[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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REPLY BRIEF OF APPELLANT MENOMINEE INDIAN TRIBE

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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

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I. SUMMARY OF ARGUMENT

The Government portrays this case as if it is a single, independent instance of a discrete dispute between the Menominee Tribe of Wisconsin ("Tribe") and the Indian Health Service ("IHS"). It is not that simple. As we show in our discussion of the background of the case, *see* Opening Brief of Appellant Menominee Indian Tribe ("Opening Brief") at 3–14, and as the Government acknowledges in its own description of the complicated Contract Support Costs ("CSC") litigation history, *see* Initial Brief for Appellees ("Govt. Brief") at 2–12, this case is merely one chapter in a Dickensian saga regarding the extent to which IHS has a duty to fully fund CSC agreements entered into with hundreds of tribes under the Indian Self-Determination and Education Assistance Act ("ISDA"),[1] a duty confirmed by the Supreme Court in *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), and recently reaffirmed by the Court in *Salazar v. Ramah Navajo Chapter*, __ U.S. __, 132 S. Ct. 2181, 2186 (2012) ("the Government must pay each tribe's contract support costs in full."). After years

[1] The ISDA authorizes tribes to enter into agreements with IHS to assume responsibility to provide contractible programs. Menominee does this through a self-determination contract and annual funding agreements ("AFAs") which provide two types of funding, "program" funds and CSC, the latter to cover reasonable administrative and overhead costs associated with carrying out the program.

spent disputing its substantive obligation to fund CSC the Government now challenges individual tribal CSC claims raising various procedural defenses. The issue in this appeal is whether the statute of limitations in the CDA was equitably tolled for the filing of the Menominee Tribe's claims for full CSC funding for CYs 1996–1998, but the Tribe's claims are deeply embedded in the broader CSC litigation landscape and must be judged in that context.

The Government cites the barebones rule that 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." *See Holland v. Florida*, 560 U.S. 631, 130 S. Ct. 2549, 2553 (2010) (internal quotations omitted). Govt. Brief at 18. What the Government does not quote, and resists acknowledging, is that the penumbra of case law, including *Holland* itself, demonstrates the rule's nuanced application; it is not a blunt instrument.

The exercise of equitable powers must be made on a "case-by-case basis," rather than according to "mechanical rules." *Holland*, 130 S. Ct. at 2563 (citations and internal quotation marks omitted). 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). Courts exercising equitable powers "draw upon decisions made in other similar cases for guidance" and with an awareness "that specific circumstances, often hard to predict in advance, could warrant special treatment in an appropriate case." *Id.* Moreover, "[t]he diligence required for equitable tolling purposes is '*reasonable* diligence,' not 'maximum feasible diligence.'" *Id.* at 2565 (internal quotations and citations omitted) (emphasis added).

This case involves "particular injustices" associated with the long-running CSC litigation. The closest precedent, and one which provides appropriate guidance because it applied equitable tolling to a nearly identical CSC claim, is 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 expressly declined to follow the reasoning employed by the district court below in *Menominee Indian Tribe of Wis. v. United States*, 841 F. Supp. 2d 99 (D.D.C. 2012) ("*Menominee III*"); Appendix, A2-A11, which was decided during briefing in *ASNA II*. *See ASNA II*, 699 F.3d at 1296 n.4.[2]

[2] The *Menominee* and *ASNA* cases have been intertwined before. In *Menominee Indian Tribe of Wis. v. United States*, 614 F.3d 519 (D.C. Cir. 2010), ("*Menominee II*"), *rev'g and remanding Menominee Indian Tribe of Wis. v. United States*, 539 F.

We urge this Court to follow the Federal Circuit and reject the district court's conclusions and reasoning on the application of equitable tolling to the unique and extraordinary circumstance surrounding the CSC litigation. The Government would like this Court to adopt the legal reasoning of the dissent in *ASNA II*, which cites *Menominee III*, *see ASNA II* at 1301 n.1, but also strains to distinguish the facts in *ASNA II* from the facts in this appeal. *See* Govt. Brief at 29–30. Notably, the dissent in *ASNA II* cited the identical circumstances in the two cases as a reason for applying the district court's rationale in *Menominee III*, rather than the reasoning of the majority in *ASNA II*. *See ASNA II*, 699 F.3d at 1301 n.1 (Bryson, C., dissenting) (*Menominee III* involved "a party in essentially the same position as ASNA").

The record in this case shows that the Menominee Tribe did not sleep on its rights but acted with reasonable diligence in extraordinary circumstances by "monitoring the relevant legal landscape" affecting CSC claims, *ASNA II*, 699 F.3d at 1297, including related class action proceedings, and filed claims after the Supreme Court resolved the substantive basis for the Tribe's claim by upholding IHS's duty to fund CSC. This Court should find that equitable tolling is warranted for the Tribe's claims.

Supp. 2d 152 (D.D.C. 2008) ("*Menominee I*"), this Court held that equitable tolling applies, noting 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.

II. ARGUMENT

The Tribe's CSC claims are embedded in the long-running nationwide CSC litigation history, involving hundreds of tribes and a number of judicial and administrative proceedings, including prior class actions certification efforts and the Supreme Court's determination of IHS's duty to fund CSC. The district court purported to apply the *Holland* equitable tolling criteria to the Tribe's actions, but erred by adopting a stringent version of the standard for equitable tolling, divorcing the question of the Tribe's *diligence* from any consideration of the *reasonableness* of the Tribe'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 misapplied *Holland* and created a *de facto* requirement that the Tribe had to have taken some "affirmative" action to file a claim or join or initiate litigation before the statute of limitations in the CDA

expired.[3] The Government and the district court dismiss the Tribe's record of involvement in and monitoring of the CSC litigation, what the court characterized as no more than "reasonable inaction," *see Menominee III*, 841 F. Supp. 2d at 107; Appendix, A8, but which was, in fact, the Tribe's reasonable diligence in carefully following the myriad threads of the CSC litigation landscape. The Tribe did not sleep on its rights, but carefully monitored the proceedings and judicial orders and opinions that were determinative of the Tribe's claims, and filed its claims only when the time was appropriate. *See* Pl.'s Opp'n, Ex. L (Wakau Decl.) ¶¶ 3-9; Appendix, A82-A84.

The district court and the Government discount the relevance of the broad CSC legal landscape, including the significance of the Government's continuing resistance to funding CSC, and refuse to recognize the factors that "stood in the way" of filing a substantive claim. The Government's narrow view of its own conduct in the litigation, as well as the purpose and effect of equitable tolling, is reflected in its analysis of the issues in this appeal, including the standard of review and the application of *Holland* criteria to establish equitable tolling.

De Novo is the Appropriate Standard of Review

[3] 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.

In *ASNA II*, the Federal Circuit applied de novo review to a decision involving a tribe in essentially the same position as the Menominee Tribe. 699 F.3d at 1294–95 ("Where, as here, the facts are undisputed, a determination of whether the criteria for equitable tolling have been met presents a question of law that we review de novo," citing *Former Emps. of Sonoco Prods. Co. v. Chao*, 372 F.3d 1291, 1295 (Fed. Cir. 2004)).[4] This Court should similarly exercise de novo review in this case.

The Government argues that "abuse of discretion" is the appropriate standard of review because the district court's decision to not apply equitable tolling was based on facts rather than law. Govt. Brief at 16–19. The Government relies on *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 n.4 (D.C. Cir. 1998), where the court noted that de novo review is used only when the district court's decision is based on a holding that equitable tolling is not supported "as a matter of law." In that case the decision was a "matter of law" because the district court entered summary judgment after determining that the evidence was not

[4] In contrast to this case, in *ASNA II*, the Government appeared to acknowledge that review of an equitable tolling decision based on undisputed facts is de novo, citing *Former Employees of Sonoco* in its own brief. *ASNA II*, Brief for Appellee at 21.

sufficient to support equitable tolling. *Id.* at 579.[5] That was the basis for the circuit court's de novo review in *Smith-Haynie*, and that is precisely what happened in *Menominee III*, where the court granted summary judgment after concluding that the facts argued by the Tribe were insufficient to support equitable tolling. *See Menominee III*, 841 F. Supp. 2d at 109.

The other primary case relied on by the Government makes clear that de novo review is appropriate where the lower court's decision to deny tolling is based on "an incorrect or inaccurate view of what the law requires." *Phillips v. Generations Family Health Center*, 723 F.3d 144, 149 (2d Cir. 2013) (quoting *Belot v. Berge*, 490 F.3d 201, 206 (2d Cir. 2007)). *See* Govt. Brief at 17. That is what happened in this case. First, the court declined to reach or decide whether the Tribe in fact exercised "reasonable diligence," and thus had no basis to find the Tribe's facts insufficient because the court failed to consider the facts in a manner required for full and fair application of the equitable tolling test. *See Menominee III*, 841 F. Supp. 2d at 107. Second, the district court applied an incorrect legal standard by completely ignoring two significant factors in the equitable analysis:

[5] Similar facts govern the other D.C. Circuit cases cited by the Government, *Chung v. U.S. Department of Justice*, reviewing de novo a dismissal for lack of sufficient evidence to support tolling, 333 F.3d 273, 278 (D.C. Cir. 2003), citing *United States v. Saro*, 252 F.3d 449, 455 n.9 (D.C. Cir. 2001), where the Court reviewed de novo the denial of a motion based on holding that facts could not justify invoking equitable tolling.

lack of prejudice to the Government and the trust relationship. *See ASNA II*, 699 F.3d at 1297–98 (concluding that tolling is not unfair to the Government and is consistent with the "special relationship between the government and Indian tribes"). The district court's decision should be reviewed de novo.

The Tribe Satisfies the Standard for Equitable Tolling

In our Opening Brief we demonstrated that 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 in the *Ramah* CSC class action; (2) the Tribe reasonably waited 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; (3) 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 (4) tolling does not prejudice the Government and is consistent with the trust relationship between the Government and the Tribe.

It is the breadth and complexity of the CSC litigation and the Tribe's response to this history that constitutes the extraordinary circumstances that justifies equitable tolling. The Tribe did not sleep on its rights, but exercised reasonable diligence by "monitoring the relevant legal landscape," *ASNA II*, 699 F.3d at 1297, and this Court should reject the district court's grounds for requiring

affirmative action by filing claims, regardless of the circumstances and without evaluating the Tribe's response to those circumstances. 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 Government denies the interrelated nature of the litigation and the Tribe's efforts monitoring and responding to the incremental developments over the course of more than a decade. Rather than considering the Tribe's actions within the CSC litigation landscape, the Government analyzes the elements of the Tribe's strategy as discrete choices or "excuses" which either failed or "backfired."

To the contrary, the elements that trigger the Tribe's claim to benefit from equitable tolling are clear in the record, and are not discrete "excuses," but taken together demonstrate that the Tribe exercised reasonable diligence. The Tribe had been a class member in the *Ramah* litigation since 1993 and for many years relied on the *Ramah* class action to vindicate its CSC claims against the BIA, claims which were paid in settlement without Menominee having filed claims. Pl.'s Opp'n, Ex. L (Wakau Decl.) ¶¶ 4-5; Appendix, A83.[6]

[6] In *Ramah Navajo Chapter v. Lujan*, No. CIV 90-0957 LH/RWM, Order (D.N.M. October 1, 1993), Addendum at 1a–6a, the court certified a nationwide class of all

The Cherokee Nation filed a separate class action against IHS on March 5, 1999. Both the asserted class and the claims were nearly identical to those in the *Ramah* case. *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, 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. *See ASNA II*, 699 F.3d at 1297 ("putative class members often remain passive during the early stages of the litigation allowing the named class representatives to press their claims" and thus are not "sleeping on [their] rights").

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*, 199 F.R.D. 357.[7] Four months after denying class certification, on June 25, 2001,

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BIA contractors under ISDA and held that other tribal contractors could participate in and benefit from the class action even if they had not presented separate claims. *Id*., Addendum at 5a. In 1997, the Tenth Circuit ruled in favor of Ramah on liability. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). The Menominee Tribe benefited from settlements in the case. *See* Opening Brief at 9–10; Pl.'s Opp'n, Ex. J (Erickson Aff.) at 5, line 450; Appendix, A55; and Pl.'s Opp'n, Ex. K (Street Aff.) at 5, line 450; Appendix, A63.

[7] It was reasonable for the Tribe to take no action before the court determined whether to certify the class. The filing of a class action suspends the limitations period until certification is resolved. *See Burnett v. New York Cent. R. Co.*, 380

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). At this point, Menominee, as a member of the asserted class, was faced with adverse precedent holding it had no valid claim for full CSC funding. Until the Supreme Court ruled in *Cherokee* on March 1, 2005, the Tribe faced conflicting circuit court rulings on IHS's duty, and thus had no firm substantive basis for filing a CSC claim.[8] The Supreme Court's decision confirmed that Menominee could make valid claims for the full payment of CSC, and the Tribe acted quickly to file its claims in 2005 within the six-year limitations period as extended by the limitations suspension period. The

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U.S. 424, 436 (1965). Thus, the Tribe did not "sleep on its rights" by not filing suit while the class action was pending. *See Crown, Cork & Seal Co., Inc.*, 462 U.S. 345, at 352–53 (1983); *Cullen v. Margiotta*, 811 F.2d 698, 719 (2d. Cir. 1987). The Government objects that these cases are not relevant because the Tribe was not eligible for the class. *See* Govt. Brief at 28 n.3. This is a misplaced argument, since, as those cases demonstrate, the whole point is that potential members of a putative class are encouraged to remain passive while the determination of the class is made.

[8] 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. *Shoshone-Bannock Tribes of Fort Hall Reservation v. Sec'y, Dep't of Health & Human Servs.*, 279 F.3d 660 (9th Cir. 2002). Then in 2003, the Federal Circuit declared that there was a statutory right to full funding of CSC. *Thompson*, 334 F.3d at 1094.

history of the CSC litigation is described in detail in our Opening Brief, at 6–14, 27–33. The Tribe charted a reasonable course through a long-running and complex litigation landscape. The decision points do not provide discrete "excuses" for not filing claims, but demonstrate the Tribe's reasonable diligence in prosecuting claims. 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," "does not constitute sleeping on one's rights," but shows "reasonable diligence" for purposes of equitable tolling. *ASNA II*, 699 F.3d at 1297.

The Government contends that the Tribe failed to satisfy both elements of the basic *Holland* test. Regarding the first prong, the Government claims the Tribe was not diligent because diligence requires that claims be filed within the limitations period for the reason that it is the "easy" thing to do, *see* Govt. Brief at 22, 25, 27, especially since "tribes have been litigating ISDA contract claims for decades and possess the same sophisticated understanding of the contracting process as other contractors," *id*. at 23. In fact, very few tribes, other than the *Ramah* class representatives, had litigated CSC claims on their own during the relevant period. Like the vast majority of tribes, Menominee had never filed individual claims before 2005 and relied instead on the *Ramah*, and later the *Cherokee*, class action. The Government's misleading efforts to tilt the equitable

balance by portraying this reliance as a tactical error by a sophisticated government contractor are contradicted by the record.

The Government argues that reliance on the *Ramah* precedent was unwarranted because eight years after certifying the class, the *Ramah* court "suggested" that decertification was a possibility. Govt. Brief at 25; *cf. id*. at 8. But this argument is completely undermined by the fact that the Government never moved to decertify the class, and it remains in existence to this day, with active settlement negotiations currently taking place in the wake of the Supreme Court's 2012 decision. Equally unavailing is the argument that reliance on *Ramah* was misplaced because the CDA statute of limitations was enacted after the *Ramah* class certification decision, but before the *Cherokee* class action. Govt. Brief at 30. The takeaway from *Ramah* was that filing the class action satisfied the presentment requirement for all asserted members of the class. It was logical to assume, as the Tribe did, that the parallel *Cherokee* complaint filed in 1999 satisfied the presentment requirement as to all claims accruing not more than six years before filing, including the claims at issue here. The CDA in no way undermined *Ramah*'s presentment holding or the reasonableness of the Tribe's actions relying on that holding.

In the Government's view, the Tribe does not satisfy the second prong of *Holland* because the Tribe does not show extraordinary circumstances that

"prevented" timely filing. Govt. Brief at 14, 24. The Government's overarching theme is the repeated claim that nothing "prevented" the Tribe from filing a claim earlier than it did. By "prevent," the Government understands the test to mean a "barrier" or "impediment" that "stood" in the Tribe's way. *See* Govt. Brief at 24, 30. But the Tribe did face a real impediment in the fact that, during the critical 2001–2005 period, there were three conflicting precedents whether the Tribe could have validly stated claims for full CSC funding. *See* note 8 above, and accompanying text. The Tribe monitored the litigation landscape and filed CSC claims only after the Supreme Court resolved IHS's obligation to fund CSC and provided a clear substantive basis for a claim. The Tribe was not presented with a situation where there was a mere "lack of clarity" or where an outcome was "uncertain." *See* Govt. Brief at 15. In the extensive CSC litigation, prior to the Supreme Court's definitive ruling, the Tribe was prevented from filing a valid claim by the extraordinary circumstance of the conflicting precedents and IHS's consistent resistance to full CSC funding. Given these circumstances, it was obvious and certain that IHS would deny any claims, and thus filing a claim would have been a fruitless exercise, with no hope of success.

Lack of any clear precedent, such as the Supreme Court's decision in *Cherokee*, is a factor in equitable tolling analysis. *Capital Tracing, Inc., v. United States*, 63 F.3d 859, 862 (9th Cir. 1995) (lack of clear precedent on an issue may

serve as an equitable factor in tolling); *see also 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). The Government tries to distinguish these cases, but does so on grounds that do not alter the basic principle that lack of clear precedent—in this case a clear substantive basis for the CSC claim—can determine whether there is hope for success in asserting a claim, *see* discussion in Govt. Brief at 33–34, and thus whether barriers "stand in the way" or "prevent" filing sufficient to satisfy the *Holland* criterion.

In sum, the long and complex history of CSC litigation "constituted an 'extraordinary circumstance' sufficient to warrant equitable tolling of the filing deadline." *ASNA II*, 699 F.3d at 1296. The Government tries to distinguish *ASNA II* by pointing out that ASNA hoped to participate in a class action filed by the Pueblo of Zuni in 2001 after the *Cherokee* decision denying class certification. Govt. Brief at 29–30. *See Pueblo of Zuni v. United States*, 467 F.Supp.2d 1099 (D.N.M. 2006). ASNA filed its claims in September 2005 (as did Menominee), shortly after the Government announced it intended to challenge the notion that class members need not present individual claims, and two years before the *Zuni* court denied class certification.

In fact, Menominee's reliance on *Cherokee* was, if anything, more reasonable and straightforward than ASNA's reliance on *Zuni*. Reliance on *Zuni* involved several factors that could have undermined ASNA's equitable tolling argument. First, the *Zuni* class action was filed after the *Cherokee* court declined to certify a virtually identical class, calling into question the *Ramah* precedent. Second, *Zuni* asserted essentially the same claims for the same class, potentially implicating the rule against "stacking" or "piggybacking" class actions. *See, e.g.*, *Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998), *cert. denied*, 525 U.S. 870, 119 S.Ct. 165, 142 L.Ed.2d 135 (1998); *Griffin v. Singletary*, 17 F.3d 356, 359 (11th Cir. 1994). Third, many courts have held that plaintiffs who file a separate action *before* the class certification decision, as ASNA did, forfeit the benefit of class-action tolling (though they might still be eligible for equitable tolling). *See, e.g.*, *In re Hanford Nuclear Reservation Litigation*, 497 F.3d 1005, 1026–27 (9th Cir. 2007) (adopting "the prevailing view" denying tolling in such situations). ASNA, like Menominee, argued that the class action tolled the statute either legally or equitably, *see ASNA II*, 699 F.3d at 1293, but Menominee's reliance on *Cherokee* rather than *Zuni* presents, if anything, a more compelling circumstance than what the Federal Circuit found sufficient to warrant equitable tolling.

The Government for the most part ignores the circumstances brought into play by IHS's resistance to CSC funding, but does seek to undercut its importance by diminishing the Menominee Tribe's role in monitoring and reacting to the broader litigation, as set forth in the declaration from Jerry Wakau, Administrator of the Tribe's Health Department. *See* Pl.'s Opp'n, Ex. L (Wakau Decl.); Appendix, A82-A86. The Government acknowledges that Mr. Wakau's declaration describes the steps taken by the Tribe, clear evidence that the Tribe did not sleep on its rights, but at the same time complains that the evidence is not definite or certain enough to identify when the steps occurred, without explaining how that might have altered the Government's view that the CSC litigation history does not constitute extraordinary circumstances. *See* Govt. Brief at 9–11, 20, 27–29. In any event, as described above, the facts substantiating the Tribe's claim to benefit from equitable tolling are clear and not contradicted in the record.

The Government also parses the record for discrete timeframes during which it believes the Tribe was obligated to file a claim rather than, as the Tribe concluded was necessary, continuing to monitor the litigation and filing only when it was appropriate. The Government states that the Tribe should have filed within time periods "ranging from about two months to more than two years" after the 1996–98 contracts at issue, as well as other periods of time, including 23 months pending class certification in *Cherokee Nation*, and another 55 months before the

Supreme Court's decision in *Cherokee*. *See* Govt. Brief at 13, 23. However strongly the Government believes that the Tribe should have filed during each of those timeframes, the CDA does not require a claim to be filed at any specific point during the limitations period.[9] After the Supreme Court's decision in *Cherokee* holding that IHS is required to pay CSC, the Tribe filed claims within the limitations period, as extended by tolling. By effectively requiring affirmative filing of a claim within the strict terms of the limitations period, without any consideration of the reasonableness of the Tribe's actions, the court and the Government sidestep the purpose of equitable tolling, and ignore the broader picture of the CSC litigation, a picture grasped firmly by the Federal Circuit in its ruling in *ASNA II*.[10]

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[9] The Government repeatedly notes that a claim must be filed to trigger a denial of the claim, as if that fact is particularly revealing about the Tribe's diligence. *See* Govt. Brief at 13, 14, 23, 31, citing *Menominee II*, 614 F.3d at 527 n.3. The context of the *Menominee II* note is that a claim must be filed in order to invoke the jurisdictional provisions of the CDA. But this does not mean, as the Government appears to suggest, that a claim must be filed immediately after it is apparent or recognized. In fact, a claim can be filed at any point during the limitations period, six years or later if extended by equitable tolling.

[10] The Government claims that the court's application of the *Holland* test, without deciding the reasonableness of the Tribe's action, does not effectively require the filing of a claim within the limitations period. *See* Govt. Brief at 26–27. The Government's formulation of the "diligence" requirement demonstrates otherwise: "The Tribe cannot meet the first prong of the *Holland* test because it cannot point to a single affirmative step that it took within the six-year claim presentment period to submit a claim." *Id.* at 13. This echoes the district court's formulation. *See Menominee III*, 841 F. Supp. 2d at 109; Appendix, A9.

This Court should conclude that the Tribe exercised reasonable diligence in responding to the breadth and complexity of the CSC litigation and that this unique history in its broad scope constitutes the extraordinary circumstances that prevented timely filing and justifies equitable tolling.

The Tribe's Claim was Equitably Tolled by a Defective Class Action

The district court dismissed the Tribe's argument that its CSC claim was equitably tolled by a defective "class action" filed by the Cherokee Nation, holding that only a defective "pleading" could toll the limitations period. *See Menominee III*, 841 F. Supp. 2d at 108; Appendix, A8-A9. The Tribe's view of the law, *see* Opening Brief at 33–37, and the Government's opposition, *see* Govt. Brief at 35–38, involve conflicting interpretations of Supreme Court precedent and the terms of this Court's decision in *Menominee II*. In our view, the Supreme Court in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), holds out *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), as an example of a case where equitable tolling was justified by a "defective" pleading, in that case a defective class action. *Irwin*, 498 U.S. at 458 n.3. The Government's—and the district court's—efforts to deny the relevance of *Irwin* require them to argue that the Supreme Court did not mean what it said. *See* Govt. Brief at 36 ("As the district court correctly observed, *American Pipe* actually addressed class action tolling, not equitable tolling."). But the Supreme Court's plain language says that a class

action, such as *American Pipe*, may support equitable tolling as well as class action tolling—for example, for parties like Menominee who reasonably, though mistakenly, relied on the class. Nothing about this statement is illogical or requires this Court to impute to the Supreme Court a mistake.

Also in our view, this Court's remand in *Menominee II* contemplated consideration of equitable tolling based on the pendency of a class action, *Menominee II*, 614 F.3d at 531, a reading supported by this Court's separate ruling on laches. *Id*. at 531–32.[11] We stand by our interpretations in both instances, and the Government states little more than that it disagrees. The Government's view is that the determination to deny class action tolling precludes equitable tolling without any additional analysis. *See* Govt. Brief at 28 n.3 ("[T]he Tribe's lack of eligibility to be a class member warrants denial of equitable tolling just as it warranted denial of class action tolling."). However, equitable tolling involves consideration of broader factors such as judgment and equity, not simply class status. 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.

[11] The Government claims that *Menominee II* "compels" dismissal of the Tribe's claims, Govt. Brief at 19, a meaningless assertion in face of this Court's remand for the specific purpose to consider equitable tolling. Basically, the Government wrongly interprets this Court's ruling on class action tolling as also precluding equitable tolling.

Lack of Prejudice and the Special Relationship Support the Determination That the Tribe Satisfies the Criteria for Equitable Tolling

The district court did not consider the equities 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."). The Government contends that lack of prejudice and the special relationship between the Government and the Tribe should not be considered when weighing application of equitable tolling. Govt. Brief at 38–42. The Government misstates the relevance of these factors. The Tribe does not argue that lack of prejudice provides an independent basis for establishing equitable tolling, as the Government appears to suggest, *id.* at 38, but merely that IHS had adequate notice of the Tribe's CSC claim and that the Tribe relies on documentary evidence, so that IHS cannot claim prejudice to avoid tolling. The Government does not dispute this. In the same manner, the Tribe does not claim that the trust relationship provides an independent basis for establishing tolling. However, the ISDA clearly invokes the special relationship, and it is relevant in assessing IHS's conduct in administering CSC funds. *See* 25 U.S.C. § 450a(b). 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. *ASNA II*, 699 F.3d at 1298.

The Federal Circuit first noted that equitable tolling was "not fundamentally unfair" to the Government, which had "notice of the exact nature and scope" of the tribal claims. *Id.* at 1297. The Government argues that tolling would work prejudice by denying it the protection of the statute of limitations. Govt. Brief at 38–39. But this could be said in every tolling case; the fact that the Government might lose on the merits does not establish prejudice for purposes of the equitable analysis. Otherwise, equitable tolling would be conclusively prejudicial and the absence of prejudice could never be a factor in applying the doctrine—yet the Government's own cases say that it is. *See* Govt. Brief at 38 (quoting *Baldwin Cty. Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984)). Invoking the generalized policy of statutes of limitation should not allow the Government to escape the consequences of its decades-long unlawful practice of short-changing tribes, as held by the Supreme Court in *Cherokee* and *Ramah*.

The Federal Circuit also held 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. This reasoning applies to Menominee and supports the application of equitable tolling in this case. The Government asserts that the Tribe "waived" this argument by failing to raise it before the district court, Govt. Brief at 41, but that is simply incorrect. *See, e.g.*, Pl. Reply Brief, at 22–24; Appendix, A88-A90 (discussing trust responsibility as incorporated into the ISDA

and arguing that "when assessing equitable tolling in the ISDA/CDA context, this Court should take into special consideration the Indian canon of construction, the trust duty, and Congress' intention to be more generous to the Indian contracting perspective").[12]

The Tribe's Timely Filing Preserved All Claims for 1996-2000.

The FY 96 Claim:

The Government supports the district court's ruling 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.*

The Government agrees that a claim accrues at the time of breach, when damages are ascertainable, *see Patton v. United States*, 64 Fed. Cl. 768, 774 (Fed. Cl. 2005); but argues that the Tribe asserted its claim in this case "some date years in the future when it [was] too late for the agency to address the alleged breach by

[12] The Government argues that the Tribe waived any argument based on the special relationship because it earlier stipulated to dismissal of a breach of trust claim. Release of a contract claim based on breach of trust does not waive the Tribe's right to the broader protections of the trust relationship, as specifically incorporated in the ISDA, which the Federal Circuit held is a relevant factor in the equitable analysis. *ASNA II*, 699 F.3d at 1297–98. The Government cites no authority holding otherwise.

paying the money owed." Govt. Brief at 44. But that mixes apples and oranges. The Tribe contends that the breach of an AFA accrues at the end of the contract term because until that point the agency has the ability to amend the amount. Filing the CDA claim later does not affect when the claim accrued under the terms of the contract. That is the precise circumstance addressed in *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 ISDA contract, and time of performance ends when contract, not fiscal year or AFA, expires).

The Government attempts to distinguish *Seneca Nation* by arguing that it involves IHS's failure to timely respond to an AFA amendment proposal, and not whether claims under the CDA have been timely filed. Govt. Brief at 46. Again, the Government mixes apples and oranges, confusing the accrual of the claim under ISDA with filing a claim under the CDA. And the Government misses the critical point about the relationship between the contract and the AFAs. *Seneca Nation* clearly holds that the contract is the "overarching document that defines the parties' relationship," while the AFAs are not "standalone" agreements, but form a part of the original contract and are subject to its terms. *See Seneca Nation*, 2013 WL 2255208, at 10. Thus, the time for the parties' "mutual performance" does not lapse with a single year AFA but with the full performance of the contract. *Id.* at

11.[13] As with the Seneca Tribe, the Menominee Tribe enters AFAs by predicting future costs and nothing precludes the parties from proposing changes to each year's AFA during the term of the contract. IHS could have made up the 1996 shortfall at any time during the contract term, and the Tribe's damages were not ascertainable and its claim did not accrue until completion of the contract at the end of 1998.[14]

This Court should rule that as a matter of law the Tribe's CSC claim accrued at the end of the contract.

1997 through 2000 Claims:

The district court dismissed the Tribe's claims for CYs 1999 and 2000 as untimely because these depend 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.

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[13] As the case cited by the Government demonstrates, payment is due and the claim accrues when "all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *See Kinsey v. United States*, 852 F.2d 556, 557 (Fed. Cir. 1988), quoting *Oceanic Steamship Co. v. United States*, 165 Ct. Cl. 217, 225 (1964).

[14] Contrary to the Government's argument, Gov't. Brief at 44–45, the result in *Terteling v. United States*, 334 F.2d 250, 254–55 (Ct. Cl. 1964) is fully consistent with this interpretation of the relationship between the contract and the AFAs because it does not result in "split" claims, but bases accrual on the completion of the contract rather than each AFA.

See 25 U.S.C. § 450j-1(b)(2) (funding amounts, with limited exceptions, "shall not be reduced by the Secretary in subsequent years"). The Government does do not dispute the Tribe's contention that if this Court holds that the statute was equitably tolled, the claims for 1997 through 2000 were timely filed and should be reinstated.

III. CONCLUSION

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,

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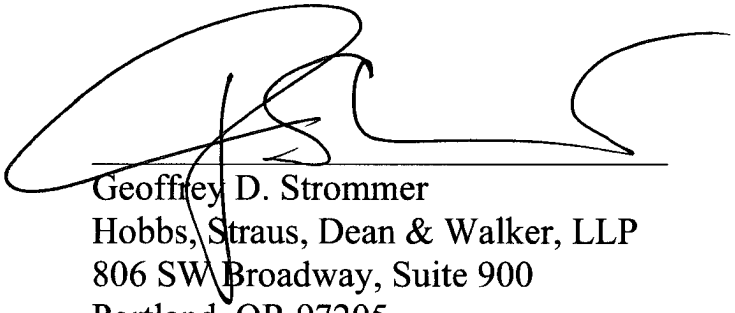

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October 10th, 2013

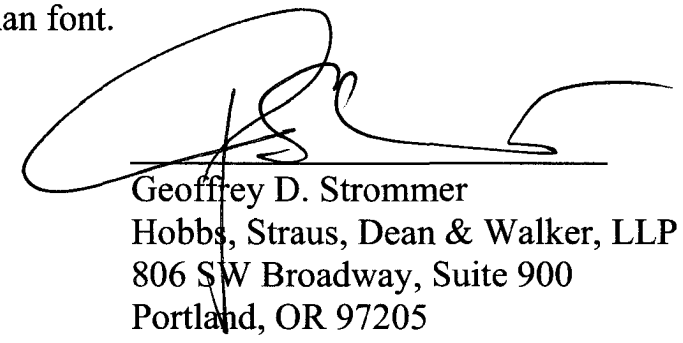
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I, Geoffrey D. Strommer, hereby certify that:

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

2. The Reply Brief of Appellant Menominee Indian Tribe ("Reply Brief") complies with the type-volume limitation of Federal Rule of Appellate Procedure ("FRAP") 32(a)(7)(B). The Reply Brief contains 6,940 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

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



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October 10, 2013

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 "Reply 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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