No. 14-_____

IN THE

# Supreme Court of the United States

MENOMINEE INDIAN TRIBE OF WISCONSIN,

*Petitioner,*

v.

UNITED STATES OF AMERICA;
SECRETARY OF HEALTH AND HUMAN SERVICES;
AND DIRECTOR, INDIAN HEALTH SERVICE,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

*Holland v. Florida*, 560 U.S. 631, 649 (2010), established that equitable tolling of a non-jurisdictional statute of limitations is warranted where a party shows (1) diligence in pursuing its rights, and (2) that some extraordinary circumstance stood in the way of timely filing. In its decision below, the D.C. Circuit applied the *Holland* test and concluded that the Menominee Indian Tribe did not establish the necessary grounds for obtaining equitable tolling of the statute of limitations for filing claims against the Indian Health Service ("IHS") under the Contract Disputes Act ("CDA") for unpaid contract support costs ("CSC"). As acknowledged in its opinion, the D.C. Circuit's application of *Holland* and its ultimate ruling was in direct conflict with the Federal Circuit's opinion in *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 699 F.3d 1289 (Fed. Cir. 2012) (Pet. App. 75a-97a), which found that the plaintiff tribal organization in that case was entitled to equitable tolling of the CDA statute of limitations under materially similar facts.

The Federal Circuit's opinion and the D.C. Circuit's opinion below are in irreconcilable conflict with one another. Unless and until reconciled by this Court, the conflict will almost certainly undermine fairness and consistency in the administration of justice in the wide array of civil and criminal contexts in which equitable tolling arises. Meanwhile, the D.C. Circuit's decision denies the Menominee Indian Tribe the right to full recovery under its Indian Self-Determination contract based on a narrow and inflexible application of *Holland*, even as other tribes and tribal organizations

may vindicate that right by filing their claims in a different forum. The Tribe therefore seeks this Court's review of the following critical question:

> Whether the D.C. Circuit misapplied this Court's *Holland* decision when it ruled—in direct conflict with a holding of the Federal Circuit on materially similar facts—that the Tribe did not face an "extraordinary circumstance" warranting equitable tolling of the statute of limitations for filing of Indian Self-Determination Act claims under the Contract Disputes Act?

## PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following list represents all the parties appearing here and before the United States Court of Appeals for the District of Columbia Circuit:

The Petitioner is the Menominee Indian Tribe of Wisconsin, a federally recognized Indian tribe. The Respondents are the United States of America, the Secretary of Health and Human Services, and the Director, Indian Health Service.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner the Menominee Tribe of Wisconsin ("Tribe" or "Menominee") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit opinion is reported at 764 F.3d 51 (*"Menominee IV"*) (Pet. App 1a-19a). The opinion of the District Court is reported at 841 F. Supp. 2d 99 (D.D.C. 2012) (*"Menominee III"*) (Pet. App. 20a-43a).

An earlier decision in this dispute by the D.C. Circuit was reported at 614 F.3d 519 (D.C. Cir. 2010) (*"Menominee II"*). (Pet. App. 44a-68a), *rev'g and remanding Menominee Indian Tribe of Wis. v. United States*, 539 F. Supp. 2d 152 (D.D.C. 2008) (*"Menominee I"*) (Pet. App. 69a-74a).

## JURISDICTION

The judgment of the court of appeals was entered on September 2, 2014. This Petition for Certiorari is being filed within 90 days thereof. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. § 450m-1(d), provides as follows: "The Contract Disputes Act . . . shall apply to self-determination contracts. . . ."

The Contract Disputes Act ("CDA"), 41 U.S.C. § 7103(a)(4)(A),[1] provides as follows: "Each claim by a contractor against the Federal Government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim."

## STATEMENT

In this case, a panel of the District of Columbia Circuit expressly declined to even consider the first prong of this Court's test in *Holland v. Florida*, 560

[1] During the years at issue in this appeal, this provision was codified at 41 U.S.C. § 605(a). The CDA has since been revised and renumbered, but the six-year statute of limitations is substantially unchanged. The D.C. Circuit in *Menominee IV* cited to the current codification, 764 F.3d at 55 n.1 (Pet. App. at 3a n.1) so in this petition Menominee will too.

U.S. 631, 649 (2010)[2]—whether the Tribe exercised reasonable diligence—in deciding whether or not the Tribe was entitled to equitable tolling in submitting its contract support costs ("CSC") claims to the IHS for a contracting officer's decision.[3] The court based its holding entirely on the "extraordinary circumstance" prong of the *Holland* test, and adopted a narrow and unreasonably stringent interpretation of that prong to require proof that "external obstacles" prevented timely filing of a claim under the ISDA, to the exclusion of other relevant equitable considerations.

In stark contrast, a panel of the Federal Circuit in *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 699 F.3d 1289 (Fed. Cir. 2012) (Pet. App. 75a-97a) ("*ASNA II*"), reviewing facts similar in all material respects to the facts in this case, held that the plaintiff tribal organization was entitled to equitable tolling. The majority of that panel applied both prongs of the *Holland* test, and, recognizing the "unique facts and extraordinary circumstances" surrounding the drawn-out CSC litigation, held that ASNA "took reasonable, diligent, and appropriate action as the legal landscape evolved," thus warranting equitable

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[2] *Holland* involved application of the Antiterrorism and Effective Death Penalty Act of 1996, not an Indian tribe's claims under the ISDA.

[3] The ISDA, 25 U.S.C. § 450m-1(d), incorporates by reference the provisions of the CDA, 41 U.S.C. §§ 7101 *et seq*., including § 7103(a)(4), which provides that "[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision[,] … shall be in writing[,] … [and] shall be the subject of a written decision by the contracting officer. … Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim."

tolling. 699 F.3d at 1297 (Pet. App. 90a-91a). In its decision below, the D.C. Circuit specifically noted its disagreement with the *ASNA II* majority's analysis and agreed with the *ASNA II* dissent that equitable tolling was unwarranted. *Menominee IV*, 764 F.3d at 60 n.5 (Pet. App. 14a n.5).

In denying Menominee the same relief afforded ASNA by the Federal Circuit, the D.C. Circuit did not point to any factual distinctions, relying instead on its conclusion that the Federal Circuit erred in its application of *Holland*.[4] In fact, the circumstances of ASNA and the Menominee Tribe are similar in all material respects:

- Both ASNA and Menominee asserted claims for breach of contract based on the IHS's policy of systematically underfunding CSC due to its mistaken interpretation of federal appropriations law, a mistake this Court pointed out in *Cherokee Nation of Okla. v. Leavitt*, 543 US. 631 (2005) *("Cherokee")*.
- Both ASNA and Menominee asserted claims for breach of contract for fiscal years 1996, 1997, and 1998.

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[4] The D.C. Circuit referred to *ASNA II* as "a case similar to this one." 764 F.3d at 60 n.5 (Pet. App. 14a n.5). The court also described its difference with the decision in *ASNA II* as based on application of the law, not any material difference in facts, and stated that it agreed with the dissent in *ASNA II*. *Id*. Likewise, the dissent in *ASNA II* cited the similar circumstances in the two cases as a reason for applying the district court's rationale in *Menominee III*, rather than the reasoning of the majority in *ASNA II*. *ASNA II*, 699 F.3d at 1301 n.1 (Pet. App. 96a n.1) (Bryson, dissenting, stating that *Menominee III* involved "a party in essentially the same position as ASNA.").

- Both ASNA's and Menominee's claims were filed with the IHS in September of 2005.
- Both ASNA and Menominee were (and are) members of the *Ramah* class that continues to press claims for unpaid CSC against the Department of the Interior.
- Both ASNA and Menominee received substantial payments associated with earlier settlements in the *Ramah* case.
- Both ASNA and Menominee therefore reasonably relied on analogous CSC class actions against IHS—Menominee on the *Cherokee* case and ASNA on the *Zuni* case.[5]
- Both ASNA and Menominee took "reasonable, diligent, and appropriate action as the legal landscape evolved," *ASNA II*, 699 F.3d at 1297 (Pet. App. 90a), by filing individual claims in September 2005 after this Court's *Cherokee* decision in March, 2005.

Given that these facts are similar in all material respects, there can be no doubt that the D.C. Circuit's decision expressly conflicts with the Federal Circuit's analysis in *ASNA II*.[6] Indeed, the decision creates a conflict between the Circuits that impacts the proper application of equitable tolling under this Court's decision in *Holland* in any number of civil and criminal contexts. This Court's immediate review of the decision below is therefore warranted.

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[5] *See infra*, n.8.

[6] The Federal Government did not seek a writ of certiorari for review of the Federal Circuit's ruling in *ASNA II*.

## BACKGROUND

First in 2005 and again in 2012, this Court confirmed the Government's obligation to fully pay CSC owed under its ISDA contracts. *Cherokee*, 543 U.S. 631; *Salazar v. Ramah Navajo Chapter*, __ U.S. __, 132 S. Ct. 2181 (2012) ("*Ramah*"). Following the *Cherokee* decision, the Menominee Tribe filed claims with the IHS for full CSC funding for its contracts covering the calendar years (CY) 1995 through 2004. The agency denied the Tribe's CY 1996 through 1998 claims on the basis that they were barred by the six-year statute of limitations in the CDA. The Tribe appealed the denials directly to the federal district court as permitted by 25 U.S.C. § 450m-1. The district court ruled on summary judgment that the Tribe did not establish facts supporting equitable tolling pursuant to the *Holland* test, 560 U.S. at 649. The D.C. Circuit affirmed. The issue in this appeal is whether the statute of limitations was equitably tolled for the filing of the Menominee Tribe's claims for full CSC funding for CYs 1996 through 1998, while the same issue was being litigated in the *Cherokee Nation* case.

### A. The ISDA and Contract Support Costs

The ISDA was enacted in 1975 to redress "the prolonged Federal domination of Indian service programs" by allowing tribes to exercise increased control over those programs. 25 U.S.C. § 450(a)(1). Under Title I of the ISDA, tribes may enter into contracts and annual funding agreements ("AFAs") with the Secretary to assume responsibility to provide contractible programs, functions, services and activities ("PFSAs") that are provided for the benefit of Indian people and that the Secretary would otherwise have administered directly. For many years the

Menominee Tribe, like many tribes, has contracted to operate a comprehensive health services program, including medical, dental, and community health services pursuant to Title I contracts and AFAs.

**B. The CSC Litigation History**

The CSC litigation and the Tribe's experience in two prior CSC class action cases, the *Ramah* case and the *Cherokee Nation* case, provide the factual basis for equitably tolling the statute of limitations.

In 1993, in a suit filed against the Bureau of Indian Affairs ("BIA") in the United States District Court for the District of New Mexico, the court certified a nationwide class of all tribal contractors who had contracted with BIA. *Menominee IV*, 764 F.3d at 56 (Pet. App. 6a). The case challenged the BIA's policy to deliberately underfund tribal CSC. The Government argued that each class member had to exhaust its administrative remedies by filing claims under the CDA,[7] but the court held that exhaustion would be futile due to the agency's consistent denials of such claims. The court held that "it is not necessary that each member of the proposed class exhaust its administrative remedies," and that all tribal contractors could participate in and benefit from the class action even if they had not gone through the futile process of presenting separate claims. *Ramah Navajo Chapter v. Lujan*, No. CIV 90-0957 LH/RWM, Order (D.N.M. October 1, 1993). In 1997, the Tenth Circuit ruled in favor of Ramah on liability. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir.

[7] *See* 41 U.S.C. §§ 7101–7109. *See* 25 U.S.C. § 450m-1(d) (incorporating by reference the CDA as a contract remedy); 25 C.F.R. Part 900, Subpart N.

1997). As a result of settlement in that case, the Menominee Tribe, a member of the *Ramah* class, received nearly $800,000 for claims for 1993 and 1994 (that had not been previously filed). *Menominee IV*, 764 F.3d at 56 (Pet. App. 6a).

The Cherokee Nation filed a separate class action against IHS on March 5, 1999. Both the class and the claims were nearly identical to those in the *Ramah* case, challenging IHS's policy to deliberately underfund CSC. *See Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001) ("*Cherokee Nation*"). Menominee, a longtime contractor with IHS, fit squarely within the *Cherokee Nation* proposed class and as part of the putative class would have been bound by any judgment had the class been certified. *See id*. at 360. Given the Tribe's experience with the *Ramah* class, it relied on the *Cherokee Nation* class action to represent its claims and it did not file its own lawsuit. Decl. of Jerry Wakau at ¶¶ 6-7, *Menominee Indian Tribe of Wis. v. United States*, 841 F.Supp. 2d 99 (D.D.C. 2012) (No. 07-cv-00812) ("Wakau Decl.") (Pet. App. 99a-100a).

In a ruling dated February 9, 2001, the court denied the Cherokee motion for class certification. *Cherokee Nation*, 199 F.R.D. at 366.[8] Four months later, on June 25, 2001, the *Cherokee Nation* court ruled on the merits and found that there was no statutory duty to fully fund CSC under the ISDA. *Cherokee Nation of Okla. v. United States*, 190 F. Supp. 2d 1248 (E.D. Okla. 2001). The Cherokee Nation appealed the

[8] After the *Cherokee Nation* court denied class certification in 2001, a second CSC class action was filed by the Pueblo of Zuni. Class certification was denied in that case in 2007. *Pueblo of Zuni v. United States,* 243 F.R.D. 436 (D.N.M. 2007).

substantive ruling to the Tenth Circuit, but did not appeal the denial of class certification, rendering that ruling final. A circuit split developed regarding the viability of CSC claims against the IHS. *Compare Cherokee Nation v. Thompson*, 311 F.3d 1054, 1063 (10th Cir. 2002) (IHS not liable) *with Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075, 1095 (Fed. Cir. 2003) (IHS liable).[9]

As of 2003, then, Menominee faced two conflicting Circuit Court rulings on the extent of the IHS's duty. Given the conflict, and IHS's consistent position interpreting the statute to allow it to fund less than 100% of CSC, it was obvious IHS would deny any claims and therefore futile for the Tribe to file claims. Menominee decided it would be prudent to allow the Supreme Court to resolve the issue before going through the expense of filing claims with the contracting officer. Wakau Decl. at ¶ 8 (Pet. App. 100a).

Once this Court held that the agencies had a duty to fully fund CSC, *Cherokee,* 543 U.S. 631, the Menominee Tribe, like many other putative members of the now uncertified class, sought full funding of CSC as provided for in *Cherokee* by filing individual claims under the CDA.[10] On September 7, 2005, the Tribe filed claims for CSC underpayments in the years 1995

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[9] The Ninth Circuit echoed the Tenth Circuit in ruling that the Government was not liable for CSC shortfalls. *Shoshone-Bannock Tribes v. Sec'y, Dep't of Health and Human Servs.*, 279 F.3d 660 (9th Cir. 2001).

[10] After this Court's decision, the Government indicated it would challenge the *Ramah* precedent and argued that asserted class members must first have presented claims to the contracting officer in order to participate in the class. *See Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099 (D.N.M. 2006) .

through 2004. Assuming the statute was tolled during the pendency of the class action, the Tribe's claims were within the 6-year statute of limitations. The agency denied the claims for CYs 1996 through1998 on the basis that they were barred by the statute of limitations in the CDA.[11] The Tribe appealed the denials directly to the federal district court as permitted by 25 U.S.C. § 450m-1 and (what was then) 41 U.S.C. § 609.

In 2008 the district court below held that the statute of limitations for filing claims under the CDA barred the Tribe's 1996 through1998 funding claims and that the statute is jurisdictional in nature and therefore not subject to tolling. *Menominee I*, 539 F. Supp. 2d at 153–54 (Pet. App. 70a). On appeal, the D.C. Circuit reversed and held that the CDA statute of limitations for filing administrative claims in federal court is not jurisdictional and is thus subject to equitable tolling, and remanded to the district court to determine whether equitable tolling was appropriate. *Menominee II,* 614 F.3d at 529, 531 (Pet. App. 65a, 68a). The court also held that class action tolling under *American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 554 (1974), did not apply in this case. *Menominee II*, 614 F. 3d at 527 (Pet. App. 57a).

On remand, the district court ruled on summary judgment that the Tribe did not establish facts supporting equitable tolling pursuant to the test in *Holland*, so the claims were time-barred. *Menominee III*, 841 F. Supp. 2d at 104–09 (Pet. App.

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[11] IHS denied the 1995 claim, which was not barred by the statute of limitations, on the basis of laches. The district court upheld IHS's decision but was reversed on appeal. *Menominee II*, 614 F.3d at 531–32 (D.C. Cir. 2010) (Pet. App. 65a-68a).

28a-37a). On appeal, the D.C. Circuit affirmed. *Menominee IV,* 764 F.3d 51 (Pet. App. 19a).

## REASONS FOR GRANTING THE PETITION

The D.C. Circuit erred in ruling that the filing deadline for the Menominee Tribe's claims was not tolled for the period the Tribe was a putative member of the *Cherokee Nation* class. The D.C. Circuit misapplied the equitable tolling doctrine by adopting a narrow test inconsistent with the flexible analysis mandated by this Court in *Holland.*[12] In *ASNA II* the Federal Circuit recognized that the CSC litigation created "unique facts and extraordinary circumstances" and held that ASNA "took reasonable, diligent, and appropriate action as the legal landscape evolved," thus warranting equitable tolling. 699 F.3d at 1297 (Pet. App. 90a-91a).

Sharply breaking from the Federal Circuit's reasoning, the D.C. Circuit ruled on materially similar facts in this case that equitable tolling

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[12] In *Holland*, this Court made clear that the exercise of equitable powers must be made flexibly on a "case-by-case basis," rather than according to "mechanical rules." *Holland*, 560 U.S. at 649-50. Equitable doctrines "relieve hardships" imposed by "hard and fast adherence" to absolute legal rules. *Id*. at 650. "The flexibility inherent in equitable procedure enables courts to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Id*. (citations and internal quotation marks omitted). Courts exercising equitable powers "draw upon decisions made in other similar cases for guidance" and with an awareness "that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." *Id.* Moreover, "[t]he diligence required for equitable tolling purposes is '*reasonable* diligence,' not 'maximum feasible diligence.'" *Id.* at 653 (internal quotations and citations omitted) (emphasis added).

was unwarranted for lack of "extraordinary circumstance." 764 F.3d at 60 n.5 (Pet. App. 14a n.5). The two decisions are in irreconcilable conflict, and the D.C. Circuit's decision imposes an inequitable result on the Tribe. Moreover, the D.C. Circuit's misapplication of the *Holland* test and the conflicting approaches to equitable tolling taken by the two Circuits will likely result in inconsistent and improper application of that doctrine in other civil and criminal contexts, well beyond the ISDA and the CDA.

## I. REVIEW IS WARRANTED BECAUSE AN ACKNOWLEDGED CIRCUIT SPLIT EXISTS ON THE INTERPRETATION AND APPLICATION OF *HOLLAND* TO MATERIALLY SIMILAR FACTS.

The Federal and D.C. Circuits' conflicting decisions, ruling on materially similar facts involving tribal claims for withheld CSC funding,[13] result in diametrically opposed precedents for application of equitable tolling. The radical difference in the courts' analyses and application of the *Holland* test is expressly acknowledged in the opinions.

In *ASNA II* the Federal Circuit held that ASNA was entitled to equitable tolling based on facts that are essentially the same as those in Menominee's case, and in doing so expressly declined to follow the reasoning employed by the district court in *Menominee III,* which was decided during briefing in *ASNA II*. *See ASNA II*, 699 F.3d at 1296 n.4 (Pet. App. 87a n.4).[14]

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[13] *See* discussion *supra* at pp.4-5.

[14] The *Menominee* and *ASNA* cases were intertwined in prior proceedings. In *Menominee II*, the D.C. Circuit held that equitable tolling applies, noting agreement with the Federal Circuit's identical ruling in *Arctic Slope Native Ass'n v. Sebelius,*

The majority in *ASNA II* found that both *Holland* prongs were satisfied in its analysis, i.e. (1) that the claimant exercised due diligence, and (2) that there were extraordinary circumstances. The court found that the CSC litigation landscape represented "unique facts and extraordinary circumstances," and held that ASNA "took reasonable, diligent, and appropriate action as the legal landscape evolved," thus warranting equitable tolling. 699 F.3d at 1297.

The Federal Circuit addressed ASNA's reliance on putative membership in class action proceedings and rejected the Government's argument that the tribal organization should have taken affirmative action to file claims. The Federal Circuit's conclusion applies as well to Menominee as to ASNA:

> Monitoring and reasonably interpreting applicable legal proceedings, judicial order and opinions, and taking action as necessary does not constitute sleeping on one's rights, particularly in the class action context where parties who believe they are putative class members often remain passive during the early stages of the litigation allowing the named class representatives to press their claims.

*ASNA II*, 699 F.3d at 1297 (Pet. App. 88a – 89a).

The Federal Circuit also found that tolling the limitations period was "not fundamentally unfair" to the Government, and that in this case the analysis should take into account the trust responsibility of the United States toward Indian tribes. *Id*. at 1297–98 (Pet. App. 90a-91a).

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583 F.3d 785, 798–99 (Fed. Cir. 2009) ("*ASNA I*"). *See Menominee II*, 614 F.3d at 530–31 (Pet. App. 49a).

The D.C. Circuit used a radically different analysis in *Menominee IV*. First, the panel expressly declined to even consider the first prong of the *Holland* test, whether the Tribe exercised reasonable diligence. 764 F.3d at 59 n.4 (Pet. App. 12a n.4). Second, the panel adopted a narrow and stringent interpretation of the "extraordinary circumstance" prong of the *Holland* test to require proof that "external obstacles" prevented timely filing of a claim. *Id.* at 62 (Pet. App. 18a). Third, the D.C. Circuit ignored other factors relevant to the equitable analysis, such as prejudice to the Government and the Tribe's trust relationship with the United States, *id.* at 59 n.4 (Pet. App. 12a n.4), factors that were included in the Federal Circuit's analysis.

The circuit split created by the different approach in these decisions threatens the fair and consistent administration of justice in the wide variety of contexts in which equitable tolling arises—well beyond the context of the ISDA or the CDA. *Holland* itself concerned tolling of the statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(d), applying a 1-year statute of limitations on applications for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. *Holland*, 560 U.S. at 634. *Holland* is also regularly applied with regard to the statute of limitations under 28 U.S.C. § 2255, the counterpart to § 2244 for prisoners in federal custody. *See, e.g.*, *United States v. Terrell*, 405 F. App'x 731, 732 (4th Cir. 2010). Federal courts also routinely apply *Holland* to determine whether circumstances warrant tolling of time limitations set in a wide range of civil statutes, impacting an array of claims against the United States as well as State and private

defendants.[15] Guidance is needed from this Court to resolve the conflict and confusion, made starkly apparent in this case, over the application of *Holland* to prevent inconsistent application of equitable tolling in all of these contexts.

## II. THE D.C. CIRCUIT MISAPPLIED *HOLLAND*.

### A. The D.C. Circuit failed to apply the diligence prong of *Holland*.

Equitable tolling requires both diligence *and* extraordinary circumstances. *Holland*, 560 U.S. at 649 (internal quotations omitted). The D.C. Circuit erred by declining to evaluate whether the Tribe exercised reasonable diligence. The two prongs of the *Holland* test are not discrete, mutually exclusive factors to be applied separately. The equitable doctrine embodied in *Holland* provides the inherent "flexibility" adequate to enable a court "to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Id*. at 650 (citations and internal

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[15] *See, e.g.*, *Wohlwend v. Shinseki*, 549 Fed. Appx. 1015 (Fed. Cir. 2013) (remanding to Veterans Court for reconsideration of equitable tolling of limitations period in 38 U.S.C. § 7266 pursuant to *Holland*); *Billups v. Scholl*, No. 2:13-cv-258, 2014 U.S. Dist. LEXIS 137338 (S.D. Ohio Sept. 29, 2014) (tolling deadline for effecting service in action pursuant to 42 U.S.C. § 1983); *Bergman v. Kindred Healthcare, Inc.*, 949 F. Supp. 2d 852, 860 (N.D. Ill. 2013) (tolling statute of limitations under Fair Labor Standards Act); *Hogan v. Northwest Airlines, Inc.*, No. 11-cv-14888, 2013 U.S. Dist. LEXIS 21962 (E.D. Mich. Feb. 19, 2013) (failure to timely meet presentment deadlines under Federal Tort Claims Act); *Flores v. Predco Servs. Corp.*, 911 F. Supp. 2d 285 (D.N.J. 2012) (applying *Holland* to statute of limitations in personal injury action against private defendant).

quotation marks omitted). In order for a court to achieve that result the two prongs must be considered in light of the relation they bear to each other and to other equitable factors. The exercise of equitable powers on a "case-by-case basis" makes sense only if the hardship imposed by the circumstance is judged in light of the reasonableness and diligence of action taken in light of the circumstance. Likewise, a party's diligence is in part measured by the nature of the circumstances that stood in the way of timely filing.

This Court's analysis in *Holland* demonstrates the wisdom of the unitary nature of the rule and offers an excellent example of its application. In *Holland*, the district court denied equitable tolling based on lack of diligence, while the circuit court denied tolling based on a conclusion that the petitioner failed to demonstrate that "extraordinary circumstances" prevented timely filing. This Court reversed and remanded for the equitable "fact-intensive" inquiry necessary to determine whether the petitioner had met the burden to establish *both* elements for equitable tolling. 560 U.S. at 653-54. The Court also evaluated both elements of the test in *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

The D.C. Circuit does not explain or provide a rationale for divorcing a consideration of reasonable diligence from its analysis of extraordinary circumstances, even though the two D.C. Circuit cases cited in the opinion involved decisions where both prongs were evaluated in determining whether equitable tolling was warranted. *See Dyson v. District of Columbia*, 710 F.3d 415, 421 (D.C. Cir. 2013) ("The District Court concluded that Appellant neither pursued her rights diligently nor proved that an extraordinary circumstance stood in her way.");

*Commc'ns Vending Corp. of Ariz. v. FCC*, 365 F.3d 1064, 1075 (D.C. Cir. 2004). *See Menominee IV*, 764 F. 3d at 58, 61 (Pet. App. 10a, 16a). Other cases cited by the D.C. Circuit also refer to both reasonable diligence and extraordinary circumstances as necessary aspects of one "extraordinary circumstances test." *See Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 750 (6th Cir. 2011) (discussing post-*Holland* law as comprising "the 'extraordinary circumstances' test, which requires *both* reasonable diligence and an extraordinary circumstance") (citations omitted and emphasis added); *Manning v. Epps*, 688 F.3d 177, 184 n.2 (5th Cir. 2012) (same); *Arthur v. Allen*, 452 F.3d 1234, 1252 (11th Cir. 2006) (same); *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) (test evaluates "extraordinary circumstances that are both beyond [the party's] control and unavoidable even with diligence"); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (citing *Sandvik*).

To the contrary, the D.C. Circuit declined to consider whether the Tribe exercised diligence, and thus did not evaluate whether the Tribe's response to the CSC litigation landscape was reasonable. The court is simply wrong to suggest that the prongs are mutually exclusive, or that the Federal Circuit in *ASNA II* failed to "separately" address the two *Holland* prongs. *See Menominee IV,* 764 F.3d at 60 n.5 (Pet. App. 14a n.5). In fact, what the Federal Circuit's careful analysis shows is that reasonable diligence can only be evaluated, and in fact only makes sense, when considered in the context of the factors and variables that constitute the "extraordinary circumstances" governing the CSC litigation.

### B. The D.C. Circuit misapplied the "extraordinary circumstance" prong to require proof that an "external obstacle" affirmatively prevented filing.

The D.C. Circuit misinterpreted the "extraordinary circumstance" prong of the *Holland* test. Rather than consider the totality of the circumstances beyond the Tribe's control, as the Federal Circuit did—for example, the history of CSC litigation created by other tribes and the U.S.—the D.C. Circuit analyzed each discrete element of the complex and protracted CSC litigation separately to determine whether it amounted to an "external obstacle" that, by itself, "prevented" the Tribe from timely filing. *E.g.*, 764 F.3d at 59, 62 (Pet. App. 12a, 18a).

The court does not cite any case employing or applying the term "external obstacle."[16] The court offers no clue about what the test means and provides no explanation, description, or example of what constitutes an obstacle, or any circumstance which, in its view, would rise to the level of an "external obstacle" warranting equitable tolling. Some cases cited by the court refer to "external factors" or circumstances "external" to the party claiming equitable tolling. In *In re Wilson*, the court noted that "failure to satisfy the statute of limitations must result from external

[16] The only two D.C. Circuit cases cited by the court do not use the term. *See Dyson*, 710 F.3d at 422 (describing equitable tolling as a doctrine "meant to ensure that the plaintiff is not, by dint of circumstances beyond his control, deprived of a reasonable time in which to file suit") (brackets and internal quotation marks omitted); *Commc'ns Vending Corp. of Ariz.*, 365 F.3d at 1075 (equitable tolling ensures that a party "is not, by dint of circumstances beyond his control, deprived of a reasonable time in which to file suit") (citations omitted).

factors beyond [the party's] control." *In re Wilson*, 442 F.3d 872, 875 (5th Cir. 2006), *citing Felder v. Johnson,* 204 F.3d 168, 174 (5th Cir. 2000) ("Equitable tolling is appropriate when an extraordinary factor beyond the plaintiff's control prevents his filing on time.").[17] However, the fact that a circumstance is an "external factor" does not mean it is necessarily an "external obstacle," a term that offers no practically useful principle of interpretation and is, in fact, impossible to reconcile with the equitable purpose of the *Holland* test and with the *Holland* Court's weighing of all equitable factors, including non-external factors. As applied by the court in this case, the limiting rule requiring evidence of an "external obstacle" amounts to the rigid *per se* approach rejected by this Court in *Holland*, 560 U.S. at 650-51. In *Holland* this Court required a "fact-intensive" inquiry into both elements against a backdrop of all factors affecting the equities. *Id.* at 653-54.

In *ASNA II* the Federal Circuit performed the same type of analysis of both *Holland* prongs, finding cumulative import in the combination of several external factors that affected timely filing of ASNA's claims: reliance on the filing of the *Cherokee Nation* CSC class action; successful past experience in a similar CSC class action; unsettled case-law; lack of prejudice to the Government; and the Government's unique trust obligation. Framed by the unique history, breadth and complexity of the CSC litigation

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[17] *See also Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) ("circumstances external to the party's own conduct"); *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004) (circumstances beyond a party's control or "external to his own conduct").

itself, the Federal Circuit found these factors constituted the extraordinary circumstances necessary to invoke application of equitable tolling.

The D.C. Circuit, on the other hand, miscalculated the true nature of the CSC litigation by applying an impractical and inexplicable requirement that some single "external obstacle" stood in the way of timely filing. As a result, the court failed to appreciate or even evaluate the Tribe's reasonable diligence – its deliberate, pragmatic and efficient response consistent with the true nature of the proceedings and judicial order. *See ASNA II*, 699 F.3d at 1297 (Pet. App. 88a). Nor did the D.C. Circuit analyze the factor of fiduciary duty to Indian tribes, which, while not conclusive to the analysis, should be entitled to some weight. Similarly, the prejudice to the Government in having to pay what it agreed to pay for the Tribe to provide health services to IHS beneficiaries—services the Government would have paid for directly but for the ISDA contract—does not seem significant.

In applying *Holland*, the court dismissed the Tribe's reliance on the *Cherokee Nation* class action as a basis for its decision to delay filing an administrative claim. The Tribe had participated in the earlier *Ramah* class action and received settlement payments without filing administrative claims. When the Cherokee Nation filed an analogous class action against IHS, the Tribe relied on that precedent and did not file individual claims while the *Cherokee Nation* case proceeded through the courts. The court of appeals acknowledged that the *Cherokee Nation* claims were "legally analogous" to the *Ramah* claims, 764 F.3d at 56 (Pet. App. 14a n.6), and that the *Cherokee Nation* suit "defined the proposed class in a manner that clearly included the Menominee

Tribe." *Id*. It is true that the *Cherokee Nation* class action did not pose an affirmative "obstacle" to Menominee filing individual claims, but the class action was certainly a key part of the "then-existing legal landscape" that the Federal Circuit found "constituted an 'extraordinary circumstance' sufficient to warrant equitable tolling of the filing deadline." *ASNA II*, 699 F.3d at 1296 (Pet. App. 87a).

The D.C. Circuit also rejected the Tribe's argument that conflicting precedent contributed to the "extraordinary circumstances" justifying application of equitable tolling. Again the court analyzed this factor in isolation, and determined it did not rise to the level of an "external obstacle" that independently "prevented" the Tribe from filing. 764 F.3d at 61-62 (Pet. App. 17a-18a). The court stated the Tribe could have filed claims with "little more than an envelope and a stamp," and then appealed the inevitable IHS denials by filing suit in "another circuit" which had not yet ruled in favor of the IHS. *Id.* at 61 (Pet. App. 16a-17a). But the fact that no "external obstacle" actively prevented the Tribe from filing claims does not mean that its decision to conserve scarce tribal resources by avoiding litigation (and forum-shopping), while monitoring the *Cherokee Nation* case, disqualified the Tribe from equitable tolling. On the contrary, under similar circumstances, the Federal Circuit found that ASNA "monitor[ed] and reasonably interpret[ed] applicable legal proceedings, judicial order and opinions," recognized that the CSC litigation represented "unique facts and extraordinary circumstances," and held that ASNA "took reasonable, diligent, and appropriate action as the legal landscape evolved," thus warranting equitable tolling. 699 F.3d at 1297 (Pet. App. 88a-91a).

The D.C. Circuit acknowledged cases cited by the Tribe which recognize that lack of clear precedent may contribute to extraordinary circumstances for purposes of equitable tolling, but construed those cases narrowly, recognizing only "binding precedent" as sufficient to constitute an extraordinary circumstance. *Menominee IV*, 764 F.3d at 62 (Pet. App. 17a-18a). at 62. In fact, the cases speak more directly to the Tribe's situation than the court of appeals admitted. In *Harris v. Carter*, 515 F.3d 1051 (9th Cir. 2008), the statute was equitably tolled where petitioner relied on circuit court precedent later overruled by the Supreme Court. In *Capital Tracing v. United States*, 63 F.3d 859, 862 (9th Cir. 1995), lack of clear precedent on an issue constituted an equitable factor in tolling. And *Communications Vending*, 365 F.3d at 1075, the case cited by the court of appeals for the argument that "uncertainties of controlling law" do not suspend limitations, involved challenges to various claims pending before the agency, not claims that had been adjudicated in litigation with established court precedent, such as the clear and conflicting precedent that existed in this case regarding the agencies' CSC obligation.[18]

The Federal Circuit's parallel decision in *ASNA II*, finding that equitable tolling applied in analogous

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[18] Claims may also be deemed tolled until a "modifying decision" has been made. *Petro-Hunt, L.L.C. v. United States*, 90 Fed. Cl. 51, 62 (Fed. Cl. 2009). *See also United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1358 (5th Cir. 1972) (claim accrues when plaintiff has a right to enforce his cause); *United States v. Le Patourel,* 593 F.2d 827, 830–31 (8th Cir. 1979) (claim accrued when right clarified).

circumstances, represents a nuanced and appropriate application of the *Holland* test, responsive to equity's purposes and to the "particular injustices" represented in the Government's longstanding resistance to providing full CSC funding. The Menominee Tribe is entitled to an identical ruling in this case, and resolution of this conflict is essential to the consistent administration of justice wherever the question of equitable tolling arises. *See Holland*, 560 U.S. at 655 (Alito, J., concurring) (noting that the "extraordinary circumstance" requirement is a "conclusory formulation" that "does not provide much guidance to lower courts charged with reviewing many habeas petitions filed every year" and noting that the majority opinion in *Holland* offered little explanation of the correct standard.)

## CONCLUSION

This case involves "particular injustices" associated with the long-running CSC litigation, the type and character of injustice that the exercise of equitable powers under *Holland* is intended to correct. *See Holland*, 560 U.S. at 650. This is not a case where different facts determined different outcomes. The courts recognized that the determining facts are essentially the same,[19] but applied different tests for equitable tolling under *Holland*. The Federal Circuit found cumulative import in the combination of a tribal

[19] Notably, the dissent in *ASNA II* cited the identical circumstances in the two cases as a reason for applying the district court's rationale in *Menominee III*, rather than the reasoning of the majority in *ASNA II*. *See ASNA II*, 699 F.3d at 1300 n.1 (Pet. App. 96a n.1) (Bryson, C., dissenting) (*Menominee III* involved "a party in essentially the same position as ASNA").

organization's reliance on the filing of the *Cherokee Nation* CSC class action; successful past experience as a putative member in another CSC class action; unsettled case-law regarding the Government's obligation to fund CSC; lack of prejudice to the Government; and the Government's unique trust obligation to tribes. The Federal Circuit found that these factors, framed by the unique history, breadth and complexity of the CSC litigation itself, constituted the extraordinary circumstances necessary to invoke application of equitable tolling, and that ASNA's reliance on prior experience in class actions represented reasonable diligence. Unlike the Federal Circuit, the D.C. Circuit characterized these factors, separately and in combination as part of the CSC litigation history, as "garden variety" in nature and explained the Tribe's lack of timely filing as the result of simple "legal misunderstandings and tactical mistakes," thus not amounting to extraordinary circumstances justifying equitable tolling. 764 F.3d at 54, 59-60 (Pet. App. 2a, 11a).

However, "similar cases"—in this instance, essentially the same cases—should be determined on the basis of consistent analysis. The D.C. Circuit's decision, which directly rejected the Federal Circuit's analysis, creates a conflict among the circuits with respect to the formulation and application of the *Holland* test and accordingly presents a critically important issue for this Court's review. Moreover, the D.C. Circuit's decision fails because it does not analyze all the relevant factors as does the *Holland* decision, and as does the Federal Circuit in following the *Holland* decision. Finally, the decision creates a clear conflict between the circuits that has a high likelihood of impacting the proper application of equitable tolling under this Court's decision in *Holland* in any number of civil and criminal contexts.

The Menominee Tribe respectfully requests that its petition for writ of certiorari be granted so that this Court can resolve the irreconcilable differences between the two circuit courts of appeals in interpreting and applying the *Holland* test for determining when equitable tolling is warranted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A**

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

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No. 12–5217.

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MENOMINEE INDIAN TRIBE OF WISCONSIN,
*Appellant*

v.

UNITED STATES OF AMERICA, *et al.*,
*Appellees*.

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Argued March 13, 2014.
Decided Sept. 2, 2014.

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Before GARLAND, *Chief Judge*, and TATEL and PILLARD, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* PILLARD.

PILLARD, *Circuit Judge*:

Federal law requires that a claim for breach of a self determination contract between an Indian Tribe and a federal agency be filed with a contracting officer at the agency within six years of the claim's accrual. The Menominee Indian Tribe of Wisconsin filed claims in 2005 against the Department of Health and Human Services for unpaid contract support costs that accrued from 1996 through 1998—more than six years earlier. This case requires us to determine whether, pursuant to the doctrine of equitable tolling, the Tribe may sue even though the statute of limitations has

lapsed. Equitable tolling is only available to a party who can show, *inter alia*, that "'some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005)). The Menominee Tribe identifies two circumstances that it suggests are "extraordinary" under *Holland*. First, the Tribe contends that it did not file timely claims because it believed that, as a member of a federal class action filed by another tribe, it was entitled to a different form of tolling—class-action tolling—that it believed afforded it two additional years beyond the statutory limitations period. Second, the Menominee Tribe contends that adverse legal precedent (which has since been reversed) led it to believe during the limitations period that its claims had no hope of success, so the Tribe refrained from the apparently futile act of filing them. We conclude that the legal misunderstandings and tactical mistakes the Tribe has identified here, however, do not amount to "extraordinary circumstance[s]" justifying equitable tolling. The Menominee Tribe's claims are thus barred by the statute of limitations.

I.

Between 1995 and 2004, the Menominee Indian Tribe of Wisconsin ("the Menominee Tribe" or "the Tribe") provided healthcare services to its members pursuant to a self determination contract with the Secretary of Health and Human Services (HHS). *Menominee Indian Tribe of Wis. v. United States (Menominee I)*, 539 F.Supp.2d 152, 153 (D.D.C.2008). The Indian Self Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq*. (2012) ("ISDA"

or the "Act"), authorizes such con-tracts to encourage tribal participation in, and man-agement of, programs that would otherwise be ad-ministered on Indian Tribes' behalf by the Depart-ment of the Interior and HHS. *See id*. §§ 450a, 450f. The Act requires the Secretary of the Interior and the Secretary of HHS to turn over direct operation of certain federal Indian programs to any Indian tribe that wishes to run those programs itself. *See id*. § 450f(a); *see also id*. § 450a(b). A "self determination contract" is the vehicle for transferring those pro-grams. *Id*. § 450b(j).

Pursuant to a self determination contract, the government agrees to pay a participating tribe what it would have cost the federal agency to provide the services had the agency implemented the program itself. *See id*. § 450j–1(a)(1). Since 1988, the Act has also required that tribal contractors be reimbursed for "contract support costs"—additional reasonable overhead and other specified indirect costs that tribes incur. *Id*. § 450j–1(a)(2), (3); *see generally* ISDA Amendments of 1988, Pub.L. No. 100–472, § 201, 102 Stat. 2285 ("1988 Amendments"); S.Rep. No. 100–274, at 8–13, 2627–32 (1987). Tribes and the government negotiate the services and the attendant contract support costs through annual funding agreements, which become part of their self determination contracts. *See* 25 U.S.C. § 450 l (c).

Parallel but mutually exclusive paths for resolving disputes relating to self determination contracts are set forth in overlapping provisions of the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109,[1] and the

[1] The CDA was codified at 41 U.S.C. §§ 601–13 during the years at issue in this case. The CDA has since been recodified and

ISDA, 25 U.S.C. § 450m–1(a), (d). Pursuant to the CDA, a contractor, such as an Indian tribe seeking underpaid contract support costs, must make a claim in writing to a contracting officer at the relevant agency before it may sue in court. *See* 41 U.S.C. § 7103(a). The demand need not be detailed, and may consist of a short written statement outlining the basis of the claim, estimating damages, and requesting a final decision. *See M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1328 (Fed.Cir.2010); *see also Arctic Slope Native Ass'n v. Sebelius (Arctic Slope I)*, 583 F.3d 785, 797 (Fed.Cir.2009) ("[S]ubmissions to the contracting officer need not be elaborate."). If the contracting officer denies the claim, the tribe may then follow one of two paths: (1) under the CDA, the tribe may appeal administratively within the agency or directly to the Court of Federal Claims, and then to the Court of Appeals for the Federal Circuit, 41 U.S.C. § 7104(a), (b)(1); or (2) under the ISDA, file a claim in any federal district court with jurisdiction over the relevant agency, 25 U.S.C. § 450m–1(a). *See Menominee Indian Tribe of Wisconsin v. United States (Menominee II)*, 614 F.3d 519, 521–22 (D.C.Cir.2010).[2] Since 1994, the CDA has also required that all claims related to government contracts be submitted to a contracting officer within six years of the accrual of the claim. *Arctic Slope Native Ass'n, Ltd. v. Sebelius (Arctic Slope II)*, 699 F.3d 1289, 1295 (Fed.Cir.2012); *Menominee II*, 614 F.3d at 521.

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renumbered. *See* 41 U.S.C. §§ 7101–09. In this opinion, we will cite to the current codification.

[2] Both paths require that a party submit a claim to a contracting officer at the relevant agency before taking further steps. *See* 41 U.S.C. § 7103(a); 25 U.S.C. § 450m–1(d) (incorporating the CDA's procedural requirements into the ISDA).

The ISDA requires self determination contracts to contain what has proven to be a contentious proviso: that full payment of contract support costs is "subject to the availability of appropriations." 25 U.S.C. § 450j–1(b); *see also Salazar v. Ramah Navajo Chapter*, ––– U.S. ––––, 132 S.Ct. 2181, 2187, 183 L.Ed.2d 186 (2012). Tribes and federal agencies have disputed the meaning of that phrase for more than 20 years. Throughout the 1990s, the Departments of Interior and HHS, the two principal agencies that enter self determination contracts with Tribes that include contract support costs, read that phrase as authorizing them to pay less than the full amount of a tribe's contract support costs even when Congress had appropriated enough unrestricted funds to the agencies to fully cover those costs. *See Salazar*, 132 S.Ct. at 2187–89; U.S. Gov't Accountability Office, GAO/RCED–99–150, Indian Self–Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed 3–4, 32–33 (1999). As a result of pervasive reimbursement short-falls, tribes cut ISDA services to tribal members, diverted resources from non-ISDA programs, and even forwent certain contract opportunities, hindering their progress toward self determination. U.S. Gov't Accountability Office, *supra*, at 3–4.

Tribes also began to pursue individual and collective legal claims against the federal government seeking recovery of unpaid contract support costs. *See*, *e.g.*, *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 125 S.Ct. 1172, 161 L.Ed.2d 66 (2005); *Shoshone–Bannock Tribes of Fort Hall Reservation v. Sec'y, Dep't of Health & Human Servs.*, 279 F.3d 660 (9th Cir.2002); *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374 (Fed.Cir.1999); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir.1997); *Ramah Navajo Sch.*

*Bd., Inc. v. Babbitt*, 87 F.3d 1338 (D.C.Cir.1996). The Menominee Tribe, however, neither filed claims with the agencies nor filed suit. It instead relied on two nationwide class actions brought by other tribes that it thought might vindicate its rights, and did not pursue its own claims more aggressively because the HHS's Indian Health Service's (IHS) consistent pattern of refusals to pay such claims led the Tribe to conclude that any such claims would be futile.

The first of two tribal class actions brought the Menominee Tribe some relief on claims that are distinct from but legally analogous to the claims at issue here, and made the Tribe somewhat complacent about these claims. That case, brought by the Ramah Navajo Chapter, sought reimbursement of contract support costs from the Secretary of the Interior and its Bureau of Indian Affairs (BIA). *See Ramah Navajo Chapter*, 112 F.3d at 1458–59, 1461. The district court in *Ramah* certified a nationwide class of all tribal contractors, even those who had not exhausted their administrative remedies under the CDA, on the ground that the case challenged the legality of the BIA's system-wide policies and practices, not the adequacy of its performance under specific contracts. Appellant Br. add. at 5a–6a (*Ramah Navajo Chapter v. Lujan*, No. CIV 90–0957 LH/RWM, Order (D.N.M. October 1, 1993)). The Menominee Tribe was a member of that class, and when the case settled, the Tribe received nearly $800,000 in compensation for BIA underpayments and equitable relief related to future BIA contract support cost payments. App. at 55, 63.

The Menominee Tribe did not fare as well in the second class action, which sought recovery from the IHS of some of the costs that are at issue here. In 1999, the Cherokee Nation sued the Secretary of HHS on

behalf of all tribal contractors, claiming that IHS had underfunded tribes' contract support costs from 1988 to the present. The suit defined the proposed class in a manner that clearly included the Menominee Tribe. *See Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357, 360 (E.D.Okla.2001). Given the Tribe's experience with the *Ramah* class, it relied on the *Cherokee Nation* class action to represent it, and did not file its own claims with IHS administratively. The district court in *Cherokee Nation*, however, denied class certification on the ground that the class lacked commonality, typicality, and adequate representation. *Id*. at 363–66. Five months later, the district court denied the Cherokee Nation's claim on the merits. *Cherokee Nation of Okla. v. United States*, 190 F.Supp.2d 1248, 1259–61 (E.D.Okla.2001). The Cherokee Nation appealed the merits decision but not the denial of class certifica-tion, and the Tenth Circuit affirmed. *See Cherokee Nation of Oklahoma v. United States*, 311 F.3d 1054, 1063 (10th Cir.2002).

While that lawsuit was pending, the Cherokee Nation also pursued identical contract support costs claims against the IHS for different years through the second route provided by the CDA—an administrative proceeding before the Interior Board of Contract Appeals (IBCA).[3] The Board ruled in favor of the Cherokee Nation, *In re Cherokee Nation of Okla*., IBCA Nos. 3877–79, 99–2 B.C.A. (CCH) ¶ 30,462, 1999 WL 440045 (I.B.C.A.1999), and the Federal Circuit affirmed, *Thompson v. Cherokee Nation of Okla*., 334

[3] The Cherokee Nation's claims against IHS—a service within HHS, not Interior—were before the IBCA because the ISDA provides that "all administrative appeals relating to [self determination] contracts shall be heard by the Interior Board of Contract Appeals." 25 U.S.C. § 450m–1(d).

F.3d 1075, 1079 (Fed.Cir.2003). That decision created a circuit split with the Tenth Circuit's *Cherokee Nation* decision and with a Ninth Circuit decision that had denied another tribe's claims for contract support costs. *See Cherokee Nation of Oklahoma*, 311 F.3d at 1063; *Shoshone–Bannock Tribes*, 279 F.3d at 663. The Supreme Court granted certiorari in the two *Cherokee Nation* cases to resolve the circuit split. *See Cherokee Nation*, 543 U.S. at 635–36, 125 S.Ct. 1172. The Court held in the consolidated cases that, when Congress has appropriated sufficient unrestricted funds to pay a tribe's contract support costs, the government cannot avoid its contractual obligation to pay those costs on grounds of "insufficient appropriations." *Id*. at 636–38, 125 S.Ct. 1172.

On September 7, 2005, six months after the Cherokee Nation's victory in the Supreme Court, the Menominee Tribe filed administrative claims with a contracting officer at the IHS to recover contract support costs for the years from 1995 through 2004. *Menominee Indian Tribe of Wis. v. United States (Menominee III)*, 841 F.Supp.2d 99, 101–02, 106 (D.D.C.2012). The contracting officer denied the claims from 1996 through 1998 as untimely. Appellant Br. at 4.

The Menominee Tribe challenged that decision in federal district court, arguing that the statute of limitations should have been tolled. *See Menominee I*, 539 F.Supp.2d at 154 n. 2. The Tribe contended that, from March 5, 1999, the date the *Cherokee Nation* class action was filed, to February 9, 2001, the date the district court in that case denied class certification—a period just shy of two years—the statute of limitations governing the Tribe's claims for 1996, 1997, and 1998 should have been tolled pursuant to the doctrine of

class-action tolling. *See* Pls.' Mem. in Opp'n at 30–35, *Menominee I*, 539 F.Supp.2d 152 (No. 07–812). The Tribe argued that its claims for the years between 1996 through 1998 accrued when its self determination contract expired in 1998, and therefore all would have been timely had the limitations period been tolled for two years during the pendency of the *Cherokee Nation* motion for class certification. *Id*. at 33. In the alternative, the Tribe argued that its claims were eligible for equitable tolling. *Id*. at 35–41.

The district court rejected the Tribe's class-action and equitable tolling arguments in a footnote, *Menominee I*, 539 F.Supp.2d at 154 n. 2, affirming the contracting officer's denial of the Menominee Tribe's claims. That court held that the statute of limitations for such claims is jurisdictional and thus categorically ineligible for tolling. *Id*. An earlier panel of this court reversed in part, agreeing that the Tribe was ineligible for class-action tolling, but holding that the statute of limitations in the CDA may be subject to equitable tolling. *Menominee II*, 614 F.3d at 529. We remanded to the district court "to determine whether tolling is appropriate under the circumstances of this case." *Id*. at 531. On remand, the district court held that the Tribe's failure to timely file its claims was not one of the "extraordinary and carefully circumscribed instances" justifying the exercise of the "court's equitable power to toll the statute of limitations." *Menominee III*, 841 F.Supp.2d at 105 (quoting *Mondy v. Sec'y of the Army*, 845 F.2d 1051, 1057 (D.C.Cir.1988)). This appeal followed.

II.

The parties disagree about the appropriate standard of review. The Menominee Tribe argues that our review is de novo. The government contends that abuse of discretion is the proper standard. We need not resolve that question, however, because, even applying non-deferential de novo review to the adverse ruling of the district court, we find that the circumstances of this case do not justify equitable tolling.

Equitable tolling is available to a party "only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland*, 560 U.S. at 649, 130 S.Ct. 2549 (quoting *Pace*, 544 U.S. at 418, 125 S.Ct. 1807). The Supreme Court has emphasized that equitable tolling must be applied flexibly, case by case, without retreating to "mechanical rules" or "archaic rigidity." *Id*. at 649–50, 130 S.Ct. 2549 (internal quotation marks omitted). *Holland* also emphasizes that courts must keep in view equity's purposes: correcting particular injustices and "reliev[ing] hardships 'which, from time to time, arise from a hard and fast adherence' to more absolute legal rules." *Id*. (quoting *Hazel–Atlas Glass Co. v. Hartford–Empire Co*., 322 U.S. 238, 248, 64 S.Ct. 997, 88 L.Ed. 1250 (1944)).

To count as sufficiently "extraordinary" to support equitable tolling, the circumstances that caused a litigant's delay must have been beyond its control. *See Dyson v. District of Columbia*, 710 F.3d 415, 422 (D.C.Cir.2013) (describing equitable tolling as a doctrine "meant to ensure that the plaintiff is not, by dint of circumstances beyond his control, deprived of a reasonable time in which to file suit" (brackets and

internal quotation marks omitted)); *see also*, *e.g.*, *In re Wilson*, 442 F.3d 872, 875 (5th Cir.2006) (per curiam); *Graham–Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560–61 (6th Cir.2000); *Harris v. Hutchinson*, 209 F.3d 325, 330–31 (4th Cir.2000); *Sandvik v. United States*, 177 F.3d 1269, 1271–72 (11th Cir.1999). The circumstance that stood in a litigant's way cannot be a product of that litigant's own misunderstanding of the law or tactical mistakes in litigation. When a deadline is missed as a result of a "garden variety claim of excusable neglect" or a "simple miscalculation," equitable tolling is not justified. *Holland*, 560 U.S. at 651, 130 S.Ct. 2549 (internal quotation marks omitted); *see Griffith v. Rednour*, 614 F.3d 328, 331 (7th Cir.2010) (no tolling for a "simple legal mistake"); *Cross–Bey v. Gammon*, 322 F.3d 1012, 1015 (8th Cir.2003) (no tolling for "lack of legal knowledge or legal resources"); *David v. Hall*, 318 F.3d 343, 346 (1st Cir.2003) (no tolling for "routine error" and "carelessness"); *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir.2001) (no tolling for "miscalculation[s]" and "inadequate research"); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir.2000) (no tolling for "miscalculation or misinterpretation"); *Harris*, 209 F.3d at 330 (no tolling for an "innocent misreading" of a statute); *see also United States v. Sosa*, 364 F.3d 507, 512 (4th Cir.2004) (no tolling for "ignorance of the law"); *Delaney v. Matesanz*, 264 F.3d 7, 15 (1st Cir.2001) (same); *Felder v. Johnson*, 204 F.3d 168, 172 (5th Cir.2000) (same); *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir.2000) (same); *Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir.1991) (same); *Sch. Dist. of Allentown v. Marshall*, 657 F.2d 16, 21 (3d Cir.1981) (same).

The Menominee Tribe faced no extraordinary circumstances because the obstacles the Tribe confronted were ultimately of its own making. The Tribe makes three arguments that "extraordinary circumstances" prevented it from timely filing its claims. We examine them in turn to explain why we ultimately conclude that, while the events the Tribe identifies were perhaps confusing or discouraging, they cannot be characterized as "extraordinary circumstances" under *Holland*.[4] At bottom, the Tribe's inadequate responses to relatively routine legal events caused it to delay pursuing its claims. At no point was the Tribe prevented by external obstacles from timely filing.

The Menominee Tribe's first argument is that, because the *Ramah* district court certified a class

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[4] The *Holland* Court was explicit that equitable tolling is available to a party "only" if it shows (1) reasonable diligence and (2) extraordinary circumstances. 560 U.S. at 649, 130 S.Ct. 2549; *see Ross v. Varano*, 712 F.3d 784, 802 (3d Cir.2013) (describing a showing of extraordinary circumstances as "necessary to support equitable tolling"); *Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 750 (6th Cir.2011) (holding that a litigant seeking equitable tolling "must demonstrate both that he has been diligent in pursuing his rights and that an extraordinary circumstance prevented his timely filing"); *see also Manning v. Epps*, 688 F.3d 177, 184 & n. 2 (5th Cir.2012) (same); *Arthur v. Allen*, 452 F.3d 1234, 1252 (11th Cir.2006) (same). *But see Arctic Slope II*, 699 F.3d 1289 (finding equitable tolling without separately addressing the two *Holland* prongs). Because no extraordinary circumstances stood in the Tribe's way, we need not pass on whether, under *Holland*'s first prong, the Tribe pursued its rights diligently. Nor do we reach the Tribe's arguments that the court should consider various other equitable "factors," such as whether the government would be prejudiced by the application of equitable tolling in this case, or whether equitable tolling should be more readily available to tribes given their special relationship to the United States.

action without requiring class members to exhaust administrative remedies, it was "logical to assume, as the tribe did" that the Tribe would also be a member of the *Cherokee Nation* class. Appellant Reply Br. at 14. The Tribe argues that it reasonably expected that, as a class member, it either could have recovered its costs through that litigation or, once the district court denied class certification, at least have the statute of limitations on its claims tolled for the two years the class certification motion had been pending, allowing it to timely file in 2005 claims that it contends accrued in 1998.

The flaw in the Tribe's calculations was that it was not eligible to participate in the *Cherokee Nation* class. Class-action tolling is available to members of yet-to-be-certified class actions. Under that doctrine, the "commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). However, as we held in *Menominee II*, class-action tolling does not extend to putative class members who fail to satisfy known jurisdictional prerequisites to participation, because "[u]ntil they satisfy the jurisdictional preconditions to class membership," they know for certain they will not be members of the resulting class. 614 F.3d at 528. Knowing they cannot participate whether a class is certified or not, they "face none of the uncertainty class-action tolling is meant to ameliorate." *Id*. Therefore, in *Menominee II*, we held that because the Tribe had failed to exhaust its administrative remedies—and was therefore jurisdictionally barred from participating in the *Cherokee Nation* class—the Tribe was

not entitled to class-action tolling during the pendency of the class certification motion in that case. *Id*. at 529.

The Menominee Tribe now argues that it only discovered in 2010—when we rejected its claimed entitlement to class-action tolling in *Menominee II*—that it would be ineligible for tolling on that ground. Thus, according to the Tribe, it learned the effective deadline for filing its claims after it was already too late to meet it. But the Menominee Tribe's belief that it could participate in the *Cherokee Nation* class without exhausting its administrative remedies was unjustified. Although the decision of the New Mexico district court in *Ramah* may have given the Tribe the impression that its failure to exhaust would not exclude it from the *Cherokee Nation* class, the weight of legal authority was to the contrary. As we explained in *Menominee II*, "[t]he Federal Circuit and the Court of Claims have long held that the court may not exercise jurisdiction until the contracting officer either issues a decision on the claim or is deemed to have denied it." 614 F.3d at 526 n. 3. Where exhaustion is a prerequisite to the exercise of a court's jurisdiction, "every class member must exhaust its administrative remedies." *Id*. at 526. The Tribe's reliance on *Ramah* as reason to expect that it was eligible to participate in the *Cherokee* class was the Tribe's miscalculation, not an external circumstance beyond its reasonable control.[5]

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[5] A divided panel of the Federal Circuit held that equitable tolling was warranted in *Arctic Slope II*, 699 F.3d 1289, a case similar to this one, because the Tribes "took reasonable, diligent, and appropriate action as the legal landscape evolved," *id*. at 1297, and reasonably relied on *Ramah* and *Pueblo of Zuni v. United States*, 467 F.Supp.2d 1099 (D.N.M.2006), which the court described as "controlling legal authority . . . that [the Tribes] did

The second obstacle the Menominee Tribe identifies also fails to clear the "extraordinary circumstance" threshold. The Tribe argues that the certainty of failure it confronted in bringing its claims was an impediment that stood in its way. According to the Menominee Tribe, the IHS's legal position that it was not obligated to pay contract support costs and its pattern of refusals to pay such costs meant that the Tribe confronted a legal landscape so bleak that filing a claim would have been "a fruitless exercise, with no hope of success." Appellant Reply Br. at 15. It was "obvious IHS would deny any claims," says the Tribe, given the agency's "consistent position interpreting the statute to allow it to fund less than 100% of [contract support costs]." *Id*. at 13.

The Menominee Tribe failed to take the steps it would have needed to take to preserve its claims pending judicial correction of IHS's error. A party is not excused from timely filing its claim because the agency's view of the law might be inhospitable. The federal courts, not contracting officers, are the final

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not need to exhaust administrative remedies to be a class member," *id*. at 1298. The Federal Circuit also found that tolling would not disadvantage the government. *Id*. at 1297. The *Arctic Slope II* majority did not separately address *Holland*'s requirement of "extraordinary circumstances," however, beyond a concluding comment that the case involved "unique facts and extraordinary circumstances" that, together with the government's fiduciary duty to the Tribes, warranted equitable tolling. *Id*. at 1297. In our view, the *Arctic Slope II* majority failed to identify any obstacle that stood in the Tribe's way to prevent timely filing of its claims, as required by *Holland* 's second prong. We thus agree with the dissent in *Arctic Slope II* that equitable tolling was unwarranted there, as it is here, for want of an "extraordinary circumstance" under *Holland*. 699 F.3d at 1300 (Bryson, J., dissenting).

word on federal law, and "[t]he only sure way to determine whether a suit can be maintained is to try it." *Commc'ns Vending Corp. of Ariz. v. FCC*, 365 F.3d 1064, 1075 (D.C.Cir.2004) (quoting *Fiesel v. Bd. of Ed. of New York*, 675 F.2d 522, 524 (2d Cir.1982)). As we have explained, "a suitor cannot toll or suspend the running of the statute by relying upon the uncertainties of controlling law. It is incumbent upon him to test his right and remedy in the available forums." *Id*. (quoting *Fiesel*, 675 F.2d at 524–25). Even though the Tribe doubted the viability of its arguments, its claims had the same probability of success as the Cherokee Nation's claims that ultimately succeeded before the Supreme Court.

No matter how adverse the agency's legal position and the Ninth and Tenth Circuits' precedents may have been, they did not stand in the Tribe's way. Under the ISDA, tribes have some choice about where they file their claims, and thus need not pursue their claims in jurisdictions with adverse precedent, but may proceed to any federal district court with jurisdiction over the agency where venue is proper. *See Menominee II*, 614 F.3d at 522. Before 2002, no circuit had excused the government from its obligation to fully fund contract support costs out of unrestricted appropriations. Even after the Ninth and Tenth Circuits held against other tribes on claims like the Menominee Tribe's, the Tribe could have appealed a contracting officer's claim denial in another circuit, and had something more than "no hope of success." Pursuant to the CDA, the Tribe could also have obtained review in the Court of Appeals for the Federal Circuit. Until 2003, that court had not yet settled the question whether the government had a contractual obligation to pay tribal contractors for all their contract support costs, and by 2003—two years

before the Supreme Court decided *Cherokee Nation*—had ruled in favor of plaintiffs on claims essentially identical to the Menominee Tribe's. *See Thompson*, 334 F.3d at 1087–88. From that point onward, the Tribe could have appealed to that court and won.

Even assuming the Menominee Tribe lacked the resources to pursue its own litigation in federal court, its eligibility to participate in the *Cherokee Nation* class would have required nothing more than some paperwork. The procedure for exhausting administrative remedies is simple, and the Tribe has not argued otherwise. *See Menominee III*, 841 F.Supp.2d at 102 (explaining that pursuing a CDA claim "'need not be elaborate' and can be reflected in letters alone" (quoting *Arctic Slope I*, 583 F.3d at 797)). Even if a contracting officer were to deny the Menominee Tribe's claim, exhaustion of administrative remedies would have made the Tribe eligible to participate in the *Cherokee Nation* class, and thus entitled it to class-action tolling while the motion for class certification was pending in that case. What stood between the Tribe and class-action tolling was little more than an envelope and a stamp.

The Menominee Tribe cites cases holding that a lack of clear legal precedent might constitute an extraordinary circumstance. *See*, *e.g.*, *Harris v. Carter*, 515 F.3d 1051 (9th Cir.2008); *Capital Tracing, Inc. v. United States*, 63 F.3d 859 (9th Cir.1995). We do not disagree. One can imagine circumstances in which the law might be so unfavorable that it functions as an obstacle and perhaps even rises to the level of an extraordinary circumstance. In *Harris* and *Capital Tracing*, for example, the parties relied "in good faith on then-binding circuit precedent" in deciding when and how to file their claims. *Harris*, 515 F.3d at 1055;

*see Capital Tracing*, 63 F.3d at 863. Because it was only as a result of the reversal of previously binding precedent that the parties' claims became untimely, the courts determined that equitable tolling was appropriate. The general rule, however, is that legal decisions based on unclear or contrary precedent justify equitable tolling in only the rarest instances. *See Boling v. United States*, 220 F.3d 1365, 1374 (Fed.Cir.2000) (declining to equitably toll statute of limitations even where the underlying action appeared futile during the limitations period).

Finally, even if no single circumstance stood in its way, the Menominee Tribe argues, the Court should consider all the factors that the Tribe faced as jointly amounting to an "extraordinary" obstacle. The Tribe points to "the breadth and complexity of [the contract support costs] litigation involving hundreds of tribes, the precedent of a similar prior class action in which the Tribe was a member of the class, the unique government-to-government and trust relationship between the United States and the Tribe, and the unsettled case law regarding the legal standard governing the Government's duty to pay full [contract support costs] under the ISDA." Appellant Br. at 17.

That argument fails because none of the many factors the Tribe identifies are external obstacles that prevented the Tribe from bringing its claims. Some are not obstacles. Neither the "unique government-to-government and trust relationship between the United States and the Tribe," *id*. at 17, nor the "litigation history" surrounding contract support costs claims, *id*. at 19, were capable of standing in the Tribe's way. Others we cannot accept. If a lawsuit's "breadth and complexity" were an "extraordinary circumstance," few statutes of limitations would

function. And the remaining circumstances—the Tribe's mistaken belief that it would be entitled to class-action tolling and that its claims had no hope of success—were the Tribe's own missteps. On the facts of this case, we cannot conclude that a series of events, none extraordinary on its own, piled up to create an extraordinary obstacle.

III.

The Menominee Tribe also appeals the denial of two "stable-funding" claims—that is, claims that the Tribe was entitled to contract support cost funding in 1999–2000 at least as high as that paid by the government in 1998. The parties appear to agree, and the court below held, that those claims are time barred unless the limitations period on the Tribe's 1997 and 1998 claims is tolled. *See Menominee III*, 841 F.Supp.2d at 111; Appellant Br. at 48–49; Appellee Br. at 47. Because, for the reasons discussed above, the circumstances here do not warrant equitable tolling on the Tribe's 1997 and 1998 claims, we affirm the judgment of the district court dismissing the Tribe's 1999–2000 stable funding claims.

* * *

Delays caused by a party's inauspicious legal judgments are not "extraordinary circumstance[s]" sufficient to justify equitable tolling. Faced with a variety of reasonable litigation options, the Menominee Tribe chose to wait and see if more favorable law would appear. In so doing, the Tribe allowed its claims to expire. Because we find that no obstacle stood in the Menominee Tribe's way of bringing the claims within the limitations period, the judgment of the district court is affirmed.

*So ordered*.

**APPENDIX B**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Case Number 07-cv-0812 (RMC)

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MENOMINEE INDIAN TRIBE OF WISCONSIN,

*Plaintiff*,

v.

UNITED STATES OF AMERICA, *et al*.,

*Defendant*.

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January 24, 2012, Decided;
January 24, 2012, Filed

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MEMORANDUM OPINION

Judges: ROSEMARY M. COLLYER, United States District Judge.

Opinion by: ROSEMARY M. COLLYER

The Menominee Indian Tribe of Wisconsin (the "Tribe" or "Menominee") returns to this Court upon remand from the D.C. Circuit, continuing to seek monies from the Department of Health and Human Services, Indian Health Service ("IHS") for contract support costs the Tribe incurred in providing health care services to its members in 1995-2000. In reversing this Court, the Circuit found that the six-year limitation period for presenting administrative claims, as allowed by the Contract Disputes Act, 41 U.S.C. § 401, et seq, can be equitably tolled.

*Menominee Indian Tribe of Wisconsin v. United States*, 614 F.3d 519, 529, 392 U.S. App. D.C. 202 (D.C. Cir. 2010) ("*Menominee II*") ("We agree that the statute is subject to tolling and remand for the district court to consider whether tolling is appropriate in this case."). The Tribe argues that it is entitled to equitable tolling because: 1) it reasonably relied on a potential class action brought by other tribes complaining of the same insufficient payments; 2) it reasonably believed it was a member of the putative class and thereby was pursuing its claims for contract support costs; and 3) it reasonably believed that, as a member of the proposed class, it was entitled to suspension of the limitations period during the class certification period.

The United States moves to dismiss, or alternatively for summary judgment, arguing that no equitable tolling is appropriate and that, on the merits, Menominee received all the monies to which it was entitled or that it waived its rights to seek more. The United States also argues that the Tribe cannot recover on its 1999 and 2000 stable-funding claim because even if it were not barred by the statute of limitations, nearly all of the appropriated money was spent. The Tribe opposes each of these arguments and also moves for summary judgment. The Court will grant summary judgment to the United States with respect to the 1996-1998 shortfall claims and the 1999 and 2000 stable-funding claim. The Court will deny both parties' motions with respect to the 1995 shortfall claim.

## I. FACTS

The Menominee Indian Tribe of Wisconsin is a federally recognized Indian tribe and is eligible to enter into contracts with the United States under the Indian Self-Determination and Education Assistance

Act ("ISDA"), 25 U.S.C. § 450. The ISDA authorizes tribes to execute "self-determination" contracts with the IHS in order to provide health care programs and other services to their members that the United States has historically provided. The United States pays tribes the amounts the federal government would otherwise spend for such health-related programs and services as well as various administrative costs incurred by the tribes (contract support costs or "CSC").

Each year from 1995 to 2000, Menominee provided health care services to eligible members pursuant to its self-determination contracts. From 1996 to 2000, the Tribe also signed "Rate Agreements" and "Annual Funding Agreements."[1] The Rate Agreements were negotiated with the Department of Interior and, according to the Tribe, were used to calculate accurate CSC for the programs and services the Tribe administered. The Annual Funding Agreements were negotiated with the IHS and, according to the United States, included all CSC owed to the Tribe.[2] For each year, IHS paid the Tribe the amount of CSC enumerated in the Annual Funding Agreements, but did not pay the amount of CSC the Tribe says is owed

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[1] In 1995, the Tribe had a Rate Agreement but no Annual Funding Agreement. For that year, the lump-sum CSC was listed in the self-determination contract and not in a separate agreement.

[2] The Tribe contends that there was no negotiation with respect to the Annual Funding Agreements and that IHS knew that there were insufficient appropriations to pay full CSC for every eligible tribe and therefore offered a lesser amount on a "take it or leave it" basis. If additional funds came in, IHS would unilaterally modify the funding agreements and pay the Tribe more; however, there was never sufficient money to fully pay the CSC as calculated using the rates in the Rate Agreements.

pursuant to the Rate Agreements. Menominee seeks damages for the unpaid CSC for 1995-2000.

## II. LAW

### A. Indian Self-Determination and Education Assistance Act

Congress enacted the ISDA in 1975 to allow American Indians and Alaska Natives to contract with the federal government to operate a variety of programs, functions, services, and activities previously provided by the federal government. See 25 U.S.C. § 450. For instance, the Secretary of Health and Human Services, through IHS, has provided health care programs to American Indians. Under the ISDA, an Indian tribe can contract with IHS and administer its own health care programs and the Secretary pays the tribe both the costs IHS would have expended for the programs (the "base" or "Secretarial" costs) and CSC.

CSC include both direct costs (such as workers' compensation insurance) and indirect costs (such as rent, utilities, and payroll for management and administration) that a tribe incurs in administering its programs. *See Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 634, 125 S. Ct. 1172, 161 L. Ed. 2d 66 (2005). Most CSC are indirect and they are "generally calculated by applying an 'indirect cost rate' to the amount of funds otherwise payable to the Tribe." *Id.* at 635 (quoting Br. for Federal Parties at 7).

### B. Contract Disputes Act

In 1978, Congress enacted the Contract Disputes Act ("CDA") which "establishe[s] a comprehensive framework for resolving contract disputes between executive branch agencies and government contractors."

*Menominee II*, 614 F.3d at 521. As originally enacted, there was no statutory time limit to bring a contract dispute claim under the CDA. In 1994, Congress amended the CDA to require that contract disputes be submitted to the contracting officer of the relevant agency "within six years after the accrual of the claim."[3] *See* 41 U.S.C. § 605(a). The submitted claim "need not be elaborate" and can be reflected in letters alone. *Arctic Slope Native Association, Ltd. v. Sebelius*, 583 F.3d 785, 797 (Fed. Cir. 2009).

Once a claim has been submitted, the contracting officer generally has 60 days to issue a decision. *See* 41 U.S.C. § 605(c).[4] If the decision is unfavorable or not timely issued, the contractor can appeal the decision to the board of contract appeals within the relevant agency or, within 12 months, file suit in the United States Court of Federal Claims. *Menominee II*, 614 F.3d at 521. The present case was brought in the District Court for the District of Columbia instead of the Court of Federal Claims because the ISDA allows a tribe to bring a contract claim in a federal district court. *Id*. at 522 (citing 25 U.S.C. § 450m-1(a)).

C. Motion to Dismiss

A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the adequacy of a complaint on its face. Fed. R. Civ. P. 12(b)(6). A complaint must be sufficient

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[3] The only exception is for a government claim against a contractor involving fraud. *See* 41 U.S.C. § 605(a).

[4] If the claim is for more than $100,000, the contracting officer must issue a decision within 60 days, or notify the contractor of when the decision will be issued. 41 U.S.C. § 605(c)(2). In the latter case, the decision should be issued "within a reasonable time." *Id*. at § 605(c)(3).

"to give a defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal citations omitted). In deciding a motion under Rule 12(b)(6), a court may consider the facts alleged in the complaint, documents attached to the complaint as exhibits or incorporated by reference, and matters about which the court may take judicial notice. *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059, 378 U.S. App. D.C. 355 (D.C. Cir. 2007). If, in considering a Rule 12(b)(6) motion, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); see *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 165, 357 U.S. App. D.C. 35 (D.C. Cir. 2003). Because the Court has considered matters outside of the pleadings, it will treat the United States' motion as one for summary judgment.

D. Motion for Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); accord *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Moreover, summary judgment is properly granted against a party who "after adequate time for discovery and upon motion . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *Id*. at 252. In addition, the nonmoving party may not rely solely on allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675, 334 U.S. App. D.C. 92 (D.C. Cir. 1999). Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *Id*. at 675. If the evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

## III. ANALYSIS

On March 14, 2008, this Court granted in part and denied in part the United States' motion to dismiss. *Menominee Indian Tribe of Wisconsin v. United States*, 539 F.Supp.2d 152 (D.D.C. 2008) ("*Menominee I*"). The Court held that the statute of limitations for filing claims under the CDA barred the 1996-1998 CSC funding claims and that the statute is jurisdictional in nature and therefore not subject to tolling. *Id*. at 153-54. The Court also held that the 1995 CSC funding claim was barred by laches. Id. at 154-55. The Court denied the motion to dismiss with respect to the 1999-2004 claims because the "ISDA mandates the payment of full indirect CSC. . ." *Id*. at 155 (emphasis in original).

On November 18, 2011, the parties stipulated to the dismissal of the 1999-2004 shortfall claims and Menominee then appealed this Court's decision. The D.C. Circuit reversed this Court and held that the

CDA statute of limitations for filing administrative claims in federal court is not jurisdictional and is thus subject to equitable tolling. *Menominee II*, 614 F.3d at 523-25. The Circuit also held that class action tolling under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), is inappropriate here because Menominee did not timely file an administrative claim and therefore would not have been part of the class in Cherokee Nation even had one been certified. *Id*. at 526-529. While the Circuit held that the CDA may be equitably tolled, it could not determine whether it should be tolled in this case because the parties disputed relevant facts.[5] *Id*. at 531. The Circuit remanded the case to determine whether equitable tolling is appropriate. *Id*.

With respect to laches, the Circuit held that the district court: 1) miscalculated the length of the Tribe's delay in submitting a claim; 2) failed to consider the Tribe's argument that the delay was reasonable; and 3) relied on insufficient reasons to hold that the government was prejudiced by the delay. *Id*. at 531-32. The Circuit remanded for the Court to determine if the 1995 claim is barred by laches. *Id*. at 531.

The United States has abandoned it laches argument and instead contends that equitable tolling is inappropriate; that the Tribe released its 1996, 1997, and 1998 claims; that there was no breach of contract because the United States paid the full amounts listed in the Annual Funding Agreements; and that even if

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[5] Although the United States argued that there were disputed facts, it now agrees that "[i]t is the significance of these facts, and not the facts themselves, that remain in dispute." Def.'s Supp. Brief [Dkt. # 48] at 2. The Tribe concurs that there are no material facts in dispute that are relevant to the question of equitable tolling. Pl.'s Supp. Brief [Dkt. # 47].

there were a breach, Menominee could not recover because there are no longer appropriated funds for the years at issue. Menominee disagrees, asserting that equitable tolling is appropriate; that the alleged releases are invalid; that the United States has not paid the amount of CSC calculated under the Rate Agreements; and that there were sufficient funds during the contract years to pay its CSC claims fully so that it is irrelevant if there are not funds available now.

A. Equitable Tolling (1996-1998 CSC Claims)

In litigation between private parties, "[f]ederal courts have typically extended equitable relief only sparingly." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). A party seeking equitable tolling has a "high" hurdle to clear. *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 579, 332 U.S. App. D.C. 182 (D.C. Cir. 1998). "Statutes of limitations are not arbitrary obstacles to the vindication of just claims . . . . They protect important social interests in certainty, accuracy, and repose." *Cada v. Baxter Healthcare Corp*., 920 F.2d 446, 452-53 (7th Cir. 1990). As such, "[t]he court's equitable power to toll the statute of limitations will be exercised only in extraordinary and carefully circumscribed instances." *Mondy v. Sec'y of the Army*, 845 F.2d 1051, 1057, 269 U.S. App. D.C. 306 (D.C. Cir. 1988).

The Supreme Court recently reaffirmed that a litigant must establish two things for equitable tolling to apply: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Holland v. Florida*, 130 S. Ct. 2549, 2562, 177 L. Ed. 2d 130 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005)). The Tribe

argues that it need not meet this two-prong test because immediately after setting forth this test, the Supreme Court "stressed the flexible nature of tolling as an equitable doctrine" and that "[e]quitable powers are to be exercised 'on a case-by-case' basis rather than according to 'mechanical rules.'" Pl.'s Opp'n at 17 (quoting *Holland*, 130 S.Ct. at 2563).

The flexibility emphasized by the Supreme Court, however, dealt with how courts analyze cases under (not instead of) the two-part rule. Specifically, the Supreme Court rejected the Eleventh Circuit's mechanical rule that attorney misconduct can never be an "extraordinary circumstance" justifying equitable tolling absent "bad faith, dishonesty, divided loyalty, mental impairment or so forth . . . ." *Holland*, 130 S.Ct. at 2562-63. The Supreme Court's rejection of a hard and fast rule to identify "extraordinary circumstances" does not give this Court license to ignore the necessity for an "extraordinary circumstance." "[C]ourts of equity 'must be governed by rules and precedents no less than the courts of law.'" *Id.* at 2562 (quoting *Lonchar v. Thomas*, 517 U.S. 314, 323, 116 S. Ct. 1293, 134 L. Ed. 2d 440 (1996)). In other words, the Court should "flexibly" consider: 1) whether the Tribe diligently pursued its rights, and 2) whether an extraordinary circumstance prevented it from failing to file a timely claim. The Court has no leeway in the name of "equity" to ignore either factor.

The Tribe relies on the long history of tribal litigation with respect to CSC to support its claim for equitable tolling:

> Despite the clear language of the ISDA, both IHS and the Bureau of Indian Affairs ("BIA") have resisted paying full CSC for at least twenty years, leading to extensive litigation.

In 1991, the Ramah Navajo chapter filed a class-action suit against the Secretary of the Interior alleging that BIA systematically underpaid indirect costs by using a flawed indirect cost rate calculation methodology. *Ramah Navajo Chapter v. Lujan*, No. 90-0957 (D.N.M.) ("Ramah"). The case later came to include "shortfall claims" of the kind Menominee raises in this case . . . .

In 1993, Ramah moved for certification of a nationwide class of all tribal contractors who had contracted with BIA under the ISDA, and Judge Hansen certified the class. . . . [Despite the Government's argument] Judge Hansen held, however, that exhaustion would be futile, so "it is not necessary that each member of the proposed class exhaust its administrative remedies under the Contract Disputes Act." *Id.* at 4. The fact that Ramah had timely presented its claims satisfied the CDA requirement, and other tribal contractors could participate in and benefit from the class action even if they had not separately presented their own claims.

In 1997, The Tenth Circuit ruled in favor of Ramah on liability. *Ramah Navah Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). Settlement discussions ensued [and a partial settlement of $76M was approved]. *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999). [Menominee shared in this and a subsequent distribution.] . . .

The Cherokee Nation filed a separate class action against IHS on March 5, 1999. Both the class and the claims were nearly identical

> to those in the *Ramah* case. The Cherokee Nation, like Ramah before it, challenged a uniform agency CSC policy . . . . The proposed class was defined as "[a]ll Indian tribes and tribal organizations operating Indian Health Service programs . . . ." *Cherokee Nation of Oklahoma v. United States*, 199 F.R.D. at 360 . . . . Given the [Menominee] experience with the Ramah class, it relied on the Cherokee class action to represent its claims and it did not file its own lawsuit. Pl.'s Opp'n at 20-21.

Class certification was denied in Cherokee Nation on February 9, 2001. *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357, 363 (E.D. Okla. 2001). The Oklahoma District Court later ruled that there was no statutory duty to fund contract support costs fully when there were insufficient appropriations. *Cherokee Nation of Okla. v. United States*, 190 F. Supp. 2d 1248, 1260-61 (E.D. Okla. 2001). Cherokee Nation appealed the latter decision but did not appeal the denial of class certification. The Tenth Circuit affirmed the district court on appeal. *Cherokee Nation v. Thompson*, 311 F.3d 1054 (10th Cir. 2002). That same year, the Ninth Circuit, in *Shoshone-Bannock Tribes v. Secretary*, Dep't of Health and Human Servs., 279 F.3d 660 (9th Cir. 2002), also ruled that tribes are not statutorily entitled to recover full CSC if Congress has not appropriated sufficient funds.

The Federal Circuit disagreed with the Ninth and Tenth Circuits, *Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003), and the Supreme Court granted certiorari to resolve this split. *Cherokee Nation of Okla. v. Thompson*, 541 U.S. 934, 124 S. Ct. 1652, 158 L. Ed. 2d 354 (2004). Given the circuit conflict and imminent review by the Supreme Court, Menominee

decided to wait for the Supreme Court ruling before filing a claim. Although the Tribe was aware of the six year statute of limitations, it believed the statute was tolled (as in *Ramah*) by the *Cherokee Nation* suit. Thus, with its limited resources, the Tribe opted not to pursue a claim until the Supreme Court decided whether the government has a statutory obligation to fund fully the CSC contractually agreed to.

The Supreme Court affirmed the Federal Circuit on March 1, 2005. *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 125 S. Ct. 1172, 161 L. Ed. 2d 66 (2005). In so doing, the Court rejected the government's argument that it was not required to pay the full CSC enumerated in Annual Funding Agreements. *Id*. 638-40.[6] Six months later, Menominee filed its administrative claims.

Menominee argues that given its prior success in *Ramah*, it was reasonable to wait for the resolution of the Cherokee Nation case before filing its administrative claim. As part of this argument, Menominee states that the United States discouraged the filing of claims prior to the *Cherokee Nation* decision by the Supreme Court by arguing that tribes who filed claims could not be part of the *Cherokee Nation* class. Finally, Menominee argues that the class pleading in Cherokee Nation was "defective" and thus equitable tolling is appropriate under *Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990) and *American Pipe & Construction Co. v. Utah*,

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[6] One notable difference between the agreements in the Cherokee Nation case and those here is that the CSC listed in Cherokee Nation's Annual Funding Agreement was unpaid. *Cherokee Nation*, 543 U.S. at 635. Here, IHS paid the CSC amount listed in Menominee's AFA but did not pay CSC calculated using the rates in the Rate Agreements

414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974). *Id*. at 18-19. The Court will address each of these arguments, applying the *Holland* framework.

*i. Reasonable to wait*

Having previously benefitted from the *Ramah* case (without filing a claim or suit), Menominee likewise believed that it would benefit from *Cherokee Nation* (without filing a claim or suit). Menominee was aware that it only had six years to file a claim, but assumed that the deadline would be tolled based upon *Cherokee Nation*. See Pl.'s Opp'n, Ex. L (Wakau Decl.) ¶ 8. Menominee points out that it was not until 2005 that it knew that it could get recompensed for CSC shortfalls, and that it was not until 2010 after *Menominee II* that it knew it needed to have filed a claim to benefit from the *Cherokee Nation* class action. Given this changing legal landscape and its prior success with Ramah, Menominee argues that it was reasonable to wait for resolution of *Cherokee Nation* before filing its administrative claim. Although the Court is sympathetic, the complete historical facts do not demonstrate that Menominee was diligent in pursuing its claims or that the lack of clarity in the law was an "extraordinary circumstance" to justify equitable tolling.

First, Menominee's focus on the *reasonableness* of its decision to wait is misplaced. Although it may have been reasonable, given the circumstances, for Menominee to expect to benefit from the *Cherokee Nation* class without filing an administrative claim or attempting to join the action (a point the Court does not reach), the reasonableness of that decision does not necessarily mean that Menominee "pursu[ed] [its] rights diligently." *Holland*, 130 S. Ct. at 2562. Litigants routinely abandon claims given the costs

of litigation, limited financial resources, and/or the uncertainty of the outcome. If a court equated reasonableness in waiting with diligence in pursuing, a statute of limitations could be tolled indefinitely, even for litigants who reasonably decide to abandon their claims. At most, Menominee has demonstrated reasonable inaction, not reasonable diligence, but the latter is required for equitable tolling.

Second, the factors Menominee has identified (prior class action, uncertain legal standard, limited resources, etc.) do not, individually or collectively, amount to "an extraordinary circumstance." Again, it is common for a litigant to be confronted with significant costs to litigation, limited financial resources, an uncertain outcome based upon an uncertain legal landscape, and impending deadlines. These circumstances are not "extraordinary" and are therefore insufficient to support Menominee's claim for equitable tolling.

*ii. Government's alleged switch of position*

As part of its argument that it was reasonable to wait for the Supreme Court ruling in Cherokee Nation, Menominee alleges that "[d]uring the *Cherokee* case, the Government argued that contractors who presented their own claims should be *excluded* from the class." Pl.'s Opp'n at 21 (emphasis in original). Later, Menominee argues that "it was not until after the Supreme Court's decision [in *Cherokee Nation*] that the government argued, for the first time[,] that asserted class members must first have presented claims to the contracting officer in order to participate in the class." *Id*. at 23. Even looking at the facts in a light most favorable to Menominee, these assertions are in error.

First, Menominee's latter statement is directly contradicted by its own brief. Menominee admits that when Ramah moved for class certification in 1993, "[t]he Government argued that the class could not be certified unless each class member had first exhausted its administrative remedies by filing claims with the agency contracting officer as required by the Contract Disputes Act." *Id*. at 20. Thus, the Government could not have been arguing "for the first time [after the *Cherokee Nation* decision in 2005] that asserted class members must first have presented claims to the contracting officer." *Id.* at 23.

Second, the Government did not, in fact, argue "[d]uring the Cherokee case . . . that contractors who presented their claims should be excluded from the class." *Id*. at 21. Instead, the United States argued that: 1) "[c]ertification of the proposed class would improperly interfere with the litigation of cases raising similar or related issues in other judicial districts,"[7] and 2) "[t]ribes that have received previous judicial decisions on their claims cannot be included in the class because their claims would be barred by the principles of res judicata." *Id*. at 13 (citing *Robertson v. Isomedix, Inc.,* 28 F.3d 965, 969 (9th Cir. 1994)). Thus, the United States was arguing that no class should be certified, not that tribes, by merely filing an administrative claim, would not be allowed to be part of the class if one were certified.

Third, and most importantly, the United States' litigation position throughout these disputes—even if

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[7] Def.'s Opp'n to Plaintiffs' Mot. for Class Certification [Dkt. # 88] at 12-13, *Cherokee Nation of Okla. v. United States*, No. 99-092 (E.D. Okla. 2000) (citing *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)).

its position had changed or were inaccurate—does not excuse Menominee's failure to file a timely claim. *See Moreno v. United States*, 82 Fed. Cl. 387, 403 (2008) ("If the fact that the agency expresses a position which turns out to be incorrect is a warrant for tolling, the limitations period would be suspended indefinitely.")

*iii. Defective pleading*

Menominee claims that equitable tolling is appropriate in this case because of a "defective pleading" filed in *Cherokee Nation*. Menominee argues that because the class as pled was defective under Rule 23, Cherokee Nation filed a "defective pleading" which warrants equitable tolling here. Pl.'s Reply at 16 [Dkt. # 41]; Pl.'s Opp'n at 19 (the lack of commonality, typicality, and adequate representation in *Cherokee Nation* "is a classic defective pleading scenario.")

Menominee's argument ignores the distinction between a defective class and a defective pleading (such as a complaint in the wrong forum, *see, e.g., Burnett v. New York Central R.R. Co.,* 380 U.S. 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965)). The former supports class action tolling; the latter supports equitable tolling. Because there was no defective pleading, *Burnett* is inapposite and Menominee cannot rely on it to support equitable tolling. Moreover, *Burnett* is distinguishable because the plaintiff in that case pursued its claim by filing a complaint (albeit in the wrong court). In this case, the Tribe did not file a complaint anywhere within the limitations period. Accordingly, Menominee's reliance on *Burnett* is further misplaced, and the Tribe's statement that "it had, in effect, filed a defective pleading in the wrong court" is incorrect. Pl.'s Reply at 18.

Menominee's reliance on *American Pipe & Contruction Co*. is also misplaced. American Pipe dealt with class action tolling, not equitable tolling. *See Menominee*, 614 F.3d at 526-29.[8] The Circuit has already made it clear that class action tolling under *American Pipe* is inappropriate in this case. *See id*. Thus, Menominee's reliance on *American Pipe* to support equitable tolling is unavailing.

*iv. Equitable Tolling Conclusion*

Menominee is correct that equitable tolling is more than just a mechanical application of the two *Holland* factors. However, 1) Menominee cannot point to any affirmative act it took in over six years to pursue its claim diligently; 2) filing an administrative claim is a relatively simple process; 4) there was no affirmative misconduct on the part of the government; and 5) Menominee does not present any additional facts from which the Court could find equitable tolling aside from those found insufficient to support class action tolling. Thus, equitable tolling is inappropriate and the Court will enter summary judgment will on behalf of the United States.

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[8] Although in passing the Supreme Court suggested that American Pipe dealt with equitable tolling, *Irwin*, 498 U.S. at 95-96, *Irwin* did not address the distinction between class action tolling and equitable tolling. *American Pipe* actually dealt with class action, not equitable tolling. *See generally American Pipe*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713. *See also Menominee II*, 614 F.3d at 526-529; *Irwin*, 498 U.S. at 96 n.3 (citing American Pipe and parenthetically stating "plaintiff's timely filing of a defective class action tolled the limitations period as to the individual claims of purported class members."); *cf. Bright v. United States*, 603 F.3d 1273, 1287-88 (Fed. Cir. 2010) (class action tolling and equitable tolling require different analysis).

B. 1995 Claim

The 1995 claim is not subject to the statute of limitations because the self-determination contract was executed before there was a statute of limitations in the Contract Disputes Act. 48 C.F.R § 33.206. Thus, equitable tolling is not applicable to this claim. There are, however, genuine issues of material fact preventing the Court from granting summary judgment to either party on this claim.

First, the cost rate for 1995 is unclear; it is either 13.80% or 12.73%. *See, e.g.*, Def.'s Reply [Dkt # 38]. Second, Menominee's damage figures set forth in its reply brief do not match those in its Complaint. Third, although the parties agree that $827,534 in CSC was carried over from 1995 to 1996, they disagree as to whether this impacts the amount of CSC due in 1995. The effect of the carry over from 1995 will have to be further briefed before the Court can conclude whether Menominee is entitled to damages on its 1995 claim.

C. 1996 Claim

Because the Court has determined that equitable tolling is unavailable, there is no need to address each of the government's alternative arguments for judgment for the 1996-1998 years. The Court notes, however, that Menominee's 1996 CSC claim would be time barred even if equitable tolling were appropriate.

Menominee argues that the statute of limitations on its claim for 1996 did not begin to run until January 1, 1999. It relies on the "common formulation," Pl.'s Opp'n at 27, that "[a] claim accrues when damages are ascertainable." *Id*. (quoting *Patton v. United States*, 64 Fed. Cl. 768, 774 (2005) (citations and internal quotations omitted)). Since the 1996 contract did not close until 1998, Menominee argues that its

damages were not ascertainable until then. "Until then, IHS could have, and did, supplement CSC for prior years in which the contract was in effect." Pl.'s Opp'n at 27. The argument is without merit. When the 1996 Annual Funding Agreement ended, Menominee knew that the government had not paid it full CSC. Once Menominee knew or should have known that it had a claim for additional contract support costs, the statute of limitations began to run, even if the precise amount of the underpayment had to be further calculated. See Kinsey v. United States, 852 F.2d 556 (Fed. Cir. 1988) ("where a claim is based upon a contractual obligation of the Government to pay money, the claim first accrues on the date when the payment becomes due and is wrongfully withheld in breach of the contract"); *Brighton Vill. Assocs. v. United States*, 52 F.3d 1056, 1060 (Fed. Cir. 1995) (claims for breach of contract generally accrue at the time of the breach).

Moreover, adopting Menominee's argument— that a claim for failing to pay under the Annual Funding Agreement does not accrue until the expiration of the self-determination contract—could extend the statute of limitations indefinitely. An initial self-determination contract may last for up to three years. 25 U.S.C. § 450j(c)(1)(A). After the contract has "matured," (i.e., been in force for three or more years without significant, material audit exceptions), a tribe can choose a longer contract term, including an indefinite term. 25 U.S.C. § 450b(h) and 450j(c)(1)(B). Thus, if the statute of limitations did not begin to run until after a self-determination contract expired, the limitations period would remain open indefinitely for tribes with an indefinite contract term. Such a result would eviscerate the statute of limitations without any equitable basis. Accordingly, the Court finds that the

statute of limitations began to run when Menominee's Annual Funding Agreements each expired and not when the underlying self-determination contract expired.

D. 1999 and 2000 Stable-Funding Claim

Menominee claims that it was underpaid in 1999 and 2000 because the CSC paid to it were less than the amount it was owed in 1998 (the "stable-funding claim").[9] Menominee's stable-funding claim fails, however based upon the law of the case. In *Menominee I*, this Court dismissed all of Menominee's CSC claims prior to 1999 based upon the statute of limitations. See *Menominee I*, 539 F.Supp.2d at 153-54; March 14, 2008 Order [Dkt. #15]. The Court did not dismiss Menominee's claims from 1999 to 2004. *See id*. The Court's opinion and order did not distinguish between Menominee's shortfall claims for 1999 to 2004 and its *stable-funding* claim for 1999 and 2000. *See id*. The order merely dismissed all claims for contract years before 1999 and left in tact *all* claims for years after 1999. *See* March 14, 2008 Order.

After the decision issued and the order was entered, Menominee could have continued to litigate its 1999-2004 claims. Instead, it agreed to voluntarily dismiss these claims in order to appeal the Court's dismissal of its 1995-1998 claims. Before doing so, however, the Tribe tried to preserve its stable-funding claim for

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[9] Menominee originally based its stable-funding claim on 1997, not 1998. In its current briefing, however, the Tribe admits that its CSC needs dropped from $404,938 in 1997 to $383,176 in 1998. *See* Pl.'s Opp'n at 36-37. Thus, its stable-funding claim is now] based upon what it was owed in 1998 and not 1997. This difference is not material, however, because the statute of limitation expired for both the 1997 and 1998 claims.

appeal. The Tribe stipulated that "[its] third Claim for Relief, entitled Stable Funding, is premised on alleged wrongs that occurred in 1997" and asked that "the Court issue a final order explicitly stating that the Tribe's [stable-funding claim] is barred by the Statute of Limitations." Joint Stipulation [Dkt. # 26] ¶ 2. As requested, the Court entered an order, stating that "[b]ecause the Tribe's [stable-funding claim] is premised on alleged wrongs that occurred in 1997, the claim is time-barred for the reasons explained in the Court's March 14, 2008 Memorandum Opinion." March 27, 2008 Order [Dkt. # 27]. Thus, going up on appeal, the law of the case was that Menominee's stable-funding claim was dependent on whether its claim for 1997 could be tolled.

On appeal, the Tribe did not challenge the Court's order that the Tribe's stable-funding claim was subject to the statute of limitations for 1997. *See* Opening Brief of Appellant, *Menominee II*. Indeed, it would have been difficult for it to do so given its stipulation that its stable-funding claim was "premised on alleged wrongs that occurred in 1997." Joint Stipulation ¶ 2. Having failed to raise the argument on appeal, Menominee's stable-funding claim continued, on remand, to rise and fall on whether or not the Court would toll the statute of limitations for either 1997 or 1998.

In its Motion for Summary Judgment, the United States points out that the Court need not reach the Tribe's stable-funding claim if it does not find that equitable tolling is warranted. The Tribe does not address this argument in its opposition. Instead, it includes a single, conclusory footnote which states, "[t]he 1999 and 2000 stable-funding claim[] [is] not subject to the statute of limitations defense." Pl.'s

Opp'n at 33 n.15. The Tribe does not explain why this claim is not subject to the statute of limitations, nor does it explain how this footnote is consistent with either its prior stipulation or the Court's prior order which held otherwise. In any event, whatever merit may lie with the argument that the 1999 and 2000 stable-funding claim is not barred by the statute of limitations that ran with the Tribe's 1997 or 1998 shortfall claim, that argument is foreclosed by the law of the case and has been waived by the Tribe.

The law of the case simply holds that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983); *see also LaShawn A. v. Barry*, 87 F.3d 1389, 1393, 318 U.S. App. D.C. 380 (D.C. Cir. 1996) (en banc) ("the same issue presented a second time in the same case in the same court should lead to the same result.") (emphasis in original). The Court has previously held (at both parties' request) that the Tribe's stable-funding claim was subject to the statute of limitations based upon actions in years prior to 1999 and that is the law of the case. This should not be disturbed especially when, as here, the Tribe had the opportunity to appeal this decision and failed to do so. *See, e.g., Williamsburg Wax Museum v. Historic Figures, Inc.*, 810 F.2d 243, 250, 258 U.S. App. D.C. 124 (D.C. Cir. 1987) ("Under the law of the case doctrine, a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time.") Accordingly,

the Court will grant summary judgment in favor of the United States on the Tribe's stable-funding claim.[10]

## IV. CONCLUSION

Because Menoniminee cannot demonstrate that it is entitled to equitable tolling, the Court will grant summary judgment to the United States with respect to Menominee's shortfall claims for 1996 to 1998 and its stable-funding claim for 1999 and 2000. The Court will deny without prejudice both parties' motions for summary judgment with respect to the Tribe's 1995 claim. A memoralizing Order accompanies this Memorandum Opinion.

Date: January 24, 2012

/s/ ROSEMARY M. COLLYER

United States District Judge

[10] Additionally, the Court finds that the Tribe also waived its argument that its stable-funding claim for 1999 and 2000 is not time-barred by failing to respond to the government's argument. See, e.g., Hopkins v. Women's Div., Bd. of Global Ministries, 238 F.Supp.2d 174, 178 (D.D.C. 2002) ("It is well understood in this Circuit that when a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.")

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 09-5005

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MENOMINEE INDIAN TRIBE OF WISCONSIN,
*Appellant*

v.

UNITED STATES OF AMERICA, *et al.*,
*Appellees*.

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November 17, 2009, Argued;
July 30, 2010, Decided

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OPINION

Before: GINSBURG, TATEL and GRIFFITH, *Circuit Judges*. Opinion for the Court filed by Circuit Judge GRIFFITH.

Opinion by: GRIFFITH

GRIFFITH, *Circuit Judge*: The district court dismissed the breach-of-contract claims of a government contractor, concluding they were barred by the statute of limitations in 41 U.S.C. § 605(a) and the equitable doctrine of laches. For the reasons set forth below, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

I.

The Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601 *et seq*. (2006), established a comprehensive framework for resolving contract disputes between executive branch agencies and government contractors. *See id*. § 602(a). In 1994, Congress amended the CDA to require, with one exception not relevant here, that all claims relating to a government contract be submitted, within six years of accrual, to the contracting officer responsible for entering and administering contracts on behalf of the relevant agency. *See* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2351(a), 108 Stat. 3243, 3322 (codified at 41 U.S.C. § 605(a)).[1]

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[1] As amended, section 605(a) of Title 41, titled "Contractor claims," reads in relevant part:

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. *Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim*. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding.41 U.S.C. § 605(a) (emphasis added).

Once the contracting officer issues a decision on a claim or is deemed to have denied the claim by failing to issue a timely decision, *see* 41 U.S.C. § 605(a), (c), a dissatisfied contractor has two options. The contractor may, within ninety days, appeal the decision to the board of contract appeals for the relevant agency. *Id*. § 606. Or the contractor may, within twelve months, file suit in the United States Court of Federal Claims. *Id*. § 609(a). Although these two paths are mutually exclusive, *Tuttle/White Constructors, Inc. v. United States*, 656 F.2d 644, 648-49, 228 Ct. Cl. 354 (Ct. Cl. 1981), they converge at the Court of Appeals for the Federal Circuit, which hears appeals from both the agency boards and the claims court. 28 U.S.C. § 1295(a)(3), (a)(10); 41 U.S.C. § 607(g).

This appeal found its way to our court--and not our sister circuit--by an unconventional third route, made possible because the case involves a contract authorized by the Indian Self-Determination and Education Assistance Act (ISDEAA). *See* 25 U.S.C. §§ 450 *et seq*. The ISDEAA permits Indian tribes to assume responsibility for federally funded programs or services that a federal agency would otherwise provide to the tribes' members. *See id*. §§ 450b(j), 450f(a). After the tribe and agency memorialize the transfer of authority in a "self-determination contract," they negotiate annual funding agreements, which become part of the contract. *Id*. § 450l(c) (subsection (f)(2) of model agreement). Though self-determination contracts are governed by the CDA, *id*. § 450m-1(d), the ISDEAA allows a tribe to bring an action arising under its contract in the district court rather than the Court of Federal Claims. *Id*. § 450m-1(a). The tribe exercised that option in this case.

The parties to the contract at issue are the Menominee Indian Tribe of Wisconsin and the Indian Health Service (IHS), the agency tasked with administering federal health programs for American Indians. Pursuant to a contract with IHS, Menominee has for many years operated a healthcare program for its members. The tribe alleges that the IHS has failed to pay all the "contract support costs" (reasonable administrative expenses and the like) to which it was statutorily entitled for the 1995 to 2004 contract years. *Id*. § 450j-1(a)(2) (obligating agencies to reimburse tribes' contract support costs). Menominee submitted its claims to the IHS contracting officer on September 7, 2005. After the contracting officer denied the claims in their entirety, Menominee timely filed this action for breach of contract in the district court.

The government filed a motion to dismiss for lack of subject-matter jurisdiction and for failure to state a claim. The district court lacked jurisdiction over the claims for 1996, 1997, and 1998, the government contended, because Menominee had not filed those claims with the contracting officer until after the six-year limitations period in the CDA had expired. Because that deadline does not apply to "contracts awarded prior to October 1, 1995," 48 C.F.R. § 33.206, the government argued that the tribe's claim for 1995 was barred by laches.

Menominee did not disagree that it filed its claims for 1996 to 1998 more than six years after their accrual, but argued that the limitations period should be tolled. The tribe's argument relied on the fact that in 1999 two other tribes filed a putative class action on behalf of all Indian tribes "that were not fully paid their contract support cost needs, as determined by IHS," under a self-determination contract. *Cherokee*

*Nation of Okla. v. United States*, 199 F.R.D. 357, 360 (E.D. Okla. 2001) (quoting Notice of Filing Revised Proposed Notice of Class Action). The district court in that case eventually denied class certification. *Id*. at 366. Menominee contended that it fell within the class described in the *Cherokee* complaint and that, under the doctrine of class-action tolling, the limitations period was suspended for two years while asserted members of the *Cherokee* class awaited the certification decision. In the alternative, Menominee asserted that principles of equitable tolling similarly excused the lateness of its claims. If either tolling theory was correct, the tribe's claims for 1996 to 1998 would not be time-barred. Menominee also disputed that laches barred its claim for 1995.

The district court dismissed the claims for 1995 to 1998. *See Menominee Indian Tribe of Wisc. v. United States*, 539 F. Supp. 2d 152 (D.D.C. 2008). The court rejected Menominee's class-action tolling theory on the ground that "presentment to the contracting officer is a mandatory jurisdictional requirement and was not timely performed by the Tribe for its 1996-1998 claims." *Id*. at 154 n.2 (citation omitted). The court also declined to equitably toll the filing deadline, reasoning that "[s]tatutory time limits are jurisdictional in nature, and courts do not have the power to create equitable exceptions to them." *Id*. at 154. With respect to the claim for 1995, the district court held that laches applied because the tribe's "11-year delay in bringing suit [was] nearly double the time allowed under the statute of limitations," *id*., and caused the government economic prejudice, *id*. at 154-55.

After the district court dismissed the tribe's remaining claims, Menominee appealed the dismissal

of its claims for 1995 to 1998. We have jurisdiction under 28 U.S.C. § 1291.

II.

We first consider the timeliness of Menominee's claims for 1996 to 1998, which are subject to the statute of limitations in 41 U.S.C. § 605(a). Menominee missed its deadline but argues that the limitations period should be tolled. The government argues that the limitations period is jurisdictional and therefore cannot be tolled, equitably or otherwise. We disagree that the limitations period is jurisdictional but agree with the government's alternative argument that class-action tolling is unavailable in this case. Nevertheless, we conclude that the limitations period in § 605(a) is subject to equitable tolling in appropriate cases and remand for the district court to consider whether it would be proper here. Our conclusions regarding the availability of class-action and equitable tolling under § 605(a) are the same as those reached by the Federal Circuit in *Arctic Slope Native Ass'n v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009), *cert. denied*, No. 09-1172, 130 S. Ct. 3505, 177 L. Ed. 2d 1091, 2010 U.S. LEXIS 5433 (U.S. June 28, 2010), which issued after the parties filed their briefs in this appeal.

A. Jurisdiction

The district court treated the six-year deadline in § 605(a) as jurisdictional. *Menominee*, 539 F. Supp. 2d at 154. This was error. Filing deadlines, statutory or not, are generally nonjurisdictional. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008); *Day v. McDonough*, 547 U.S. 198, 205, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006); *Scarborough v. Principi*, 541 U.S. 401, 413-14, 124 S. Ct. 1856, 158 L. Ed. 2d 674 (2004);

*see also Carlisle v. United States*, 517 U.S. 416, 434, 116 S. Ct. 1460, 134 L. Ed. 2d 613 (1996) (Ginsburg, J., concurring) ("It is anomalous to classify time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction.'" (footnote omitted)). The time limit in § 605(a) is no exception.

"Subject matter jurisdiction defines the [tribunal's] authority to hear a given type of case." *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862, 1866, 173 L. Ed. 2d 843 (2009). The Supreme Court has distinguished between prescriptions that may be "properly typed 'jurisdictional,'" *Scarborough*, 541 U.S. at 414, and those better classified as "claim-processing rules," *id.* at 413. A claim-processing rule may serve to inform a plaintiff of the time he has to file a claim, *Kontrick v. Ryan*, 540 U.S. 443, 456, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004), or to "protect a defendant's case-specific interest in timeliness," *John R. Sand*, 552 U.S. at 133, but it "does not reduce the adjudicatory domain of [the] tribunal," *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region (Union Pacific)*, 130 S. Ct. 584, 596, 175 L. Ed. 2d 428 (2009). *See also Dolan v. United States*, 133 S. Ct. 2533, 177 L. Ed. 2d 108, 113 (2010) (slip op. at 4) (noting that a claim-processing rule "do[es] not limit a [tribunal's] jurisdiction, but rather regulate[s] the timing of motions or claims").[2]

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[2] In dismissing for lack of subject-matter jurisdiction, the district court implicitly concluded that the time limitation in § 605(a) demarcates the jurisdiction of the reviewing court, not only the jurisdiction of the contracting officer. Our holding that the time limit is not jurisdictional eliminates the need for us to doubt the district court's conclusion. In any event, the distinction between jurisdictional requirements and claim-processing rules applies. *See Union Pacific*, 130 S. Ct. at 596-98 (applying the

The different treatment of claim-processing rules and jurisdictional requirements has significant effects on the scope of authority held by adjudicatory tribunals. Claim-processing rules "typically permit [tribunals] to toll the limitations period in light of special equitable considerations," *John R. Sand*, 552 U.S. at 133, and their protection can be "forfeited if the party asserting the rule waits too long to raise the point." *Kontrick*, 540 U.S. at 456; *see*, *e.g.*, *Eberhart v. United States*, 546 U.S. 12, 19, 126 S. Ct. 403, 163 L. Ed. 2d 14 (2005) (per curiam); *Wilburn v. Robinson*, 480 F.3d 1140, 1144-46, 375 U.S. App. D.C. 257 (D.C. Cir. 2007). But a tribunal "has no authority to create equitable exceptions to jurisdictional requirements," *Bowles v. Russell*, 551 U.S. 205, 214, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007), and litigants cannot by waiver or forfeiture confer jurisdiction where it is otherwise lacking, *see United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002); *S. Cal. Edison Co. v. FERC*, 603 F.3d 996, 1000, 390 U.S. App. D.C. 267 (D.C. Cir. 2010).

Whether a statutory time limit or other prerequisite to suit is jurisdictional is "discerned by looking to the condition's text, context, and relevant historical treatment." *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1246, 176 L. Ed. 2d 18 (2010). We begin by considering whether Congress "clearly state[d]" the limitation should "rank . . . as jurisdictional." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). If so, our inquiry is over.

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distinction to rules governing adjudications by an administrative agency). We note, however, that generally "[a] defect in an agency's jurisdiction . . . does not affect the subject matter jurisdiction of the district court." *Mitchell v. Christopher*, 996 F.2d 375, 378, 302 U.S. App. D.C. 109 (D.C. Cir. 1993).

*Id*. at 515-16. If, on the other hand, the limitation "lacks a clear jurisdictional label," we then ask whether the structure of the statute or long-standing judicial precedent "compel[s] the conclusion that . . . it nonetheless impose[s] a jurisdictional limit." *Muchnick*, 130 S. Ct. at 1244.

The time limit for initiating a claim under the CDA is not stated in jurisdictional terms. Section 605(a) provides that all claims by a contractor "shall be in writing"; "shall be submitted to the contracting officer for a decision"; and "shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 605(a). The statute does not "refer in any way to . . . jurisdiction," *Zipes v. Trans World Airlines, Inc*., 455 U.S. 385, 394, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982), so we must turn to its structure and history.

The government asks the court to infer from the structure of the statutory regime for processing government contract claims that the limitations period in § 605(a) is jurisdictional. Specifically, the government argues that tolling the six-year deadline in § 605(a) would "undermine" 28 U.S.C. § 2501, Appellee's Br. at 25, which generally limits the jurisdiction of the Court of Federal Claims to claims filed within six years of their accrual. *John R. Sand*, 552 U.S. at 134-38. It is hard to see how. Section 2501 does not even apply to claims arising under the CDA, which instead gives contractors six years to file a claim with the contracting officer and one year to seek judicial review of the contracting officer's decision. *Pathman Constr. Co. v. United States*, 817 F.2d 1573, 1580 (Fed. Cir. 1987); *see also* 41 U.S.C. §§ 605(a), 609(a). Regardless of whether § 605(a) is tolled, a contractor may have more than six years after its claim accrues to file suit in the Court of Federal

Claims. *See Pathman*, 817 F.2d at 1574-75, 1580. The tolling of the limitations period in § 605(a) simply has no bearing on § 2501.

Likewise, the historical treatment of the type of limitation imposed by § 605(a) does not suggest that its six-year filing deadline is jurisdictional. In *John R. Sand & Gravel Co. v. United States* and *Bowles v. Russell* the Supreme Court recognized the general rule that time requirements do not affect subject-matter jurisdiction but concluded that the particular time limits at issue in those cases were jurisdictional based on their historical treatment. *See John R. Sand*, 552 U.S. at 134-38 (construing 28 U.S.C. § 2501); *Bowles*, 551 U.S. at 209-11 (interpreting 28 U.S.C. § 2107 and FED. R. APP. P. 4). In each case, the Court rested its decision on a line of Supreme Court precedent dating back more than a century. *John R. Sand*, 552 U.S. at 134 (citing *Kendall v. United States*, 107 U.S. 123, 2 S. Ct. 277, 27 L. Ed. 437, 18 Ct. Cl. 758 (1883)); Bowles, 551 U.S. at 210 (citing *United States v. Curry*, 47 U.S. (6 How.) 106, 12 L. Ed. 363 (1848)). Section 605(a) lacks a comparable lineage. Indeed, it was not until 1994 that Congress enacted any statute of limitations for submitting claims to contracting officers. *See* Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2351, 108 Stat. at 3322. As originally enacted, the CDA contained no time limit on the filing of claims. Pub. L. No. 95-563, § 6(a), 92 Stat. 2383, 2384 (1978). Although government contracts sometimes specified how long the parties would have to submit their claims, *see* 41 U.S.C. § 605 note, these contractual deadlines were not considered jurisdictional, *see Do-Well Mach. Shop, Inc. v. United States*, 870 F.2d 637 (Fed. Cir. 1989) (holding that failure to submit a timely claim is an "affirmative defense" that "does not oust a tribunal of jurisdiction");

*cf.* JACK PAUL, UNITED STATES GOVERNMENT CONTRACTS AND SUBCONTRACTS 227-28 (1964) ("[I]f the contracting officer decides the contractor's claim on the merits without raising the issue of untimeliness of notice, the notice requirement is deemed waived.").

The government also makes a broader argument: that § 605(a) "run[s] for the benefit of the Government" and this type of time limit has "long been considered jurisdictional." Appellee's Br. at 13. The government has it precisely backwards. *Irwin v. Department of Veterans Affairs* established a "general rule" that time limits for suing the government are presumptively subject to equitable tolling, 498 U.S. 89, 95, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990), and therefore nonjurisdictional. The government's categorical argument that statutes of limitations running for the benefit of the Government are jurisdictional in nature lacks merit.

Finally, the government argues that the limitations period in § 605(a) is jurisdictional because it facilitates administrative review and promotes judicial efficiency. That may be so, but such virtues do not make the limitations period jurisdictional. Many time limitations—including claim-processing rules—serve "system-related goal[s] such as facilitating the administration of claims," *John R. Sand*, 552 U.S. at 133. A limitations period should not "be ranked as jurisdictional merely because it promotes important congressional objectives." *Muchnick*, 130 S. Ct. at 1248 n.9.

Because the time limit in § 605(a) is not jurisdictional in nature, the district court erred in dismissing Menominee's claims for lack of subject-matter jurisdiction. We may still affirm, however, if we conclude that the district court should have dismissed

for failure to state a claim. *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624, 326 U.S. App. D.C. 67 (D.C. Cir. 1997). Because Menominee failed to meet the filing deadline and the government has not waived or forfeited its defense of untimeliness, such a dismissal would be proper unless the limitations period can be tolled. We now turn to that question.

B. Class-Action Tolling

In *American Pipe & Construction Co. v. Utah*, the Supreme Court held "that the commencement of a class action" will in some cases "suspend[] the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. 538, 554, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974). In this case we consider whether the time limit for filing an administrative claim should be tolled under *American Pipe* when filing that claim is a jurisdictional prerequisite to participation in the class action.

A party generally must exhaust administrative remedies before seeking relief in federal court. *See McCarthy v. Madigan*, 503 U.S. 140, 144-45, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992); *see also Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51, 58 S. Ct. 459, 82 L. Ed. 638 (1938). That rule "applies to class actions," in which courts typically require "exhaustion by at least one member of the class." *Phillips v. Klassen*, 502 F.2d 362, 369, 163 U.S. App. D.C. 360 (D.C. Cir. 1974); *see*, *e.g.*, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975). Where exhaustion is a jurisdictional requirement, however, every class member must exhaust its administrative remedies. *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d

699, 704-05, 388 U.S. App. D.C. 1 (D.C. Cir. 2009); *see*, *e.g.*, *Weinberger v. Salfi*, 422 U.S. 749, 764, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975).

Menominee contends that the pendency of the *Cherokee* class action brought by other Indian tribes against the IHS tolled the limitations period in § 605(a) for all putative class members, including Menominee, under *American Pipe*. At the same time, Menominee acknowledges that it did not submit its claims to the contracting officer until after class certification was denied, and it concedes that the submission of such a claim is a jurisdictional prerequisite to judicial review. Appellant's Br. at 42 n.17.[3] It follows that Menominee should have been excluded from the *Cherokee* class, had one been certified,

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[3] The concession is well taken. The Federal Circuit and the Court of Claims have long held that the court may not exercise jurisdiction until the contracting officer either issues a decision on the claim or is deemed to have denied it. *See Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1578-79 & n.6 (Fed. Cir. 1994); *Paragon Energy Corp. v. United States*, 645 F.2d 966, 971, 227 Ct. Cl. 176 (Ct. Cl. 1981) ("Absent this 'claim,' no 'decision' is possible and, hence, no basis for jurisdiction in this court."), *aff'd*, 230 Ct. Cl. 884 (1982). Their conclusion is confirmed by the structure of the CDA. By its plain terms, § 8(d) of the Act makes a decision by the contracting officer a jurisdictional prerequisite to review by the agency board of contract appeals. 41 U.S.C. § 607(d) (titled "Jurisdiction"). Section 10, which permits contractors to file a direct action in the Court of Federal Claims "in lieu of appealing the decision of the contracting officer . . . to an agency board," *id*. § 609(a)(1), is not similarly framed in jurisdictional terms. Yet the jurisdiction of the agency boards and the court of claims are clearly coterminous. *See Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 750 (Fed. Cir. 1993). Because a decision from the contracting officer or a "deemed denial" of the claim is a prerequisite to the board's exercise of its jurisdiction, it is likewise necessary for the court to act.

because the tribe had not satisfied the jurisdictional exhaustion requirement. In arguing otherwise, the tribe relies on cases permitting class-action tolling of the administrative filing deadlines in Title VII and the Age Discrimination in Employment Act (ADEA). *See Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1392-93 (11th Cir. 1998) (en banc); *Griffin v. Singletary*, 17 F.3d 356, 359-61 (11th Cir. 1994); *Andrews v. Orr*, 851 F.2d 146, 148-49 (6th Cir. 1988). Those cases are inapposite, however, because neither Title VII nor the ADEA incorporates a jurisdictional exhaustion requirement. *See Zipes*, 455 U.S. at 395 n.11, 397. Also unhelpful is Menominee's citation to *McDonald v. Secretary of Health & Human Services*, 834 F.2d 1085 (1st Cir. 1987), in which all unnamed class members had already satisfied "the non-waivable jurisdictional requirement of having presented 'a claim for benefits . . . to the Secretary,'" *id.* at 1092 n.4 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 328, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). *Accord Arctic Slope*, 583 F.3d at 794 & n.1.

Menominee further argues that even if the *Cherokee* court could not have exercised jurisdiction over its claims, class-action tolling of the period for filing an administrative claim is nevertheless required. In keeping with this court's "functional reading of *American Pipe*," *McCarthy v. Kleindienst*, 562 F.2d 1269, 1274, 183 U.S. App. D.C. 321 (D.C. Cir. 1977), we consider whether tolling under these circumstances would serve the purposes underlying the class-action tolling doctrine. We hold that the limitations period for submitting an administrative claim is not tolled under *American Pipe* for asserted class members who, because of their failure to satisfy a jurisdictional exhaustion requirement, are ineligible

to participate in the class action at the time class certification is denied.

*American Pipe* addressed what effect, if any, the timely filing of a complaint on behalf of an asserted class should have on the statute of limitations governing the claims of absent class members—a problem that arises from the delay between the commencement of the action and the district court's determination "whether to certify the action as a class action" and how to "define the class and the class claims." FED. R. CIV. P. 23(c)(1)(B). If the statute of limitations on the claims of putative class members continued to run in the meantime, the unnamed plaintiffs would face a choice: act to preserve their rights (by moving to intervene or join or by initiating a separate action) or run the risk of forfeiting their rights if class certification is denied after their claims have grown stale. The *American Pipe* Court held that, where a class is certified, the commencement of the action by the named plaintiff satisfies the statute of limitations "as to all those who might subsequently participate in the suit." 414 U.S. at 551. If certification is denied, then the limitations period is suspended between the filing of the class complaint and the denial of class status. *Id*. at 554. The tolling rule of *American Pipe* permits members of the asserted class to safely await the certification decision before filing a motion to intervene in the action brought by the named plaintiff, *id*., or a separate lawsuit, *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983).

A contrary rule would defeat Rule 23's objectives of "efficiency and economy of litigation" by forcing putative class members to file protective motions to intervene in the pending action or run the risk of their

claims growing stale. *American Pipe*, 414 U.S. at 553. "[R]equiring successful anticipation of the determination of the validity of the class would breed needless duplication of motions," the Court explained, because that determination in some cases turns on "such subtle factors as experience with prior similar litigation or the current status of a court's docket." *Id*. at 553-54. The need for class-action tolling thus rests on the uncertainty of putative class members regarding whether the court will certify a class that will protect their interests. If putative class members knew in advance that a class would not be certified or that they would be excluded from the class action, there would be no need for tolling.

We agree with the Federal Circuit that the *American Pipe* doctrine does not require courts to toll the time putative class members have to satisfy a jurisdictional prerequisite to judicial review when the failure to do so precludes them from obtaining relief via the class action. *See Arctic Slope*, 583 F.3d at 797. Until they satisfy the jurisdictional preconditions to class membership, putative class members have no reason to anticipate whether or not class certification will be granted and face none of the uncertainty class-action tolling is meant to ameliorate. Regardless of whether certification is granted, every contractor must submit its claim to the contracting officer. Only once a contractor's claim is denied by the contracting officer does the contractor have a choice between participating in the class or proceeding individually—the choice with which the class-action tolling doctrine is concerned. Because Menominee could not have participated in the Cherokee class action without first presenting a claim to the contracting officer, the purposes of Rule 23 would not be advanced by tolling the limitations period in § 605(a). "Where the rationale

for a rule stops, so ordinarily does the rule." *United States v. Textron Inc.*, 577 F.3d 21, 31 (1st Cir. 2009) (Boudin, J.).

Menominee contends that extending class-action tolling to the time limitation in § 605(a) would advance the goal of "efficiency and economy of litigation" described by the Court in *American Pipe*, 414 U.S. at 553. Unless tolling applies, Menominee asserts, contractors will be forced to file claims with the contracting officer "merely to preserve their rights to participate in [a] proposed class [action]." Appellant's Br. at 17. Yes and no. It is true that contractors must file administrative claims in order to participate in a class action brought under the CDA. But every asserted class member must submit a claim to the contracting officer because of the general rule that one cannot obtain relief as a member of a class action without first satisfying the jurisdictional prerequisites to judicial review, not because class-action tolling is inapplicable to § 605(a). Menominee also suggests that, under our rule, contractors that submit claims to the contracting officer must then file individual actions or motions to intervene within twelve months of the contracting officer's decision. This argument fails, too. The tribe would be correct if the time limit for seeking judicial review in § 609 were not subject to tolling under *American Pipe*, but nothing in our decision precludes application of class-action tolling to that deadline.

Menominee further argues that the district court in *Cherokee* "conclusively decided the parameters of the putative class[,] . . . that the Tribe was a member of that class," and that the issue "cannot be re-litigated." Reply Br. at 4-5 & n.1. That argument has no merit. The *Cherokee* court denied class certification and

therefore never defined a class. *See* FED. R. CIV. P. 23(c)(1)(B).

Finally, Menominee contends that class-action tolling should apply here because the tribe's failure to present a timely claim resulted from its reliance upon the *Cherokee* class action and arguments the government allegedly made in the course of that litigation. *See* Appellant's Br. at 17; Reply Br. at 6. But Menominee's purported reliance on the pendency of the class action is not germane to the availability of class-action tolling, which benefits even those "asserted class members who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings." *American Pipe*, 414 U.S. at 552. The various defenses raised by the government in the *Cherokee* litigation similarly have no bearing on the availability of class-action tolling.

In sum, Menominee advocates extending the benefit of tolling to all members of the class described by the named plaintiff, including those jurisdictionally barred from participation due to their failure to exhaust administrative remedies. Such a rule would serve only one function: Permitting plaintiffs who could not have participated in the class to initiate actions against the government after their claims have grown stale. Adopting the rule Menominee advances would not further the objectives of Rule 23 but rather "invit[e] abuse" of the class device by encouraging lawyers "to frame their pleadings . . . [to] save members of the purported class who have slept on their rights." *Crown, Cork & Seal*, 462 U.S. at 354 (Powell, J., concurring) (quoting *American Pipe*, 414 U.S. at 561 (Blackmun, J., concurring)) (internal quotation marks omitted). We join the Federal Circuit

in holding that class-action tolling is not available under these circumstances.

C. Equitable Tolling

In the alternative, Menominee argues that the CDA's six-year limitations period should be equitably tolled. We agree that the statute is subject to tolling and remand for the district court to consider whether tolling is appropriate in this case.

"It is hornbook law that limitations periods are customarily subject to equitable tolling unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002) (internal citations and quotation marks omitted). Indeed "a nonjurisdictional federal statute of limitations is normally subject to a rebuttable presumption in favor of equitable tolling." *Holland v. Florida*, 130 S. Ct. 2549, ___,177 L. Ed. 2d 130, 144 (2010) (slip op. at 13) (internal quotation marks omitted). That presumption applies in litigation against the United States, *Irwin*, 498 U.S. at 95, where "the injury to be redressed is of a type familiar to private litigation," *Chung v. DOJ*, 333 F.3d 273, 277, 357 U.S. App. D.C. 152 (D.C. Cir. 2003). Because the time limitation in § 605(a) is nonjurisdictional and actions for breach of contract are familiar to private litigation, we must presume that § 605(a) is subject to equitable tolling. The only question that remains is whether there is "good reason to believe that Congress did not want the equitable tolling doctrine to apply." *United States v. Brockamp*, 519 U.S. 347, 350, 117 S. Ct. 849, 136 L. Ed. 2d 818 (1997).

The requirement that all claims "shall be submitted within 6 years after the accrual of the claim," 41 U.S.C. § 605(a), reads like a run-of-the-mill statute of

limitations. Because this provision was enacted after *Irwin* established the presumption in favor of equitable tolling, Congress was on notice that courts would read § 605(a) to permit tolling unless it provided otherwise. *See Holland*, 130 S. Ct. at 143 (slip op. at 13) "The presumption's strength is . . . reinforced by the fact that Congress enacted [the statute] after th[e] Court decided *Irwin* . . . ."). Yet Congress included no "[s]pecific statutory language" that could be construed to "rebut the presumption." *John R. Sand*, 552 U.S. at 137-38. That silence is a strong indication that *Irwin*'s default rule governs. *Arctic Slope*, 583 F.3d at 798.

The government argues that § 605(a) is much like the statute at issue in *United States v. Brockamp*, in which the Supreme Court held that the *Irwin* presumption had been rebutted even though Congress had not expressly precluded tolling. *Brockamp* involved the time limitation for filing claims for tax refunds. *See* 26 U.S.C. § 6511. In holding that Congress did not want the deadline equitably tolled, the Court relied on several factors including the provision's "detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions," 519 U.S. at 352, as well as its "unusually emphatic form," *id*. at 350, and the "underlying subject matter" of tax collection, *id*. at 352. None of these factors is at work in § 605(a).

The government describes the CDA as "a detailed, technical, complex scheme that sets forth precise procedures and deadlines for the assertion of a claim." Appellee's Br. at 31. Be that as it may, the government's focus on the regulatory scheme as a whole is misplaced. The *Brockamp* Court did not concern itself with the complexity of the Tax Code taken as a whole,

but the complexity of the time limitations found in § 6511. *See* 519 U.S. at 350-51. As Irwin itself illustrates, a fairly complicated regulatory scheme—in that case Title VII—may nevertheless include a limitations period that uses "fairly simple language, which one can . . . plausibly read as containing an implied 'equitable tolling' exception." *Id*. at 350. As the Federal Circuit observed, "[t]he statutory time limitation of section 605(a) is a simple provision and does not contain technical language." *Arctic Slope*, 583 F.3d at 799.

The *Brockamp* Court also drew on the several "explicit exceptions to [the] basic time limits" in § 6511 to conclude that it would be inappropriate to allow equitable tolling. 519 U.S. at 351. Section 605(a) is similar, the government asserts, in that it expressly states that its limitations period does not apply "to a claim by the government against a contractor that is based on a claim by the contractor involving fraud." 41 U.S.C. § 605(a). But this exception is easily explained in a way that does not require us to infer that Congress meant to preclude equitable tolling. When Congress amended § 605(a) to add the limitation period, § 604 already imposed a deadline on the government for claims involving fraud. That deadline specifies that "[l]iability . . . shall be determined within six years of the commission of [the contractor's] misrepresentation of fact or fraud." 41 U.S.C. § 604. In excepting claims involving fraud from the limitations period in § 605(a), Congress presumably meant only to avoid implicitly abrogating § 604. There is no reason to think that the inclusion of an express exception for

claims involving fraud should be read to exclude an implicit exception for equitable tolling.[4]

We agree with the Federal Circuit that the time limitation in § 605(a) is subject to equitable tolling. Because the parties dispute facts relevant to application of the equitable tolling doctrine, we remand for the district court to determine whether tolling is appropriate under the circumstances of this case.

III.

Neither party suggests that Menominee's claim for 1995 is subject to the CDA's six-year time limit, which is inapplicable to "contracts awarded prior to October 1, 1995." 48 C.F.R. § 33.206. The district court still dismissed Menominee's claim for 1995, but it did so based on the doctrine of laches.

The equitable defense of laches "is designed to promote diligence and prevent enforcement of stale claims" by those who have "'slumber[ed] on their rights.'" *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F.2d 838, 843, 224 U.S. App. D.C. 272 (D.C. Cir. 1982) (quoting *Powell v. Zuckert*, 366 F.2d 634, 636, 125 U.S. App. D.C. 55 (D.C. Cir. 1966)). Laches "applies where there is '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *Pro Football, Inc. v. Harjo*, 565 F.3d 880, 882, 385 U.S. App. D.C. 417 (D.C. Cir. 2009) (quoting *Nat'l R.R.*

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[4] The government also argues that tolling the limitations period in § 605(a) would undermine the statute of limitations for filing actions in the Court of Federal Claims, 28 U.S.C. § 2501, which cannot be equitably tolled, *John R. Sand*, 552 U.S. at 137. The government offered a substantially similar argument in favor of treating the limitations period as jurisdictional, and we reject the argument here for the same reasons. *See supra*, at 9.

*Passenger Corp. v. Morgan*, 536 U.S. 101, 121-22, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)). The district court stated that Menominee's "11-year delay in bringing suit is nearly double the time allowed under the statute of limitations and is certainly long enough to satisfy the standards under the first prong of the test for laches." *Menominee*, 539 F. Supp. 2d at 154. The court also explained that this delay prejudiced the government because "[f]unding for the 1995 contract year has long since expired." *Id*.

The parties dispute the applicable standard of review. Menominee urges us to review the dismissal de novo, and the government advocates review under an abuse-of-discretion standard. We have observed that "both standards are relevant" when the district court's laches determination comes at summary judgment, *Harjo*, 565 F.3d at 883, but have not addressed the standard that governs in an appeal from a dismissal. We need not determine here whether our review should be de novo or for abuse of discretion because we would reverse under either standard. With the following observations, we remand for the district court to reconsider the matter.

First, the district court incorrectly calculated the length of the tribe's delay. As the government now acknowledges, the tribe submitted its claim for 1995 "nine years and nine months after the claims accrued," Appellee's Br. at 43, not the eleven years suggested by the district court. *Cf. Gull Airborne*, 694 F.2d at 843 (stating that the plaintiff's delay should be measured by the "period of time [that] elapses between accrual of the claim and suit").

Second, the district court erred in failing to consider the tribe's arguments that its delay was reasonable. "[L]aches is not, like limitation, a mere matter of

time," *Holmberg v. Armbrecht*, 327 U.S. 392, 396, 66 S. Ct. 582, 90 L. Ed. 743 (1946), but "attaches only to parties who have *unjustifiably* delayed in bringing suit." *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 49, 367 U.S. App. D.C. 276 (D.C. Cir. 2005) (per curiam) (emphasis added). The doctrine is equitable in nature, and its application "turns on whether the party seeking relief 'delayed inexcusably or unreasonably in filing suit,'" not simply whether the party delayed. *Id*. (quoting *Rozen v. District of Columbia*, 702 F.2d 1202, 1203, 227 U.S. App. D.C. 14 (D.C. Cir. 1983) (per curiam)). On remand, the district court should consider Menominee's arguments that it had good reason for not presenting its claims to the contracting officer sooner.

Third, the district court provided inadequate reasons for concluding that Menominee's delay prejudiced the government. The court offered only the terse observation that "[f]unding for the 1995 contract year has long since expired." *Menominee*, 539 F. Supp. 2d at 154. This statement appears to be an endorsement of the government's assertion in its motion to dismiss that it was "economically prejudiced" by the delay because "the appropriations for 1995 have long since lapsed." Mot. to Dismiss at 9. In support of that position, the government cited the Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, 108 Stat. 2499 (1994), which provided that "[n]o part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein," *id*. § 304, 108 Stat. at 2536. The 1995 fiscal year ended on September 30, 1995. *Id*. pmbl., 108 Stat. at 2499. Because Menominee's claim for 1995 did not accrue until several months later, the relevant appropriations

would have already expired had the tribe filed suit on the day its claim accrued. We fail to see how the tribe's delay prejudiced the government.

We close by noting that "a motion to dismiss generally is not a useful vehicle for raising the issue [of laches]." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1277, at 644 (3d ed. 2004). *But see*, *e.g.*, *Love v. Stevens*, 207 F.2d 32, 32, 93 U.S. App. D.C. 69 (D.C. Cir. 1953) (per curiam) (affirming a dismissal based "upon plaintiff's laches"). Laches may be the "legal cousin" of the statute of limitations, *Daingerfield Island Protective Soc'y v. Babbitt*, 40 F.3d 442, 448, 309 U.S. App. D.C. 186 (D.C. Cir. 1994) (Wald, J., dissenting), but it "involves more than the mere lapse of time and depends largely upon questions of fact." WRIGHT & MILLER § 1277, at 643. "[A] complaint seldom will disclose undisputed facts clearly establishing the defense." *Id*. at 643-44.

IV.

The dismissal of Menominee's claims is reversed and the case is remanded for further proceedings consistent with this opinion.

*So ordered.*

**APPENDIX D**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 07-812 (RMC)

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MENOMINEE INDIAN TRIBE OF WISCONSIN,

*Plaintiff*,

v.

UNITED STATES OF AMERICA, *et al*.,

*Defendants*.

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March 14, 2008, Decided

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MEMORANDUM OPINION

Judges: ROSEMARY M. COLLYER, United States District Judge.

Opinion by: ROSEMARY M. COLLYER

The Menominee Indian Tribe of Wisconsin ("Tribe") operates a health care system for tribal members pursuant to a self-determination contract with the Secretary of the Department of Health and Human Services ("HHS" or "Secretary"). The Tribe sues HHS for alleged breach of contract in the years 1995 through 2004. The Tribe alleges that HHS failed to compensate it fully for indirect contract support costs ("CSC"), despite clear contractual and statutory language in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450, *et seq*. ("ISDA"), to the contrary. HHS insists that it negotiated specific amounts for indirect contract support

costs with the Tribe for each year in question and paid those amounts. It asks that the Complaint be dismissed. *See* Dkt. # 6. The Motion will be granted in part and denied in part.

A. Claims Related to 1996 through 1998 CSC Funding are Time-Barred

The Contract Disputes Act ("CDA") governs Plaintiff's claims. *See* 25 U.S.C. § 450m-1(d); 41 U.S.C. § 605(a). The CDA is a waiver of sovereign immunity and the time limitations found therein operate as a condition on that waiver. *James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996). Statutory time limits are jurisdictional in nature, and courts do not have the power to create equitable exceptions to them. *Bowles v. Russell*, 127 S. Ct. 2360, 2366, 168 L. Ed. 2d 96 (2007).

In 1994, Congress enacted a six-year statute of limitations for Contract Dispute Act claims. 41 U.S.C. § 605(a) ("Each claim by a contractor against the government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim."). Because the Tribe did not raise claims related to its 1996 through 1998 CSC funding within six years of their accrual,[1] these claims must be dismissed for lack

[1] The Tribe's claims under the 1996 contract accrued by no later than the end of December 1996, and the statute of limitations on these claims expired by the end of December 2002. Plaintiff's claims under the 1997 contract accrued by the end of December 1997, and the statute of limitations on these claims expired by the end of December 2003. Finally, Plaintiff's claims under the 1998 contract accrued by the end of December 1998, and the statute of limitations on these claims expired by the end of December 2004. By its own admission, the Tribe did not submit any of its claims for contract years 1996-98 to the contracting officer until September 7, 2005. *See* Compl. P 8.

of subject matter jurisdiction.[2]

B. Claims Related to 1995 CSC Funding are Barred by Laches [3]

"Laches applies where there has been an unfair and prejudicial delay by a plaintiff in bringing an action." *CarrAmerica Realty Corp. v. Kaidanow*, 355 U.S. App. D.C. 180, 321 F.3d 165, 171 (D.C. Cir 2003). Laches applies when there is: (1) a lack of diligence by the party against whom the defense is asserted; and (2) prejudice to the party asserting the defense. *Pro-Football, Inc. v. Harjo*, 367 U.S. App. D.C. 276, 415 F.3d 44, 47 (D.C. Cir. 2005) (citing *AMTRAK v. Morgan*, 536 U.S. 101, 121-22, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)). Both of those elements are met here.

First, the Tribe's cause of action accrued by December 1995 at the latest, when the contract year ended and the Tribe had not been fully paid under the contract. This 11-year delay in bringing suit is nearly double the time allowed under the statute of limitations and is certainly long enough to meet the standards under the first prong of the test for laches.

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[2] The Court is not persuaded by the Tribe's tolling arguments. *See* Pl.'s Opp'n at 30-43. HN3 Administrative presentment to the contracting officer is a mandatory jurisdictional requirement, *see Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1106 (D.N.M. 2006), and was not timely performed by the Tribe for its 1996-1998 claims. Because federal court jurisdiction cannot attach until there has been administrative presentment, tolling does not apply. *See NuFarm Am., Inc. v. United States*, 398 F. Supp. 2d 1338, 1353-54, 29 Ct. Int'l Trade 1317 (Ct. Int'l Trade 2005).

[3] Arguably, the CDA statute of limitations does not apply to the Tribe's 1995 contract because it was signed prior to the passage of the CDA statute of limitations.

*See*, *e.g.*, *Mexican Intermodal Equip., S.A. v. United States*, 61 Fed. Cl. 55, 71 (2004).

Second, the Court believes that the Secretary has been prejudiced by the Tribe's delay. *See A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1032 (Fed. Cir. 1992) (laches applies when delay causes economic prejudice or injury to defendant's ability to mount a defense). Funding for the 1995 contract year has long since expired and the Tribe "slumber[ed] on its rights" by waiting 11 years to file suit. *See Pro-Football, Inc.*, 415 F.3d at 47. Accordingly, the Court will dismiss any claims related to 1995 CSC funding.

C. Claims Related to 1999 through 2004 CSC Funding Survive Defendants' Motion to Dismiss

In his brief, the Secretary asserts that "ISDA does not mandate the payment of a specific amount of indirect CSC," Def.'s Mem. at 16, and "[i]t is the contracts themselves that create an entitlement to CSC." *Id*. at 17. These statements represent a very troubling misapprehension of the statute. ISDA mandates the payment of full indirect CSC and ISDA itself establishes that entitlement. *Ramah Navajo Sch. Bd., Inc., v. Babbitt*, 318 U.S. App. D.C. 329, 87 F.3d 1338, 1341 (D.C. Cir. 1996) ("[T]he [ISDA] requires the Secretary to allocate certain Contract Support Funds to cover the full administrative costs the Tribe will incur . . . . [and] which the statute refers to as an entitlement of the contracting Tribes." (citing 25 U.S.C. § 450j-1(g) ("The Secretary shall add to the contract the full amount of funds to which the contractor [the Tribe] is *entitled* under subsection (a).")). The Secretary is not free to negotiate hard and require the Tribe to accept less than full funding if, as seems likely, the Secretary has more money available.

*See* Def.'s Mem. at 18 n.6 ("because IHS has already obligated all but minor amounts of the capped funds" for the years between 1998 and 2004, "no additional CSC funding can be awarded to Plaintiff for those years"). Although the Secretary cannot disburse funds he does not have or amounts in excess of limitations set by Congress, he still has the obligation to fund indirect CSC to the greatest extent possible inasmuch as the statutory promise is full funding.

The Secretary relies on the negotiated terms and his full payment accordingly and does not seem to appreciate his statutory obligations to fully fund indirect CSC insofar as possible. No information is provided to the Court concerning how the Secretary "follow[ed] as closely as possible the allocation plan Congress designed," *Ramah Navajo Sch. Bd.*, 87 F.3d at 1345, when there were insufficient appropriations to allow full funding. Accordingly, Defendants' Motion to Dismiss will be denied as it relates to 1998 through 2004 CSC funding.

A memorializing order accompanies this Memorandum Opinion.

/s/

ROSEMARY M. COLLYER
United States District Judge

Date: March 14, 2008

ORDER

For the reasons stated in the Memorandum Opinion filed separately and contemporaneously herewith, it is hereby

ORDERED that Defendants' Motion to Dismiss [Dkt. # 6] is GRANTED as it relates to 1995 through 1998 CSC funding; and it is

FURTHER ORDERED that Defendants' Motion to Dismiss [Dkt. # 6] is DENIED as it relates to 1998 through 2004 CSC funding.

SO ORDERED.

/s/

ROSEMARY M. COLLYER
United States District Judge

Date: March 14, 2008

**APPENDIX E**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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2011-1485

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ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
*Appellant*,

v.

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES,
*Appellee*.

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November 9, 2012, Decided

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OPINION

Judges: Before BRYSON, MAYER and REYNA, *Circuit Judges*. Opinion for the court filed by Circuit Judge REYNA. Dissenting opinion filed by Circuit Judge BRYSON.

Opinion by: REYNA

Reyna, *Circuit Judge*.

Arctic Slope Native Association, Ltd., ("ASNA") appeals a decision of the Civilian Board of Contract Appeals ("Board") dismissing ASNA's breach-of-contract claim under the Contract Disputes Act ("CDA") as time-barred. Because the CDA's six-year statute of limitations should have been equitably tolled, we reverse and remand.

I

ASNA is an inter-tribal consortium of seven federally recognized tribes situated across the North Slope of Alaska. In fiscal years 1996, 1997, and 1998, ASNA contracted with the Department of Health and Human Services, Indian Health Service ("IHS") pursuant to the Indian Self-Determination and Education Assistance Act ("ISDA") to operate a hospital in Barrow, Alaska. ISDA, as amended, requires the government to pay tribal contractors' contract support costs,[1] *i.e.*, costs that a federal agency would not have incurred but which the tribes reasonably incur in managing the programs. When the government refused to pay the full contract support costs sought by the tribes, the tribes sued.

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[1] 25 U.S.C. § 450j-1(a)(2): "There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which—(A) normally are not carried on by the respective Secretary in his direct operation of the program; or (B) are provided by the Secretary in support of the contracted program from resources other than those under contract."

25 U.S.C. § 450j-1(a)(3)(A): "The contract support costs that are eligible costs for the purposes of receiving funding under this Act shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of— (i) direct program expenses for the operation of the Federal program that is the subject of the contract, and (ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract, except that such funding shall not duplicate any funding provided under section 106(a)(1) [subsec. (a)(1) of this section]."

A. Legal Landscape

In 1990, the Ramah Navajo Chapter filed a class action in federal district court in New Mexico to recover damages for the underpayment of contract support costs. *See Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999). *Ramah* challenged the government's methodology used to determine the applicable contract support costs. The issue of exhaustion of administrative remedies arose at the outset of the litigation. The government argued that the claims of the class were not typical because while the class representative had exhausted its administrative remedies, there was no showing that other class members had done so. According to the government, "the theory is that the exhaustion of administrative remedies is jurisdictional and that if the remedies have not been exhausted, the Court's action regarding the class would be without jurisdiction." J.A. 137.

In 1993, Judge Hanson of the District Court of New Mexico rejected the Government's exhaustion of administrative remedies argument and certified the class. He explained:

> Plaintiff's action does not concern a typical contract dispute wherein issues of performance need be addressed. If that were the case, the purposes behind exhaustion of administrative remedies would require that the contract claim first be brought to the attention of an agency contracting officer. Instead, Plaintiff's action challenges the policies and practices adopted by the BIA as being contrary to the law and seeks to make systemwide reforms. In such a case as this, exhaustion of administrative remedies is not

> required. In light of the above, it *is not necessary that each member of the proposed class exhaust its administrative remedies under the Contract Disputes Act*. J.A. 319 (emphasis added).[2] ASNA was a class member in *Ramah* and received funds flowing from a partial settlement of that litigation. Like the plaintiffs in *Ramah*, ASNA challenged the agency's practices and procedures concerning payout of support costs.

In the second class action—*Cherokee Nation of Oklahoma v. United States*—the court denied class certification in February 2001 because typicality, commonality, and adequate representation were not met since the contracts differed by tribe. 199 F.R.D. 357, 362 (E.D. Okla. 2001). This action concerned IHS's refusal to pay tribes the full contract support costs because of an alleged lack of available appropriations and the class, as described, would have included contractors, like ASNA, who had not yet presented claims to the contracting officer. Specifically, it sought certification of a class including "all Indian tribes and tribal organizations operating [Indian Health Service] programs . . . authorized by the [ISDA] . . . that were not fully paid their contract support costs needs, as determined by [the Indian Heath Service], at any time between 1988 and the

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[2] On December 6, 2002, prior to the expiration of ASNA's claims in the Zuni litigation with respect to fiscal years 1996, 1997, and 1998, the *Ramah* court entered an order noting that the government would resist class certification on at least one of the new claims and that "decertification of [both claims] is a possibility." *Ramah Navajo Chapter v. Babbitt*, 250 F. Supp. 2d 1303, 1308 (D.N.M. 2002). The same decision also stated that "[a] number of decisions have been announced . . . which are harmful to the Class'[s] claims." *Id*.

present." *Id*. at 360. The court later ruled on the merits, and the merits decision, not the denial of class certification, was appealed to the U.S. Supreme Court, which rendered a decision on March 1, 2005. *See Cherokee Nation v. Leavitt*, 543 U.S. 631, 125 S. Ct. 1172, 161 L. Ed. 2d 66 (2005). In reaching this conclusion, the court did not discuss or rely upon the fact that some tribes had exhausted their remedies while others had not.

A third class action—*Pueblo of Zuni v. United States*—was filed on September 10, 2001, in the District Court of New Mexico and assigned to Judge Hanson, the same judge who had granted class certification in *Ramah*. 467 F. Supp. 2d 1099, 1105 (D.N.M. 2006). The complaint claimed that IHS improperly calculated contract support costs, as alleged in *Ramah*, and failed to pay the full amount owed, as alleged in *Cherokee*. *Zuni* sought to certify a class of "all tribes and tribal organizations contracting with IHS under the ISDA between fiscal years 1993 to the present." *Id*.

In December 2001, before Zuni moved for class certification, the proceedings in *Zuni* were stayed pending the conclusion of the appellate proceedings in *Cherokee*. *Zuni* was then transferred to a different judge. After the stay was lifted, the government moved to dismiss a portion of the claims at issue in *Zuni* because the tribe had not first submitted all of its claims to the contracting officer. The district court granted the motion. *Zuni*, 467 F. Supp. 2d at 1112. The court rejected Zuni's purported reliance upon the 1993 certification order in *Ramah* as justifying its failure to exhaust its administrative remedies, noting that "Plaintiff can hardly be said to rely on the oblique argument that a class certification order in a separate

case allows Plaintiff to forego exhaustion of their claims in this case." *Id*. at 1114.

In May 2007, the district court denied Zuni's motion for class certification because "exhaustion under the CDA is mandatory and jurisdictional" and "the existence of unexhausted claims within the claims of the putative class remains a jurisdictional defect, precluding class certification." *Pueblo of Zuni v. United States*, 243 F.R.D. 436, 442-43 (D.N.M. 2007). According to the district court, "[t]here is no legal basis for a waiver of this requirement for Plaintiff or any putative class member, given the express mandate for presentment with the statutory language." *Id*. The district court also found that "[t]he terms and conditions of the tribal contracts were sufficiently individualized so that the question of whether all tribal contractors were underpaid becomes one of the disputed issues," *id*. at 448, and that "[t]he nature of this kind of case with individualized contracts does not lend itself to class litigation." *Id*. at 446.

B. Procedural History

ASNA contends that it was a putative class member in the foregoing class actions even though it did not individually present its claims in writing to the contracting officer within the CDA's six-year statute of limitations. As will be discussed in more detail below, the Federal Circuit ultimately held that the ISDA was subject to equitable tolling, but not statutory class action tolling, and remanded the case to the Board to determine if the statute of limitations should be equitably tolled as to ASNA. The Board found that ASNA did not satisfy the equitable tolling criteria. Whether the Board erred in that determination is the narrow question presented in this appeal.

On September 30, 2005, after the Supreme Court issued its decision in *Cherokee* and while the *Zuni* class action was pending, ASNA presented its CDA claims to the IHS contracting officer. It is undisputed that, absent equitable tolling, these claims had each expired as of the date of their presentment to the contracting officer.

In its letter to IHS, ASNA argued that IHS failed to meet its contractual and statutory obligations in two ways. First, it failed to pay the full amount of ASNA's contract support costs. Second, it failed to include in the calculation of those costs the full indirect contract support costs by employing the same illegal calculation methodology that was struck down in *Ramah*. ASNA presented arguments to the IHS that were similar to the underpayment arguments it made to the court in *Ramah* and *Zuni*.

On August 21, 2006—almost a year before the district court denied the motion for class certification in *Zuni*—ASNA filed a complaint with the Board, alleging IHS's failure to pay the full contract support costs and to calculate the costs correctly. The Board dismissed ASNA's claims as time-barred, reasoning:

> ASNA's failure to submit its FY 1996 through FY 1998 claims to the awarding official within six years after they accrued, as required by section 605(a) of the CDA deprives this Board of jurisdiction to consider the claims. We cannot suspend the running of the six-year time limit any more than we could suspend the requirements, also found in section 605 that a claim must be submitted to the contracting officer, that a claim must be submitted in writing, and that a claim in excess of $100,000 must be certified. In the

> absence of a claim which meets all the requirements of section 605, we lack jurisdiction to consider an appeal. J.A. 32.

ASNA appealed the Board's decision to the Federal Circuit. We affirmed the Board's decision regarding statutory class action tolling but held that equitable tolling is available for claims brought under § 605(a) of the CDA. We remanded the case to the Board for a determination as to whether equitable tolling applied to ASNA.

On remand, a Majority of the Board found on June 9, 2011 that ASNA had not met the criteria for equitable tolling after reading *Cherokee* as requiring it to treat ASNA as a contractor and the contract as an ordinary procurement contract.[3] In reaching this conclusion, the Board observed that prior to 1994, no statute of limitations applied to the presentment of claims to the contracting officer. Specifically, the six-year statute of limitations took effect in 1994, one year *after* the district court granted class certification in *Ramah*. Second, although the Supreme Court had justified equitable tolling where a defective pleading was involved, the complaint in *Zuni* was not defective. Indeed, the district court did not dismiss the *Zuni* complaint, and class members that had complied with the presentment requirement could continue to litigate the claims set forth therein. The Majority of the Board reasoned that since ASNA did not take the actions required to be considered a purported class member—*i.e.*, timely present its claims to the contracting officer—then equitable tolling did not

[3] It is worth noting that the Majority's interpretation of *Cherokee* was issued almost five years after ASNA filed its claims with the CDA in August 2006.

apply. According to the Majority, ASNA had a responsibility to investigate the applicable legal landscape in pursuing its claims and to make an independent and reasoned decision, rather than relying upon Judge Hanson's court order. The Majority pointed out that ASNA had not established that the conduct of its adversary caused it to miss the statutory deadlines and determined that ASNA's decision could not turn on the presumed litigation position of an opposing party.

The Majority was unconvinced by ASNA's argument that the special relationship between the government and Indian tribes warranted application of equitable tolling. As the Majority explained, "[t]he canon that statutes should be interpreted for the benefit of the tribe does not mean that a statute should be interpreted in a manner divorced from the statute's text and purpose." ASNA App. 11a (citing *U.S. v. Tohono O'odham Nation*, 131 S. Ct. 1723, 179 L. Ed. 2d 723 (2011)). The Majority reasoned that recognition of tribes' special status simply requires construing ambiguous language in their favor, not ignoring the meaning and import of clear statutory language. In distinguishing the veterans' cases relied upon by ASNA for its assertion that equitable tolling was warranted given its special relationship with the government, the Majority noted that ASNA had competent and capable counsel throughout the litigation whereas many veterans proceed *pro se*. ASNA App. 13a.

In her dissent, Judge Steel wrote that the case should be resolved in ASNA's favor given the special relationship between the government and Indian tribes, the canon of construing the ISDA liberally, and the pertinent language of the statute and contracts.

This appeal followed. We have jurisdiction under 28 U.S.C. § 1295(a)(10).

II

Because we have already determined that equitable tolling may apply under § 605 of the CDA, the narrow question presented in this appeal is whether the six-year statute of limitations should have been equitably tolled as to ASNA given the unique circumstances of the case. *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 583 F.3d 785, 798 (Fed. Cir. 2009) ("ASNA I").

A. Standard of Review

Where, as here, the facts are undisputed, a determination of whether the criteria for equitable tolling have been met presents a question of law that we review *de novo*. 41 U.S.C. § 7107(b); *Former Employees of Sonoco Prods. Co. v. Chao*, 372 F.3d 1291, 1295 (Fed. Cir. 2004).

B. ISDA and the CDA

Prior to 1988, the ISDA did not require the government to pay the administrative costs that the tribes incurred to operate the covered programs. *ASNA I*, 583 F.3d at 788. The 1988 amendments to the ISDA required the government, instead of contractors, to provide funds to pay the administrative expenses of covered programs. *Id*. (citing statutory amendments). The ISDA amendments made the CDA applicable to disputes concerning self-determination contracts. 25 U.S.C. § 450m-1(d). As a result, ISDA self-determination contractors can appeal an adverse decision by a contracting officer on contract disputes to the Civilian Board of Contract Appeals, *see* 41 U.S.C. § 606, or to the Court of Federal Claims. *See* 41 U.S.C. § 609(a)(1). In addition, the ISDA permits

contractors to bring claims in district courts, an avenue of relief that is generally unavailable to government contractors under the CDA. *ASNA I*, 583 F.3d at 789 (citing 25 U.S.C. § 450m-1(a)).

In claims between the government and contractors, the federal regulations discussing the CDA defines "claim" as a written demand or assertion by one of the contracting parties seeking the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. 48 C.F.R. § 2.101. While a "claim" need not use particular language to satisfy CDA requirements, the contractor must submit in writing to the contracting officer a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim. *SITCO Gen. Trading and Contracting Co. v. U.S.*, 87 Fed. Cl. 506, 508 (Fed. Cl. 2009) (citing *Contract Cleaning Maint. Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987)). The CDA requires a contractor to present the written claim to the contracting officer within six years of a claim's accrual before bringing suit. 41 U.S.C. § 7103(a). The six-year statute of limitations at issue here was implemented in 1994 when Congress passed the Federal Acquisition Streamlining Act. Prior to 1994, no statute of limitations applied to the presentment of claims to a contracting officer.

C. Equitable Tolling

Equitable tolling hinges upon the particular equities of the facts and circumstances presented in each case. *See ASNA I*, 583 F.3d at 798, 800. It "permits courts to modify a statutory time limit and 'extend equitable relief' when appropriate." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). Equitable tolling applies where the litigant

proves: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 130 S. Ct. 2549, 2553, 177 L. Ed. 2d 130 (2010). The exercise of equity powers must be made on a case-by-case basis, *id*. at 2564, and equitable relief is typically extended only sparingly. *See Cloer v. Sec'y of Health & Human Servs*., 654 F.3d 1322, 1344-45 (Fed. Cir. 2011) (en banc). Equitable tolling does not apply to garden variety claims of excusable neglect, such as an attorney miscalculation leading to a missed deadline. *Holland*, 130 S. Ct. at 2564.

D. Analysis

ASNA argues that equitable tolling should apply because it did not sleep on its rights and it reasonably relied upon the *Zuni* class action as well as its reasonable interpretation of the then-existing legal landscape to conclude that it need not present its claims to the contracting officer or file its own civil suit in order to preserve its claims.

The government counters that ASNA failed to take timely action to diligently pursue its rights and that no extraordinary circumstance prevented it rom doing so. According to the government, ASNA's reliance on *Ramah* was misplaced because the CDA's six-year statute of limitations was not in effect when the district court granted class certification in *Ramah*, and the claims in *Ramah* substantially differed from ASNA's claims. The government argues that it was foreseeable that the *Zuni* class might be denied certification, especially since the proposed class in *Cherokee* (involving claims nearly identical to ASNA's), was not certified, and the district court in *Ramah* inferred that decertification was possible in

light of the new cost claims added to *Ramah* after class certification was granted as to the calculation methodology claim. The government contends that there was no change in the law because the grant of class certification in *Ramah* hinged upon the fact that the case challenged system-wide policies and practices, and therefore, did not concern a typical contract case. The government argues that ASNA was aware of the pertinent legal landscape because ASNA's President "was kept informed of general litigation activities concerning contract support costs, including activities in ongoing class action lawsuits." J.A. 436.

We agree with ASNA that equitable tolling should apply and remand to the Board for proceedings consistent with this opinion.[4] There is no dispute that ASNA relied on the *Ramah*, *Cherokee*, and *Zuni* litigation in deciding that it was not required to present its claims to the contracting officer within the six-year limitations period. The critical questions are whether ASNA pursued its rights diligently even though it did not present and whether its reliance on the then-existing legal landscape in deciding not to present constituted an "extraordinary circumstance" sufficient to warrant equitable tolling of the filing deadline.

Here, the *Zuni* complaint was filed on behalf of "all tribes and tribal organizations contracting with IHS under the ISDA between fiscal years 1993 to the present." The parties agree that ASNA was such a

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[4] We are not bound by and therefore decline to follow the reasoning recently employed by a district court in a similar case. *See Menominee Indian Tribe of Wis. v. United States*, 841 F. Supp. 2d 99, 2012 U.S. Dist. LEXIS 8108 (D.D.C. Jan. 24, 2012) (refusing to [**19] apply equitable tolling).

tribe and had contracted with the ISDA during that period. The *Zuni* complaint sought damages for contract support underpayments and defective cost calculation methodology—the same claims ASNA wished to assert. The class certification description did not mention exhaustion of administrative remedies. *Zuni* was assigned to the same judge in the same district court that had certified a similar class in *Ramah* in 1993 involving the same issues and held that class members did not have to satisfy exhaustion requirements to participate in the class.

ASNA's President was aware that "ASNA's claims had already succeeded in *Ramah* without ASNA filing its own claims." J.A. 437. As he explained, "[s]ince the *Zuni* case covered all of ASNA's claims, I concluded that the most efficient course of action was to remain in the *Zuni* case, just as ASNA has remained in the *Ramah* case, because ASNA's claims had already succeeded in *Ramah* without ASNA filing its own claims, and because filing our own claims could apparently remove ASNA from the new *Zuni* class."[5] *Id*. Monitoring and reasonably interpreting applicable legal proceedings, judicial order and opinions, and taking action as necessary does not constitute sleeping on one's rights, particularly in the class action context where parties who believe they are putative class members often remain passive during the early

[5] ASNA appears to have alleged that the government implied that ASNA's exhaustion of its administrative remedies might have imperiled its chances of being a class member. In any event, ASNA appears to have conceded at oral argument that it did not rely upon this argument on appeal, and we do not rely upon it in reaching our decision. Oral Argument, *available at* http://www.cafc.uscourts.gov/oral-argument-recordings/ 2012-05-07/all.

stages of the litigation allowing the named class representatives to press their claims.

ASNA participated in the *Ramah* and *Zuni* litigations, including taking action to receive its share of settlement proceeds from *Ramah*. Once the *Zuni* stay was lifted in 2005, the government indicated that it would challenge the holding in *Ramah* that presentment was unnecessary to be a class member. In response, ASNA swiftly and diligently presented its claims to the contracting officer in September 2005—without waiting for a court ruling on the presentment issue. ASNA took further precautionary steps when it filed a complaint with the Board in 2006. Only after the case was transferred to a different judge in 2007 did the district court explicitly exclude non-presenters like ASNA from the putative class.

Although the District Court of Oklahoma had denied class certification in *Cherokee* as of February 2001, that decision was not controlling upon the District Court of New Mexico where *Zuni* was pending. The only controlling, on-point authority on that court at that time (2007) was *Ramah*, in which the same judge had explicitly held that a putative class member need not exhaust its administrative remedies to be a member of the class.[6] The facts and circumstances on which Judge Hanson based his order were similar, if not identical to, the operative facts and circumstances on which the *Zuni* complaint was based. We hold that given the existence of the unambiguous court order

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[6] Although not dispositive, we note that some circuits have equitably tolled a statute of limitations when a party detrimentally relied on ambiguity in law or controlling precedent that was later resolved against the party or overturned. *See*, *e.g.*, *York v. Galetka*, 314 F.3d 522, 525 (10th Cir. 2003); *Harris v. Carter*, 515 F.3d 1051, 1056-57 (9th Cir. 2008).

that specifically addressed the exhaustion of remedies issue and the fact that ASNA diligently pursued its rights by monitoring the relevant legal landscape, ASNA took reasonable, diligent, and appropriate action as the legal landscape evolved.

This result is not fundamentally unfair to the government because filing of the *Zuni* complaint put IHS on notice of the exact nature and scope of ASNA's claims. "Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983). Having adequate notice, the government was aware of its need to preserve evidence. This is especially true where, as here, the evidence consists of documents in the administrative record, and there are few, if any, concerns about fading witness memory.

The Supreme Court and Congress have repeatedly recognized the special relationship between the government and Indian tribes. *E.g.*, *United States v. Mitchell*, 463 U.S. 206, 225, 103 S. Ct. 2961, 77 L. Ed. 2d 580 (1983); 25 U.S.C. § 450a(b) (reaffirming the federal government's "unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole"). Consequently, we must judge the government's conduct with the Indian tribes by "the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297, 62 S. Ct. 1049, 86 L. Ed. 1480, 96 Ct. Cl. 561 (1942). This special relationship is especially crucial under the ISDA, which Congress passed to facilitate and promote economic growth and development amongst the Indian tribes. *See generally* S. Rep. No. 100-274, at 4-7 (1987) (detailing federal

policies encouraging Indian self-determination and tribal economic development). The Select Committee on Indian Affairs recognized that self-determination contracts supporting local government services on Indian lands were "essential to the success of Indian economic development efforts." *Id*. at 7. Although not dispositive, the existence of the special relationship between the government and Indian tribes supports our holding.

In sum, the previous class actions involved similar issues and parties, and put the government on notice of the general nature and legal theory underlying ASNA's claims. ASNA pursued its rights by monitoring the legal landscape and taking action as appropriate. ASNA reasonably relied upon controlling authority, which held that it did not need to exhaust administrative remedies to be a class member. Our conclusion that equitable tolling applies is informed by these unique facts and extraordinary circumstances, taken together with the obligations flowing from the special relationship between the government and Indian tribes. For the foregoing reasons, we reverse and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED

Costs

No costs.

Dissent by: BRYSON

Dissent

Bryson, *Circuit Judge*, dissenting.

The question before us boils down to whether the Arctic Slope Native Association ("ASNA") was diligent in pursuing its breach of contract claim. The majority believes that it was; I believe that it was not.

I

The Supreme Court has held that a litigant seeking equitable tolling "is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 130 S. Ct. 2549, 2562, 177 L. Ed. 2d 130 (2010), citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005). The Court has allowed equitable tolling "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 & n.3 (1990). Neither of those conditions is present here. ASNA does not suggest that its failure to present its claims on a timely basis was the result of government misconduct, and this case does not involve the filing of a defective pleading, such as a pleading filed in the wrong court. *E.g.*, *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965); *Herb v. Pitcairn*, 325 U.S. 77, 65 S. Ct. 954, 89 L. Ed. 1483 (1945). Moreover, although the Supreme Court in *Irwin* cited *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974), as

an example of a case in which the timely filing of a defective class action tolled the limitations period as to individual claims of purported class members, *see* 498 U.S. at 96 n.3, it has already been determined that class action tolling is unavailable to ASNA. In *Arctic Slope Native Ass'n v. Secretary of Health & Human Services*, 583 F.3d 785, 795 (Fed. Cir. 2009) ("*Arctic Slope I*"), we rejected ASNA's claim that it is entitled to class action tolling based on its expectation that it would be a class member in the *Zuni* litigation, so that avenue of relief is closed.

II

In my view, ASNA did not exercise reasonable diligence to protect its rights. ASNA could have, and should have, presented its claims to the contracting officer within six years of their accrual, for two reasons. First, although ASNA claims that it relied on the class certification in the *Ramah* litigation, ASNA had two indications, prior to the expiration of the six-year limitations period, that certification of the class in *Ramah* may have been unusual: (1) the *Ramah* court itself suggested, as the case evolved and certain claims were added (namely, claims alleging that the tribes' full contract support costs should be paid), that the continued appropriateness of a class action was questionable, and (2) the district court in the *Cherokee* case denied class certification on claims essentially identical to those presented in *Zuni*. Second, it would have been very easy for ASNA simply to present its claims to a contracting officer and comply with the statutory presentment requirement.

The indications that the *Ramah* certification may have been questionable would have led a reasonably diligent party to file its claims with the contracting officer before they expired. Approximately a decade

after the *Ramah* complaint was filed, the *Ramah* plaintiffs added new claims similar to those in the *Cherokee* and *Zuni* cases. On December 6, 2002, the *Ramah* court entered an order noting that the government would resist class certification on at least one of the new claims and that "decertification of [both claims] is a possibility." *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303, 1308 (D.N.M. 2002). And in *Cherokee*, which involved claims essentially the same as those presented in *Zuni*, the district court denied class certification in February 2001, prior to the expiration of ASNA's claims. Although the court in that case denied certification because individual questions predominated over class questions, the court noted that the government had argued that certification was inappropriate because the proposed class "fail[ed] to exclude putative class members whose claims in this case are barred by the six-year general statute of limitations." *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357, 362 (E.D. Okla. 2001).

ASNA nevertheless claims that "[t]he undisputed evidence is that ASNA was 'surprised' to learn that the government [in 2005 after the Supreme Court's decision in *Cherokee Nation v. Leavitt*, 543 U.S. 631, 125 S. Ct. 1172, 161 L. Ed. 2d 66 (2005)] was insisting that every tribal contractor had to have individually presented its own claims." ASNA claims it was surprised "because in *Ramah* [the district judge] had already ruled to the contrary, and because, based on that ruling, over $100 million dollars had already been paid to *Ramah* class members like ASNA who had never presented their claims." Even if ASNA truly was surprised, the surprise can be attributed to—at best—negligence, which is "not a basis for equitable tolling." *See Holland*, 130 S. Ct. at 2573. ASNA was or should have been aware of the statute requiring exhaustion

within six years. ASNA was or should have been aware of the government's position that claimants who had failed to exhaust were not eligible to be members of the classes in *Ramah* and *Cherokee*. Finally, ASNA was or should have been aware of the indications in both *Ramah* and *Cherokee* that the class in *Zuni* might not be certified.

The fact that the district judge in *Ramah* had previously held that presentment was not necessary in that case does not save ASNA here. *Ramah* was a different case and, at the time of the decision on which ASNA relies, that case did not involve claims similar to those presented by the plaintiffs in *Cherokee* and *Zuni*. Additionally, after the judge certified the class in *Ramah*, the six-year limitations period was added to the statutory exhaustion requirement. Thus, in addition to the fact that *Ramah* was a different case with different claims, the judge in *Ramah* was operating under a different statutory framework at the time class certification was granted than was the judge who denied class certification in *Zuni*. Accordingly, a reasonably diligent party would have inferred that *Zuni* was not likely to proceed in the same manner as *Ramah*.

The diligence issue is also influenced by the fact that very little effort would have been required for ASNA to present its claims to the contracting officer. In *Arctic Slope I*, this court noted that the claim letter submissions to the contracting officer "need not be elaborate." 583 F.3d at 797. The letters in the record consist of approximately two typewritten, single-spaced pages for each fiscal year. The letters for each year appear to be identical except for the amount of the claimed damages. It seems reasonable to assume that anyone familiar with the situation could have

prepared the letters with minimal expenditure of time and effort. The damages figure itself appears to be the only element of the letters that required any effort to derive. However, ASNA presumably would have had to present the damages figures to the district court in *Zuni* had its case proceeded there, so there was no added burden on ASNA in having to obtain those figures. Accordingly, a prudent course would have been for ASNA to prepare and submit the letters prior to the expiration of its claims, even if it believed its participation in the *Zuni* class might ultimately make the letters unnecessary. ASNA knew or should have known that the statute required exhaustion, and ASNA knew or should have known that the government was seeking to enforce the statute. With that knowledge, a reasonably diligent party would have prepared and presented the letters prior to the expiration of the six-year period.

Even if ASNA's conduct were regarded as satisfying the diligent pursuit of rights prong of *Holland*, nothing in ASNA's presentation suggests that this case satisfies Holland's second prong, which requires that in addition to demonstrating diligence, the party claiming equitable tolling against the government must show that "some extraordinary circumstance stood in his way and prevented timely filing." Nor has the majority pointed to any facts that would suffice to meet that exacting standard.[1]

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[1] The United States District Court for the District of Columbia has agreed that equitable tolling is unavailable to a party in essentially the same position as ASNA. *Menominee Indian Tribe v. United States*, 841 F. Supp. 2d 99 (D.D.C. 2012). While that decision is, of course, not binding on us, it contains a detailed analysis of the Supreme Court's *Irwin* and *Holland* decisions and,

ASNA's other arguments for applying equitable tolling are not convincing. First, ASNA contends that the government is not likely to be prejudiced by its failure to file its claims on a timely basis, but even assuming that to be the case, the absence of prejudice does not trigger the right to equitable tolling. *See Baldwin Cnty. Welcome Center v. Brown*, 466 U.S. 147, 152, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984) ("Although absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures."). Second, ASNA argues that equitable tolling is warranted because Indian tribes are disadvantaged and protected plaintiffs. This court, however, has specifically rejected that argument, noting that "statutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress or relief from the government." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576 (Fed. Cir. 1988).

In sum, I believe that a reasonably diligent party in ASNA's position would have presented its claims to a contracting officer before the six-year limitations period expired. Moreover, in this case there were no "extraordinary circumstances [that] stood in [ASNA's] way and prevented timely filing." *Holland*, 130 S. Ct. at 2562. I would therefore affirm the decision of the Board holding ASNA's claims to be time-barred.

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as the only precedent dealing with the precise issue before us, is entitled to careful consideration.

**APPENDIX F**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Case No. 1:07cv00812

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MENOMINEE INDIAN TRIBE OF WISCONSIN,

*Plaintiff*,

v.

UNITED STATES OF AMERICA, KATHLEEN SEBELIUS, Secretary of the Department of Health & Human Services, and YVETTE ROUBIDEAUX, Director of the Indian Health Service,

*Defendants.*

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Hon. Rosemary M. Collyer

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DECLARATION OF JERRY WAKAU

1. My name is Jerry Wakau, and I am the Administrator of the Health Department of the Menominee Indian Tribe of Wisconsin ("Tribe"). I have been employed with Tribe since 1985. For over 26 years one of my duties has been to participate annually on behalf of Tribe in negotiations with the Indian Health Service ("IHS") over the terms of Contracts and Annual Funding Agreements ("AFAs") under the Indian Self-Determination and Education Assistance Act ("ISDA").

2. I have been asked to describe (1) the Tribe's experiences with the contract support cost class action lawsuits over the years, and (2) how funds are

provided by IHS for contract support costs over each funding year.

The Contract Support Cost Class Actions

3. Since the early 1990s, I have been aware, as have others in the Tribal Government, of the contract support cost class action lawsuit brought by the Ramah Navajo Chapter. We received periodic updates on the case from class counsel and other sources. We understood that, as an ISDA contractor with the Bureau of Indian Affairs ("BIA"), the Tribe was a member of the Ramah class.

4. The Tribe received notice of the New Mexico District Court's ruling in 1993 that the Ramah class was approved and that the case could proceed as a class action. We understood that the court's ruling meant the Tribe did not have to file its own claims to participate in the class. Therefore, the Tribe did not file any contract support cost claims against BIA.

5. The Tribe received notice in 1999 of a partial settlement of the Ramah case for $76 million, and another notice in 2002 of a second partial settlement for $29 million. The Tribe received substantial payments from each of the two partial settlements in the Ramah case.

6. I was also aware, as were others in the Tribe's government, of the parallel contract support cost class action litigation against IHS brought by the Cherokee Nation in 1999. We received notice of the filing of the case in 1999, and periodic updates from class counsel. It was our understanding that the Cherokee class action was nearly identical to the Ramah case except for the agency against which it was brought.

7. Our understanding was that the class included all ISDA contractors with IHS from 1988 to the present, and that as a contractor with IHS during this period, the Tribe was a member of that class. Based on our experience as a member of the Ramah class, the Tribe did not file individual claims against IHS. We assumed that it would work the same way. Our expectation was that the Cherokee class, like the Ramah class, would be approved and the Tribe's claims would be resolved as part of any judgment against or settlement with IHS.

8. In 2001, we learned that the court had denied the Cherokee motion for class certification. Later we learned that the decision was not appealed and that there would be no Cherokee class. At that point, the Tribe considered whether to file individual claims. Our understanding was that the case law was not clear on whether tribal contract support cost claims were valid. There were many meetings concerning contract support and from what we learned, most courts had ruled against such claims. The Tribe has limited resources and it has to very carefully weigh whether it will bring a case against the United States. We also assumed that even if we did file a claim, the contracting officer would deny it since the cases said there was no such claim. Once the Federal Circuit ruled for the Cherokees, we were even more uncertain as to what to do. We knew we had six years to file and with the Cherokee class action we had a little more time. So we waited to see what the Supreme Court would do.

9. In March 2005, after the Supreme Court decided the Cherokee case in favor of tribal contractors, the Tribe had confirmation that its claims

were viable. The Tribe filed its claims as soon as it could on September 7, 2005.

Contract Support Cost Payment Process

10. I have also been asked to describe how funds are provided by IHS for contract support costs over the AFA funding year. Specifically, I have been asked if the Tribe engages in separate negotiations with IHS to add contract support costs funds to the AFA after the parties negotiate the initial amount that is identified in the AFA.

11. Generally, when we sit down to negotiate with IHS, the 1HS tells us that we can only identify in the AFA an amount for contract support costs that is consistent with what the IHS paid the previous year and that is consistent with the amount of funds the IHS believes it will have available to pay. This amount is always less than the amount that is calculated by application of the indirect cost rate to the base, the methodology the IHS's policy uses to calculate the total amount of contract support costs that Tribe is entitled to be paid under the ISDA in a given year.

12. Each year it is understood by both parties that if more funds become available, IHS will pay those additional funds to the Tribe through the AFA without the parties needing to negotiate an amendment that reflects the increased amount. The fact is that the IHS has never paid us the entire amount calculated by application of the indirect cost rate to the base because they have told us that they are chronically short of funds and that Congress has not appropriated sufficient funds for them to pay us with. So far as I am aware, the Tribe has never engaged in separate negotiations for additional contract support cost funds to be added to the AFAs.

13. In every year from 1995 through 2000, I believe that the Tribe had in place indirect cost rate agreements with the Federal Government that were used to calculate and identify the full amount of contract support costs that the Tribe was entitled to be paid under the ISDA and our AFAs with the IHS. in each of those years, the Tribe suffered indirect cost shortfalls that had to be made up by using program funds or tribal funds, resulting in either a reduction in health care service or a tribal subsidy of federal health programs. Based on the Tribe's records and calculations, the shortfalls are as set forth in paragraph 25 of the Complaint.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 31 day of May, 2011.

By Jerry Wakau
Jerry Wakau
*Health Administrator*
Menominee Indian Tribe of Wisconsin