[NO DATE HAS BEEN SET FOR ORAL ARGUMENT]

No. 12-5217

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MENOMINEE INDIAN TRIBE,

Appellant

v.

UNITED STATES OF AMERICA, et al.,

Appellees.

Appeal from the U.S. District Court for the District of Columbia

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OPENING BRIEF OF APPELLANT MENOMINEE INDIAN TRIBE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties. The following were parties to the district court action and are parties to this appeal: The Menominee Indian Tribe of Wisconsin; United States of America; Secretary of Health and Human Services; and Director, Indian Health Service.

(B) Rulings Under Review. The rulings under review are (1) the U.S. District Court for the District of Columbia's memorandum opinion and accompanying order, dated January 24, 2012, in *Menominee Indian Tribe of Wis. v. United States*, No. 1:07-cv-00812, District Judge Rosemary M. Collyer, reported at 841 F. Supp. 2d 99 (D.D.C. 2012) (*"Menominee III"*); Appendix, A1-A11; and (2) Judge Collyer's order dismissing the claims at issue in this appeal without prejudice, dated May 1, 2012; Appendix, A12.

(C) Related Cases. An earlier appeal in this contract dispute was decided by this Court in *Menominee Indian Tribe of Wis. v. United States*, 614 F.3d 519 (D.C. Cir. 2010) (Judges Griffith, Ginsburg and Tatel) (*"Menominee II"*) (equitable tolling available for claims brought under § 605(a) of the Contracts Dispute Act ("CDA")),[1] *rev'g and remanding Menominee Indian Tribe of Wis. v. United States*, 539 F. Supp. 2d 152 (D.D.C. 2008) (*"Menominee I"*). There are no

[1] The CDA has since been recodified and renumbered. *See* 41 U.S.C. §§ 7101-7109. The statute of limitations at issue in this appeal, formerly at 41 U.S.C. § 605(a), now appears at 41 U.S.C. § 7103(a)(4).

other related cases in this court.

The issue in this case—whether the six-year statute of limitations for a CDA claim was equitably tolled due to the Tribe's reasonable diligence and the unique circumstances of the case—was also presented in *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 699 F.3d 1289 (Fed. Cir. 2012) (*"ASNA II"*) (equitable tolling warranted), and *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009) (*"ASNA I"*) (equitable tolling available for claims brought under § 605(a) of the CDA), *cert. denied*, 130 S. Ct. 3505 (2010). There is one case of which Appellant is aware involving substantially similar issues: *Bristol Bay Area Health Corporation v. the United States of America*, No. 1:07-725C (Judge Margaret M. Sweeney), in the United States Court of Federal Claims.

Respectfully submitted,

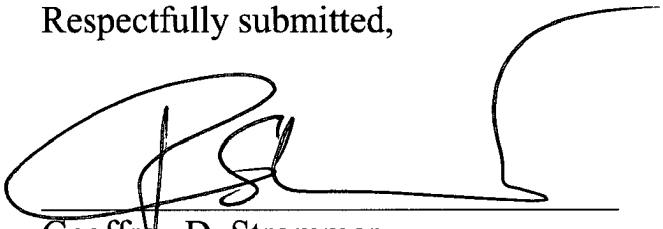

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TABLE OF CONTENTS

GLOSSARY

AFA	annual funding agreement
BIA	Bureau of Indian Affairs
CBCA	Civilian Board of Contract Appeals
CDA	Contract Disputes Act
CSC	contract support costs
CY	calendar year
EEOC	Equal Employment Opportunity Commission
FELA	Federal Employers' Liability Act
FY	fiscal year
IHS	Indian Health Service
IRS	Internal Revenue Service
ISDA	Indian Self-Determination and Education Assistance Act
PFSAs	programs, functions, services, and activities
Secretary	Secretary of Health and Human Services

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

***Authorities upon which we chiefly rely are marked with asterisks.**

Statutes

Other Authorities

Rules

Regulations

I. JURISDICTIONAL STATEMENT

This is a claim for breach of contract under the Indian Self Determination and Education Assistance Act, 25 U.S.C. §§ 450 – 458ddd-2 ("ISDA"). The ISDA incorporates by reference the Contract Disputes Act ("CDA"), 41 USCA §§ 7101–7109 (previously codified at 41 U.S.C. §§ 601–613),[1] and grants to the federal district court original subject matter jurisdiction pursuant to 25 U.S.C. § 450m-1(a) and (d).

The Court of Appeals has jurisdiction over an appeal of a final order of the federal district court pursuant to 28 U.S.C. § 1291. The federal district court issued an order dismissing the claims at issue here without prejudice on May 1, 2012. *See* (1) *Menominee Indian Tribe of Wis. v. United States*, No. 1:07-cv-00812, District Judge Rosemary M. Collyer, reported at 841 F. Supp. 2d 99 (D.D.C. 2012) ("*Menominee III*"); Appendix, A1-A11; and (2) Judge Collyer's order dismissing the claims at issue in this appeal without prejudice, dated May 1, 2012; Appendix, A12. The court's order stated that if neither party moved to re-open the case within 45 days, the case would stand dismissed with prejudice. The court never issued a separate judgment. The Tribe filed a timely notice of appeal

[1] The district court decision applies the CDA as it existed during the years at issue, then codified at 41 U.S.C. §§ 601–613, and we cite to that version as well. The CDA as previously codified is included in the Addendum at 35a *et seq*.

under Fed. R. App. P. 4(a) on July 11, 2012, and it was docketed on July 12, 2012 [Dkt. # 58].

II. STATEMENT OF THE ISSUES

In *Menominee Indian Tribe of Wisconsin v. United States*, this Circuit held that, under *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), "the time limitation in [41 U.S.C.] § 605(a) is subject to equitable tolling," and remanded to the district court "to determine whether tolling is appropriate under the circumstances of this case." 614 F.3d 519, 531 (D.C. Cir. 2010) ("*Menominee II*").

The issues presented in this appeal encompass:

1. Whether the district court erred in holding the statute of limitations under the CDA, 41 U.S.C. § 605, was not equitably tolled, when:

a) the Tribe pursued its claims with reasonable diligence by relying on a Contract Support Cost ("CSC") class action, when the Tribe's experience, based on participation in a similar class action, was that such reliance was reasonable and not subject to any prerequisites; and

b) tolling would result in no prejudice to the Government; and

c) tolling would be consistent with the special trust responsibility of the Government to the Tribe.

2. Whether the limitations period on the Calendar Year ("CY") 1996 claim began to run at the end of the contract term rather than the end of the annual

funding agreement incorporated into the contract when the Tribe had not been paid in full and further payments could have been made for CY 1996 even though the funding agreement had expired.

The pertinent statutes and regulations are reproduced in the Addendum.

III. STATEMENT OF THE CASE

This case is the latest chapter in the continuing saga regarding the extent to which the Secretary of Health and Human Services ("Secretary"), through the Indian Health Service ("IHS"), has a duty to fully fund CSC for agreements entered into with tribes under the ISDA. The issue in this appeal is whether the statute of limitations in the CDA has been equitably tolled for the filing of the Menominee Tribe's claims for full CSC funding for CYs 1996-1998.

Funding under the ISDA is "subject to the availability of appropriations[.]" 25 U.S.C. § 450j-1(b). From 1994 through 1997, Congress appropriated to the IHS millions of dollars in lump-sum appropriations for Indian health care. Despite the availability of these funds, the Secretary maintained he had discretion to limit "available" funds for CSC to the amounts recommended in Congressional committee reports accompanying the appropriations bills, and therefore chronically underfunded CSC. After years of litigation, the Supreme Court confirmed that if the Government has a lump-sum appropriation available, it has a duty to honor the promises made in its ISDA contracts, including the duty to fully fund CSC.

Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631 (2005) (*"Cherokee"*), *aff'g Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003) (*"Thompson"*) *and rev'g Cherokee Nation of Oklahoma v. Thompson*, 311 F.3d 1054 (10th Cir. 2002).

Once the Supreme Court decided *Cherokee*, the Tribe filed claims under the CDA, 41 U.S.C. § 605(a) (now § 7103(a)) for full CSC funding for the years 1995 through 2004 on September 7, 2005. In letters dated April 28, 2006, the agency denied the claims on the basis that, among other reasons, the claims for CYs 1996-1998 were barred by the 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 and (what was then) 41 U.S.C. § 609.[2] There is no dispute that the Tribe presented its claims to the contracting officer in writing as required by the statute. However, in 2008 the district court below held that the statute of limitations for filing claims under the CDA barred the Tribe's 1996–1998 funding claims and that the statute is jurisdictional in nature and therefore not subject to tolling. *Menominee Indian Tribe of Wis. v. United States*, 539 F. Supp. 2d 152, 153–54 (D.D.C. 2008) (*"Menominee I"*). On appeal, this Court reversed the district court and held that the CDA statute of limitations for filing

[2] The years at issue in this appeal are CY 1996 through CY 1998 as well as the Tribe's "stable-funding" shortfall claim for 1999 and 2000, based on the amount owed in 1998.

administrative claims in federal court is not jurisdictional and is thus subject to equitable tolling. *Menominee II*, 614 F.3d at 529. This Court also held that class action tolling under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), is inappropriate in this case. *Menominee II*, 614 F.3d at 527. Because it appeared that the parties disputed relevant facts, this Court found that it could not determine whether the statute of limitations should be tolled in this case and remanded to the district court to determine whether equitable tolling is appropriate. *Id.* at 531.[3]

On remand, the Government moved to dismiss, or alternatively for summary judgment, and the Tribe filed a cross-motion for summary judgment. The district court ruled on summary judgment that the Tribe (1) did not establish facts supporting equitable tolling pursuant to the test in *Holland v. Florida*, —— U.S. ——, 130 S. Ct. 2549, 2562 (2010); and (2) did not file a "defective pleading" warranting equitable tolling as applied in the Supreme Court's decision in *Irwin*, 498 U.S. at 96. *See Menominee III*, 841 F. Supp. 2d at 104–09; Appendix, A5-A9. The court also ruled that even if equitable tolling applied, the Tribe's claim for CY

[3] On remand, the district court found that there were no disputed material facts: "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 [Appendix, A99]. 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] [Appendix, A92]." *Menominee III*, 841 F. Supp. 2d at 104 n.5; Appendix, A11.

1996 would fall outside the tolled period. *Id.* at 109–10; Appendix, A9-A10. Finally, the court ruled that the Tribe's "stable-funding" shortfall claims for 1999-2000, based on the amount owed in 1998, were barred by "law of the case." *Id.* at 110–11; Appendix, A9-A10.

This appeal followed.

IV. STATEMENT OF FACTS

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). The ISDA authorizes tribes to enter into agreements with the Secretary to assume responsibility to provide contractible programs, functions, services and activities ("PFSAs") that are provided for the benefit of tribal members and other beneficiaries that the Secretary would otherwise have administered directly. The mechanism for doing so that is relevant to this action is the self-determination contract under Title I of the ISDA. For many years the Tribe, under its Title I contracts and annual funding agreements ("AFAs"), has contracted to operate a comprehensive health services program, including medical, dental, and community health services.

As part of the agreement, the ISDA at Section 106(a) requires the Secretary to provide two types of funding: (1) "program" funds, the amount the Secretary

would have provided for the PFSAs had the IHS retained responsibility for them, 25 U.S.C. § 450j-1(a)(1); and (2) CSC, which cover reasonable administrative and overhead costs associated with carrying out the PFSAs, 25 U.S.C. §§ 450j-1(a)(2), (3), and (5). The latter category is the subject of the underlying dispute out of which this appeal arises.

B. The Statutory Requirement to Fully Fund CSC

In 1988 Congress amended the ISDA to address "[t]he consistent failure of federal agencies to fully fund tribal indirect costs." S. Rep. 100-274 (1987), at 8, *reprinted in* 1988 U.S.C.C.A.N. 2620, 2627. The Senate committee emphasized that funding of full CSC was the core policy of the ISDA: "Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed." *Id*. at 13.

While Section106, as amended, required full payment of CSC from available appropriations, the IHS continued to underpay tribal contractors considerably. It did so based on the agency's interpretation of section 106(b), which makes funding "subject to the availability of appropriations." 25 U.S.C. § 450j-1(b). From 1994 through 1997, the IHS maintained that the Secretary had the discretion to limit "available" funds to the amounts recommended in committee reports on the

appropriations bills.[4] Therefore, 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." *See* 25 U.S.C. § 450j-1(c) (mandating annual report to Congress on CSC distribution and deficiencies). After years of litigation, the Supreme Court held that the Secretary's interpretation of Section 106 was wrong and that there is a duty to fully fund CSC from the agency's lump-sum appropriation since it is "available." *Cherokee*, 543 U.S. at 637–38. The Court recently reaffirmed "that the Government must pay each tribe's contract support costs in full." *Salazar v. Ramah Navajo Chapter*, __ U.S. __, 132 S. Ct. 2181, 2186 (2012).

C. The Unique Factual Context for Tolling Created by CSC Litigation

The factual basis for equitably tolling the statute of limitations principally involves the Tribe's experience in two prior class action cases, the *Ramah* case and the *Cherokee* case. In order to appreciate the Tribe's diligence in pursuing its claims, it is necessary to understand the context of this complex CSC litigation landscape in greater detail.

[4] *See Thompson*, 334 F.3d at 1087–88 (summarizing and rejecting Secretary's interpretation, and holding that funds available for payment of CSC included agency's entire unrestricted lump-sum appropriation); *Cherokee Nation*, 543 U.S. at 644 (same).

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.), Addendum at 1a. The case later came to include "shortfall claims" of the kind Menominee raises in this case—i.e., that the Secretary did not pay 100% of indirect costs even as calculated with the diluted rates—as well as claims for unpaid direct CSC.

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. *Ramah Navajo Chapter v. Lujan*, No. CIV 90-0957 LH/RWM, Order (D.N.M. October 1, 1993), Addendum at 1a–6a. The 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 CDA. 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.*, Addendum at 5a. 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 presented separate claims.

In 1997, the Tenth Circuit ruled in favor of Ramah on liability. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). Settlement discussions ensued. The Menominee Tribe is a member of the *Ramah* class, and benefited from the favorable settlements obtained in the case. In 1999, the district court approved a $76 million partial settlement. *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999). Menominee received a distribution of $425,685.53 pursuant to this settlement. Pl.'s Opp'n, Ex. J (Erickson Aff.) at 5, line 450; Appendix, A55. In 2002, the district court approved a second partial settlement of $29 million. *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002). Menominee received a distribution of $370,177.07 pursuant to this settlement. Pl.'s Opp'n, Ex. K (Street Aff.) at 5, line 450; Appendix, A63.

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—deliberate underfunding of CSC for virtually all tribal contractors. The proposed class was defined as "[a]ll Indian tribes and tribal organizations operating Indian Health Service programs under contracts, compacts, or annual funding agreements authorized by the [ISDA] that were not fully paid their

contract support cost needs, as determined by IHS, at any time between 1988 and the present." *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357, 360 (E.D. Okla. 2001) ("*Cherokee Nation*"). Menominee, a longtime contractor with IHS, fit squarely within this definition and as part of the putative class would have been bound by any judgment had the class been certified, unless the Tribe opted out. 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. Pl.'s Opp'n, Ex. L (Wakau Decl.) ¶¶ 6-7; Appendix, A83.

In a ruling dated February 9, 2001, the court denied the Cherokee motion for class certification, holding that commonality had not been established. *Cherokee Nation*, 199 F.R.D. at 363.[5]

Four months after denying class certification, 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). Thus, for all members of the asserted class, the district court had denied the substance of their claims. At this point, Menominee was faced with adverse precedent holding it had no valid claim for full CSC funding.

[5] 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).

The Cherokee Nation appealed the substantive ruling of the district court to the Tenth Circuit, but it did not appeal the denial of class certification, rendering that ruling final. On appeal, on November 26, 2002, the Tenth Circuit affirmed the district court's substantive ruling. *Cherokee Nation*, 311 F.3d 1054, 1063. The Ninth Circuit made a similar 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. 2002).

The Cherokee Nation was also pursuing an administrative claim for contract support for other fiscal years in a separate proceeding before the Interior Board of Contract Appeals ("IBCA"). In that administrative setting, the IHS pressed the same arguments but the IBCA disagreed and the Cherokee Nation succeeded in establishing the right to the full funding of CSC before that Board. *In re Cherokee Nation of Okla.*, 99-2 BCA P 30462, 1999 WL 440045 (I.B.C.A. 1999), *reconsideration denied*, 01-1 BCA P 31349, 2001 WL 283245 (I.B.C.A. 2001). Thus, by 2002, there were three conflicting rulings on the IHS's duty to fully fund CSC; two rulings were by appellate courts.

IHS appealed the IBCA ruling and a further conflict was created when the Federal Circuit agreed with the IBCA, declaring that there was a statutory right to full funding of CSC. *Thompson*, 334 F.3d 1075 (Fed. Cir. 2003). As of September 12, 2003, when the Federal Circuit denied rehearing en banc, Menominee faced

two clearly 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. Menominee decided it would be prudent to allow the Supreme Court to resolve the issue before filing claims with the contracting officer. Pl.'s Opp'n, Ex. L (Wakau Decl.) ¶ 8; Appendix, A84.

The Supreme Court granted certiorari to resolve the conflict and in 2005 it affirmed the Federal Circuit, holding that the statute set out a duty to fully fund CSC and the government had to satisfy its contractual obligations out of other unrestricted appropriated funds if they were available. *Cherokee*, 543 U.S. 631.

After the Supreme 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) and Pl.'s Opp'n, Ex. M (memorandum to tribal attorneys from *Zuni* class counsel); Appendix, A43-45.

Once the Supreme Court finally decided *Cherokee*, the Tribe, like many other putative members of the now uncertified class, sought full funding of CSC as provided for in *Cherokee* by filing an individual claim under the CDA, 41 U.S.C. §§ 601–613 (now 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. The CDA then provided:

> 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.

41 U.S.C. § 605(a) (2000). As discussed below, assuming the statute was tolled during the pendency of the class action, the Tribe timely filed claims with the contracting officer for full CSC funding for the years 1995 through 2004 on September 7, 2005.[6] Following denial of the claims, the Tribe brought suit in federal district court.

V. SUMMARY OF ARGUMENT

In *Menominee II* this Court held that equitable tolling applies to the six-year time limitation in the CDA.[7] In recognizing that the statute of limitations in the

[6] Assuming the statute was tolled upon the filing of the class action that included the Tribe, the statute remained tolled until February 9, 2001 when the *Cherokee Nation* court denied the motion for class certification. *Cherokee Nation of Oklahoma v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001). The accrual date for CY 1996 claims is an issue in this appeal. See discussion on pages 44-46.

[7] In reaching this conclusion this Court applied two related principles: that there is a "rebuttable presumption" in favor of equitable tolling, *Holland*, 130 S. Ct. at 2562, and that equitable tolling applies to suits against the United States, *Irwin*, 498 U.S. at 95, where "the injury to be redressed is of a type familiar to private

CDA is subject to equitable tolling, this Court specifically noted agreement with the Federal Circuit's identical ruling in *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 583 F.3d 785, 798–99 (Fed. Cir. 2009) ("*ASNA I*"). *See Menominee II*, 614 F.3d at 530–31. Equitable tolling applies where a party 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*, 130 S. Ct. at 2553 (internal quotations omitted). The exercise of equitable powers must be made on a "'case-by-case' basis, rather than according to 'mechanical rules.'" *Id.* at 2563. Moreover, "[t]he diligence required for equitable tolling purposes is '*reasonable* diligence,' not 'maximum feasible diligence[.]'" *Id.* at, 2565 (internal quotations and citations omitted) (emphasis added).

On remand, the district court ruled that the Menominee Tribe 1) did not establish facts supporting equitable tolling, and 2) did not file a "defective pleading" warranting equitable tolling. *See Menominee III*, 841 F. Supp. 2d at 104–09; Appendix, A5-A9. The district court's decision and reasoning are fundamentally at odds with the Federal Circuit's recent decision in *Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 699 F.3d 1289 (Fed. Cir. 2012) ("*ASNA II*"), where the Court found that equitable tolling applied to a tribal organization's reliance on facts that are essentially the same as those in Menominee's case, and in doing so

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litigation." *Menominee II*, 614 F.3d at 529, *quoting Chung v. DOJ*, 333 F.3d 273, 277 (D.C. Cir. 2003).

expressly declined to follow the reasoning employed by the district court below in *Menominee III*, which was decided during briefing in *ASNA II*. *See ASNA II*, 699 F.3d at 1296 n.4. This Court should follow the Federal Circuit and reject the district court's conclusions and reasoning on the application of equitable tolling.

The district court erred because it misapplied *Holland* by adopting a stringent version of the standard for equitable tolling, divorcing the question of a party's *diligence* from any consideration of the *reasonableness* of the party's actions:

> 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."

Menominee III, 841 F. Supp. 2d at 107, citing *Holland*, 130 S. Ct. at 2562 (emphasis in original); Appendix, A8. By declining to reach or decide whether the Tribe in fact exercised "reasonable diligence," the district court created a *de facto* requirement that the Tribe had to take some affirmative action to file its claim before the statute of limitations expired.[8] Given the extraordinary factors at play,

[8] The district court concluded, *inter alia*, that "Menominee cannot point to any affirmative act it took in over six years to pursue its claim diligently," and that "filing an administrative claim is a relatively simple process." *Menominee III*, 841 F. Supp. 2d at 109; Appendix, A9.

including the breadth and complexity of CSC 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 CSC under the ISDA, the Tribe unquestionably exercised reasonable diligence by waiting until after the Supreme Court decided the legal standard in *Cherokee*, but before the limitations period expired (with the benefit of tolling) to file its claims.

The Tribe exercised reasonable diligence by "monitoring the relevant legal landscape," *ANSA II*, 699 F.3d at 1297, and this Court should reject the district court's grounds for requiring affirmative action to file claims. As the Federal Circuit found in circumstances virtually the same as this case:

> 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.

Id. The record in this case shows that the Menominee Tribe acted with reasonable diligence by monitoring the broad legal landscape affecting CSC claims, including related class action proceedings, and filed claims after the Supreme Court resolved the conflict in the Circuits regarding the IHS's duty to fund CSC. This Court should find that equitable tolling is warranted for the Tribe's claims.

The district court also erred by dismissing the Tribe's argument that its due diligence in this matter is demonstrated by the combination of the pendency of the class action and a "defective pleading" filed during the statutory period. *See Irwin*, 498 U.S. at 96. The Tribe diligently pursued its claims through the C*herokee* class action, and although the class was never certified, it would be unfair to penalize the Tribe for that—particularly in light of the success of the parallel *Ramah* CSC class action.

The district court dismissed the Tribe's reasoning on the ground that it ignores a distinction between a defective *class* and a defective *pleading*, and the district court's assumption that this Court already rejected this argument by ruling that class action tolling was inapplicable in this case. *See Menominee III*, 841 F. Supp. 2d at 108–09, *citing Menominee II*, 614 F.3d at 526–29; Appendix, A8-A9. The district court mistakenly conflated class action tolling with equitable tolling, reasoning, incorrectly, that the same defects which barred the application of class action tolling necessarily barred equitable tolling, a conclusion that is not supported by this Court's ruling in *Menominee II*.[9] The district court's conclusion

[9] In the prior appeal in *Menominee II*, the Tribe cited *American Pipe*, 414 U.S. 538, for the proposition that the *Cherokee* class action *legally* tolled the statute as to all asserted members of the class, including Menominee. This Court held it could not have been a member of the class since it had not presented its claims to its contracting officer under § 605(a), which renders it ineligible to benefit from legal class action tolling. While this Court rejected the legal tolling argument, 614 F.3d

was in error because the Tribe's reasonable reliance on the filing of the *Cherokee* class action to vindicate its contract claims, in the context of the extraordinary CSC litigation history, meets the standard for equitable tolling.

The Tribe's reliance on the class action was particularly reasonable because the Tribe did in fact recover money damages as a class member in the *Ramah* case. This Court should reverse the district court, apply the correct standard for equitable tolling, and find that the Tribe reasonably relied on the pendency of a class action as serving as an adequately filed pleading of its claim. The Tribe could not have known based on its prior experience that the certification would be denied. Thus the Tribe exercised reasonable diligence and took appropriate action sufficient to toll the limitations period.

The district court also erred by refusing to consider the equities of the Tribe's circumstances in determining whether equitable tolling is warranted. *See ASNA II*, 699 F.3d at 1295 ("Equitable tolling hinges upon particular equities of the facts and circumstances presented in each case."). In applying its stringent version of the equitable tolling standard, the district court did not take into account the fact that the agency would not be prejudiced by the tolling of the limitations period, or that the analysis should be influenced by the special relationship between the Government and Indian tribes. In *ASNA II*, the Federal Circuit carefully

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at 526–29, it did not hold that the *Cherokee* class action could not equitably toll the statute.

considered both of these factors, and found that equitable tolling was warranted for a tribe in essentially the same position as the Menominee Tribe. *See ASNA II*, 699 F.3d at 1297–98 (equitable tolling was "not fundamentally unfair" to the Government and consistent with the obligations flowing from the special relationship between the Government and tribes).

First, the Government is not prejudiced because (1) it has been on notice of the Tribe's claims since the *Cherokee* case was filed in 1999, and (2) the Tribe's claims rely solely on documentary evidence (principally contracts, funding agreements, and indirect cost rate agreements). The Federal Circuit found notice and the documentary nature of the evidence in that case to be significant factors in finding that equitable tolling applied. *ASNA II*, 699 F.3d at 1297.

Second, the Government's trust responsibility to the Tribe is a critical factor in the balance of equities for tolling. In *ASNA II*, the Federal Circuit ruled, in factual circumstances virtually identical to Menominee's, that tolling was consistent with the obligations flowing from the special relationship between the Government and tribes, noting that the trust relationship is especially critical under the ISDA, which affirms the Government's "unique and continuing relationship with, and responsibility to, individual Indian tribes[.]" *ASNA II*, 699 F.3d at 1297–98 (quoting 25 U.S.C. § 450a(b)).

The district court erred in failing to even consider the lack of prejudice to the Government and the trust responsibility, factors raised by the Tribe and not seriously disputed by the Government. This Court should follow the Federal Circuit and find that equitable tolling applies to the filing of the Menominee Tribe's claims.

If the Court finds that equitable tolling is warranted in this case, it should address and overturn two additional rulings made by the district court. First, the court ruled that even if equitable tolling applied, the Tribe's claim for CY 1996 would fall outside the tolled period. *Menominee III*, 841 F. Supp. 2d at 109–10; Appendix, A9-A10. The court held that the claim accrued at the end of 1996, rather than at the end of 1998 when the contract closed and the damages became ascertainable, as demonstrated by the Tribe. *Id.* This Court should rule that as a matter of law the Tribe's CSC claim accrued at the end of the contract.

Finally, the district court ruled that the Tribe's "stable-funding" shortfall claims for 1999-2000, based on the amount owed in 1998, were barred by "law of the case." *Id.* at 110–11; Appendix, A10. The Tribe contended that IHS should have paid the full CSC amount in 1998 and at least the same amount in 1999 and 2000. The district court held that these claims are premised on valid claims for 1997 and 1998, which in turn depend on whether the statute was tolled. These

claims should be reinstated if the Court holds that the Tribe's reasonable and diligent actions tolled the limitations period.

VI. ARGUMENT

This Court held that "the time limitation in [the CDA] is subject to equitable tolling." *Menominee II*, 614 F.3d at 531. In *Irwin*, the Supreme Court held that equitable tolling applies to suits against the Government in the same way it applies to private suits. 498 U.S. at 96. Equitable tolling applies where a party proves: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Holland*, 130 S. Ct. at 2553. Equitable powers are to be exercised "on a case-by-case basis" rather than according to "mechanical rules." *Id.* at 2563. Equitable doctrines "relieve hardships" imposed by "hard and fast adherence" to absolute legal rules. *Id*. (citations and internal quotation marks omitted). "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). Moreover, "[t]he diligence required for equitable tolling purposes is '*reasonable* diligence,' not 'maximum feasible diligence.'" *Id.* at 2565 (internal quotations and citations omitted) (emphasis added).[10] *See also ASNA II*, 699 F.3d

[10] *See also Campbell v. United States*, 375 Fed. App'x. 254, 259 (3d Cir. 2010) ("Equitable tolling requires the exercise of reasonable diligence."); *In re Jim L. Shetakis Distrib. Co.*, 401 Fed. App'x. 249, 251 (9th Cir. 2010) ("A party cannot invoke equitable tolling when it fails to investigate its claim in a reasonable, diligent manner."); *Pafe v. Holder*, 615 F.3d 967, 969–70 (8th Cir. 2010) (applying standard of "reasonable diligence"); *Jaquay v. Principi*, 304 F.3d 1276, 1287 (Fed.

at 1295 ("Equitable tolling hinges upon particular equities of the facts and circumstances presented in each case.").

The Tribe meets the equitable test for tolling because (1) the Tribe took reasonable, diligent and appropriate action given the *Cherokee* class action and the Tribe's experience as a participant in another CSC class action; (2) the Tribe reasonably relied on the filing of a class action that was ultimately not certified, meaning in effect that the Tribe had filed in the wrong court, a classic equitable tolling scenario; and (3) tolling does not prejudice the Government and is consistent with the trust relationship between the Government and the Tribe. The district court erred in failing to apply well-established principles of equitable tolling based on the Tribe's reasonable diligence in relying on the filing of the *Cherokee* class action and the extraordinary circumstances caused by the history, breadth and complexity of the CSC litigation.

A. Standard of Review

The standard of review for a district court's summary judgment decision is *de novo*. *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161 (D.C. Cir. 2011); *Calhoun v. Johnson*, 632 F.3d 1259, 1261 (D.C. Cir. 2011); *Gallant v. N.L.R.B.*, 26 F.3d 168, 171 (D.C. Cir. 1994). Summary judgment is appropriate if there is no dispute as to

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Cir. 2002) (en banc), *overruled on other grounds by Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (en banc), *rev'd* 131 S. Ct. 1197 (2011).

any material fact. FED. R. CIV. P. 56(a). Where facts are undisputed, the determination whether the criteria for equitable tolling are met is a question of law subject to *de novo* review. *See United States v. Saro*, 252 F.3d 449, 455 n.9 (D.C. Cir. 2001) ("[W]e 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."); *see also ASNA II*, 699 F.3d at 1294–95, *citing Former Emps. of Sonoco Prods. Co. v. Chao*, 372 F.3d 1291, 1295 (Fed. Cir. 2004)). The parties below agreed there are no disputed issues of fact.[11]

Under the ISDA, a court is required to apply a statutory rule of construction that requires a liberal interpretation of the statute and the contract in favor of the Tribe. 25 U.S.C. § 450*l*(c) (§ 1(a)(2) of mandatory model agreement).

B. The Statute of Limitations on the 1996-1998 Claims Was Equitably Tolled Because the Tribe Pursued Its Claims with Reasonable Diligence by Relying on a CSC Class Action, When the Tribe's Experience, Based on Participation in a Similar Class Action, Was that Such Reliance Was Reasonable and Not Subject to Any Prerequisites.

1. It Was Reasonable for Menominee to Believe it Was a Member of the Proposed Class.

The district court recognized that the Tribe's CSC claims were interwoven with the long and complex nationwide CSC litigation history, involving a number of judicial and administrative proceedings and hundreds of tribes. *See Menominee*

[11] *See Menominee III*, 841 F. Supp. 2d at 104 n.5; Appendix, A11.

III, 841 F. Supp. 2d at 105–06; Appendix, A6-A7. Rather than determining whether the Tribe exercised reasonable diligence under these extraordinarily complicated circumstances, the district court applied a standard of diligence that required that the Tribe had to take some form of affirmative action, beyond monitoring the legal landscape and relying on the class action, to pursue and perfect a claim before the agency or in court. In doing so the court dismissed what it characterized as the Tribe's "reasonable inaction," *id.* at 107, but which was, in fact, the Tribe's reasonable diligence in carefully monitoring the numerous threads of the CSC litigation landscape.

If a party can demonstrate diligence only by filing an administrative claim or by initiating or joining a lawsuit, as the court's ruling would require, then equitable tolling could never apply. The Tribe's reasonable decision to rely on the class action was not "inaction." As the Federal Circuit recently observed, in holding that tolling was warranted for a tribal organization in the same position as the Menominee Tribe:

> 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.

ANSA II, 699 F.3d at 1297. We urge this Court to adopt the Federal Circuit's more appropriate view of what constitutes "reasonable diligence" in monitoring the existing legal landscape of nationwide complex and multi-faceted litigation.

Given the extraordinary circumstances surrounding the CSC litigation, there can be no doubt that the Tribe acted reasonably and diligently to monitor the proceedings and judicial orders and opinions that were determinative of the Tribe's claims and, when the time was appropriate, to file its claims. See Pl.'s Opp'n, Ex. L (Wakau Decl.) ¶¶ 3-9; Appendix, A82-A84.

The Tribe's actions were consistent with the presumption that the complaint filed in a class action is filed on behalf of all proposed class members and thereby stands as a properly filed lawsuit until the class certification is resolved. For class actions, it is anticipated that putative class members—and those who reasonably believe they are class members—will not act to file their own pleadings. As explained by the Supreme Court, "[c]lass members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims." *Crown, Cork & Seal Co., Inc.*, 462 U.S. 345, at 352–53 (1983). *See also Cullen v. Margiotta*, 811 F.2d 698, 719 (2d. Cir. 1987) (Potential members of a putative class "are expected and encouraged to remain passive during the early stages of the class action and to 'rely on the named plaintiffs to press their

claims.'") (quoting *Crown, Cork & Seal Co., Inc.*, 462 U.S. at 353). In this context, monitoring the legal landscape is the critical activity demonstrating reasonable diligence.

Although Menominee learned in 2010 that it was not entitled to Rule 23 tolling because it did not present its claims, *Menominee II*, 614 F.3d at 528, the law was quite different at the critical time the *Cherokee* class was pending. The Tribe had been a class member in the *Ramah* litigation since 1993 and for many years Menominee relied on the *Ramah* class action to vindicate its CSC claims against BIA. That reliance was justified, as the Tribe received some $800,000 from the settlements of the class claims, as well as equitable relief related to future indirect cost rate calculations. The Tribe never filed requests for a contracting officer's decision on these claims, Pl.'s Opp'n, Ex. L (Wakau Decl.) ¶¶ 4-5 Appendix, A83, yet was not barred from participation in the class either by the CDA presentment requirement or by the statute of limitations.

On March 5, 1999, the day the *Cherokee* class action was filed, class counsel sent a "Dear Tribal Leader" letter to all tribes announcing that they may have a claim covered by the class action if they contracted with IHS under the ISDA from 1988 to the present. Pl.'s Opp'n, Ex. N at 1 Appendix, A46. In an accompanying General Bulletin, class counsel assured tribes that "[filing] the case as a class action has the effect of stopping the running of any statute of limitations against

individual tribes eligible for membership in the class." *Id*. at 4; Appendix, A49. Based on these representations, as well as Menominee's experience in the *Ramah* class, the Tribe reasonably believed it need not file its own claims to participate in the class action, and that the statute of limitations on such claims was tolled at least until such time as class certification might be denied. Pl.'s Opp'n, Ex. L (Wakau Decl.) ¶¶ 6-7; Appendix, A83.

When the *Cherokee Nation* court declined to certify the class on February 9, 2001, Menominee first learned that it might not be a member of the class action. But the *Cherokee Nation* court did not hold that exhaustion was necessary to be part of the class; on the contrary, it held that the class was sufficiently definite, as it was composed of the 296 tribes that had suffered CSC shortfalls (but not submitted claims) in the years at issue. *Cherokee Nation*, 199 F.R.D. at 361. The court specifically declined to disagree with *Ramah*, noting that its ruling not to certify the class was based on Rule 23 and not presentment. *Id*. at 366 n.1. Thus, based on its experience with the *Ramah* precedent, the Tribe reasonably concluded that the statute was tolled for almost two years during the class action.

Menominee's reliance on *Cherokee* to toll the statute during the period 1999-2001 must be judged based on its monitoring of the legal landscape at that time, not with the hindsight of rulings a decade later. *Ramah* was the only precedent available at the time and it held that exhaustion was not required under

the CDA when an ISDA class action challenged uniform agency policy. Other authorities supported this position: "[T]he Supreme Court has held that class members need not exhaust administrative remedies individually in order to participate as a member of the class." 1 NEWBERG ON CLASS ACTIONS § 1:3. *Ramah* followed this precedent when it held that exhaustion by a class representative was sufficient to meet the exhaustion requirement for all class members. Not until 2010 was the matter decided conclusively when the D.C. Circuit in *Menominee II* followed the Federal Circuit and found presentment had been required in order for any tribal contractor to have been a member of the *Cherokee* class and thus benefit from class action tolling.

Menominee filed its claims in 2005 within the six-year limitations period as extended by the limitations suspension period. Menominee learned in 2010 that it had been mistaken about its membership in the *Cherokee* class, but at the time that the *Cherokee* case was in litigation Menominee's reliance was well-founded based on the law as it then existed. *Cf. Harris v. Carter*, 515 F.3d 1051 (9th Cir. 2008) (holding statute equitably tolled where petitioner relied on circuit court precedent later overruled by Supreme Court).[12] Menominee cannot be accused of inaction or

[12] Following the *American Pipe* and *Crown, Cork & Seal Co., Inc.* reasoning, at least three other federal courts besides *Ramah* had stated that administrative claims are tolled during the class action period. "Applying the tolling rule to the filing of administrative claims will have the same salutary effect as exists for the filing of lawsuits. In both cases, tolling the statute of limitations during the pendency of a

lack of diligent attention to the fate of its CSC claims simply on the basis that the Tribe did not file individual claims. Menominee actively participated in the *Ramah* class case through the class claims process, followed the rulings in the *Cherokee* case, and relied on the presentment ruling in *Ramah*. Under these circumstances, Menominee monitored and reasonably interpreted the existing legal proceedings and precedent, *see ASNA II*, 699 F.3d at 1297, and filed claims within the statute of limitations as equitably tolled.

2. The Tribe Took Reasonable, Diligent and Appropriate Action Given the Unsettled Legal Landscape.

Menominee acted diligently and reasonably in assessing the legal landscape in determining when to file. As discussed above, the Tribe's delay was justified by the law on presentment and class membership in a CSC class action under the ISDA during the time at issue. Further, the merits of an individual claim—whether IHS in fact had a legal duty to pay full CSC—were, at the time, far from clear. Lack of any clear precedent, while not determinative, is a factor in equitable tolling analysis. *Capital Tracing, Inc., v. United States*, 63 F.3d 859, 862 (9th Cir. 1995)

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class action will avoid encouraging all putative class members to file separate claims with the EEOC and the respective state agencies in deferral states . . . . This Court concludes that the *American Pipe-Parker* analysis applies equally well to putative class members who have yet to file an administrative claim." *Sharpe v. Am. Express Co.*, 689 F. Supp. 294, 300–01 (S.D.N.Y. 1988); *cited with approval in Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994); *see also McDonald v. Sec'y of Health & Human Servs.*, 834 F.2d 1085, 1092 (1st Cir. 1987).

(lack of clear precedent on an issue may serve as an equitable factor in tolling); *Vance v. Whirlpool Corp.*, 707 F.2d 483, 489–90 (4th Cir. 1983). Claims may also be deemed tolled until "the 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).

During 2001-2005, there were three precedents that conflicted on the point of whether Menominee could have validly stated claims for full funding of CSC to the IHS contracting officer. The federal district court in Oklahoma held, and the Tenth Circuit affirmed, that any claim for full funding of CSC was not valid. *See Cherokee*, 311 F.3d at 1063. In *Shoshone-Bannock*, the Ninth Circuit also held that the Government was not liable for CSC shortfalls. 279 F.3d 660. Then in 2003, the Federal Circuit declared that there was a statutory right to full funding of CSC. *Thompson*, 334 F.3d at 1094. Thus, as of September 12, 2003, when the Federal Circuit denied rehearing en banc, Menominee faced conflicting Circuit Court rulings on the extent of the IHS's duty. Given the legal 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.

It was at this time that the initial limitations period was coming to an end (October 1, 2003). It was reasonable for Menominee to conclude that the limitations period was equitably extended and await the Supreme Court's resolution of the conflict as to whether there could be a valid claim for the full funding of CSC. The Tribe made the decision to allow the Supreme Court to resolve the matter. Pl.'s Opp'n, Ex. L (Wakau Decl.) ¶ 8; Appendix, A84.

It was not until the Supreme Court ruled on March 1, 2005 that the conflict among Circuits was resolved. At that time it was confirmed that Menominee could make valid claims under the ISDA for the full payment of CSC. The Tribe acted quickly after that ruling to file its claims with the contracting officer within the statute of limitations period as calculated under the class action limitations tolling doctrine. In the same circumstances, the Federal Circuit held that such action "[m]onitoring and reasonably interpreting applicable legal proceedings, judicial order and opinions, and taking action as necessary," constituted "reasonable diligence" for purposes of equitable tolling. *ANSA II*, 699 F.3d at 1297.

The Supreme Court has said that "[t]he diligence required for equitable tolling purposes is reasonable diligence, . . . not maximum feasible diligence." *Holland*, 130 S. Ct. at 2565 (citations and internal quotation marks deleted). Given the unsettled case law on the Government's duty to pay full CSC under the ISDA, the Tribe exercised reasonable diligence by monitoring existing proceedings and

respecting judicial order and precedent, and thus waiting until after the Supreme Court decided *Cherokee*, but before the limitations period expired (with the benefit of tolling) to file its claims. Equity requires no more. Fairness is fairness, and the Tribe's reasonable diligence based on the law at the time, combined with the lack of prejudice to the Government and the Government's trust relationship with the Tribe, warrant equitable tolling. *See Capital Tracing, Inc.*, 63 F.3d at 863.

C. The Statute of Limitations on the 1996-1998 Claims Was Equitably Tolled by the Cherokee Nation's Defective Class Action Pleading.

Equitable tolling applies when a "claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period," *Irwin*, 498 U.S. at 96, and reliance on an unsuccessful class action is one example of such a "defective pleading." *Id*. at 96 n.3, *citing American Pipe*, 414 U.S. 538.

The district court misapplied Supreme Court precedents in holding that only a defective pleading, i.e. complaint, can toll the statute, not reliance on a "defective class"—i.e., one later denied as not meeting the requirements of Rule 23.

In *Irwin*, the Supreme Court cited *American Pipe* as an example of a case where equitable tolling was justified by a defective pleading—i.e., "plaintiff's timely filing of a defective class action tolled the limitations period as to the individual claims of purported class members." 498 U.S. at 458 n.3. There was nothing "defective" about the State of Utah's complaint in *American Pipe*, other

than its assertion of a class ultimately held not to meet the requirements of Rule 23. But the Supreme Court equated reliance on the filing of that class action complaint as a defective pleading warranting equitable tolling.

The district court dismisses *Irwin* in a footnote: "*Irwin* did not address the distinction between class action tolling and equitable tolling. *American Pipe* actually dealt with class action, not equitable tolling." *Menominee III*, 841 F. Supp. 2d at 109 n.8; Appendix, A11. These statements are true but they do not explain why a defective class could not support *either* class action *or* equitable tolling, as the Supreme Court clearly indicates it could. The district court's analysis is not logical and is contrary to equitable analysis, which is flexible and designed to "relieve hardships" imposed by "hard and fast adherence to more absolute legal rules" such as the district court created. *Holland*, 130 S. Ct. at 2563.

In fact, holding the statute equitably tolled based on the pendency of a class action and reliance thereon as the *ASNA II* Court did is fully consistent with this Court's ruling in *Menominee II*. This Court clearly distinguished between "class-action tolling," which is automatic under Rule 23, and equitable tolling, holding that while the former did not apply the latter might. "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." 614 F.3d at 531. The key critical "circumstances" the Court was

referring to in this case are the CSC class actions and the fact that the Tribe based its equitable tolling argument significantly on the fact that a class action was pending. Pl.'s Opp'n (Sept. 10, 2007) at 35; Appendix, A66 ("In the Alternative, the Statute of Limitations Was Equitably Tolled by the CSC Class Actions.").

The Tribe's "purported reliance on the pendency of the class action" was irrelevant to legal tolling, the other legal theory at issue, which benefits even those class members unaware of the proceedings. 614 F.3d at 529. But such reliance is at the heart of the fact-based equitable tolling analysis, which this Court remanded to the district court to consider in the first instance. Thus, this Court clearly contemplated that a class action could equitably toll the statute of limitations for an asserted class member in circumstances where it did not legally toll the statute. *See Hatfield v. Halifax*, 564 F.3d 1177, 1188 (9th Cir. 2009) (equitable tolling based on reasonable, good-faith reliance can apply when class-action tolling does not).

To read this Court's decision as precluding equitable tolling based on the class actions (as well as legal tolling), would render the remand a pointless exercise. If this Court had considered the two doctrines to be somehow identical, then it would not have remanded the case for consideration under equitable tolling principles. But it did so aware that the Tribe intended to use its reliance on the

class as a basis to establish its case for delay in filing its administrative claim.[13] There is no other way to interpret the remand order than as a mandate to determine whether reasonable reliance on the class actions justified equitable tolling of the statute.

That a class action can provide a basis for equitable tolling is also supported by this Court's ruling on laches. The Tribe did not argue the substance of its equitable tolling case to this Court, but it did argue the substantive case for laches, asking the Court to find that the Tribe's reliance on the class was reasonable so as to preclude the application of the laches doctrine. This Court directed the district court to consider the Tribe's arguments that it had good reason for delaying the filing of claims. *Menominee II*, 614 F.3d at 531–32.[14] Noting the equitable nature

[13] On appeal in *Menominee II*, the Tribe cited *American Pipe* for the proposition that the *Cherokee* class action *legally* tolled the statute as to all asserted members of the class, including Menominee. This Court held that the Tribe could not benefit from legal class action tolling, 614 F.3d at 526–29, but did not hold that the *Cherokee* class action could not equitably toll the statute. Indeed, if this Court believed that, it could have said so in its opinion, although such a ruling would have contravened the Supreme Court in *Irwin*, along with many other courts. *See, e.g.*, *Bridges v. Dep't of Maryland State Police*, 441 F.3d 197, 211 (4th Cir. 2006) (*American Pipe* equitable tolling rule protects "the objectively reasonable reliance of absentee class members"); *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 322–23 (2d Cir. 2004) (citing *American Pipe* for proposition that "equitable tolling has been held appropriate where plaintiff filed and served defective papers before the expiration of the statutory period").

[14] *See also Metlakatla Indian Cmty. v. Dep't of Health & Human Services*, CBCA 181-ISDA and 279 to 282-ISDA, 2008 WL 3052446 (Order, July 28, 2008). The Civilian Board of Contract Appeals noted that the Tribe submitted its claims to the

of the laches inquiry, this Court remanded the laches issue to the district court to consider the Tribe's reliance argument. *Menominee II*, 614 F.3d at 531–32 (since the doctrine is an equitable one that turns on whether the party "delayed inexcusably or unreasonably in filing suit," then "[o]n remand, the district court should consider Menominee's arguments that it had a good reason for not presenting its claims to the contracting officer sooner").

The Tribe's good faith reliance on the filing of the class action to vindicate its contract claims meets the standard for equitable tolling. Like the class in *American Pipe*, the *Cherokee Nation* class ultimately was not certified because the requirements of Rule 23 were not met. In *American Pipe*, the class action was defective because the class failed the numerosity requirement of Rule 23(a)(1), *see* 414 U.S. at 543, while in *Cherokee Nation* the defects were lack of commonality, typicality, and adequate representation under Rules 23(a)(2), (3), and (4). The Tribe cannot be tasked with knowing that it had, in effect, filed a defective pleading by relying on the class complaint in *Cherokee Nation* to vindicate its rights. This is a classic defective pleading scenario. The Tribe cannot not be said to have slept on its rights, given its reliance on a class action, albeit one that was later denied.

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contracting officer four years after the request for class certification was denied in *Cherokee Nation*, and a few months after the Supreme Court's decision, and found the delay justified based on the pending class litigation. The Board rejected the Government's equitable defense of laches. Addendum at 12a–14a.

D. Equitable Tolling Does Not Prejudice the Government and Is Consistent with the Obligations Flowing From the Special Relationship Between the Government and Tribes.

In applying its stringent version of the equitable tolling standard the district court did not take into account anywhere in its opinion the fact that there is no evidence that the agency would be prejudiced by the tolling of the limitations period, or that the court's analysis must be influenced by the special relationship between the Government and Indian tribes, as reflected in the trust responsibility and ISDA. The district court thus failed to consider significant factors weighing in the balance of the equities.

In *ASNA II*, the Federal Circuit carefully considered both of these factors, expressly declined to follow the reasoning employed by the district court in *Menominee III*, and found that equitable tolling was warranted for a tribal contractor in essentially the same position as the Menominee Tribe. The Federal Circuit noted that equitable tolling was "not fundamentally unfair" to the Government, which had "notice of the exact nature and scope" of the tribal claims, and that tolling was consistent with the obligations flowing from the special relationship between the Government and the tribes. *ASNA II*, 699 F.3d at 1297–98. The district court in *Menominee III* erred by not evaluating lack of prejudice and the significance of the trust responsibility. The reasoning employed by the

Federal Circuit in *ANSA II* applies equally to the Menominee Tribe and supports the application of equitable tolling in this case.

1. The Government is not Prejudiced by the Application of Equitable Tolling in This Case.

Equitable tolling analysis requires inquiry into the impact on the Defendants of applying tolling. "[A]bsence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply . . . ." *Hedges v. United States*, 404 F.3d 744, 753 (3rd Cir. 2005); *Capital Tracing, Inc.*, 63 F.3d at 863 (The lack of clarity in our circuit's law . . . and the absence of demonstrated prejudice to the government justifies equitable tolling of the limitations period . . . ."). In this case, the delay allowed by equitable tolling has no prejudicial impact on the Government, a fact that argues strongly in favor of applying the doctrine.

First, the Government has been on notice of the Tribe's claims (and those of all other tribal contractors) at least since 1999, when the Cherokee Nation filed its class action. This is a key reason why courts, including the Supreme Court in *Irwin*, apply equitable tolling to defective class actions. Tolling is consistent with "essential fairness to defendants" when the class action "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." *American Pipe*, 414 U.S. at 554–55. As the *ASNA II* court noted, the

Zuni CSC class action—like the *Cherokee* class action before it—"put IHS on notice of the exact nature and scope" of the claims. 699 F.3d at 1297.

Second, the Tribe's claims rely solely on documentary evidence—the contracts, funding agreements, indirect cost rate agreements, and shortfall reports—rather than the testimony of witnesses. The Federal Circuit found this a significant factor in its equitable tolling analysis. *ASNA II*, 699 F.3d at 1297. Indeed, in Menominee's case, the Government concedes that there are no disputed material facts, *Menominee III*, 841 F. Supp. 2d at 104 n.5; Appendix, A11; there is no need for testimony at all.

In *Menominee II*, this Court concluded that in the laches context the Government was not prejudiced by the Tribe's late filing of its FY 1995 claim: "We fail to see how the tribe's delay prejudiced the government." 614 F.3d at 532. If the Tribe's 2005 filing of its 1995 claim worked no prejudice, it follows that filing the 1996, 1997, and 1998 claims in 2005 also did not prejudice the Government.[15]

[15] *See ASNA II*, 699 F.3d at 1297 ("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."); *see also Council of Athabascan Tribal Gov'ts v. United States*, 693 F. Supp. 2d 116, 123 (D.D.C. 2010) (holding, in rejecting laches defense, that the Government was not prejudiced by delay because CSC claims depend on issues of statutory and contract interpretation, not witness testimony).

Finally, the Government's own conduct is relevant to the equitable analysis. The Government argued in *Cherokee* that filing administrative claims would disqualify a tribe from participating in the class. Years later, in 2005, the Government argued that administrative presentment was a prerequisite to participation in the *Zuni* class. *See* Pl.'s Opp'n, Ex. M at 2-3; Appendix, A44-A45. The district court declined to consider these statements as relevant factors in the shifting and evolving legal landscape of CSC claims.

The court's heading for this part of the analysis is the "Government's alleged switch of position," *Menominee III*, 841 F. Supp. 2d at 107; Appendix, A8, which misconstrues the Tribe's argument. The court quoted the Tribe's summary of the Government's argument ("[d]uring the *Cherokee* case, the Government argued that contractors who presented their own claims should be *excluded* from the class"), *id.*, but not the Tribe's following citation to the court in the *Cherokee* case, which had concluded that the Government sought to "exclude tribes that are litigating or have litigated cases in other judicial *or administrative* forums." *Cherokee Nation*, 199 F.R.D. at 362 (emphasis added). *See* Pl.'s Opp'n at 21; Appendix, A87. The district court construed the Government's action as "arguing that no class should be certified," not that tribes which filed a claim would be excluded, *Menominee III*, 841 F. Supp. 2d at 108; Appendix, A8, an interpretation at odds with the court's contrary conclusion in *Cherokee Nation*.

Even if, in hindsight, the district court's interpretation may be more accurate than that of the court in *Cherokee Nation*, the application of equitable tolling should turn on the reasonableness of the Tribe's actions in real time, not in hindsight. In any event, even though the court disagreed with the Tribe's characterization of the Government's alternate litigation positions, it concluded that the Government's changed or inaccurate litigation positions would not excuse failure to take affirmative action to file a claim. *Menominee III*, 841 F. Supp. 2d at 108; Appendix, A8.

This conclusion was wrong. The Tribe did not argue that offering alternate litigation positions amounts to the kind of trickery or misconduct that would independently justify equitable tolling. *See Irwin*, 498 U.S. at 96. Tolling, however, like other equitable doctrines, is flexible and depends on the totality of the facts. *See Holland*, 130 S. Ct. at 2563 ("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.") (citations and internal quotation marks omitted); *accord Mapu v. Nicholson*, 397 F.3d 1375, 1380 (Fed. Cir. 2005) ("We again reject the suggestion that equitable tolling is limited to a small and closed set of factual patterns. . . ."). And in this context, the Government's changed or inaccurate litigation positions

are very relevant when evaluating both the Tribe's reasonable diligence monitoring the complex legal landscape and any alleged prejudice to the Government.

In sum, the Defendants were on notice of the claims due to the class actions, and the documentary record is sufficient to decide the merits of the claims. The Defendants can show no prejudice from the application of equitable tolling.

2. The Special Relationship Between the Government and Indian Tribes Is an Important Factor in the Balance of Equities for Tolling.

The district court also failed to account for the special relationship between the Government and Indian tribes as a factor in the balance of equities for tolling. The ISDA and the contracts specifically invoke the trust responsibility. In declaring its policy of self-determination, the ISDA states that "Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole. . . ." 25 U.S.C. § 450a(b). The Tribe's contracts mirror the statutory model agreement: "The United States reaffirms its trust responsibility to the Menominee Indian Tribe of Wisconsin. . . ." IHS Contract No. 239-96-0030, § (d)(1)(A), Defs.' Ex. B at 013; Appendix, A38[16]; *cf.* 25 U.S.C. § 450*l*(c), § 1(d)(1)(A) of model agreement.

[16] This contract applied in calendar years 1996, 1997, and 1998. The successor contract had the same provision—as required by the ISDA.

In *ASNA II*, the Federal Circuit ruled, in factual circumstances virtually identical to those in this case, that tolling was consistent with the obligations flowing from the special relationship between the Government and the tribes. *ASNA II*, 699 F.3d at 1297–98. The court noted that this special relationship is especially critical under the ISDA, which affirms the federal government's "unique and continuing relationship with, and responsibility to, individual Indian tribes." *Id*. at 1298 (quoting 25 U.S.C. § 450a(b)). That same reasoning applies to the Menominee Tribe and fully warrants application of equitable tolling in this case.

For decades the Government has resisted its obligation to "pay each tribe's contract support costs in full," *Salazar*, 132 S. Ct. at 2186, and now asserts statute of limitations (and other defenses) to avoid liability. The application of equitable tolling in this case would promote fundamental fairness by allowing the court to reach the merits of the Tribe's 1996-1998 claims.

E. Menominee Timely Filed the 1996 Claim, as Well as the 1997 and 1998 Claims, and Thus Preserved All Claims for 1996-2000.

1. The CY 1996, 1997, and 1998 Claims Were Filed Within the Tolled Period.

The district court ruled that even if equitable tolling applied in this case, the Tribe's claim for CY 1996 would fall outside the tolled period. *Menominee III*, 841 F. Supp. 2d at 109–10; Appendix, A9-A10. This Court should rule that the

Tribe's CSC claim accrued at the end of the contract on December 31, 1998, and that claims for all years CY 1996-1998 fall within the tolled period.

It is hornbook law that a class action suspends the limitations period until certification is resolved. *See Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 436 (1965); *American Pipe*, 414 U.S. at 560–61 (limitations period suspended); *Crown, Cork & Seal Co., Inc.*, 462 U.S. at 353–54 (the commencement of a class action suspends the applicable statute of limitations for all asserted members of the putative class "until class certification is denied"); *ASNA I*, 583 F.3d at 791 (statute of limitations suspended during class action).

The district court ruled that even if equitable tolling applied, the Tribe's claim for CY 1996 would fall outside the tolled period because, in the court's view, the claim accrued at the end of 1996, when the annual funding agreement expired, rather than at the end of 1998 when the contract closed and the damages became ascertainable, as argued by the Tribe. *Menominee III*, 841 F. Supp. 2d at 109–10; Appendix, A9-A10. This conclusion is error.

A common formulation is that "[a] claim accrues when damages are ascertainable." *Patton v. United States*, 64 Fed. Cl. 768, 774 (Fed. Cl. 2005) (citations and internal quotations omitted); *Terteling v. United States*, 334 F.2d 250, 254–55 (Ct. Cl. 1964). The Tribe's damages for breach of the 1996 contract

were not ascertainable until the contract closed at the end of 1998.[17] Until then, IHS could have amended the contract to add the full amount of 1996 CSC. *See Seneca Nation of Indians v. U.S. Dep't of Health & Human Servs.*, CIV.A. 12-1494, 2013 WL 2255208 at *10–11 (D.D.C. May 23, 2013) (holding that AFAs are part of ISDEAA contract, and time of performance ends when contract, not fiscal year or AFA, expires). IHS did, in fact, supplement CSC for prior years in which the contract, but not the AFA, remained in effect. *See, e.g.*, Menominee Tribe's 1998 AFA, Defs. Ex. D at 016; Appendix, A41 (adding, in modification to FY 1998 AFA dated September 23, 1998, "$618 of FY '97 CSC IDC shortfall," along with "$498 of FY 98 CSC IDC shortfall"). Because the IHS could have made up the 1996 shortfall at any time throughout the contract term, the Tribe's damages were not ascertainable and its claim did not accrue until the end of 1998.

The *Cherokee Nation* class action was filed in 1999 and the class certification was denied on February 9, 2001, a period of one year and 341 days from the filing of the complaint, extending the filing deadline to December 8, 2005. The Tribe's claim having accrued January 1, 1999, the Tribe's filing on

[17] The record is clear that the 1996 contract remained in effect through December 31, 1998. *See* Dkt. # 35-2 at 7; Appendix, A39 (section (b)(1) of Contract No. 239-96-0030, providing that term "shall be indefinite, until cancelled by Tribal Legislative action"). This contract, which took effect on January 1, 1996, *id*. at § (b)(2), remained in effect through calendar year 1998. *See* Dkt. # 35-4 at 5; Appendix, A40 (CY 1998 AFA, identified as Attachment 2-98 to Contract No. 239-96-0030); Dkt. # 35-5 at 6; Appendix, A42 (Contract No. 239-99-0014, the successor to No. 239-96-0030, which took effect January 1, 1999).

September 7, 2005 was timely for all relevant years, CY 1996, 1997 and 1998, with the benefit of the *Cherokee Nation* tolling period.

Even if the Tribe's claims accrued at the end of each calendar year, as ruled by the court, it is clear that the Tribe's CY 1997 and 1998 claims were timely with the statute tolled.[18]

The Tribe requests that this Court rule that the Tribe's CY 1996 CSC claim accrued at the end of the contract in 1998, and that claims for all years fall within the tolled period.

2. The CY 1999 and 2000 Claims Should Not Be Dismissed.

The district court dismissed the Tribe's claims for CYs 1999 and 2000 as untimely because these claims, under the "law of the case" doctrine, depended on viable claims for 1997 and 1998, which the court held were barred by the statute of limitations. *Menominee III*, 841 F. Supp. 2d at 110–11; Appendix, A10-A11. The Tribe's claim is that IHS should have paid the full CSC amount in 1998 and at least the same amount in 1999 and 2000. *See* 25 U.S.C. § 450j-1(b)(2) (funding

[18] Even if the AFA, not the contract, controls time of performance and thus accrual, the Tribe's 1997 claim accrued at the earliest on January 1, 1998, the day after the AFA expired. Ordinarily, then, the Tribe's claim for CY 1997 would have been due by January 1, 2004. With the benefit of the *Cherokee* class action tolling period, the deadline for filing was extended one year and 341 days, to December 8, 2005. The Tribe filed its claims for 1997 on September 7, 2005, well within the time period. The deadline for the Tribe's 1998 claims was extended to December 8, 2006. The Tribe filed the 1998 claims on September 7, 2005, some fifteen months before the deadline.

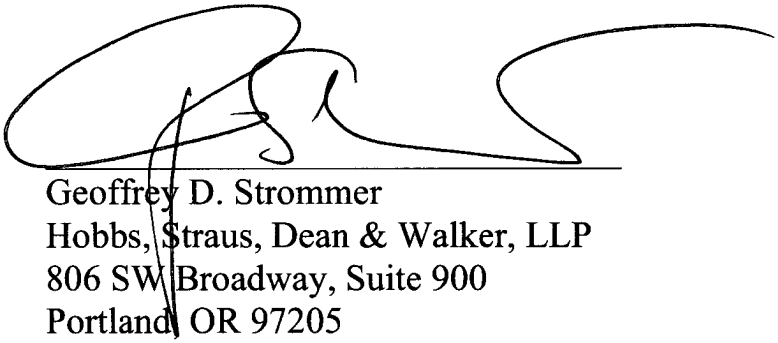
amounts, with limited exceptions, "shall not be reduced by the Secretary in subsequent years"). The district court held that these claims are premised on valid claims for 1997 and 1998, which in turn depend on whether the statute was tolled. *Id*. If this Court holds that the statute was equitably tolled, the district court's dismissal of the claims for 1999 and 2000 must also be reversed.

VII. CONCLUSION

What the district court characterizes as the Tribe's "inaction" was in fact a careful monitoring and evaluation of the complex and evolving legal landscape presented by the CSC litigation. Like ASNA, the Menominee Tribe "diligently pursued its rights by monitoring the relevant legal landscape" and "took reasonable, diligent, and appropriate action as the legal landscape evolved." *ASNA II*, 699 F.3d at 1297. Therefore, equitable tolling should extend to the Tribe's claims as well. Since there are no facts in dispute, the Tribe asks this Court to hold that the statute of limitations in the CDA was equitably tolled during the pendency of the *Cherokee* class action. Further, the Tribe asks this court to find that the CY 1996 claim accrued at the end of the contract period in 1998 and reverse the district court's dismissal of the claims from 1996 through 2000.

Respectfully submitted,

HOBBS, STRAUS, DEAN & WALKER, LLP



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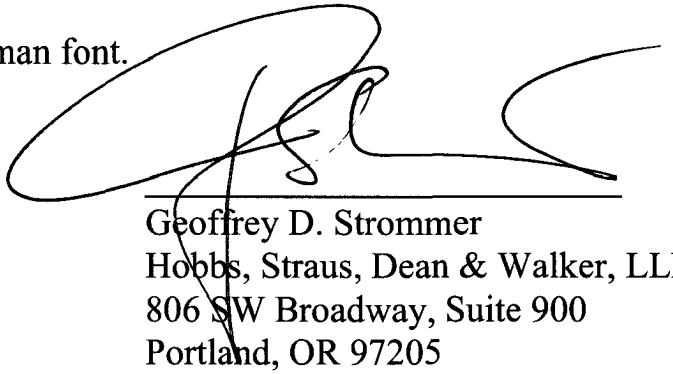
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I, Geoffrey D. Strommer, hereby certify that:

1. I am counsel of record for Appellant in the above-captioned matter.

2. The Opening Brief of Appellant Menominee Indian Tribe ("Opening Brief") complies with the type-volume limitation of Federal Rule of Appellate Procedure ("FRAP") 32(a)(7)(B). The Opening Brief contains 12,246 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

3. The Opening Brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6). The Opening Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, Times New Roman font.



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October 16th, 2013

ADDENDUM

ADDENDUM
TABLE OF CONTENTS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RAMAH NAVAJO CHAPTER,

Plaintiff,

-vs-

No. CIV 90-0957 LH/RWM

MANUEL LUJAN, Secretary of the Interior; EDDIE BROWN, Assistant Secretary of the Interior; MARVIN PIERCE, Chief of the Office of Inspector General, U. S. Department of the Interior; and the UNITED STATES OF AMERICA,

Defendants.

ORDER

THIS MATTER came on for consideration of Plaintiff's Motion to Certify Class Under Rule 23, filed on August 21, 1991 (Docket No. 31). The Court having reviewed the memoranda of the parties and having issued its memorandum opinion of even date, FINDS:

That Plaintiff's motion is well taken and will be granted.

IT IS, THEREFORE, ORDERED that Plaintiff's Motion to Certify Class Under Rule 23 be, and the same hereby is, **GRANTED.**

IT IS FURTHER ORDERED that the plaintiff class shall include those Indian tribes and organizations who have contracted with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

RAMAH NAVAJO CHAPTER,

Plaintiff,

-vs-

No. CIV 90-0957 LH/RWM

MANUEL LUJAN, Secretary of the Interior; EDDIE BROWN, Assistant Secretary of the Interior; MARVIN PIERCE, Chief of the Office of Inspector General, U. S. Department of the Interior; and the UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM OPINION

THIS MATTER came on for consideration of Plaintiff's Motion to Certify Class Under Rule 23, filed on August 21, 1991 (Docket No. 31). Plaintiff seeks to certify as a class all Indian tribes and organizations contracting under the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450) (the "Act") with the Bureau of Indian Affairs ("BIA"), who receive or are entitled to receive contract support funding based on indirect cost rates negotiated through the office of the inspector general. Having reviewed the positions of the parties and the applicable law, the Court concludes that the motion is well taken and shall be granted.

Plaintiff claims that the BIA has failed to provide statutorily mandated indirect costs to Plaintiff in an amount set forth in Section 450j-1 of the Act.

Defendants resist the motion for class certification. Defendants' principal objection is that although Plaintiff has exhausted its administrative remedies and is therefore properly before this Court, the claims of Plaintiff as representative party are not typical of the proposed class members. Specifically, Defendants argue that there is no showing that the members of the class to be certified have exhausted their administrative remedies under the Act. Defendants contend that unless the administrative remedies have been exhausted by each of the members of that class that they may not be included in the class. 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.

The Indian Self-Determination Act provides that the United States District Court shall have concurrent jurisdiction with the United States Court of Claims over any civil action or claim against the BIA for money damages arising out of self-determination contracts authorized by the Act. The Act also provides that the Contract Disputes Act, 41 U.S.C. § 601, *et seq.*, shall apply to disputes concerning self-determination contracts. The claims being brought by Plaintiff relate to a self-determination contract with the BIA, and it is clear that the Contract Disputes Act applies to this case. Thus, decisions relating to the Contract Disputes Act are instructive in

determining whether the exhaustion of remedies under that statute is a jurisdictional prerequisite to an action in this Court.

A review of the decisions of the Court of Claims or its successor, the United States Claims Court, and appeals therefrom, make clear that when a government contractor wishes to seek relief in connection with the performance of his contract, he must first submit a claim to the agency contracting officer and receive an opinion from that official. The completion of these steps is a jurisdictional prerequisite to the filing of a complaint relative to the claim in the Court of Claims. *Thoen v. United States*, 765 F.2d 1110 (Fed. Cir. 1985); *W. M. Schlosser Co. v. United States*, 705 F.2d 1336 (Fed. Cir. 1983).

Plaintiff contends, however, that even if exhaustion of administrative remedies is a jurisdictional prerequisite, certification may still be granted if it would be futile for the potential class members to complete those jurisdictional prerequisites. The Court notes that Plaintiff has not cited, nor could it locate, any case decided under the Contract Disputes Act where exhaustion of remedies was waived as having been futile. This is not dispositive, however.

In *Association for Community Living in Colorado v. Romer*, 992 F.2d 1040 (10th Cir. 1993), a case decided under the Individuals with Disabilities Education Act ("IDEA"), the Tenth Circuit Court of Appeals concluded that a claimant under the IDEA need not exhaust its remedies if exhaustion would be futile or would fail to provide adequate relief, or where an agency has

adopted a policy or pursued a practice of general applicability that is contrary to the law. *Id.*, 992 F.2d 1040, 1044.

"Administrative remedies are generally inadequate or futile where plaintiffs allege structural or systemic failure and seek systemwide reforms." *Id.*

The *Romer* case, along with the Supreme Court's decision in *Honig v. Doe*, 484 U.S. 305 (1988) are instructive. The Court notes that 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.[1] 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. The Court will therefore

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[1]In *Romer*, the Court noted that exhaustion of administrative remedies under the IDEA serves the following important purposes: "(1) permitting the exercise of agency discretion and expertise on issues requiring these characteristics; (2) allowing the full development of technical issues and a factual record prior to court review; (3) preventing deliberate disregard and circumvention of agency procedures established by Congress; and (4) avoiding unnecessary judicial decisions by giving the agency the first opportunity to correct any error." *Romer*, 992 F.2d 1040, 1044 (*quoting Hayes v. Unified Sch. Dist. No. 377*, 877 F.2d 809, 812 (10th Cir. 1989) (decided under the Education of the Handicapped Act).

certify the class to include all Indian tribes and organizations who have contracted with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act.

An order in accordance with this memorandum opinion shall be entered.

UNITED STATES DISTRICT JUDGE

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UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS GRANTED AS TO CBCA 280-ISDA AND 281-ISDA AND DENIED AS TO CBCA 181-ISDA, 279-ISDA, AND 292-ISDA: July 28, 2008

CBCA 181-ISDA, 279-ISDA, 280-ISDA, 281-ISDA, 282-ISDA

METLAKATLA INDIAN COMMUNITY,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Geoffrey D. Strommer of Hobbs, Straus, Dean & Walker, LLP, Portland, OR, counsel for Appellant.

Melissa Jamison, Office of the General Counsel, Department of Health and Human Services, Rockville, MD, counsel for Respondent.

Before Board Judges **HYATT**, **DeGRAFF**, and **STEEL**.

STEEL, Board Judge.

For all the years at issue in these appeals, the Metlakatla Indian Community (Metlakatla) provided health care services to its members under self-determination contracts or compacts with the Department of Health and Human Services (HHS) Indian Health Service (IHS), pursuant to the Indian Self-Determination and Education Assistance Act (ISDA or Act), Pub. L. No. 93-638, codified as amended at 25 U.S.C. §§ 450, *et seq.* (2000). Metlakatla seeks additional amounts of indirect contract support cost (CSC) funding from IHS under ISDA contracts and compacts in fiscal years (FYs) 1995 through 1999. IHS moves to dismiss the appeals.

Background

In 1975, Congress enacted the ISDA to encourage Indian self-government by allowing the transfer of certain federal programs operated by the Federal Government, including health care services programs, to tribal governments and other tribal organizations by way of contracts. The amount of contract funds provided to the tribes was the same as the amount IHS would have provided if it had continued to operate the programs. This amount is known as the "Secretarial amount" or "tribal shares." 25 U.S.C. § 450j-l(a). The Secretarial amount, however, included only the funds IHS would have provided directly to operate the programs. It did not include funds for additional administrative costs the tribes incurred in running the programs, but which IHS would not have incurred, such as the cost of annual financial audits, liability insurance, personnel systems, and financial management and procurement systems. S. Rep. No. 100-274, at 8-9 (1987).

In 1988, Congress amended the ISDA to authorize IHS to negotiate additional instruments, self-governance "compacts," with a selected number of tribes. Pub. L. No. 100-472, tit. II, § 201(a), (b)(1), 102 Stat. 2288, 2289 (1988); *see* 25 U.S.C. § 450f note (repealed by Pub. L. No. 106-260, § 10, 114 Stat. 711, 734 (2000)). Under this more flexible Tribal Self-Governance Demonstration Project, the selected tribes were given the option of entering into either contracts or compacts[1] with IHS to perform certain programs, functions, services, or activities (PFSAs) which IHS had operated for Indian tribes and their members. If a tribe and IHS entered into a compact, they also entered into annual funding agreements (AFAs).

The 1988 amendments also provided for funding for the additional administrative costs which tribes incurred in running health services programs. The statute as amended provides that there shall be added to the Secretarial amount 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." 25 U.S.C. § 450j-l(a)(2). These amounts are for "costs which normally are not carried on by the respective Secretary in his direct operation of the program; or . . . are provided by the Secretary in support of the contracted program from resources other than those under contract." *Id.*

There are three categories of CSC: start-up costs, indirect costs (IDC), and direct costs. Start-up costs are one-time costs necessary to plan, prepare for, and assume operation of a new or expanded PFSA, such as the start-up costs for a new clinic. Indirect costs are

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[1] For the purposes of this decision, there are no significant differences between contracts and compacts.

those costs incurred for a common or joint purpose, but benefiting more than one PFSA, such as administrative and overhead costs. Direct CSC are expenses which are directly attributable to a certain PFSA but which are not captured in either the Secretarial amount or indirect costs, such as workers' compensation insurance, which the Secretary would not have incurred if the agency were operating the program. 25 U.S.C. § 450j-1(a).

The provision of funds for CSC is "subject to the availability of appropriations," notwithstanding any other provision in the ISDA, and IHS is not required to reduce funding for one tribe to make funds available to another tribe or tribal organization. 25 U.S.C. § 450j-1(b).

From one fiscal year to the next, IHS cannot reduce the Secretarial amount and the CSC it provides except pursuant to:

> (A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;
> (B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;
> (C) a tribal authorization;
> (D) a change in the amount of pass-through funds needed under a contract; or
> (E) completion of a contracted project activity or program.

25 U.S.C. § 450j-l(b)(2).

IHS is required to prepare annual reports for Congress regarding the implementation of the ISDA. Among other things, these reports include an accounting of any deficiency in the funds needed to provide contractors with CSC. 25 U.S.C. § 450j-l(c). The reports which set out the deficiencies in funds needed to provide CSC are known as "shortfall reports." Complaint ¶ 14; 25 U.S.C. § 450j-1(c), (d). Each IHS Area Office, including the Alaska Area Office, prepared shortfall reports for FYs 1995 - 1999 which were submitted to Congress. Complaint ¶ 14; Answer ¶ 14.

For FYs 1995 through 1998, Congress set aside $7.5 million of IHS's appropriated funds into the Indian Self-Determination (ISD) fund which were to be used for the transitional costs of new or expanded tribal programs. Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-332, tit. II, 108 Stat. 2499, 2528 (1994); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189 (1996); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-12 (1996); Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1582

(1997). In connection with the ISD fund, IHS developed a policy for funding CSC for new or expanded programs. IHS established a priority list, called the "queue," and funded CSC for new or expanded programs on a first-come, first-served basis, as determined by the date on which IHS received a tribe's request for funding. *See, e.g.*, IHS Circular No. 96-04, § 4.A(4)(a)(ii). Thus, IHS would fund the first request it received for funding CSC for a new or expanded program, then it would fund the next request it received, and it would continue funding CSC requests until the ISD funds were exhausted for a fiscal year. Requests not funded during one fiscal year moved up the queue to be paid when the next fiscal year's funds were distributed. Appeal File, Exhibit 4-29, Indian Self-Determination Memorandum (ISDM) 92-2 ¶ 4-C(1), at 4.

One of the 1988 amendments to the ISDA provided that the Contract Disputes Act (CDA) "shall apply to self-determination contracts." 25 U.S.C. § 450m-1(d). In 1994, Congress amended the Contract Disputes Act to include a six-year time limit for presenting a claim to the contracting officer (often an awarding official in the ISDA context):

> 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. . . . 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.

41 U.S.C. § 605(a).

Findings of Fact

In 1988, Metlakatla entered into contract no. 243-88-0184 for "various Health and Related Services for Alaska Natives, Annette Island Reserve." Appeal File, Exhibit 2 at 3-1. For Fiscal Year 1995, effective October 1, 1994, amendment no. 54 modified the original contract and extended the period of performance to cover the period from October 1, 1994, through September 30, 1995. *Id.* at 4-1.

On April 1, 1995, Metlakatla and IHS entered into a new Self-Determination Contract, no. 243-95-6001, together with attachment 2, the applicable AFA, to deliver health services from April 1 to September 30, 1995. Appeal File, Exhibits 5, 6. The AFA for FY 1996, amendment 8 to contract 243-95-6001, was signed on September 28, 1995, with an effective date of December 1, 1995. *Id.*, Exhibit 11.

The "Alaska Tribal Health Compact between Certain Alaska Native Tribes and the United States of America" (ATHC) and related negotiated AFAs authorized thirteen Alaskan tribes to operate health care programs. Appeal File, Exhibit 2 at 15-1. Metlakatla joined the ATHC for FY 1997 and the years thereafter. Complaint ¶ 1; Appeal File, Exhibits 15-18.

On August 19, 1999, Metlakatla submitted a claim for unpaid CSC in the amount of $132,878 ($44,033 in CSC funding for tribal shares and $88,845 to defray start-up costs for a new or expanded program). IHS denied the claim on April 17, 2000, and Metlakatla did not appeal IHS's decision. Metlakatla agrees it is too late to appeal this decision. Appellant's Response to Respondent's Motion to Dismiss at 10. Although the claim was submitted in FY1999, the claim and the awarding official's decision say these amounts were contained in the FY 1997 AFA and repeated in the AFAs for FY 1998 and FY 1999.

Metlakatla's FY 1995 claim is dated June 30, 2005 and was received by the awarding official on July 1, 2005. Appeal File, Exhibits 2 at 1, 20 at 1. The claim was for $114,191, which is the amount listed on the shortfall report. *Id.*

Metlakatla's FY 1996 claim is dated June 30, 2005, and was received on July 1, 2005. Appeal File, Exhibits 2 at 4, 20 at 1. The claim was for $155,632, which is the amount listed on the shortfall report. *Id.*

Metlakatla's FY 1997 claim is dated June 30, 2005, and was received on July 1, 2005. Appeal File, Exhibit 2 at 8. The claim was for $262,116, which is $230,980 listed on the shortfall report, plus $24,230 listed in the queue and not accounted for in the shortfall report, and $6906 in additional indirect CSC. *Id.* at 4.

Metlakatla's FY 1998 claim is dated June 30, 2005, and was received on July 1, 2005. The claim was for $134,767, which included funds for CSC for ongoing programs. Appeal File, Exhibits 2 at 10, 20 at 2. The amount listed on the shortfall report was $128,396. *Id.*

Metlakatla's FY 1999 claim is dated June 30, 2005, and was received on July 1, 2005. The claim was for either $119,429, which is based upon a contract theory of recovery which assumes the appropriation for FY 1999 is capped and which seeks to recover for a breach of statutory sections which are incorporated in the compact, or $211,330, which is based upon a theory of recovery which challenges the applicability of the appropriations cap and which asks for the amount listed on the shortfall report. Appeal File, Exhibits 2 at 15, 20 at 2.

Except for the denial of the August 19, 1999 claim, the contracting officer did not issue decisions on these claims. They are therefore deemed denied. 41 U.S.C. § 605(c)(5). Appeals were filed with the Department of the Interior Board of Contract Appeals on May

8, 2006, and docketed as cases IBCA-4767/2006 through IBCA-4771/2006. On January 6, 2007, the Department of the Interior Board of Contract Appeals was merged with other civilian agency boards into the Civilian Board of Contract Appeals (CBCA), where the cases were docketed as described below. Pub. L. No. 109-163, § 847, 119 Stat. 3136 (2006).

Discussion

In their briefs, the parties make a great many arguments, all of which we carefully considered. Due to the manner in which we resolve the issues before us, it is not necessary for us to address each of the arguments they raised in order to resolve the motion to dismiss. As explained below, laches does not bar Metlakatla's FY 1995 claim and we possess jurisdiction to consider the FY 1996 claim. We lack subject matter jurisdiction to consider the FY 1997 and FY 1998 claims. We possess subject matter jurisdiction to consider the FY 1999 claim and we cannot dismiss it for failure to state a claim upon which relief can be granted. Therefore, we grant the motion to dismiss, in part.

FY 1995 (CBCA 181-ISDA)

The parties agree that the claim for FY 1995 accrued on the last day of the fiscal year, which was September 30, 1995, since appellant could expect no further payments for the fiscal year after that date. On June 30, 2005, Metlakatla submitted this claim to the awarding official. In its motion to dismiss, IHS raises the equitable defense of laches in response to the claim for FY 1995 CSC.[2]

In order to persuade us to apply a laches defense, IHS must establish that Metlakatla delayed submitting its claim for an unreasonable and inexcusable length of time and that this delay resulted in prejudice or injury to the Government. *Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020, 1032 (Fed. Cir. 1992) (en banc); *Cornetta v. Lehman*, 851 F.2d 1372, 1377-78 (Fed. Cir. 1988) (en banc); *SUFI Network Services, Inc.*, ASBCA 55948, 08-1 BCA ¶ 33,766 at 167,149; *Systems Integrated*, ASBCA 54439, 05-2 BCA ¶ 32,978 at 163,380. IHS can establish the existence of undue delay and prejudice either by establishing

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[2] Usually, the equitable defense of laches is resolved upon motion for summary judgment or relief or, where there are genuine facts in dispute, following trial. *A.C. Aukerman Co. v. R. L. Chaides Construction Co.*, 960 F.2d 1020 (Fed. Cir. 1992) (en banc), *Houston Ship Repair, Inc. v. U.S. Department of Transportation*, DOT BCA 4505, 06-2 BCA ¶ 33,381; *2160 Partners v. General Services Administration*, GSBCA 15973, 03-2 BCA ¶ 32,269. However, IHS raised the issue in its motion to dismiss, and we address it here.

there is a presumption of laches or by offering actual proof of undue delay and prejudice. *Aukerman*, 960 F.2d at 1036.

Relying upon *Aukerman*, IHS asks us to decide that a presumption of laches exists because Metlakatla failed to submit its claim to the awarding official within the six-year time limit contained in section 605(a) of the CDA. In addition, IHS says Metlakatla waited an unreasonable and inexcusable length of time to submit the claim to the contracting officer, and says its ability to defend against Metlakatla's claim has been prejudiced by the delay. Respondent's Motion to Dismiss at 16-18.

We do not need to decide whether we should create a presumption of laches based upon the six-year time limit contained in section 605(a) of the CDA because even if we were to do so, we would conclude Metlakatla has eliminated the presumption by offering proof to show its delay was excusable. Metlakatla has shown its delay was the result of other litigation, which is one of the reasons the Court in *Aukerman* recognized as justifying a delay. *Aukerman*, 960 F.2d at 1033, 1038.

On March 5, 1999, the Cherokee Nation of Oklahoma filed a complaint against IHS in the United States District Court for the Eastern District of Oklahoma. The tribe requested certification of a class consisting of "all Indian tribes and tribal organizations operating Indian Health Service Programs under [the ISDA] that were not fully paid their contract support cost needs. . . ." *Cherokee Nation of Oklahoma v. United States*, 199 F.R.D. 357, 360 (E.D. Okla. 2001) (hereinafter *Cherokee Nation of Oklahoma*). Nearly two years later, on February 9, 2001, the court denied the request for class certification. Metlakatla asserts that it was a putative class member in this lawsuit, and the Government has not disputed this fact. Appellant's Response to Respondent's Motion to Dismiss at 5-6. Further, Metlakatla plausibly suggests that the basis for its FY 1995 claim was uncertain until the Supreme Court issued its decision in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005). Metlakatla submitted its claim to the awarding official approximately four years after the request for class certification was denied in *Cherokee Nation of Oklahoma*, and approximately two months after the Supreme Court's decision in *Cherokee Nation*. The existence of this other litigation provides Metlakatla with an excuse for its delay such as would eliminate any presumption of laches.

After reviewing IHS's actual proof of unreasonable delay and prejudice, we find it lacking. Regarding delay, the existence of the litigation discussed in the preceding paragraph counters IHS's proof that Metlakatla unduly delayed submitting its claim to the awarding official. Regarding prejudice, IHS says it has been prejudiced by witnesses retiring from the agency and by its inability to locate relevant documents. Respondent's Reply to Appellant's Response to Motion to Dismiss at 16-17. These statements are allegations of counsel,

however, and are not evidence. In addition, although witnesses may have retired, this does not mean they are unavailable to testify. *Hoover v. Department of the Navy*, 957 F.2d 861, 863-64 (Fed. Cir. 1992). Moreover, the pendency of the litigation discussed above ought to have alerted IHS to the need to preserve relevant documents for tribes which might become class members.

IHS has failed to persuade us that we should apply a laches defense and bar the claim for FY 1995 CSC. Even if we were to create a presumption of laches based upon section 605(a) of the CDA, Metlakatla has eliminated the presumption by providing a valid excuse for its delay. IHS's actual proof of unreasonable delay and prejudice is insufficient to convince us to exercise our discretion in its favor. Therefore, we deny the motion to dismiss the FY 1995 claim on the grounds of laches.[3]

FY 1996 (CBCA 279-ISDA)

IHS moves to dismiss Metlakatla's FY 1996 claim for lack of subject matter jurisdiction because Metlakatla failed to submit this claim to the awarding official within six years after it accrued, as required by section 605(a) of the CDA. Respondent's Motion to Dismiss at 11. In resolving IHS's motion, we assume all well-pled factual allegations are true and find all reasonable inferences in favor of the non-moving party. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (stating that decisions on such motions to dismiss rest "on the assumption that all the allegations in the complaint are true"); *Leider v. United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002); *Gould Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Kawa v. United States*, 77 Fed. Cl. 294, 298 (2007); *Barth v. United States*, 28 Fed. Cl. 512, 514 (1993).

In order to evaluate IHS's motion, we must determine the applicability of the six-year time limit contained in section 605(a) of the CDA. The CDA did not include the six-year time limit until its amendment in 1994 by the Federal Acquisition Streamlining Act, Pub. L. No. 103-355, § 2351(a), 108 Stat. 3243, 3322 (Oct. 13, 1994). This time limit was not immediately applicable on the date of enactment. Instead, its applicability depended upon the promulgation of final regulations. *Id.* § 10001(b)(2), 108 Stat. at 3404; *see also Motorola, Inc. v. West*, 125 F.3d 1470, 1473 (Fed. Cir. 1997). On September 18, 1995, the

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[3] *But see Menominee Indian Tribe of Wisconsin v. United States*, No. 1:07cv-00812 (D.D.C. Mar. 24, 2008), *reconsideration denied* (Apr. 30, 2008), in which the district court dismissed the Menominee Indian Tribe's CSC claim for FY 1995 on the grounds that the claim was barred by laches. The Board is not bound by this decision and we reach a contrary conclusion after considering the arguments raised and facts presented to us.

Office of Management and Budget's Office of Federal Procurement Policy (OFPP) published amendments to the Federal Acquisition Regulation (FAR). 60 Fed. Reg. 48,224, 48,230 (Sept. 18, 1995). The regulation at 48 CFR 33.206 states that the six-year limit does not apply to contracts awarded prior to October 1, 1995.

Because the six-year time limit contained in section 605(a) does not apply to contracts awarded prior to October 1, 1995, we look to see when the contract which provided for the payment of FY 1996 CSC was awarded. The parties agree that they entered into a contract on April 4, 1995, and that the related AFA for FY 1996 was signed on September 28, 1995, with an effective date of October 1, 1995. Respondent's Reply to Appellant's Response to Motion to Dismiss at 14-15, Appellant's Rebuttal Brief in Response to Respondent's Reply on Respondent's Motion to Dismiss at 10-11. IHS argues that because the effective date of the FY 1996 AFA is October 1, 1995, it is subject to the six-year limit set out in section 605(a) of the CDA. Respondent's Reply to Appellant's Response to Motion to Dismiss at 14.

IHS's argument misses the mark because according to the regulation which implemented section 605(a), the applicability of the six-year time limit depends upon the award date of a contract, not a contract's effective date. The contract which underlies this claim was awarded on April 4, 1995, and the related AFA for FY 1996 was awarded on September 28, 1995. Because the six-year time limit does not apply to contracts awarded prior to October 1, 1995, the limit does not apply, whether the relevant effective date is that of the underlying contract or the AFA. Therefore, we deny the motion to dismiss the FY 1996 claim for lack of subject matter jurisdiction.

FY 1997 (CBCA 280-ISDA)

The FY 1997 claim accrued on the last day of the fiscal year, which was September 30, 1997. On June 30, 2005, Metlakatla submitted this claim to the awarding official. IHS moves to dismiss the FY 1997 claim for lack of subject matter jurisdiction because Metlakatla failed to submit this claim to the awarding official within six years after it accrued, as required by section 605(a) of the CDA. Respondent's Motion to Dismiss at 13-14. Metlakatla contends the six-year time limit was met, because the time limit was either equitably or legally tolled. Appellant's Response to Respondent's Motion to Dismiss at 18-31.

Tolling, whether equitable or legal, is a concept which applies to statutes of limitation. If a court (or a board) possesses jurisdiction to consider a claim, the claim must be filed before the limitations period expires or else it becomes unenforceable. A time limit for filing suit can be suspended, in effect, based upon equitable considerations, *Irwin v. Department*

of Veterans Affairs, 498 U.S. 89 (1990), or based upon legal considerations, *Stone Container Corp. v. United States*, 229 F.3d 1345, 1354 (Fed. Cir. 2000). If the applicable statute is tolled for a sufficient period, the time limit for filing suit is met.

Section 605(a) does not contain a statute of limitations which imposes a time limit for filing suit. Rather, it imposes a time limit which this Board's precedent establishes is a prerequisite to our jurisdiction. *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514; *accord*, *Gray Personnel, Inc.*, ASBCA 54652, 06-2 BCA ¶ 33,378; *see also Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099 (D.N.M. 2006). As *Gray Personnel* explained:

> Under the CDA, there are two prerequisites to an appeal to the Board or to the United States Court of Federal Claims:
>
> > Those prerequisites are (1) that the contractor must have submitted a proper CDA claim to the contracting officer requesting a decision, . . . [41 U.S.C.] § 605(a), and (2) that the contracting officer must either have issued a decision on the claim, . . . § 609(a), or have failed to issue a final decision within the required time period, . . . § 605(c)(5).
>
> *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 852 (Fed. Cir. 2004). If a contractor has not submitted a proper claim, the contracting officer does not have the authority to issue a decision:
>
> > The Act . . . denies the contracting officer the authority to issue a decision at the instance of a contractor until a contract "claim" in writing has been properly submitted to him for a decision. § 605(a). Absent this "claim", no "decision" is possible – and, hence, no basis for jurisdiction . . . .
>
> *Paragon Energy Corp. v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981). Thus, "[i]t is well established that without . . . a formal claim and final decision by the contracting officer, there can be no appeal . . . under the CDA. It is a jurisdictional requirement." *Milmark Services, Inc. v. United States*, 231 Ct. Cl. 954, 956 (1982).

Section 605(a) as implemented by FAR subpart 33.2, Disputes and Appeals, is the key provision in determining whether there is a proper or formal claim for purposes of the CDA. *See, e.g., Reflectone, Inc. v. Dalton*, 60 F.3d 1572,

> 1575 (Fed. Cir. 1995) (en banc) (definition of a claim); *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1576 (Fed. Cir. 1992) (requirement that a claim be submitted for a decision). [The Federal Acquisition Streamlining Act] added the six-year requirement to this key provision, rather than, for example, to 41 U.S.C. §§ 606 or 609, establishing filing periods at the boards and the United States Court of Federal Claims. We conclude, in view of the placement of the six-year provision in § 605(a), that the requirement that a claim be submitted within six years after its accrual, like the other requirements in that section, is jurisdictional. *Accord Axion Corp. v. United States*, 68 Fed. Cl. 468, 480 (2005).

Gray Personnel, Inc., 06-2 BCA at 165,474-75. *Cf. John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008).

Metlakatla's failure to submit its FY 1997 claim to the awarding official within six years after it accrued, as required by section 605(a) of the CDA, deprived this Board of jurisdiction to consider the claim. 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.

We grant the motion to dismiss the FY 1997 claim for lack of subject matter jurisdiction because Metlakatla failed to submit this claim to the awarding official within six years after it accrued, as required by section 605(a) of the CDA.[4]

FY 1998 (CBCA 281-ISDA)

The FY 1998 claim accrued on the last day of the fiscal year, which was September 30, 1998. On June 30, 2005, Metlakatla submitted this claim to the awarding official. For the same reason we grant the motion to dismiss the FY 1997 claim, we grant the motion to dismiss the FY 1998 claim. We lack subject matter jurisdiction because Metlakatla failed to submit this claim to the awarding official within six years after it accrued, as required by section 605(a) of the CDA.

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[4] If we had jurisdiction to consider the FY 1997 claim, it would not extend to any amounts included in the claim dated August 19, 1999, because IHS denied this claim on April 17, 2000, and IHS's decision became final when Metlakatla did not appeal.

FY 1999 (CBCA 282-ISDA)

The FY 1999 claim accrued on the last day of the fiscal year, which was September 30, 1999. On June 30, 2005, Metlakatla submitted this claim to the awarding official. We have jurisdiction to consider this claim because Metlakatla submitted it to the awarding official within six years after it accrued, as required by section 605(a) of the CDA. IHS argues that Metlakatla fails to state a claim upon which relief can be granted because in FY 1999, Congress limited the amount of money which IHS had available to fund CSC.

We agree with IHS that Congress restricted the funds available for CSC in FY 1999. The requirement to fund CSC is subject to the availability of appropriations, notwithstanding any other provisions of the ISDA. 25 U.S.C. § 450j-1(b). Congress restricted IHS's FY 1999 appropriation when it provided "not to exceed $203,781,000 shall be for payments to tribes and tribal organizations for contract or grant support costs . . . ." Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 328, 112 Stat. 2681, 2681-337 (1998). No separate amount was designated for the Indian Self-Determination Fund for initial and expanded programs. *Id.*

The fact that funds for CSC were restricted in FY 1999 does not, however, mean that Metlakatla has failed to state a claim upon which relief can be granted. If providing Metlakatla with additional funding for CSC would have caused IHS to expend more than $203,781,000 for CSC in FY 1999, Metlakatla had no statutory or contractual right to such additional funding and its claim for additional funding would not be one upon which we could grant relief. *Greenlee County, Arizona v. United States*, 487 F.3d 871 (Fed. Cir. 2007); *Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999); *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). If, however, IHS could have provided Metlakatla with additional funding for CSC without expending more than $203,781,000 for CSC in FY 1999, Metlakatla might be able to establish it had a statutory or contractual right to such funding up to the amount of the unexpended funds, in which case its claim would be one upon which we could grant relief. We do not know how much of the $203,781,000 IHS expended during FY 1999.

Because we do not know whether providing Metlakatla with additional funding for CSC would have caused IHS to expend more than $203,781,000 for CSC for FY 1999, we deny the motion to dismiss the FY 1999 claim for failure to state a claim upon which relief can be granted.

Decision

The motion to dismiss is **GRANTED** as to CBCA 280-ISDA and 281-ISDA. The motion to dismiss is **DENIED** as to CBCA 181-ISDA, 279-ISDA, and 282-ISDA.

Candida Steel

CANDIDA S. STEEL
Board Judge

We concur:

Catherine B. Hyatt

CATHERINE B. HYATT
Board Judge

MARTHA H. DeGRAFF
Board Judge

3. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638 as amended, 25 U.S.C. § 450 et seq. (exerpts)

Sec. 2. CONGRESSIONAL FINDINGS [25 U.S.C. § 450]

(a) The Congress, after careful review of the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people, finds that--

(1) the prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities; and

(2) the Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations, and persons.

(b) The Congress further finds that--

(1) true self-determination in any society of people is dependent upon an educational process which will insure the development of qualified people to fulfill meaningful leadership roles;

(2) the Federal responsibility for and assistance to education of Indian children has not effected the desired level of educational achievement or created the diverse opportunities and personal satisfaction which education can and should provide; and

(3) parental and community control of the educational process is of crucial importance to the Indian people.

Sec. 3. DECLARATION OF POLICY [25 U.S.C. § 450a]

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the

establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

(c) The Congress declares that a major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.

* * * * *

Sec. 102. SELF-DETERMINATION CONTRACTS [25 U.S.C. § 450f]

(a) (1) The Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs --

(A) provided for in the Act of April 16, 1934 (48 Stat. 596), as amended;

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto;

(C) provided by the Secretary of Health and Human Services under the Act of August 5, 1954 (68 Stat. 674), as amended;

(D) administered by the Secretary for the benefit of Indians for which appropriations are made to agencies other than the Department of Health and Human Services or the Department of the Interior; and

(E) for the benefit of Indians because of their status as Indians without regard to the agency or office of the Department of Health and Human Services or the Department of the Interior within which it is performed.

The programs, functions, services, or activities that are contracted under this paragraph shall include administrative functions of the Department of the Interior and the Department of Health and Human Services (whichever is applicable) that support the delivery of services to Indians, including those

administrative activities supportive of, but not included as part of, the service delivery programs described in this paragraph that are otherwise contractable. The administrative functions referred to in the preceding sentence shall be contractable without regard to the organizational level within the Department that carries out such functions.

(2) If so authorized by an Indian tribe under paragraph (1) of this subsection, a tribal organization may submit a proposal for a self-determination contract, or a proposal to amend or renew a self-determination contract, to the Secretary for review. Subject to the provisions of paragraph (4), the Secretary shall, within ninety days after receipt of the proposal, approve the proposal and award the contract unless the Secretary provides written notification to the applicant that contains a specific finding that clearly demonstrates that, or that is supported by a controlling legal authority that—

(A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;

(B) adequate protection of trust resources is not assured;

(C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;

(D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j–1(a) of this title; or

(E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes activities that cannot lawfully be carried out by the contractor.

Notwithstanding any other provision of law, the Secretary may extend or otherwise alter the 90-day period specified in the second sentence of this subsection,1 if before the expiration of such period, the Secretary obtains the voluntary and express written consent of the tribe or tribal organization to extend or otherwise alter such period. The contractor shall include in the proposal of the contractor the standards under which the tribal organization will operate the contracted program, service, function, or activity, including in the area of construction, provisions regarding the use of licensed and qualified architects, applicable health and safety standards, adherence to applicable Federal, State, local, or tribal building codes and engineering standards. The standards referred to in the preceding sentence shall ensure

structural integrity, accountability of funds, adequate competition for subcontracting under tribal or other applicable law, the commencement, performance, and completion of the contract, adherence to project plans and specifications (including any applicable Federal construction guidelines and manuals), the use of proper materials and workmanship, necessary inspection and testing, and changes, modifications, stop work, and termination of the work when warranted.

(3) Upon the request of a tribal organization that operates two or more mature self-determination contracts, those contracts may be consolidated into one single contract.

(4) The Secretary shall approve any severable portion of a contract proposal that does not support a declination finding described in paragraph (2). If the Secretary determines under such paragraph that a contract proposal—

> **(A)** proposes in part to plan, conduct, or administer a program, function, service, or activity that is beyond the scope of programs covered under paragraph (1), or
>
> **(B)** proposes a level of funding that is in excess of the applicable level determined under section 450j–1(a) of this title,

subject to any alteration in the scope of the proposal that the Secretary and the tribal organization agree to, the Secretary shall, as appropriate, approve such portion of the program, function, service, or activity as is authorized under paragraph (1) or approve a level of funding authorized under section 450j–1(a) of this title. If a tribal organization elects to carry out a severable portion of a contract proposal pursuant to this paragraph, subsection (b) of this section shall only apply to the portion of the contract that is declined by the Secretary pursuant to this subsection.

(b) Procedure upon refusal of request to contract

Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall—

(1) state any objections in writing to the tribal organization,

(2) provide assistance to the tribal organization to overcome the stated objections, and

(3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue raised in the matter and the opportunity for appeal on the objections raised, under such rules and

regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m–1(a) of this title.

(c) Liability insurance; waiver of defense

(1) Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this subchapter. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are covered by the Federal Tort Claims Act.

(2) In obtaining or providing such coverage, the Secretary shall, to the greatest extent practicable, give a preference to coverage underwritten by Indian-owned economic enterprises as defined in section 1452 of this title, except that, for the purposes of this subsection, such enterprises may include non-profit corporations.

(3)

(A) Any policy of insurance obtained or provided by the Secretary pursuant to this subsection shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage or limits of the policy of insurance.

(B) No waiver of the sovereign immunity of an Indian tribe pursuant to this paragraph shall include a waiver to the extent of any potential liability for interest prior to judgment or for punitive damages or for any other limitation on liability imposed by the law of the State in which the alleged injury occurs.

(d) Tribal organizations and Indian contractors deemed part of Public Health Service

For purposes of section 233 of title 42, with respect to claims by any person, initially filed on or after December 22, 1987, whether or not such person is an Indian or Alaska Native or is served on a fee basis or under other circumstances as permitted by Federal law or regulations for personal injury, including death, resulting from the performance prior to, including, or after December 22, 1987, of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, or for purposes of section 2679, title 28, with respect to claims by any such person, on or after November 29, 1990, for personal injury, including death, resulting from the operation of an emergency motor vehicle, an Indian tribe, a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under sections 2 450f or 450h of this title is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of title 28 and including an individual who provides health care services pursuant to a personal services contract with a tribal organization for the provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement: *Provided*, That such employees shall be deemed to be acting within the scope of their employment in carrying out such contract or agreement when they are required, by reason of such employment, to perform medical, surgical, dental or related functions at a facility other than the facility operated pursuant to such contract or agreement, but only if such employees are not compensated for the performance of such functions by a person or entity other than such Indian tribe, tribal organization or Indian contractor.

(e) Burden of proof at hearing or appeal declining contract; final agency action

(1) With respect to any hearing or appeal conducted pursuant to subsection (b)(3) of this section or any civil action conducted pursuant to section 450m–1(a) of this title, the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

(2) Notwithstanding any other provision of law, a decision by an official of the Department of the Interior or the Department of Health and Human Services, as appropriate (referred to in this paragraph as the ''Department'') that constitutes final agency action and that relates to an appeal within the Department that is conducted under subsection (b)(3) of this section
shall be made either—

(A) by an official of the Department who holds a position at a higher organizational level within the Department than the level of the departmental agency (such as the Indian Health Service or the Bureau of Indian Affairs) in which the decision that is the subject of the appeal was made; or

(B) by an administrative judge.

Sec. 106. CONTRACT FUNDING [25 U.S.C. § 450j-1]

(a) (1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this Act shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract, without regard to any organizational level within the Department of the Interior or the Department of Health and Human Services, as appropriate, at which the program, function, service, or activity or portion thereof, including supportive administrative functions that are otherwise contractible, is operated.

(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.

(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).

(B) On an annual basis, during such period as a tribe or tribal organization operates a Federal program, function, service, or activity pursuant to a contract entered into under this Act, the tribe or tribal organization shall have the option to negotiate with the Secretary the amount of funds that the tribe or tribal organization is entitled to receive under such contract pursuant to this paragraph.

(4) For each fiscal year during which a self-determination contract is in effect, any savings attributable to the operation of a Federal program, function, service, or activity under a self-determination contract by a tribe or tribal organization (including a cost reimbursement construction contract) shall--

(A) be used to provide additional services or benefits under the contract; or

(B) be expended by the tribe or tribal organization in the succeeding fiscal year, as provided in section 8.

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary--

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

* * * * *

Sec. 107. PROMULGATION OF RULES AND REGULATIONS [25 U.S.C. § 450k]

(a) **(1)** Except as may be specifically authorized in this subsection, or in

any other provision of this Act, the Secretary of the Interior and the Secretary of Health and Human Services may not promulgate any regulation, nor impose any nonregulatory requirement, relating to self-determination contracts, or the approval, award, or declination of such contracts, except that the Secretary of the Interior and the Secretary of Health and Human Services may promulgate regulations under this Act relating to chapter 171 of Title 28, United States Code, commonly known as the 'Federal Tort Claims Act', the Contract Disputes Act of 1978 (41 U.S.C. § 601 et seq.), declination and waiver procedures, appeal procedures, reassumption procedures, discretionary grant procedures for grants awarded under section 103, property donation procedures arising under section 105(f), internal agency procedures relating to the implementation of this Act, retrocession and tribal organization relinquishment procedures, contract proposal contents, conflicts of interest, construction, programmatic reports and data requirements, procurement standards, property management standards, and financial management standards.

* * * * *

Sec. 108. CONTRACT OR GRANT SPECIFICATIONS [25 U.S.C. § 450*l*]

(a) Each self-determination contract entered into under this Act shall--

(1) contain, or incorporate by reference, the provisions of the model agreement described in subsection (c) (with modifications where indicated and the blanks appropriately filled in), and

(2) contain such other provisions as are agreed to by the parties.

* * * * *

c) The model agreement referred to in subsection (a)(1) reads as follows:

SECTION 1. AGREEMENT BETWEEN THE SECRETARY AND THE _____ TRIBAL GOVERNMENT.

(a) AUTHORITY AND PURPOSE.--

(1) AUTHORITY.--This agreement, denoted a Self-Determination Contract (referred to in this agreement as the "Contract"), is entered into by the Secretary of the Interior and the Secretary of Health and Human Services (referred to in this agreement as the "Secretary"), for and on behalf of the United States pursuant to

title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.) and by the authority of the _____tribal government or tribal organization (referred to in this agreement as the "Contractor"). The provisions of title I of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.) are incorporated in this agreement.

(2) PURPOSE.--Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and following related functions, services, activities, and programs (or portions thereof), that are otherwise contractible under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor: (List functions, services, activities, and programs).

(b) TERMS, PROVISIONS, AND CONDITIONS.--

* * * * *

(4) FUNDING AMOUNT.--Subject to the availability of appropriations, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). Such amount shall not be less than the applicable amount determined pursuant to section 106(a) of the Indian Self-Determination and Education Assistance Act (25 U.S. C. § 450j-l).

* * * * *

(c) OBLIGATION OF THE CONTRACTOR.--

(1) CONTRACT PERFORMANCE.--Except as provided in subsection (d)(2), the Contractor shall perform the programs, services, functions, and activities as provided in the annual funding agreement under subsection (f)(2) of this Contract.

(2) AMOUNT OF FUNDS.--The total amount of funds to be paid under this Contract pursuant to section 106(a) shall be determined in an annual funding agreement entered into between the Secretary and the Contractor, which shall be incorporated into this Contract.

(3) CONTRACTED PROGRAMS.--Subject to the availability of appropriated funds, the Contractor shall administer the programs,

services, functions, and activities identified in this Contract and funded through the annual funding agreement under subsection (f)(2).

* * * * *

(d) OBLIGATION OF THE UNITED STATES.--

(1) TRUST RESPONSIBILITY.--

(A) IN GENERAL.--The United States reaffirms the trust responsibility of the United States to the _____ Indian tribe(s) to protect and conserve the trust resources of the Indian tribe(s) and the trust resources of individual Indians.

(B) CONSTRUCTION OF CONTRACT.--Nothing in this Contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribe(s) or individual Indians. The Secretary shall act in good faith in upholding such trust responsibilities.

(2) GOOD FAITH.--To the extent that health programs are included in this Contract, and within available funds, the Secretary shall act in good faith in cooperating with the Contractor to achieve the goals set forth in the Indian Health Care Improvement Act (25 U.S.C. § 1601 et seq.).

* * * * *

Sec. 110. APPEALS, NO UNILATERAL REVISION [25 U.S.C. § 450m-1]

(a) The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this Act or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 102(a)(2) or to compel the Secretary to award and fund an approved self-determination contract).

* * * * *

(b) The Secretary shall not revise or amend a self-determination contract with a tribal organization without the tribal organization's consent.

* * * * *

(d) The Contract Disputes Act (Public Law 95-563), Act of November 1, 1978; 92 Stat. 2383, as amended) shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. § 607).

* * * * *

Sec. 111. EFFECT ON EXISTING RIGHTS [25 U.S.C. § 450n]

Nothing in this Act shall be construed as--

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

* * * * *

4. Contracts Under the Indian Self-Determination and Education Assistance Act, Post-Award Disputes, 25 C.F.R. Part 900, Subpart N, and 42 C.F.R. § 137.412

Subpart N:_Post-Award Contract Disputes

Sec. 900.215 What does this subpart cover?

(a) This subpart covers:
(1) All HHS and DOI self-determination contracts, including construction contracts; and
(2) All disputes regarding an awarding official's decision relating to a self-determination contract.
(b) This subpart does not cover the decisions of an awarding official that are covered under subpart L.

Sec. 900.216 What other statutes and regulations apply to contract disputes?

(a) The Contract Disputes Act of 1978 (CDA), Public Law 95-563 (41 U.S.C. 601 as amended);
(b) If the matter is submitted to the Interior Board of Contract Appeals, 43 CFR 4.110-126; and
(c) The Equal Access to Justice Act, 5 U.S.C. 504 and 28 U.S.C. 2412 and regulations at 43 CFR 4.601 through 4.619 (DOI) and 45 CFR 13 (DHHS).

Sec. 900.217 Is filing a claim under the CDA our only option for resolving post-award contract disputes?

No. The Federal government attempts to resolve all contract disputes by agreement at the awarding official's level. These are alternatives to filing a claim under the CDA:
(a) Before issuing a decision on a claim, the awarding official should consider using informal discussions between the parties, assisted by individuals who have not substantially participated in the matter, to aid in resolving differences.
(b) In addition to filing a CDA claim, or instead of filing a CDA claim, the parties may choose to use an alternative dispute resolution mechanism, pursuant to the provisions of the Administrative Dispute

Resolution Act, Public Law 101-552, as amended, 5 U.S.C. 581 et seq., or the options listed in section 108(1)(b)(12) of the Indian Self-Determination Act, as applicable.

Sec. 900.218 What is a claim under the CDA?

(a) A claim is a written demand by one of the contracting parties, asking for one or more of the following:
(1) Payment of a specific sum of money under the contract;
(2) Adjustment or interpretation of contract terms; or
(3) Any other claim relating to the contract.
(b) However, an undisputed voucher, invoice, or other routing request for payment is not a claim under the CDA. A voucher, invoice, or routing request for payment may be converted into a CDA claim if:
(1) It is disputed as to liability or amount; or
(2) It is not acted upon in a reasonable time and written notice of the claim is given to the awarding official by the senior official designated in the contract.

Sec. 900.219 How does an Indian tribe, tribal organization, or Federal agency submit a claim?

(a) An Indian tribe or tribal organization shall submit its claim in writing to the awarding official. The awarding official shall document the contract file with evidence of the date the claim was received.
(b) A Federal agency shall submit its claim in writing to the contractor's senior official, as designated in the contract.

Sec. 900.220 Does it make a difference whether the claim is large or small?

Yes. The Contract Disputes Act requires that an Indian tribe or tribal organization making a claim for more than $100,000 shall certify that:
(a) The claim is made in good faith,
(b) Supporting documents or data are accurate and complete to the best of the Indian tribe or tribal organization's knowledge and belief;
(c) The amount claimed accurately reflects the amount believed to be owed by the Federal government; and
(d) The person making the certification is authorized to do so on

behalf of the Indian tribe or tribal organization.

Sec. 900.221 What happens next?

(a) If the parties do not agree on a settlement, the awarding official will issue a written decision on the claim.
(b) The awarding official shall always give a copy of the decision to the Indian tribe or tribal organization by certified mail, return receipt requested, or by any other method which provides a receipt.

Sec. 900.222 What goes into a decision?

A decision shall:
(a) Describe the claim or dispute;
(b) Refer to the relevant terms of the contract;
(c) Set out the factual areas of agreement and disagreement;
(d) Set out the actual decision, based on the facts, and outline the reasoning which supports the decision; and
(e) Contain the following language:

This is a final decision. You may appeal this decision to the Civilian Board of Contract Appeals (CBCA), U.S. Department of the Interior, 1800 M Street, NW., 6th Floor, Washington, DC 20036. If you decide to appeal, you shall, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the IBCA and provide a copy to the individual from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, and refer to the decision and contract number. Instead of appealing to the IBCA, you may bring an action in the U.S. Court of Federal Claims or in the United States District Court within 12 months of the date you receive this notice.

[61 FR 32501, June 24, 1996, as amended at 71 FR 76601, Dec. 21, 2006]

Sec. 900.223 When does an Indian tribe or tribal organization get the decision?

(a) If the claim is for more than $100,000, the awarding official shall issue the decision within 60 days of the day he or she receives the claim. If the awarding official cannot issue a decision that

quickly, he or she shall tell you when the decision will be issued.

(b) If the claim is for $100,000 or less, and you want a decision within 60 days, you shall advise the awarding official in writing that you want a decision within that period. If you advise the awarding official in writing that you do want a decision within 60 days, the awarding official shall issue the decision within 60 days of the day he or she receives your written notice.

(c) If your claim is for $100,000 or less and you do not advise the awarding official that you want a decision within 60 days, or if your claim exceeds $100,000 and the awarding official has notified you of the time within which a decision will be issued, the awarding official shall issue a decision within a reasonable time. What is ``reasonable'' depends upon the size and complexity of your claim, and upon the adequacy of the information you have given to the awarding official in support of your claim.

Sec. 900.224 What happens if the decision does not come within that time?

If the awarding official does not issue a decision within the time required under Sec. 900.223, the Indian tribe or tribal organization may treat the delay as though the awarding official has denied the claim, and proceed according to Sec. 900.222(e),

Sec. 900.225 Does an Indian tribe or tribal organization get paid immediately if the awarding official decides in its favor?

Yes. Once the awarding official decides that money should be paid under the contract, the amount due, minus any portion already paid, should be paid as promptly as possible, without waiting for either party to file an appeal. Any payment which is made under this subsection will not affect any other rights either party might have. In addition, it will not create a binding legal precedent as to any future payments.

Sec. 900.226 What rules govern appeals of cost disallowances?

In any appeal involving a disallowance of costs, the Board of Contract Appeals will give due consideration to the factual circumstances giving rise to the disallowed costs, and shall seek to determine a fair result without rigid adherence to strict accounting

principles. The determination of allowability shall assure fair compensation for the work or service performed, using cost and accounting data as guides, but not rigid measures, for ascertaining fair compensation.

Sec. 900.227 Can the awarding official change the decision after it has been made?

(a) The decision of the awarding official is final and conclusive, and not subject to review by any forum, tribunal or government agency, unless an appeal or suit is timely commenced as authorized by the Contract Disputes Act. Once the decision has been made, the awarding official may not change it, except by agreement of the parties, or under the following limited circumstances:

(1) If evidence is discovered which could not have been discovered through due diligence before the awarding official issued the decision;

(2) If the awarding official learns that there has been fraud, misrepresentation, or other misconduct by a party;

(3) If the decision is beyond the scope of the awarding official's authority;

(4) If the claim has been satisfied, released or discharged; or

(5) For any other reason justifying relief from the decision.

(b) Nothing in this subpart shall be interpreted to discourage settlement discussions or prevent settlement of the dispute at any time.

(c) If a decision is withdrawn and a new decision is issued that is not acceptable to the contractor, the contractor may proceed with the appeal based on the new decision. If no new decision is issued, the contractor may proceed under Sec. 900.224.

(d) If an appeal or suit is filed, the awarding official may modify or withdraw his or her final decision.

Sec. 900.228 Is an Indian tribe or tribal organization entitled to interest if it wins its claim?

Yes. If an Indian tribe or tribal organization wins the claim, it will be entitled to interest on the amount of the award. The interest will be calculated from the date the awarding official receives the claim until the day it is paid. The interest rate will be the rate which the Secretary of the Treasury sets for the Renegotiation Board under the Renegotiation Act of 1951, Public Law 92-41, 26 U.S.C. 1212 and 26

U.S.C. 7447.

Sec. 900.229 What role will the awarding official play during an appeal?

(a) The awarding official shall provide any data, documentation, information or support required by the CBCA for use in deciding a pending appeal.

(b) Within 30 days of receiving an appeal or learning that an appeal has been filed, the awarding official shall assemble a file which contains all the documents which are pertinent to the appeal, including:

(1) The decision and findings of fact from which the appeal is taken;

(2) The contract, including specifications and pertinent modifications, plans and drawings;

(3) All correspondence between the parties which relates to the appeal, including the letter or letters of claims in response to which the decision was issued;

(4) Transcripts of any testimony taken during the course of the proceedings, and affidavits or statements of any witnesses on the matter in dispute, which were made before the filing of the notice of appeal with the CBCA; and

(5) Any additional information which may be relevant.

[61 FR 32501, June 24, 1996, as amended at 71 FR 76601, Dec. 21, 2006]

Sec. 900.230 What is the effect of a pending appeal?

(a) Indian tribes and tribal organizations shall continue performance of a contract during the appeal of any claims to the same extent they would had there been no dispute.

(b) A pending dispute will not affect or bar the negotiation or award of any subsequent contract or negotiation between the parties.

* * * * *

42 C.F.R. Part 137: Tribal Self-Governance

Subpart P: Appeals

Sec. 137.412 Do the regulations at 25 CFR Part 900, Subpart N apply to compacts, funding agreements, and construction project agreements entered into under Title V?

Yes, the regulations at 25 CFR Part 900, Subpart N apply to compacts, funding agreements, and construction project agreements entered into under Title V.

5. Contract Disputes Act, 41 U.S.C. § 601-613 (Excerpts)

§ 605. Decision by contracting officer

(a) Contractor claims
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. The authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(b) Review; performance of contract pending appeal
The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

(c) Amount of claim; certification; notification; time of issuance; presumption
(1) A contracting officer shall issue a decision on any submitted claim of $100,000 or less within sixty days from his receipt of a written request

from the contractor that a decision be rendered within that period. For claims of more than $100,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable, and that the certifier is duly authorized to certify the claim on behalf of the contractor.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $100,000—

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the tribunal concerned to direct a contracting officer to issue a decision in a specified period of time, as determined by the tribunal concerned, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

(6) The contracting officer shall have no obligation to render a final decision on any claim of more than $100,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification was found to be defective. A defect in the certification of a claim shall not deprive a court or an agency board of contract appeals of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency board of contract appeals, the court or agency board shall require a defective certification to be corrected.

(7) The certification required by paragraph (1) may be executed by any person duly authorized to bind the contractor with respect to the claim.

(d) Alternative means of dispute resolution

Notwithstanding any other provision of this chapter, a contractor and a contracting officer may use any alternative means of dispute resolution under subchapter IV of chapter 5 of title 5, or other mutually agreeable procedures, for resolving claims. The contractor shall certify the claim when required to do so as provided under subsection (c)(1) of this section or as otherwise required by law. All provisions of subchapter IV of chapter 5 of title 5 shall apply to such alternative means of dispute resolution.

(e) Termination of authority to engage in alternative means of dispute resolution; savings provision

In any case in which the contracting officer rejects a contractor's request for alternative dispute resolution proceedings, the contracting officer shall provide the contractor with a written explanation, citing one or more of the conditions in section 572(b) of title 5 or such other specific reasons that alternative dispute resolution procedures are inappropriate for the resolution of the dispute. In any case in which a contractor rejects a request of an agency for alternative dispute resolution proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

§ 606. Contractor's right of appeal to board of contract appeals

Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

§ 607. Agency boards of contract appeals

* * * * *

(d) Jurisdiction

…. The Civilian Board shall have jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than the

Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Regulatory Commission, or the Tennessee Valley Authority) relative to a contract made by that agency. Each other agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer relative to a contract made by its agency. In exercising this jurisdiction, the agency board is authorized to grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

* * * * *

§ 609. Judicial review of board decisions

(a) Actions in United States Court of Federal Claims; district court actions; time for filing

(1) Except as provided in paragraph (2), and in lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

*** * * * ***

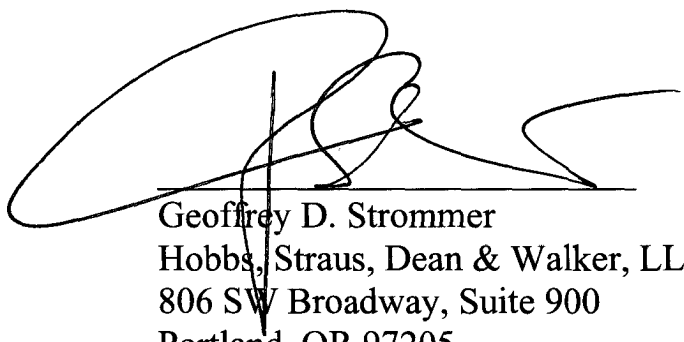
(3) Any action under paragraph (1) or (2) shall be filed within twelve months from the date of the receipt by the contractor of the decision of the contracting officer concerning the claim, and shall proceed de novo in accordance with the rules of the appropriate court.

(b) Finality of board decision

In the event of an appeal by a contractor or the Government from a decision of any agency board pursuant to section 607 of this title, notwithstanding any contract provision, regulation, or rules of law to the contrary, the decision of the agency board on any question of law shall not be final or conclusive, but the decision on any question of fact shall be final and conclusive and shall not be set aside unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence.

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 10th day of October, 2013, I caused the foregoing "Opening Brief of Appellant Menominee Indian Tribe" 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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