NO DATE HAS BEEN SET FOR ORAL ARGUMENT

No. 12-5217

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MENOMINEE INDIAN TRIBE,
Appellant,

v.

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

On Appeal From The United States District Court For The District Of Columbia

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August 30, 2013

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties: All parties appearing in the district court and this appeal are listed in the brief for Menominee Indian Tribe of Wisconsin (Tribe).

B. Rulings Under Review: References to the rulings at issue appear in the brief for the Tribe. However, we note that the trial court's May 1, 2012, order dismissing the case provided that the case would be dismissed with prejudice in 45 days without further order if the parties failed to file a motion to reopen the case within that period. Because the parties did not file a motion to reopen the case, the case stands dismissed with prejudice.

C. Related Cases: This case was previously before this Court in *Menominee Indian Tribe of Wisconsin v. United States*, 614 F.3d 519 (D.C. Cir. 2010) (No. 09-5005). We are aware of four cases pending in courts with issues similar to those presented here, namely whether the statute of limitations in the Contract Disputes Act should be equitably tolled for tribes submitting claims for contract support costs: *Seminole Tribe of Fl. v. United States*, D.D.C. No. 1:13-cv-00425-RC; *Confederated Tribes of the Colville Reservation v. Sebelius et al.*, D. Or. No. 3:11-cv-1166-MO; *Nez Perce Tribe v. United States*, Court of Federal Claims No. 09-231; and *Bristol Bay Area Health Corporation v. United States*, Court of Federal Claims No. 07-725C.

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GLOSSARY

A	Appendix
ASNA	Arctic Slope Native Association
CDA	Contract Disputes Act
CSC	Contract Support Costs
HHS	United States Department of Health and Human Services
IHS	Indian Health Service
ISDA	Indian Self-Determination and Education Assistance Act
Interior	United States Department of the Interior
Tribe	Menominee Indian Tribe

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On Appeal From The United States District Court For The District Of Columbia

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INITIAL BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT

Appellees, the United States, the Department of Health and Human Services (HHS), and the Indian Health Service (IHS), have identified no basis to challenge the Court's jurisdiction to review the district court's opinion dated January 24, 2012, or its order dismissing the case on May 1, 2012, which are the subject of this appeal.

COUNTER-STATEMENT OF THE ISSUES

1. Whether the district court correctly held that the circumstances of this case do not warrant equitable tolling because the Menominee Indian Tribe failed to demonstrate that it had diligently pursued its claims and that extraordinary circumstances stood in its way and prevented timely filing.

2. Whether the Tribe's claim for 1996 is time barred even if the presentment deadline were tolled during the time period in 1999 – 2001 in which the proposed class action filed by the Cherokee Nation was pending.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in appellant's brief.

STATEMENT OF THE CASE

This case is one of several cases or pending claims involving tribal contracts under the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. § 450 *et seq.* ISDA requires that the Secretaries of Interior and HHS enter into self-determination contracts with Indian tribes in which the tribes agree to provide services, such as health services, that otherwise would have been provided by the Government. As originally enacted, the funding authorized under the ISDA was limited to the "Secretarial," or "106(a)(1)," amount, which is the amount the relevant Secretary would have spent in its direct operation of the program. 25 U.S.C. § 450j-1(a)(1). The Secretarial amount covers all costs that

are common to both the Government's and a Tribe's administration of the contracted program, including costs that may be categorized as "direct" or "indirect" costs. *See, e.g.*, *Arctic Slope Native Ass'n v. Sebelius*, 629 F.3d 1296, 1298-99 (Fed. Cir. 2010) (explaining that indirect costs are funded through the Secretarial amount), *rev'd on other grounds*, 133 S. Ct. 22 (2012)).

In 1988, Congress amended ISDA to require that the relevant Secretary pay "an additional amount" for "contract support costs" (CSC) under such contracts, and defined CSC as the costs of activities that the tribal contractor must carry on to ensure contract compliance that are not already funded through the Secretarial amount. 25 U.S.C. 450j-l(a)(2). However, the amounts that Congress appropriated were insufficient to pay all CSC owed under all ISDA contracts. *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2187 (2012). In *Ramah*, the Supreme Court held that the Government must pay any unpaid CSC that is owed to tribes even though Congress had not appropriated enough funds to pay all such costs (other than in the general judgment-fund appropriation).

The Menominee Indian Tribe (Tribe) contends that it is entitled to additional CSC incurred in connection with its performance of self-determination contracts with IHS from 1996-2000. More specifically, the Tribe asserts a "shortfall" claim for the contract in place for each calendar year from 1996 through 1998. In the shortfall claim, the Tribe contends that IHS provided it a lower amount for CSC

than it contends it needed during those years. The Tribe also asserts a "stable funding" claim for 1999 and 2000, that is, that it was entitled to a level of CSC funding in 1999-2000 that was at least as high as that paid by IHS in 1998.

The issue in this appeal, however, is not the merits of the Tribe's claims but rather the statutory requirement that a contractor asserting a contract claim, including a claim for CSC owed under an ISDA contract, timely submit its claim to a contracting officer. The Contract Disputes Act (CDA), 41 U.S.C. § 601 *et seq*. (2006) (now 41 U.S.C. § 7101 *et seq.*), specifies the process for resolving Government contracting disputes. The CDA specified that "[a]ll claims" (now "[e]ach claim") by a contractor against the Government "shall be submitted to the contracting officer for a decision." § 605(a) (now § 7103(a)(1)). Since 1994, the CDA has also required that "[e]ach [such] claim shall be submitted within six years after the accrual of the claim." *Id.* (now § 7103(a)(4)(A)). The contracting officer's decision is "final and conclusive" unless a timely administrative appeal or court action is commenced. § 605(b) (now § 7103 (g)).

The Tribe submitted certified claims to the IHS contracting officer for each year from 1995-2004 on September 7, 2005. Appendix (A) _ (Complaint ¶ 8). The contracting officer denied the claims by written decision dated April 28, 2006. *Id.* at ¶ 9. The Tribe then filed suit in the District Court for the District of Columbia on May 3, 2007.

The district court initially dismissed the Tribe's 1996-98 claims for lack of subject matter jurisdiction because the Tribe had not submitted these claims within the presentment deadline and rejected the Tribe's tolling arguments. *Menominee Indian Tribe of Wisc. v. United States*, 539 F. Supp. 2d 152 (D.D.C. 2008) (*Menominee I*). On appeal, this Court reversed. *Menominee Indian Tribe of Wisc. v. United States*, 614 F.3d 519 (D.C. Cir. 2010) (*Menominee II*). The Court held that the CDA presentment deadline was not jurisdictional and, therefore, was subject to tolling. However, the Court held that dismissal would be proper for failure to state a claim unless the limitations period could be tolled. *Id.* at 526.

The Court distinguished between the time period to submit a claim, which it held was not jurisdictional, and the requirement to submit a claim prior to appealing to a board of contract appeals or filing suit, which is jurisdictional. *Id.* at 526-27 & n.3 (citations omitted). The Court held that the presentment deadline was not tolled for asserted class members who, because of their failure to submit a claim, were ineligible to participate in the class action. *Id.* at 527. Accordingly, the Court rejected the Tribe's contention that class-action tolling was appropriate. *Id.*

With respect to equitable tolling, the Court held only that the presentment deadline was subject to equitable tolling. *Id.* at 530-31. Because the parties

disputed relevant facts, the Court remanded to the district court to determine whether the facts supported the application of equitable tolling.

On remand, the district court held that the Tribe had submitted its 1996-98 claims after the presentment deadline had passed and that the facts did not warrant equitable tolling because the Tribe had not demonstrated either that it had diligently pursued its claims, or that an extraordinary circumstance stood in its way and prevented timely filing. *Menominee Indian Tribe v. United States*, 841 F. Supp. 2d 99, 107-09 (D. D.C. 2012) (*Menominee III*). In addition, the district court held that, even if the presentment deadline were tolled during the period advocated by the Tribe, its 1996 claim still had not been submitted to the contracting officer within six years of accrual. *Id.* at 109-110. The district court further held that the Tribe's claims for 1999 and 2000 were barred by the law of the case doctrine because the court had previously held that these claims were subject to the presentment deadline for 1997 and the Tribe had failed to challenge that ruling in its first appeal. *Id.* at 110-111.

STATEMENT OF THE FACTS

As the Tribe states in its brief, there has been extensive litigation between the Government and various Indian tribes for more than two decades concerning CSC. Two other cases are relevant to understanding the Tribe's equitable tolling claim:

1. *Ramah:* In 1990, tribal plaintiffs filed suit in the District Court for the District of New Mexico against the Secretary of Interior (Interior) seeking unpaid indirect costs under ISDA contracts. When the plaintiffs moved for class certification in 1993, the Government (unsuccessfully) opposed certification on the ground that a class could not be certified unless each class member had presented its contract claims to a contracting officer. *See Menominee III*, 841 F. Supp. 2d at 108. Later in 1993 -- but before Congress's 1994 CDA amendment imposing a six-year claim-presentment period -- the district court certified a nationwide class of all tribes with ISDA contracts with Interior. *See Arctic Slope Native Assoc. v. Sebelius*, 699 F.3d 1289, 1291 (Fed. Cir. 2012) (*ASNA II*). In 1999, the district court approved a partial settlement of certain claims from 1989-93 regarding Interior's calculation of certain indirect costs. *Ramah Navajo Chapter v. Norton*, 50 F. Supp. 2d 1091 (D.N.M. 1999).

Thereafter, the plaintiffs in *Ramah* added a shortfall claim similar to that asserted by the Tribe in this case, that is, a claim that the tribes were owed more indirect and direct CSC than was paid by Interior. *See Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303, 1305 (D.N.M. 2002). In 2002, the court approved a second partial settlement. The 2002 settlement, among other things, settled the class CSC claims for certain fiscal years "before Congress limited the appropriations for contract support costs" with the passage of appropriations caps

in subsequent years. *Id.* at 1306. The court's reasons for approving the settlement included:

> c. Class certification of the [direct contract support costs] claims would be resisted by the government; and
>
> d. Decertification of the Shortfall claim is a possibility as is the possibility that the [direct contract support costs] might not be certified as a class claim.
>
> e. There now exists a significant body of case law adverse to the position of the Class on these claims.

Id. at 1308.

2. *Cherokee*: On March 5, 1999, tribal plaintiffs filed suit in the District Court for the Eastern District of Oklahoma against HHS for CSC under their ISDA contracts with IHS. The plaintiffs moved to certify a class of "[a]ll Indian tribes and tribal organizations operating IHS programs under [ISDA] contracts . . . that did not receive full contract support costs funding from 1988 to the present." *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357, 360 (E.D. Okla. 2001).

On February 9, 2001, the district court denied class certification because the plaintiffs had failed to meet their burden under Rule 23(a) of the Federal Rules of Civil Procedure of demonstrating that the proposed class met the requirements for commonality, typicality, and adequate representation. *Id.* at 366. The court did not base its decision on the requirement that each contractor present its claim to a contracting officer within six years of accrual, *id.* at 363-366, but it noted without

resolving the Government's argument that the class should not be certified because "plaintiffs fail[ed] to exclude putative class members whose claims in this case are barred by the six-year general statute of limitations," *id.* at 362. The court also rejected the plaintiffs' contention that the district court's certification of the *Ramah Navajo* class provided precedent supporting class certification because the district court in that case had failed to consider the requirements of Rule 23. *Cherokee Nation*, 199 F.R.D. at 366, n.1. The action proceeded with the named plaintiffs and eventually led to the Supreme Court's decision in *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005).

The Tribe's Claims Submission

After the denial of class certification in *Cherokee*, the Tribe did not act promptly to submit claims. Rather, it waited nearly 55 months before it submitted its claims. *See* A_ (Complaint ¶ 8). In considering whether the case warranted equitable tolling, the district court provided the Tribe, which was represented by sophisticated counsel, with the opportunity to present evidence and testimony in support of its decision to wait until September 2005 to submit claims.

The Tribe submitted a declaration from Jerry Wakau, Administrator of the Health Department of the Menominee Indian Tribe of Wisconsin. A_. (Wakau Declaration). Mr. Wakau testified that the Tribe had been a member of the *Ramah* class and did not submit claims in that case. A_ at ¶ 4. After the Tribe learned of

the filing of the proposed *Cherokee* class action, the Tribe "assumed that it would work the same way," and expected that the class would be certified and its claims would be paid as part of any settlement or judgment in that case without having to submit claims. *Id.* at ¶ 7. Mr. Wakau's declaration does not contain any testimony that explains why the Tribe had not submitted claims for its 1996 or 1997 contracts by the time *Cherokee* was filed in March 1999.

With respect to the Tribe's actions from 2001-05, Mr. Wakau's declaration contains two paragraphs of testimony.[1] Mr. Wakau testified that "[i]n 2001" the Tribe learned that the district court had denied class certification in *Cherokee* and "[l]ater" learned that decision had not been appealed. A_ at ¶ 8. He testified that the Tribe considered whether to submit claims but it understood that "the case law was not clear on whether tribal contract support costs claims were valid." *Id.* He testified that "[t]here were many meetings concerning contract support and from what we learned, most courts had ruled against such claims." *Id.* Mr. Wakau testified that "[o]nce the Federal Circuit ruled for the Cherokees, we were even more uncertain as to what to do." *Id.*; *see Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075 (Fed. Cir. 2003). The Tribe decided to "wait[] to see

[1] Because the parties did not conduct discovery, Mr. Wakau's declaration is the only evidence available to explain why the Tribe delayed in submitting its claims. There was no discovery to explore whether, for example, anyone advised the Tribe to consider submitting its claims sooner to ensure that it met the CDA's presentment deadline, such as after class certification was denied in the *Cherokee* action.

what the Supreme Court would do." *Id.* When the Supreme Court ruled in favor of the *Cherokee* plaintiffs in March 2005, the Tribe "had confirmation that its claims were viable" and determined to submit claims to the contracting officer. *Id.* at ¶ 9.

The Alleged CSC Underpayments To The Tribe

At pages 7-8 of its brief, the Tribe contends that "in every one of the claim years, the IHS severely underpaid the vast majority of tribal contractors, including the Menominee Tribe, a fact documented in the agency's annual CSC 'shortfall reports.'" In fact, the district court never reached the issue of whether the Tribe was underpaid in the years in dispute (1996-98) and the Government contests the amounts claimed by the Tribe. IHS disputes the Tribe's position, including its reliance on the shortfall reports in support of its contention that tribal contractors were systematically underpaid. To that end, IHS submitted evidence to the district court that showed that the "shortfall reports" identified only the difference between CSC estimates at the time the reports were generated (and that the tribes now claim are the amounts that they needed) and the amount that Congress appropriated. The "shortfall reports" do not identify amounts owed under any contract because, among other things, the amounts in these reports were calculated using unaudited costs and often contained outdated information such as expired indirect cost rates. IHS never considered the shortfall data as an amount that the Government owed to

the tribes. A_ (Declaration of William Fisher, ¶¶ 30-32, Dkt 35-7). Accordingly, nothing in the record provides a basis for the Court to conclude that the Tribe is owed any money, even if the Tribe had presented timely claims.

SUMMARY OF THE ARGUMENT

Pursuant to *Holland v. Florida,* 130 S. Ct. 2549, 2562 (2010), the party seeking equitable tolling must demonstrate: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. The district court in this case correctly held that the Tribe failed to meet either prong of this test because: 1) Menominee cannot point to any affirmative act it took in over six years to pursue its claim diligently; 2) submitting an administrative claim is a relatively simple process; 3) there was no affirmative misconduct on the part of the Government; and 4) the Tribe does not present any additional facts from which the Court could find equitable tolling aside from those found insufficient to support class action tolling. Accordingly, this case does not warrant the "rare remedy" of equitable tolling. *See Wallace v. Kato,* 549 U.S. 384, 396 (2007).

The purposes of the equitable tolling doctrine would not be served by extending it to the Tribe, just as the Court rejected the Tribe's class action tolling claim because the purposes of class action tolling would not be served by extending it to a contractor that was not eligible for class membership. *See*

Menominee II, 614 F.3d at 526-27. In narrow circumstances not present here, the equitable tolling doctrine allows a court to use its discretion to relieve a litigant of some of the harshness of a statute of limitations during a period of time in which it diligently attempted to act or was prevented from taking action. The equitable tolling doctrine would not be served by extending it to those, like Menominee, who simply chose not to act or whose strategy decisions backfired.

The Tribe cannot meet the first prong of the *Holland* test because it cannot point to a single affirmative step that it took within the six-year claim presentment period to submit a claim. Any reasonably diligent Government contractor would have known that it could not simply ignore the presentment deadline and hope that it would be excused. Indeed, more than 30 years of precedent dating back nearly to the enactment of the CDA in 1978 holds that a contractor must have submitted a claim to the contracting officer for a court to possess jurisdiction to consider a lawsuit challenging the contracting officer's denial (or deemed denial) of that claim. *See Menominee II*, 614 F.3d at 527, n.3. The Tribe's decision to wait periods of time ranging from about two months to more than two years after the performance of the 1996-98 contracts at issue, then to wait about 23 months while the district court considered class certification in *Cherokee*, and then to wait 55 more months after that court denied class certification was not diligence; it was

negligent to not take the simple step of submitting a claim to the contracting officer.

The Tribe's brief virtually ignores the second prong of the *Holland* test that requires it to identify some extraordinary circumstance that "stood" in its way and prevented timely filing. Nor could the Tribe have made any such contention because, as the Wakau declaration demonstrates, the Tribe voluntarily accepted the risk of not submitting a claim by deciding to wait for the results of cases filed by others.

The tribe relies heavily upon the district court's class certification in *Ramah* and its assumption that the *Cherokee* district court also would certify a class without regard to whether putative class members had submitted claims. However, the *Ramah* court certified that class before the CDA contained a presentment deadline. The Tribe took the risk of relying on a single non-precedential district court decision that is contrary to the long line of Federal Circuit precedent holding that claim presentment is a prerequisite to jurisdiction. *Menominee II*, 614 F.3d at 527, n.3. In any event, regardless of what the Tribe thought the *Cherokee* district court might do, the fact remains that when the *Cherokee* district court denied class certification in February 2001, the Tribe retained ample time to submit even its 1996 claim. A minimally diligent contractor would have submitted its claims upon

the denial of class certification in *Cherokee*. The Tribe's failure to do so is the result of a failed strategy and not a circumstance that warrants equitable tolling.

Similarly, Mr. Wakau's testimony in his declaration concerning the lack of clarity as to whether the Tribe's claims would be successful, and the limited resources of the Tribe, fail to demonstrate that this case warrants equitable tolling. As the district court correctly observed, these are not extraordinary circumstances because litigants are commonly faced with limited resources and uncertain outcomes based upon the prevailing law. Thus, such contentions do not support the Tribe's claim for equitable tolling. *Menominee III*, 841 F. Supp. 2d at 107.

The district court also correctly held that the Tribe failed to submit its 1996 claim within the presentment deadline even if the statute were equitably tolled for about 23 months (from March 1999 to February 2001) as the Tribe requests. The Tribe does not dispute that it received the 1996 CSC payments in 1996 and that its 1996 annual funding agreement expired at the end of that year. Once the Tribe knew or should have known that it had been underpaid, it had a claim for additional CSC and the presentment deadline began to run. *Menominee III*, 841 F. Supp. 2d at 110 (citing *Kinsey v. United States*, 852 F.2d 556 (Fed. Cir. 1988) (holding that a claim first accrues on the date when the payment becomes due and is wrongfully withheld)). Accordingly, the deadline for claim presentment began to run in 1996 and, even if the Court were to grant a 23-month extension for

equitable tolling, the six-year deadline expired in 2004. Because the tribe did not submit its 1996 claim until September 2005, its claim is time barred.

ARGUMENT

I. Standard Of Review

Abuse of discretion is the appropriate standard of review in this appeal. Although we have identified at least three cases[2] in which the Court applied a *de novo* standard of review to a district court's equitable tolling decision, the Court's precedent, as well as precedent from other circuits, indicates that abuse of discretion is appropriate based on the specific facts here. In *Smith-Haynie v. District of Columbia*, the Court suggested that an abuse of discretion standard is appropriate unless the district court held that the plaintiff was not entitled to equitable tolling as a matter of law: "We use the *de novo* standard despite the fact that the doctrine of equitable tolling ordinarily involves discretion on the trial judge's part. We read the judge's decision here to be based upon her finding that as a matter of law Smith-Haynie's evidence could not support invocation of the equitable tolling doctrine based upon her mental state." 155 F.3d 575, 578, n.4 (D.C. Cir. 1998).

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[2] *Chung v. U.S. Department of Justice*, 333 F.3d 273, 278 (D.C. Cir. 2003) (citing *United States v. Saro*, 252 F.3d 449, 455, n.9 (D.C. Cir. 2001) ("we employ *de novo* review when a district court holds - as the court appears to have done here - that the facts cannot justify equitable tolling as a matter of law"); *Smith-Haynie v. District of Columbia*, 155 F.3d 575 (D.C. Cir. 1998).

Several other circuits have used an abuse of discretion standard to review equitable tolling decisions. *Palacios v. Stephens*, --- F.3d ----, 2013 WL 3762674 (5th Cir. 2013) ("The standard of review governing a district court's equitable tolling decision depends on the basis on which it is grounded. If the district court exercises its discretion to deny equitable tolling, review is for abuse of discretion . . . if the district court denies equitable tolling as a matter of law, review is *de novo*"). In *Phillips v. Generations Family Health Center*, --- F.3d ----, 2013 WL 3242110 at *4 (2nd Cir. 2013), the Court of Appeals for the Second Circuit stated "We review a district court's determination that equitable tolling is inappropriate for 'abuse of discretion.'" However, the court proceeded to explain that "this term 'obscures more than it reveals' and that the 'operative review standard [for equitable tolling determinations] in the end will depend on what aspect of the lower court's decision is challenged.'" *Id.* (quoting *Belot v. Burge*, 490 F.3d 201, 206 (2d Cir.2007). "'If a district court denies equitable tolling on the belief that the decision was compelled by law' or '[i]f the decision to deny tolling was premised on an incorrect or inaccurate view of what the law requires,' 'the decision should be reviewed de novo." *Id.* "[I]f the decision to deny tolling was premised on a factual finding, the factual finding should be reviewed for clear error." *Id.* "Only where the 'court has understood the governing law correctly, . . . has based its decision on findings of fact which were supported by the evidence,

[and] the challenge is addressed to whether the [district] court's decision is . . . within the range of possible permissible decisions" will we actually review for 'abuse of discretion' in both 'name' and 'operation.'" *Id.* at 206–07. *See also*; *Impact Energy Resources, LLC v. Salazar*, 693 F.3d 1239, 1246 (10th Cir. 2012); *Holmes v. Spencer*, 685 F.3d 51, 62 (1st Cir. 2012); *Stone v. Thaler*, 614 F.3d 136, 138 (5th Cir. 2010); *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1003 (9th Cir. 2006); *but see ASNA II*, 699 F.3d at 1294 (applying *de novo* review).

The district court in this case determined that equitable tolling "is inappropriate" based upon the court's conclusion that: 1) Menominee cannot point to any affirmative act it took in over six years to pursue its claim diligently; 2) submitting an administrative claim is a relatively simple process; 3) there was no affirmative misconduct on the part of the Government; and 4) the Tribe does not present any additional facts from which the Court could find equitable tolling aside from those found insufficient to support class action tolling. The court applied the correct legal standard for equitable tolling specified by the Supreme Court in *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010), which requires the party seeking equitable tolling to demonstrate: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing. The court applied this legal test to facts that are undisputed. *See* Menominee brief at 5, n.3 (agreeing with Government that there

are no material facts in dispute). Accordingly, where the district court applied the correct law to undisputed facts, the decision whether to apply equity lay with that court and should be reviewed only for an abuse of discretion. But, regardless of the standard that the Court applies, the Government should prevail because the Tribe cannot satisfy either prong of the *Holland* test.

II. The District Court Correctly Held That Equitable Tolling Was Not Appropriate

A. *Menominee II* Compels Dismissal Of The Tribe's Claims

In *Menominee II*, the Court denied class action tolling because the Tribe was not eligible to participate in the *Cherokee* class when it had not submitted a claim, a jurisdictional prerequisite in any CDA case, including the *Cherokee* class. *Menominee II*, 614 F.3d at 526-27. The Court held that the application of class action tolling would not serve the underlying purposes of that doctrine, which relieves putative class members from the burden of filing protective motions to intervene while the court determines whether to certify the class. Forcing class members to file such motions would defeat the objectives of efficiency and economy of litigation behind Rule 23. *Id.* at 527-28.

The Court reasoned, however, that until putative class members satisfy the jurisdictional preconditions to class membership, they do not face the uncertainty of those who are eligible to participate in a class. CDA contractors must submit a claim to the contracting officer and obtain a decision (or wait until the claim can be

deemed denied) for a court or board to possess jurisdiction to consider a lawsuit or appeal on that claim and contractors cannot, as a matter of law, be class members without submitting a claim. Only once a contractor's claim is denied by the contracting officer would a contractor have a choice between participating in the class or proceeding individually - the choice with which the class-action tolling doctrine is concerned. Thus, the Court held that, because the Tribe 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). *Id.* at 528.

Similar reasoning applies to equitable tolling because its application to this case would not serve the purposes of that doctrine. In this case, Mr. Wakau testified that the Tribe made a calculated decision not to submit claims to IHS after denial of class certification in *Cherokee* essentially for two reasons. First, he testified that "most courts had ruled against such claims" and the Tribe assumed that even if it submitted a claim, the contracting officer would deny it. A_ at ¶ 8 (Wakau Declaration). Second, Mr. Wakau testified that the "Tribe has limited resources and it has to very carefully weigh whether it will bring a case against the United States." *Id.* Based on these considerations "we waited to see what the Supreme Court would do." *Id.* Thus, upon learning that the *Cherokee* district court had denied class certification, rather than pursue its claim, the Tribe chose to

wait, and only submitted its claim after the Supreme Court had suggested that the Tribe's theory for recovery might be viable. Id.

A litigant's skepticism about the viability of its lawsuit--and consequent inaction--is not grounds for equitable tolling. The Supreme Court has allowed equitable tolling in situations 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 (1990). The Court has specified that it "is a rare remedy to be applied in unusual circumstances . . . ." *Wallace v. Kato*, 549 U.S. 384, 396 (2007). Moreover, the Court has held that the "[p]rocedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984). Thus, in rare circumstances, a court can use its discretion to relieve a litigant of some of the harshness of a statute of limitations during the period he diligently attempted to act or was prevented from acting. The doctrine would not be served by extending it to those, like Menominee, who voluntarily chose not to act or those whose strategy decisions backfired.

B. The *Holland* Standard Requires Denial Of Equitable Tolling

As the district court correctly held, the Tribe cannot show that it diligently pursued its rights or that extraordinary circumstances stood in its way and prevented timely filing, as required by the Supreme Court in *Holland*. *Menominee III*, 841 F. Supp. 2d at 107-09. With respect to diligent pursuit, the district court correctly noted that a CDA claim "'need not be elaborate' and can be reflected in letters alone." *Menominee III*, 841 F. Supp. 2d at 102 (quoting *Arctic Slope Native Assoc. v. Sebelius*, 583 F.3d 785, 797 (Fed. Cir. 2009)). Indeed, as the Federal Circuit has explained, the body of a claim need only contain a written demand that includes (1) adequate notice of the basis and amount of a claim and (2) a request for a final decision. *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1328 (Fed. Cir. 2010). Although a contractor is required to state a sum certain in the claim, it is not locked into that amount and may increase it in court as long as it does not present new claims not presented to the contracting officer. *Santa Fe Eng'rs, Inc. v. United States*, 818 F.2d 856, 858 (Fed. Cir. 1987). Thus, given the ease of submitting a claim, it is almost inconceivable that a contractor could diligently pursue the submission of such a claim but fail to achieve it during a six-year limitations period (absent some facts not present here such as submission of the claim to the wrong agency).

It also appears inconceivable that the Tribe would anticipate that it would be relieved of the consequences of its inaction. As the Court observed in *Menominee II*, precedent in the Federal Circuit and its predecessor court, the Court of Claims has held since the enactment of the CDA in 1978 that there is no basis for jurisdiction in a court or board if the contractor has not submitted a claim. 614 F.3d at 527, n.3. Thus, any reasonably diligent Government contractor would have known that it could not simply ignore the filing deadline and hope that it would be excused.

This point applies to tribal contractors under ISDA. As we noted above, tribes have been litigating ISDA contract claims for decades and possess the same sophisticated understanding of the contracting process as other contractors. Accordingly, the Tribe's decision to wait periods of time ranging from about two months to more than two years after the performance of the 1996-98 contracts at issue, then to wait about 23 months while the district court considered class certification in *Cherokee*, and then to wait 55 more months after that court denied class certification was not diligence; it was negligent to not take the simple step of submitting a claim to the contracting officer.

But the more fundamental flaw in the Tribe's case is that there was no extraordinary circumstance that "stood in its way" and "prevented timely filing." The facts here do not reflect that the Tribe prepared a claim but it was lost in the

mail, or that the claim was defective somehow, or was rejected by the agency, or that IHS engaged in some misleading conduct that tricked the Tribe into not submitting a claim. There was absolutely no barrier to the Tribe submitting a claim to IHS at any time during the six-year limitation period. That should be the end of this case for equitable tolling purposes. *See United States v. Cicero*, 214 F.3d 199, 204 (D.C. Cir. 2000) (A prisoner who filed a late post-conviction motion cited various problems including being stabbed and having little or no access to the library or his legal papers. The Court denied equitable tolling because he had shown "impediments" to his work on the motion but not that he was "prevented" from working on it).

In its brief, the Tribe contends that the overall history of the CSC litigation between Indian tribes and the Government is an extraordinary circumstance. *See*, *e.g.*, Menominee brief at 16, 18. To the extent that the Tribe is relying on this litigation in response to the second *Holland* factor, the Tribe never explains how this litigation satisfies the most significant part of the second prong: that the extraordinary circumstance "stood" in its way and "prevented" timely filing. Of course, such an argument would be nonsensical and its brief otherwise fails to identify anything that stood in its way and prevented timely filing. Menominee's entire case is built on the notion that the Court will disregard these requirements.

The Tribe relies heavily on *ASNA II*, in which the panel majority barely mentioned the second part of the *Holland* test but appeared to conclude that the "legal landscape" of CSC litigation was an extraordinary circumstance. *See ASNA II*, 699 F.3d at 1296, 1298. The panel majority otherwise disregarded the *Holland* requirement that the plaintiff show that the extraordinary circumstance stood in the way and prevented timely filing. Regardless of the ASNA II decision, it's clear in this case that nothing prevented timely filing except the Tribe's hesitance.

The *ASNA II* dissent would have denied equitable tolling because the tribes had not demonstrated diligence. Among other things, the dissent observed that both of the earlier class actions relied upon by the tribes in that case alerted the tribes that the *Ramah* class certification was unusual in that the *Ramah* court later suggested that the continued appropriateness of certification was questionable and the *Cherokee* court had denied class certification. The dissent also pointed out that it would have been "easy" for the tribes to submit claims to a contracting officer. *ASNA II*, 699 F.3d at 1299-1300. The dissent also correctly observed that the majority failed to point to any facts that met the second part of the *Holland* test and it cited *Menominee III* with approval. *Id.* at 1300, n.3. This Court should follow the well-reasoned *ASNA II* dissent and uphold the similarly well-reasoned district court decision.

C. The District Court Correctly Rejected Menominee's Excuses

In its brief, the Tribe raises a number of contentions that purport to excuse its late submission of its claims. The district court acted within its discretion when it rejected these contentions.

1. As The District Court Held, A Class Action Filed By Others Is Not A Substitute For Diligent Pursuit

At pages 24-30 of its brief, the Tribe contends that it was reasonable for it to believe that it was a member of the *Cherokee* class and that its inaction was reasonable in light of the legal landscape. Adhering to the Supreme Court's guidance, the trial court recognized that Menominee's choice to do nothing about its claim could possibly have been reasonable but its decision alone did not meet the standard for equitable tolling.

Thus, Menominee complains at page 25 of its brief that the district court held it to the literal words of the *Holland* test by requiring it to show diligent pursuit, rather than reasonable inaction. That is the nub of the Tribe's appeal to this Court: that its choice to do nothing must be accepted as a substitute for the diligent activity described by the Supreme Court. The Tribe contends that under the district court's application of the test, equitable tolling would never apply because a tribe could only demonstrate diligent pursuit "by filing an administrative claim or by initiating or joining a lawsuit." Menominee brief at 25. This contention lacks merit; one can imagine multiple scenarios in which a tribe could

demonstrate diligent pursuit, such as by preparing a claim that was lost in the mail, or that it prepared a claim that was defective or was rejected by the agency, or that the agency engaged in some misleading conduct that tricked the tribe into not submitting a claim. *See, e.g.*, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96.

The key distinction in any imagined scenario of diligent pursuit and the Tribe's inaction is, of course, action. The Supreme Court expects a party to actively pursue its rights, unless tricked into inaction. The Tribe cannot make any such assertions here. Thus, its real problem is not the way that the district court applied the *Holland* test, it is the fact that the Tribe had six years to do something that, in the words of the *ASNA II* dissent, would have been "easy" to do, but it simply chose not to do it. *See Arctic Slope Native Ass'n v. Sebelius*, 538 F.3d 785, 797 (Fed. Cir. 2009) (*ASNA I*) ("As the claim letters in the record in this case show, however, such submissions to the contracting officer need not be elaborate.")

The Tribe also contends at page 25 of its brief that the record demonstrates "the Tribe's reasonable diligence in carefully monitoring the numerous threads of the CSC litigation landscape." The only possible support in the record for this assertion is the Wakau declaration, but the scant facts in that declaration do not

support this expansive statement.[3] Mr. Wakau's declaration contains no explanation as to why the Tribe did not act on its claims prior to the filing of the *Cherokee* case in March 1999, at which time it was more than two years after the conclusion of its 1996 contract performance. Mr. Wakau's declaration contains only two paragraphs that discuss the Tribe's inactivity from the filing of Cherokee until the Supreme Court's decision in March 2005.

Mr. Wakau testified that, at some time in 2001 that he does not identify, the Tribe learned of the *Cherokee* lawsuit and that it then received periodic updates from class counsel. A_ (Wakau ¶¶ 6, 8). The Tribe '[l]ater" (he does not identify the year) learned that the court denied class certification. Mr. Wakau further testified that there were "many meetings concerning contract support" but does not state when they took place or who attended. At these meetings, some unidentified person told the Tribe that "most courts had ruled against such claims." *Id.* at ¶ 8. Mr. Wakau also testified that at some unidentified point in time, the Tribe learned that the Federal Circuit had ruled in favor of the Cherokee tribe and the Tribe then decided to wait to see what the Supreme Court would do.

[3] At page 26 of its brief, the Tribe also cites two class action tolling cases, *Crown, Cork & Seal Co. Inc. v. Parker*, 426 U.S. 345 (1983) and *Cullen v. Margiotta*, 811 F.2d 698, 719 (2nd Cir. 1987), in support of its contention that it was reasonable for it to take no action until the court had determined whether to certify the *Cherokee* class. However, as we have demonstrated, the Tribe's lack of eligibility to be a class member warrants denial of equitable tolling just as it warranted denial of class action tolling.

In his description of the Tribe's inactivity, Mr. Wakau does not mention that by the time the Supreme Court granted certiorari in *Cherokee* in March 2004, it had been more than six years from the completion of its performance of the 1996 and 1997 contracts. Mr. Wakau's testimony also does not contain a description of anything the Tribe did to preserve its claims, much less any concern with the passing of time or the expiration of the time in which the Tribe was required to submit its claims. Mr. Wakau's declaration fails to establish diligent pursuit; it merely explains the Tribe's rationale behind its failed strategy to wait for a Supreme Court decision rather than taking the prudent (and simple) course of presenting its claims to IHS before the presentment deadline expired.

Having only documented its chosen inactivity, the Tribe seizes upon the Federal Circuit's grant of equitable tolling to a different tribe in *ASNA II*. We believe that decision is wrong in that it substituted reasonable inaction for diligent pursuit and relieved that plaintiff of showing that an extraordinary circumstance prevented timely filing. But even if that case could be considered supporting authority, there are some key differences between that case and Menominee's claims here. For one, the tribes in *ASNA II* were hoping to participate in a class action filed by the Pueblo of Zuni tribe in which the court did not deny class certification until 2007. When ASNA learned in 2005 that the Government intended to challenge the notion that claim submission was unnecessary, it "swiftly

and diligently presented its claims to the contracting officer in September 2005." *ASNA II*, 699 F.3d at 1297. This contrasts sharply with Menominee, which waited 55 months after the denial of class certification in *Cherokee* before it submitted its claims.

In addition, the Federal Circuit had a record in *ASNA II* that allowed it to conclude that ASNA was relying upon the putative Zuni class and that the tribe was "[m]onitoring and reasonably interpreting applicable legal proceedings, judicial order [sic] and opinions . . . ." *Id.* As we just demonstrated, the record in this case does not support such conclusions. This record reveals that there was no impediment to submission of a claim by the Tribe, other than its own choice not to proceed.

2. Reliance On The Ramah Class Certification Was Not Due Diligence

At pages 27-29 of its brief, the Tribe contends that its actions should be judged in light of the law as it existed in 2001-05. In particular, the Tribe cites its participation in the *Ramah* class action--which was not brought against IHS--where the district court did not require submission of claims to a contracting officer to participate as a class member. But the *Ramah* district court certified the class before the CDA contained a presentment deadline for claim submission. Thus, the Tribe's reliance on the *Ramah* district court decision was misplaced because that court never considered the deadline. A claimant in another case relies

on a district court decision at its own risk. It is axiomatic that "A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 131 S. Ct. 2020, 2033, n.7 (2011).

Moreover, as *Menominee II* indicates, the district court's 1993 class certification is in conflict with long established Federal Circuit and Court of Claims precedent holding that a court or board lacks jurisdiction when the contractor did not submit a claim to the contracting officer. 614 F.3d at 527, n.3. There was no justification for the tribe to believe that the *Cherokee* court would adopt the conclusion of an unpublished, tersely-reasoned opinion from another district in the face of circuit precedent to the contrary. In any event, to the extent that the legal landscape as described by Menominee contained precedent that the Tribe found to be conflicting or confusing, it undermines the Tribe's chosen course of inaction. If anything, such conflict and complexity in competing court decisions would compel the Tribe to take some action to preserve its claims. Certainly, the risk that the claim would be barred as untimely provided a strong incentive to take the simple step of submitting a claim. Given the uncertainty expressed by the

Tribe, the reasonably diligent course would have been to submit a claim, not to wait for the results of cases filed by other contractors. [4]

The Tribe also cites *Harris v. Carter*, 515 F.3d 1051 (9th Cir. 2009), which involved a prisoner who relied upon circuit precedent for filing his Federal habeas petition late. The precedent relied upon by the prisoner was later overturned by the Supreme Court. The Ninth Circuit held that the case warranted equitable tolling because the prisoner had "diligently pursued his rights," *id*. at 1055, and that he "had no control over the operative fact that caused his petition to become untimely – the Supreme Court's decision in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005)]." *Id.* at 1056. The court also held that its precedent had "misled" Mr. Harris into believing that he had ample time to file his habeas petition when, in fact, time was running out. *Id.*

The Ninth Circuit also noted, however, that "[e]quitable tolling is typically denied in cases where a litigant's own mistakes clearly contributed to his predicament." *Id.* at 1055 (citing *Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007)); *see Dyson v. Dist. of Columbia*, 710 F.3d 415, 422 (D.C. Cir. 2013) (denying equitable tolling where appellant "caused a substantial portion of the

[4] The three cases that the Tribe cites at p. 30, n.12, are class action tolling cases that are not relevant for the reasons we identified in footnote two above. The Court rejected the Tribe's reliance upon two of these cases in *Menominee II*. 614 F.3d 527.

overall delay."). In addition, the court held that "Harris' failure to file a timely petition is not the result of oversight, miscalculation or negligence on his part, all of which would preclude the application of equitable tolling." *Id.*

If the standard the Ninth Circuit applied in *Harris* were applied to this case, the Tribe's claims would be barred. The Tribe's calculated decisions not to submit claims, and its wholesale reliance on the *Ramah* class certification while ignoring contrary information in the *Ramah* and *Cherokee* cases, were mistakes that clearly contributed to its predicament.

The Tribe also relies upon *Capital Tracing, Inc. v. United States*, 63 F.3d 859, 862 (9th Cir. 1995) and *Vance v. Whirlpool Corp.*, 707 F.2d 483, 489-90 (4th Cir. 1983) in support of its contention that the legal uncertainty that it faced warrants equitable tolling. However, both of these cases involved the court's jurisdiction to consider claims that the litigants filed at what they thought was their earliest opportunity and are distinguishable for reasons similar to those in *Harris*.

In *Capital Tracing*, the Ninth Circuit allowed equitable tolling based on a lack of clear precedent within the Ninth Circuit. 63 F.3d at 862. The law in the circuit appeared to be conflicting as to whether the district court had jurisdiction to determine the rightful owner of the funds at issue in exoneration proceedings. *Id.* at 862-63. Relying on precedent which suggested the court had such jurisdiction, the plaintiff "exercised its rights at what it thought was the earliest opportunity."

Id. at 863. That assumption turned out to be erroneous due to an intervening Ninth Circuit decision. But the plaintiff's decision not to file a claim asserting wrongful levy was reasonable in light of the apparent state of law. *Id.* Accordingly, because *Capital Tracing* involved controlling circuit precedent, it is not comparable to the Tribe's reliance on the *Ramah* class certification order entered by a district court in another district before the CDA contained a presentment deadline.[5]

The Tribe also cites *Petro-Hunt, L.L.C. v. United States*, 90 Fed. Cl. 51, 62 (2009), for the contention that claims may be deemed tolled until "the modifying decision" has been made. However, as the court noted in that case, the claim at issue involved the Tucker Act statute of limitations, which the Supreme Court has held cannot be equitably tolled. *Id.* at 62, n.6 (citing *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008)). *Petro-Hunt* involved a contention that accrual of the statute of limitations should be tolled. Under the accrual suspension doctrine, a plaintiff must show that his cause of action did not accrue until he knew or should have known that the claim existed. *Id.* (citing *Martinez v.*

[5] *Vance* provides little analysis for its application of equitable tolling other than a brief discussion in which the court cited the lack of prejudice to the defendant and the lack of clear precedent that addressed the plaintiff's case. 707 F.2d at 489-90. The case involved facts not present here in that the law required the posting of a notice advising employees of their rights under the Age Discrimination in Employment Act but the employer had not done so. As a result, the employee was not aware of his rights until it was too late for him to timely follow all steps required by the statute to prosecute his claim. *Id.* at 485.

United States, 333 F.3d 1295, 1319 (Fed. Cir. 2003) (*en banc*). The plaintiff "must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was 'inherently unknowable' at the accrual date." *Id.* Because there is no assertion here that the Tribe was unaware of its claim (as opposed to being uncertain about its likelihood of success) or that the Government concealed its actions, accrual suspension cases have no relevance in determining whether equitable tolling is warranted here. To the contrary, the Tribe's entire argument is premised on its knowledge of the litigation in which tribes have been alleging that the Government has been habitually underpaying CSC for decades. [6]

3. Menominee Cannot Rely On The Putative *Cherokee* Class As A Defective Pleading

As stated above, in *Irwin*, the Supreme Court held that a plaintiff who actively pursued his judicial remedies by filing a defective pleading during the statutory period may be entitled to equitable tolling. 498 U.S. at 96; *see, e.g.*, *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 429 (1965) (Plaintiff filed a timely complaint in the wrong court). At pages 33-37 of its brief, the Tribe stretches the *Irwin* ruling past the breaking point by contending that it should receive the benefit

[6] After a "*see also*" cite, the Tribe cites two other non-equitable tolling cases, *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1358 (5th Cir. 1972) and *United States v. Le Patourel*, 593 F.2d 827, 830-31 (8th Cir. 1979). These cases discuss when a claim accrues but have little relevance to whether the requirements for equitable tolling were satisfied here.

of Cherokee's putative class action, which it contends was a defective pleading. There are several problems with this theory. First, the Tribe cites no precedent for the remarkable proposition that a litigant who did not file a pleading should be allowed to rely on someone else's defective pleading to gain equitable tolling. Second, even if we assume for the sake of argument that Cherokee's pleading was defective, that would not help the Tribe. Cherokee's claim clearly was not defective, so there is no logical basis for the comparison. Third, as the district court correctly held, the Tribe ignores the distinction between a defective class, which may support class action tolling, and a defective pleading, which would support equitable tolling. Because there was no defective pleading in *Cherokee*, the Tribe cannot rely on that case. *Menominee III*, 841 F. Supp. 2d at 108.

The Tribe relies on footnote three in the *Irwin* opinion, in which the Supreme Court seemed to suggest that its decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) dealt with equitable tolling. *Irwin*, 498 U.S. at 96, n.3. As the district court correctly observed, *American Pipe* actually addressed class action tolling, not equitable tolling. *Menominee III*, 841 F. Supp. 2d at 109, n.8. Where this Court has already rejected *American Pipe* class action tolling under these facts, there is no basis for concluding that *American Pipe* somehow helps the Tribe under an equitable tolling analysis, particularly where the Supreme Court has clarified since *Irwin* that equitable tolling requires both diligent

pursuit and an extraordinary circumstance that stood in the way and prevented timely filing. *Holland v. Florida*, 130 S. Ct. at 2562.

The Tribe also reads in *Menominee II* a suggestion by the Court that a class action could equitably toll the statute. Menominee brief at 34. There simply is no basis to support this contention found in the opinion, however, as the Court said little more than that there were facts in dispute and that it would remand for the district court to consider the issue.[7] *Menominee II*, 614 F. 3d at 531.

Similarly, the Tribe attempts to find support in *Menominee II* for its equitable tolling contentions because the Court remanded for further consideration of the Tribe's response to the Government's laches defense to the Tribe's 1995 claim. 614 F. 3d at 532. The Court's laches discussion was directed at a contract for which there was no presentment deadline and to which a different legal standard applied, and, as such, offers no support for the Tribe's contentions with respect to equitable tolling. The Court remanded the laches issue because the trial court miscalculated the length of delay and failed to consider all of the Tribe's

[7] The Tribe also incorrectly relies upon the decision of the Ninth Circuit in *Hatfield v. Halifax PLC*, 564 F.3d 1177 (9th Cir. 2009). In that case, the court applied class action tolling principles to establish equitable tolling, but did so in the context of equitable tolling under California law, which permits tolling where there is (1) "timely notice" to the defendant; (2) "a lack of prejudice to the defendant" by an untimely claim proceeding; and (3) "good faith and reasonable conduct by the plaintiff." *Hatfield*, 564 F.3d at 1185. That case has no application here, where the Tribe must meet the stricter *Holland* requirements

arguments. *Id.* For the 1996-1998 period relevant here, there is no dispute as to the length of the Tribe's delay, nor did the court fail to consider the Tribe's arguments; the court simply rejected them.

4. Any Perceived Lack Of Prejudice Is Not A Factor For Determining Whether This Case Warrants Equitable Tolling

The Tribe contends at pages 38-43 of its brief that the Government will not be prejudiced by the application of equitable tolling. This is entirely speculative and self-serving on the part of the Tribe. What the Tribe fails to acknowledge, however, is that the absence of prejudice is not a basis for permitting equitable tolling. "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." *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984). The Tribe cites *Hedges v. United States*, 404 F.3d 744, 753 (3rd Cir. 2005), but in that case the court denied equitable tolling and, relying on *Baldwin*, correctly observed that the absence of prejudice is not an independent basis for invoking equitable tolling. Accordingly, because the Tribe has not identified a factor to justify equitable tolling in the first instance, the alleged lack of prejudice to the Government is irrelevant.

Yet, contrary to Menominee's presumptive argument, the Government has in fact suffered prejudice by the untimely pursuit of its claims. Menominee brief at

39-40. Statute of limitations periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. *Carter v. Washington Metropolitan Area Transit Authority*, 764 F.2d 854, 857 (D.C. Cir. 1985) *citing Kavanagh v. Noble*, 332 U.S. 535, 539 (1947) (citations omitted); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (statutes of limitations are by definition arbitrary, and are the choice of the legislature, not the judiciary); collected citations footnote 7. Thus, the legislature establishes a point at which the parties's opportunities to complain about their relationship are at an end. Here the United States is entitled to be free of contract claims that were required to be brought months and years earlier. Permitting Menominee's late claims would defeat the public good of finality that was imposed by Congress with the statute of limitations of the CDA. Again, Menominee's position is contrary to the purpose of the limitations period, as it is contrary to the purpose of equitable tolling as discussed in section II. above. The equitable tolling doctrine should be used to set aside the statute of limitations only in narrow circumstances because that doctrine requires that one party be prejudiced when another is allowed to proceed beyond the finality bar of the statute of limitations. Menominee insists that the Court deprive the Government of the protection of the statute's limitations. Thus, the question is whether the equitable circumstances here are so compelling as to allow Menominee to

prejudice the rights of the United States. The answer is no, especially when Menominee simply chose not to act and now complains because its strategy backfired.

At pages 41-43 of its brief, the Tribe also contends that a consideration in favor of equitable tolling is that the Government purportedly contended in the *Cherokee* case that submission of a claim to the contracting officer would disqualify the contractor from the class but then contended in the case filed by the Pueblo of Zuni that claim submission was a prerequisite to participation in the class. First, this is inaccurate because the Government's position has always been that CDA contractors must submit claims to the contracting officer. Indeed, as the district court recognized, the Government took that position in *Ramah* in the early 1990s. *Menominee III*, 841 F. Supp. 2d at 108.

Second, the Tribe's citation to the district court opinion in *Cherokee* does not support the Tribe's contentions, as the lower court recognized here. *See id.* The *Cherokee* opinion states that the Government opposed class certification under Rule 23 because the plaintiffs did not meet their burden under class size. *Cherokee*, 199 F.R.D. at 362. Among other things, the Government contended that "the plaintiffs' attempt to identify potential class members and thus determine class size is defective for four reasons." These reasons included "plaintiffs fail to exclude tribes that are litigating or have litigated cases in other judicial or

administrative forums." *Id.* Read in context, the Government's contention was that the plaintiffs had not met the class size requirement because they failed to exclude claims that were already in litigation at a court or board of contract appeals. As the district court recognized here, the Government did not contend in *Cherokee* that tribes that had merely submitted claims to a contracting officer should be excluded from the class. *Menominee III*, 841 F. Supp. 2d at 108.

5. The Special Relationship Is Not An Equitable Tolling Factor

The Tribe contends at pages 43-44 of its brief that the special relationship between the United States and Indian tribes is a factor in determining whether to apply equitable tolling because both ISDA and the contracts cite the Government's trust responsibility to the tribes. The Tribe has waived this argument both because in 2008 it stipulated to the dismissal of its breach of trust claim with prejudice (*see* Dkt No. 26 at ¶ 3, Dkt no. 27) and because it failed to raise the argument during briefing of the equitable tolling issue in the district court. *Marymount Hosp., Inc. v. Shalala*, 19 F.3d 658, 663 (D.C. Cir. 1994).

Even if this contention has not been waived, nothing about the special relationship between the United States and Indian tribes supports the application of equitable tolling to tribal contractors bringing claims under the CDA. The mere fact that Section 110(d) of the ISDA, 25 U.S.C. § 450m-1(d), applies the CDA to Indian self-determination contracts does not vest Indian tribes with any entitlement

to equitably toll the CDA's presentment deadline. In fact, Congress' choice to subject ISDA contracts to the CDA suggests the opposite. The Supreme Court has made it clear that judicial imposition of fiduciary standards on the Government in the tribal context is inappropriate: the Government's duties vis-a-vis Indian tribes are defined by "specific, applicable, trust-creating statute[s] or regulation[s]," not "common-law trust principles." *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2325 (2011). The statute of limitations at issue in this case is the presentment deadline in the CDA, which is a statute of general applicability that creates no fiduciary duties between the United States and its contractors. Moreover, the Federal Circuit has recognized that ISDA does not, by itself, create fiduciary duties. *See, e.g.*, *Samish Indian Nation v. United States*, 419 F.3d 1355, 1368 (Fed. Cir. 2005). Thus, no Federal law establishes a fiduciary duty that allows equitable tolling for Indian contractors that fail to present their CDA claims within the time required.

III. Menominee's 1996 Claim Is Untimely Even If Equitable Tolling Applied

The district court correctly held that, even if it were to apply equitable tolling, the Tribe's 1996 claim still would be time barred. This is so, the court held, because when the Tribe's annual funding agreement expired at the end of 1996, the Tribe knew that the Government had paid it less CSC than the Tribe believed it was owed under ISDA. *Menominee III*, 841 F. Supp. 2d at 110. Once

the Tribe knew or should have known that it had been underpaid, it had a claim for additional CSC and the presentment deadline began to run. *Id.* (citing *Kinsey v. United States*, 852 F.2d 556 (Fed. Cir. 1988)). As the Federal Circuit explained in *Kinsey*, a claim accrues when payment is due but is withheld:

> [a] claim against the United States first accrues on the date when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action. . . . Therefore, 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.

Kinsey, 852 F. 2d at 557 (quoting *Oceanic Steamship Co. v. United States*, 165 Ct. Cl. 217, 225 (1964)); *see Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002) (explaining that claims seeking damages for breach of contract generally accrue at the time of the breach). Accordingly, the Tribe's claim accrued in 1996 when it first received a payment that was less than the amount to which the Tribe claims entitlement.

The Tribe does not dispute that it received the 1996 CSC payments in 1996 and that its 1996 annual funding agreement expired at the end of that year. Nevertheless, it contends that its claim did not accrue until the end of 1998 when the underlying self-determination contract expired. This is so, the Tribe contends, because IHS could have amended the contract to increase CSC and, as a result, the Tribe could not ascertain the amount of its damages.

The district court recognized that this is not the law. *See Menominee III*, 841 F. Supp. 2d at 110. As we have demonstrated, a claim accrues at the time of alleged breach when the contractor knows it has not been paid, not some date years in the future when it is too late for the agency to address the alleged breach by paying the money owed. As the district court also recognized, if the Tribe's contention were correct, self-determination contracts with an indefinite term would also have an indefinite presentment deadline, which would "eviscerate the statute of limitations without any equitable basis." *Id.*

The cases that the Tribe cites do not support its theory. It first cites a case involving a claim for breach of an implied-in-fact contract brought by a cooperating witness against the Federal Bureau of Investigation (FBI). *Patton v. United States*, 64 Fed. Cl. 768 (2005). The case involved a claim that the FBI made an implied-in-fact promise to pay storage locker fees for the witness, notwithstanding two written contracts to the contrary. Although the court noted in passing that some courts have stated that a claim accrues when damages are ascertainable, the court correctly noted that "Claims for breach of contract generally accrue at the time of the breach." *Id.* at 774.

The Tribe also cites, *Terteling v. United States*, 334 F.2d 250 (Ct. Cl. 1964), which illustrates an unusual circumstance in which a claim will not accrue until damages are ascertainable. In *Terteling*, a contractor performed a construction

contract for the Government that required the contractor to enter borrow pits on adjacent privately owned lands. *Id.* at 252. In 1946, three years after it completed the contract and the Government accepted the work, the property owners sued the contractor for the value of material removed from the pits. Although the contractor promptly notified the Government that it would expect to be reimbursed for the expenses or damages of this litigation, it did not immediately file suit. The litigation with the private landowners continued for 11 years, finally ending in 1957, and the contractor did not file in the Court of Claims until 1960. *Id.* at 254. The Court of Claims rejected the Government's statute of limitations defense. It held that when the contractor was sued it was impossible for it to know the extent of its damages. If it had filed suit while the underlying litigation was ongoing, that would have resulted in a split cause of action, which the court's precedent barred. As a result, its claim did not accrue until 1957 when that litigation ended and its damages were ascertainable. *Id.* at 254-55. Thus, the facts in *Terteling* are nothing like what occurred here and the case does not help the Tribe.

Finally, the Tribe relies on *Seneca Nation of Indians v. United States*, CIV. A. 12-1494, 2013 WL 2255208 (D. D.C. May 23, 2013), in support of its contention that the term of the underlying self-determination contract, rather than the 1996 annual funding agreement, should control when its 1996 CDA claim accrued. *See* Menominee brief at 45-46. But *Seneca Nation* is irrelevant to the

issues here. In *Seneca Nation*, the question was whether a letter submitted by the Nation purporting to propose, pursuant to 25 U.S.C. § 450f, additional funding under its fiscal year 2010 and 2011 annual funding agreements was deemed approved by operation of law. *See Seneca Nation*, 2013 WL 2255208, at *9-10. However, this section of the ISDA entails entirely different legal considerations and triggers different obligations on the part of the IHS than does receiving a CDA claim.

The court's decision in *Seneca Nation* simply cannot be extrapolated to apply to the facts of Menominee's appeal or the claims filing requirements of the CDA. First, unlike the CDA, which includes a six-year presentment deadline, the ISDA includes no express deadline for submitting proposals to amend an annual funding agreement. Also, in contrast to 25 U.S.C. § 450f, which deems amendments approved if the agency fails to timely respond, the CDA provides that claims that are not decided within the statutory time frames are deemed to be denied. 41 U.S.C. § 605(c)(5) (now 7103(f)(5)). Moreover, while the court held in *Seneca Nation* that annual funding agreements are not "standalone agreements" that were segregable from the underlying self-determination contract, this holding pertained to whether – as a result of an alleged error made by IHS – funding could be added to the 2010 annual funding agreement by subsequent amendment pursuant to 25 U.S.C. § 450f. The court did not consider when a cause of action

for an alleged breach of the FY 2010 annual funding agreement might have accrued for purposes of triggering the CDA's six-year presentment deadline. Had the court considered this question, the most logical accrual date would have been September 30, 2010, which was the end of the fiscal year and when the Nation first might have determined that it had not been paid all of the funds it thought it was owed under the fiscal year 2010 annual funding agreement.

Finally, with respect to the Tribe's claims for 1999 and 2000, the Court should affirm the trial court's dismissal of these claims if the Court affirms the district court's equitable tolling opinion because the Tribe has not appealed the court's ruling that these claims are barred by the law of the case doctrine.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the Court affirm the decision of the district court.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,253 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c), D.C. Circuit Rule 25(c), and this Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that, on this 30th day of August, 2013, I caused the foregoing "FINAL BRIEF OF RESPONDENTS" to be filed upon the Court through the use of the D.C. Circuit CM/ECF electronic filing system and, thus, also served counsel of record.

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