessity of paying just compensation, making those APA challenges different from the typical ones based on procedural or jurisdictional irregularities," *id*, it recognized that a sufficient overlap of operative facts to deny jurisdiction requires more similarity between the claims pursued in the two suits than exists here.

3. The remedies sought here were unavailable in the APA action, precluding res judicata

The "act or contract" test alone is insufficient for another reason. As the court recognized in *Resource Investments*, *res judicata* usually "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." *Resource Investments*, 785 F.3d at 666 (quoting *Aurora City v. West*, 74 U.S. 82, 102 (1868) (emphasis in original)).

There was never a taking or breach of contract claim asserted in Solenex's district court litigation, and the district court would have had no jurisdiction to review it even if there was, so the takings and breach of contract claims were not "properly" the subject of the APA action. Solenex could not, "exercising reasonable diligence," have brought forward its takings and breach of contract claims in the

district court action.[11] *See Crocker v. U.S.*, 125 F.3d 1475, 1476 (Fed. Cir. 1997) (Tucker Act does not create jurisdiction in the CFC for a party contesting the propriety of a seizure); *Tabb Lakes, Ltd. v. U.S.*, 10 F.3d 796, 802 (Fed. Cir. 1993) ("[The] claimant must concede the validity of the government action which is the basis of the taking claim to bring suit under the Tucker Act.").

Indeed, it is well established in this Circuit that a claim for just compensation for a lawful taking is separate from—and mutually exclusive with—a claim that the government acted unlawfully; they are entirely independent claims that rely on different sorts of facts and must be brought in different courts under different theories of jurisdiction. *See Acadia Tech.*, 458 F.3d at 1330 ("a takings claim is separate from a challenge to the lawfulness of the government's conduct: a taking does not result simply because the government acted unlawfully, nor does a takings claim fail simply because the government's conduct is subject to challenge as unlawful."); *Lion Raisins*, 416 F.3d at 1369 ("We have made clear that a claim premised on a regulatory violation does not state a claim for a taking."); *Rith Energy*,

[11] Past constructions of Section 1500 have been described as a "trap for the unwary," *d'Abrera v. United States,* 78 Fed. Cl. 51, 56 n.10 (2007), and can even ensnare the diligent. In the past, the Supreme Court has directed the CFC to stay proceedings pending resolution in district court to ensure proper judicial review and avoid precisely this sort of injustice. *See Loveladies Harbor*, 27 F.3d at 1555–56; *Pennsylvania R.R. Co. v. U.S.*, 363 U.S. 202, 205–06 (1960); *see also Aulston v.U.S.*, 823 F.2d 510, 514–15 (Fed Cir. 1987); *Underwood Livestock, Inc. v. U.S.*, 79 Fed. Cl. 486, 499–500 (2007), *on reconsideration*, 89 Fed. Cl. 287 (2009), *aff'd*, 417 Fed. Appx. 934 (Fed. Cir. 2011) (unpublished).

247 F.3d at 1365 ("an uncompensated taking and an unlawful government action constitute 'two separate wrongs that give rise to two separate causes of action.'") (quoting *Del–Rio Drilling*, 146 F.3d at 1364); *Davis*, 123 Fed. Cl. at 243 ("an uncompensated taking and an unlawful government action constitute two separate wrongs that give rise to two separate causes of action") (quoting *Acadia Tech.*, 458 F.3d at 1331).

The *Tohono* concurrence addressed this point, noting that claim preclusion does not apply "when a plaintiff was unable to obtain a certain remedy in the earlier action." *Tohono*, 563 U.S. at 328–29 (Sotomayor, J. and Breyer, J. concurring). Particularly, the concurrence cited an 1891 edition of Black's Law of Judgments which stated, "A judgment is not conclusive of any matter which, from the nature of the case, the form of action, or the character of the pleadings, could not have been adjudicated in the former suit." *Id*. at 319 (quoting 2 H. Black, Law of Judgments § 618, p. 744 (1891)). As explained above, Solenex's monetary claims were not available in its APA action and its challenge to the legitimacy of the Secretary's conduct is not available for review here, thus claim preclusion and so § 1500 does not apply.[12] *Res judicata* principles do not bar this suit and would not have barred it in 1868.

[12] *Resource Investments* noted and rejected the *res judicata* exception in a single sentence, stating that it did not apply because *Tohono* found § 1500 applicable

4. The evidence to support the APA action differs from the evidence to support Solenex's claims here

The evidence Solenex will rely on to prove its claims differs substantially between the two suits. "[T]wo claims are not the same if the second claim 'is to fault [the defendants] for conduct different from that identified in the original complaint,' even if the new claim 'shares some elements and some facts in common' with the original claim." *Klamath*, 113 Fed. Cl. at 715 (quoting *Jones v. Bernanke*, 557 F.3d 670, 674 (D.C. Cir. 2009)). As in *Klamath*, the evidence Solenex has used to support its APA action has focused on whether the Government complied with NEPA and other procedural statutes, as well as whether the complained of agency action "was issued pursuant to a process that was arbitrary, capricious and otherwise contrary to law," and has largely been made up of years-old agency records pertaining to the agency decision-making process. *See id*.

Solenex's other APA assertions rely upon the granting and revocation of an application for permit to drill a well, the creation and impact of a Traditional Cultural District, and the government's lack of compliance with the National Historical Preservation Act. By contrast, historical evidence related to NEPA and NHPA

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without regard to the relief sought. *Resource Investments*, 785 F.3d at 666. The *Resource Investments* court did not, however, reconcile the historic creation of the APA and its completely new causes of action. *See Eastern Shawnee Tribe of Okla. v. U.S.*, 582 F.32d 1306, n.4 (Fed. Cir. 2009) (noting APA limitations on remedies and question of whether claim asserted but beyond court's jurisdiction had legal significance in § 1500 analysis), *vacated on other grounds*, 131 S.Ct. 2872.

compliance and the Cultural District will have little, if any, use supporting the claims at issue before this Court. Again, this reasoning applies equally strongly to Solenex's breach of contract claim. The evidence supporting contract formation and breach, central to the present suit, is not at play in the district court APA suit.

CONCLUSION

For the foregoing reasons, the CFC's decision dismissing Solenex's claims should be reversed, and the case remanded.

DATED, this 21st day of April, 2023.

Respectfully submitted,

/s/ David C. McDonald

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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