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THE DEPARTMENT OF THE INTERIOR  
BOARD OF CONTRACT APPEALS

ARCTIC SLOPE NATIVE ASSOCIATION,  
LTD.

Appellant,

MICHAEL O. LEAVITT, SECRETARY,  
U.S. DEPARTMENT OF HEALTH AND  
HUMAN SERVICES; CHARLES GRIM,  
DIRECTOR, INDIAN HEALTH SERVICE;  
UNITED STATES OF AMERICA

Appellees.

IBCA Nos. 4794-4803/06

ISDA Contract No. 243-96-6025

ISDA Compact No. 58G980054

REPLY TO APPELLANT'S OPPOSITION TO THE  
GOVERNMENT'S MOTION TO DISMISS

INTRODUCTION

The Indian Health Service (Appellee) moved to dismiss this Appeal based on two theories. First, the Board lacks jurisdiction to review Contract Disputes Act ("CDA") claims not presented to the contracting officer ("CO") within the Congressionally-mandated deadline. Second, a Congressionally-imposed cap on contract support costs ("CSC") bars payment of additional CSC in FY 1998, FY 1999, and FY 2000, rendering Appellant's claims for those years moot. In response, Arctic Slope Native Association, Ltd. (Appellant) consolidated its Response with a Motion for Partial Summary Judgment, combining several aspects of Appellee's argument.

Because the Board has given Appellee two dates on which to respond to the arguments

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raised in the consolidated memorandum, this Reply will focus on Appellant's Rule 23 and equitable tolling arguments. Because Appellant has addressed the Congressionally-imposed cap primarily in its Motion for Partial Summary Judgment, Appellee will reserve responding to that argument in its Opposition to the Motion for Partial Summary Judgment due in January 2007. However, Appellee reaffirms here that the Congressionally-imposed cap is a proper basis for dismissal because Appellant has no remedy.

Appellant's Response does nothing more than misapply tolling doctrines to explain away its inaction. The bottom line is that Appellant's failure to present claims until years after statutory presentment deadlines had lapsed is not excused by any case law or allegation raised in its Response. First, legal tolling does not apply to the six-year limitation period for administratively presenting a claim to a CO. Second, legal tolling is unavailable to litigants who choose to file before the question of class certification is decided. Third, equitable tolling does not apply to the six-year statute of limitations under the CDA. Finally, Appellant does not meet the requirements for equitable tolling.

#### ARGUMENT

##### I. THE BOARD LACKS JURISDICTION TO DECIDE ANY CLAIM NOT TIMELY PRESENTED TO THE CONTRACTING OFFICER WITHIN THE SIX-YEAR PRESENTMENT PERIOD

Appellant's FY 1996, FY 1997, and FY 1998 claims must be dismissed for lack of jurisdiction because Appellant failed to present a timely claim to the contracting officer in accordance with the CDA's administrative presentment requirements. See James M. Ellett Constr. Co. v. United States, 93 F.3d 1537, 1542 (Fed. Cir. 1996)("Congress granted the court jurisdiction only over an appeal from a contracting officer's decision on a valid claim."); Reliance

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Ins. Co. v. United States, 931 F.2d 863, 866 (Fed. Cir. 1991) (holding that the Government did not waive its sovereign immunity for claims not properly before the court); Pueblo of Zuni v. United States, Case No. CV 01-1046, slip op. at 14-15 (D.N.M. 2006) (reconsideration denied) (attached as Exhibit B to Appellee's Motion to Dismiss); see also, International Air Response v. U.S., 324 F.3d 1376 (Fed. Cir. 2003) (discussing the CDA as a waiver of sovereign immunity); Martinez v. U.S., 333 F.3d 1295, 1316 (Fed. Cir. 2003) ("It is well established that statutes of limitations for causes of action against the United States, being conditions on the waiver of sovereign immunity, are jurisdictional in nature.").

A. Rule 23 Tolling Is Not Applicable Because This Case Involves Administrative Presentment That is Jurisdictional

Appellant's legal (class action) tolling argument misapplies the tolling afforded to potential class members under Rule 23 of the Federal Rules of Civil Procedure. While class action tolling has not been recognized under the CDA, Appellant's class action tolling analysis ignores that the CDA is a two-step process. (See Appellant's Response at 30). Ultimately, Appellant's analysis fails to excuse its absolute failure to present claims until years after the statutory deadline. Step (1) in the CDA process is that "[a]ll 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." 41 U.S.C. § 605(a). Step (2) is the appeal of the contracting officer's (CO) decision. See 25 U.S.C. § 450m-1. Class action tolling, when applied to the CDA, would only affect step (2), tolling the statute of limitations for filing a lawsuit after the exhaustion of administrative requirements. Class action tolling would not toll the administrative six (6) year deadline to present a claim to the CO under step (1).

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The purpose of permitting tolling under Rule 23 is for judicial economy - preventing a flood of lawsuits in the courts from potential class members while class certification is pending. See e.g., American Pipe & Const. Co. v. Utah, 414 U.S. 538, 550-551 (1974). The Supreme Court was worried that potential class members attempting to intervene or filing separate lawsuits in order to preserve their legal rights would place an unnecessary strain on the courts. See Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345, 350-51 (1983). The Federal Circuit has permitted the tolling of a statute of limitation so potential class member would not be forced to file a lawsuit in court during the pendency of class certification. See Stone Container Corp. v. United States, 229 F.3d 1345 (2000).

However, it is critical to distinguish between the tolling of a statute of limitation governing the filing of a complaint in district court and an administrative presentment requirement, such as the one in this case, 41 U.S.C. § 605(a). Administrative presentment (step (1)) is a requirement to be a potential class member whose action could be tolled. Unlike the American Pipe, Crown, Cork, and Stone Container line of cases, the filing deadline at issue in this case is a mandatory administrative requirement that must be met prior to commencing an action in Federal court or with an administrative board. See Zuni, Case No. CV 01-1046, slip op. at 10 ("[A]dministrative exhaustion under the CDA is a mandatory requirement before federal court jurisdiction can exist.") (Exhibit B to Government's Motion to Dismiss.).

Any claim which has not been presented first to an agency's contracting officer cannot be reviewed by this Board or any other tribunal. Zuni, at 16-21.<sup>1</sup> Extending class action tolling to

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<sup>1</sup> The Supreme Court, ruling on a claim for disability benefits under the Social Security Act, discussed in detail the distinction between (1) the presentment of a claim to the Agency, and (2) the necessity of having obtained a final decision to be appealed; only the latter of

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the six-year administrative presentment period could serve to delay class actions unnecessarily because courts would have to wait until potential class members presented claims and exhausted their administrative remedies with the contracting officer. Thus, adhering to a firm six-year administrative exhaustion deadline actually promotes judicial economy and is consistent with American Pipe.

Federal courts have discussed the mandatory presentment scheme in the context of class actions under the Federal Torts Claims Act ("FTCA"). Like the CDA, the FTCA's mandatory presentment requirement limits the exercise of federal court jurisdiction. See 28 U.S.C. §§ 2401(b), 2675(a); See In re Agent Orange Prod. Liability Litig., 818 F.2d 194, 198 (2d Cir. 1987) ("It is well established that neither the district court nor this Court has jurisdiction over a Federal Tort Claims class action where, as here, the administrative prerequisites of suit have not been satisfied by or on behalf of each individual claimant."). Based on this statutory presentment requirement, courts have uniformly held that each and every member of a putative FTCA class action must present an individual claim for relief to the relevant agency; the failure to do so

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which was waivable under the Social Security Act. Mathews v. Eldridge, 424 U.S. 319, 328 (1976) ("[S]everal conditions... must be satisfied in order to obtain judicial review...one of which is purely 'jurisdictional' in the sense that it cannot be 'waived' by the Secretary in a particular case...The nonwaivable element is the requirement that a claim for benefits *shall have been presented* to the Secretary.") (emphasis added). The Eldridge ruling has been applied to class actions, where it was determined potential class members all had to meet the presentment requirement. See Johnson v. Sullivan, 922 F.2d 346 (7<sup>th</sup> Cir., 1990) ("In Johnson I, we held that the plaintiffs had all met the *sine qua non* requirement of having filed a claim..."). Thus, in Johnson, tolling was available to those that filed initial claims for benefits. Id. at 355. Applying the same reasoning to the CDA, all potential class members would be required to present their claims prior taking part in the class or obtaining class benefits. Unlike the Social Security Act provisions in Eldridge, however, the CDA contains a statutory "waiver" of the final decision requirement after presentment, known as a "deemed denial". 41 U.S.C. § 605(c)(5).

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requires dismissal or denial of the motion for class certification. *Id.* at 198.<sup>2</sup>

Moreover, the Court of International Trade (CIT), discussing Stone Container, has ruled explicitly that class tolling is unavailable to potential class members who have not exhausted jurisdictional administrative requirements. See NuFarm America's, Inc. v. U.S., 398 F.Supp.2d 1338, 1352 (CIT 2005) (holding that Rule 23 tolling is unavailable to potential class members who "have failed to meet the jurisdictional requirement of exhausting their administrative remedies..."). The CIT explained its rationale in an unreported case. See M.G. Maher & Co., Inc. v. U.S., 26 C.I.T. 1040, 1041, 2002 WL 2005839 (CIT 2002) ("[T]he court sees many reasons for requiring agency processing of claims here. First, it will be the agency that will verify amounts owed and make refunds, even if it does so pursuant to court order. Second, the agency is entitled to know what claims exist against it and to contemplate disposition of such claims in the first instance. It may be that particular claims may be paid or settled, even if at first glance they appear untimely under the regulation.").

Requiring potential class members to present claims and exhaust administrative remedies during the pendency of class certification promotes judicial economy; provides notice to the defendant; and does not harm a potential class member's legal rights. Thus, the pendency of the

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<sup>2</sup> Appellant cites cases where the American Pipe tolling doctrine has been applied to administrative filing deadlines. However, the administrative filing deadline in those cases was not jurisdictional, a key factor in each case. See, e.g., McDonald v. Secretary, HHS, 834 F.2d 1085, 1092 n. 4 (1st Cir. 1987) (holding that all class members had met "the non-waivable jurisdictional requirement of having presented 'a claim for benefits ... to the Secretary.'" (quoting Mathews v. Eldridge, 424 U.S. 319, 328)). Compare Sharpe v. American Exp. Co., 689 F.Supp. 294 (S.D.N.Y., 1988) (holding that the 90-day filing requirement for a federal action under Title VII is not jurisdictional); Griffin v. Singletary, 17 F.3d 356, 360-61 (11th Cir. 1994) (applying the rulings in McDonald and Sharpe to toll a non-jurisdictional EEOC filing deadline). Indeed, the reasoning in all of these cases is contradictory to the instant Appeal.

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Zuni class action cannot be a basis for tolling Appellant's jurisdictional presentment requirement under the CDA. In this case, because filing a claim with the CO within six years is a jurisdictional requirement, Appellant cannot avail itself of class action tolling.

B. Rule 23 Tolling is Unavailable to Litigants that Choose to Bring an Action Before a Determination on Class Certification

Numerous courts have ruled that class action tolling not is available for litigants who choose to file their own individual action during the pendency of class certification. In other words, such litigants may not rely on the American Pipe tolling doctrine. See, e.g.; Wyser-Pratte Management Co., Inc. v. Telxon Corp., 413 F.3d 553, (6th Cir. 2005) ("The purposes of American Pipe tolling are not furthered when plaintiffs file independent actions before decision on the issue of class certification, but are when plaintiffs delay until the certification issue has been decided."); Glater v. Eli Lilly & Co., 712 F.2d 735, 739 (1st Cir. 1983) ("The policies behind Rule 23 and American Pipe would not be served, and in fact would be disserved, by guaranteeing a separate suit at the same time that a class action is ongoing."); In re WorldCom, Inc. Securities Litigation, 294 F.Supp.2d 431, 452 (S.D.N.Y. 2003) ("Limiting the American Pipe tolling doctrine to plaintiffs who wait until after a decision on class certification to commence their actions is consistent with the purpose and holdings of both American Pipe and Crown Cork."); In re Ciprofloxacin Hydrochloride Antitrust Litigation, 261 F.Supp.2d 188, 221 (E.D.N.Y., 2003) ("The rationale behind that decision-avoidance of multiple lawsuits, court congestion, wasted paperwork and expense-militates against applying the tolling doctrine to Organizational Plaintiffs in this case who are attempting to bring another lawsuit before class certification in the initial action has even been addressed."); see also, Chinn v. Giant Food, Inc.,

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100 F.Supp.2d 331, 335 (D.MD.,2000), Rahr v. Grant Thornton LLP, 142 F.Supp.2d 793, 800 (N.D.TX., 2000); Stutz v. Minnesota Mining Manufacturing Company, 947 F.Supp. 399 (S.D.IN, 1996).<sup>3</sup>

Because Appellant brought an individual action before a determination regarding class certification in Zuni, Appellant cannot avail itself of American Pipe tolling. As such, its claims are barred by the CDA's presentment deadline.

C. Equitable Tolling Does Not Apply Under the CDA and Even if it Did, The Facts of This Case do Not Warrant its Application

Appellant's effort to apply equitable tolling is equally unpersuasive. Appellant's efforts to equitably toll the six year administrative presentment requirement fails because: (1) the CDA waiver of sovereign immunity enacted by Congress after the Irwin decision did not include exceptions for tolling, (2) the facts of this case do not come close to supporting equitable tolling of administrative presentment, and (3) interpreting the availability of equitable tolling "liberally" would not benefit Appellant.

In 1990, the Supreme Court decided that equitable tolling may, under some circumstances, apply to toll statutes of limitations applicable to claims against the United States. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95-96 (1990). In Irwin, the Supreme Court ruled that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." Id. The Supreme Court recognized in Irwin and subsequent cases that equitable tolling of statutory deadlines is not

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<sup>3</sup> There are a few district courts which have not followed this line of cases. See e.g., Lehman v. United Parcel Service, Inc., 443 F.Supp.2d 1146 (W.D.Mo., 2006) (though the court rejected the view of the majority of courts on this issue, it noted that "it might be a good idea to have a rule that prohibits individual cases until after class certification is resolved....").

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appropriate where Congress has indicated otherwise. E.g., Irwin, 498 U.S. at 95-96; United States v. Beggerly, 524 U.S. 38, 48 (1998) (equitable tolling not appropriate where Congress has incorporated a generous statute of limitations); United States v. Brockamp, 519 U.S. 347, 352 (1997) (equitable tolling was not intended when statutes contain explicit exceptions); Lane v. Pena, 518 U.S. 187, 192 (1996) (equitable tolling available only upon identification of the requisite unequivocal expression of congressional intent to grant such a waiver).

When deciding whether equitable tolling or other exceptions should be applied against the government, the Board must look to the language of the statute and congressional intent. "Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute." Beggerly, 524 U.S. at 48 (citing Brockamp, 519 U.S. 347). Since Irwin, the Supreme Court and other federal courts such as the Federal Circuit, have barred the application of equitable tolling to numerous federal statutes. See Brockamp, (section 6511 of the Internal Revenue Code); Beggerly, (Quiet Title Act, 28 U.S.C. § 2409a(g)); Brice v. Sec'y of Health and Human Svcs, 240 F.3d 1367 (Fed. Cir. 2001) (section 16(a)(2) of the National Childhood Vaccine Injury Act ("Vaccine Act")); RHI Holdings, Inc. v. United States, 142 F.3d 1459 (Fed. Cir. 1998) (26 U.S.C. § 6532(a)); Weddel v. Sec'y of Health and Human Svcs, 100 F.3d 929 (Fed. Cir. 1996) (section 16(a)(1) of the Vaccine Act).

Brockamp pointed to relevant factors that illustrated Congressional intent: time limitations set forth in emphatic terms; time limitations explained in a highly technical manner (that "cannot be easily read as containing implicit exceptions"); limitations reiterated several different ways; and exceptions provided in the statute. Brockamp, 519 U.S. at 350-352. These factors are instructive and illustrate a clear intent against equitable tolling, but a statute need not

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contain all of these factors in order to find that equitable tolling is not applicable. See Brice, 240 F.3d at 1372-73. In Beggerly, equitable tolling did not apply to the Quiet Title Act due to the already generous language in the statute of limitations (12 years SOL, and limitations period did not begin to run until plaintiff knew or should have known of the government's claim). Beggerly, 524 U.S. at 48-49. The Federal Circuit refused to read equitable tolling into a statute because it contained two of the Brockamp factors - detailed statutory scheme with strict deadlines, and the inclusion of specific exceptions to the limitations period. Brice, 240 F.3d at 1373 ("When an act includes specific exceptions to a limitations period, we are not inclined to create other exceptions not specified by Congress."). The Brockamp factors should also preclude tolling under the CDA.

1. Congress Did Not Intend to Extend Equitable Tolling Under § 605(a)

While no court has ruled on the applicability of equitable tolling under 41 U.S.C. § 605(a), there is strong support against applying equitable tolling under the CDA. See Renda Marine Inc. v. United States, 71 Fed. Cl. 782 (Fed. Cl. June 30, 2006) (no tolling under 41 U.S.C. § 605(b)); Hamza v. United States, 36 Fed. Cl. 10, 14 (Fed. Cl. 1996) (failure to timely file under § 605(b) renders contracting officer's decision "final and conclusive."); See also John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1354 (Fed. Cir. 2006) ("[W]e are unwilling to disturb the well-settled law that section 2501 creates a jurisdictional condition precedent for suit in the Court of Federal Claims, which may not be waived by the parties.") Moreover, at least one Board of Contract Appeals has refused to address the issue of equitable tolling under the CDA. See In re Romero, 04-2 BCA P 32790 (A.S.B.C.A 1994) (declining to extend equitable tolling because it has not been extended by the Supreme Court or the Federal

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Circuit).<sup>4</sup>

2. The Facts of this Case do not Warrant Equitable Tolling

Appellant does not meet the standard necessary for equitable tolling. Equitable tolling when it has been applied, is used in very limited circumstances, and requires a finding that: (1) the plaintiff "actively pursued his judicial remedies" but filed a defective pleading, or (2) the plaintiff had been "induced or tricked by his adversary's misconduct" into missing filing deadlines. See Irwin, 498 U.S. at 96; see also, Am-Pro Protective Agency, Inc. v. United States, 281 F.3d 1234, 1238-39 (Fed. Cir. 2002); Wood-Ivey Sys. Corp. v. United States, 4 F.3d 961, 964 n.4 (Fed. Cir. 1993); Bath Iron Works Corp. v. United States, 20 F.3d 1567, 1572 n.2 (Fed. Cir. 1994). A plaintiff must show how the facts of its particular case warrant its application. See Bonneville Assocs., Ltd. P'ship v. Barram, 165 F.3d 1360, 1366 (Fed. Cir. 1999). Equitable tolling has been extended sparingly. Irwin, 498 U.S. at 96.

In the instant case, Appellant fails to explain how the facts of this case warrant equitable tolling under Irwin. Indeed, Appellant does not even cite the factors that must be considered for equitable tolling under the Irwin standard. Moreover, there is no evidence of those factors in this case. Appellant has neither filed a defective pleading within the statute of limitations period nor been "induced or tricked" by IHS. Appellant's failure to adhere to the strict statutory requirement that it present its claim to the CO within six years is due to its own lack of due diligence. If the Board allows Appellant to proceed with its untimely claim, where neither of the two principles for applying the Irwin standard are in existence, it would be contrary to the Supreme Court's ruling and rationale.

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<sup>4</sup>Appellee is aware of no Board's which have applied equitable tolling under the CDA.

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Since the Supreme Court's decision in Irwin, the Federal Circuit has not reversed course, but has held that even if the CDA's time limits could be tolled, the facts of the particular case must warrant tolling. See, e.g., Am-Pro Protective Agency, 281 F.3d at 1238-39 (finding no duress or coercion on the part of the government to warrant consideration of equitable tolling); Bonneville, 165 F.3d at 1365 (finding consideration of equitable tolling unwarranted because claimant failed to protect his rights and there was no government misconduct).

In this case, Appellant did not diligently preserve any purported legal right. Appellant's FY 1996, FY 1997 and FY 1998 claims accrued no later than the close of those fiscal years. Yet Appellant did not file the instant claims with the contracting officer until September 2005, years after the statutory deadline. "Failure to bring the action within the limitations period was a judgment for which the appellants are responsible." Frazer v. U.S., 288 F.3d 1347, 1353 (Fed. Cir., 2002) (holding plaintiffs "responsible for the consequences of their judgment, including the risk that it was incorrect.").

3. The Board may not Liberally Interpret the Availability of Equitable Tolling Under the CDA

The Secretary's relationship with ISDA contractors does not permit the Board to interpret the availability of equitable tolling under the CDA more liberally than Irwin allows, contrary to Appellant's argument.<sup>5</sup> Appellant misapplies recent Federal Circuit rulings regarding the availability of equitable tolling in the veterans appeal system to reach an opposite conclusion. Id. at 31, 32. In extending equitable tolling to veteran's appeals deadlines, the Federal Circuit

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<sup>5</sup> Appellant argues that because of "the unique relationship between the United States and Tribes, and the trust services being contracted, equitable tolling should be interpreted liberally." (Appellant's Response at 31.)