

CIVILIAN BOARD OF CONTRACT APPEALS

ARCTIC SLOPE NATIVE ASSOCIATION,)	
LTD.,)	
)	
Appellant,)	
vs.)	CBCA 190-ISDA through 297-ISDA
)	(IBCA 4794-4803-2006)
MICHAEL O. LEAVITT, SECRETARY)	
U.S. DEPARTMENT OF HEALTH AND)	
HUMAN SERVICES, <i>et al.</i> ,)	
)	
Appellees.)	
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**NOTICE OF ADDITIONAL AUTHORITY IN
OPPOSITION TO APPELLEES' MOTION TO DISMISS**

Appellant Arctic Slope Native Association (ASNA) hereby gives notice of additional recent authority in support of ASNA's Opposition to Appellees' pending Motion to Dismiss.

On March 7, 2007, the United States Court of Appeals for the Federal Circuit issued an *en banc* opinion in *Kirkendall v. Dep't of the Army*, ___ F.3d ___, 2007 WL 675744 (Fed. Cir. 2007) (*en banc*). The earlier three-judge panel opinion, published at 412 F.3d 1273 (Fed. Cir. 2005) and reaching the same conclusion as the *en banc* Court, was cited by Appellant Arctic Slope Native Association (ASNA) at pages 30-31 of ASNA's Mem. in Opp. to Aples' Mot. to Dismiss and in Supp. of Aplt's Mot. for Partial Summ. Judgment (filed Nov. 20, 2006).

The new opinion rejects as "without merit" the proposition – repeatedly advanced here by the Indian Health Service (IHS), *see* Reply to Aplt's Opp. to Gov't's Mot. to Dismiss at 3 (filed Dec. 11, 2006); Corrected Resp. to Aplt's Surreply in Opp. to Aples' Mot to Dismiss at 2-6 (filed Jan. 23, 2007) – that the "jurisdictional" nature of a limitations provision means it is "not subject to equitable tolling." *Kirkendall*, 2007 WL 675744, at *8. To the contrary, the *en banc* Court


reaffirms an earlier *en banc* opinion that “statutes specifying the time for review are within the rebuttable presumption in favor of equitable tolling.” *Id.* at *8 (quoting *Bailey v. West*, 160 F.3d 1360, 1367 (Fed. Cir. 1998) (*en banc*))

The *Kirkendall en banc* opinion also reiterates that a statutory scheme intended specially to benefit a class of which the plaintiff is a member (there, a veterans benefit program) is an added reason not to find the general presumption in favor of equitable tolling to have been rebutted. *Kirkendall*, 2007 WL 675744, at *7.

More generally, the Court’s application of the factors from prior Supreme Court and Circuit cases for assessing when the tolling presumption has been rebutted in a particular statute, *see id.* at *4-*7, closely tracks ASNA’s analysis and supports ASNA’s conclusion that equitable tolling is available under the Contract Disputes Act (CDA) and the Indian Self-Determination Act (ISDA), *see* Aplt’s Surreply in Opp. to Aples’ Mot. to Dismiss at 15-18. It also rejects the notion that the tolling rule is to be assessed differently depending on whether the issue is an initial filing or an appeal from an agency decision. *Compare Kirkendall* 2007 WL 675744, at *9 (majority) with *26 (Moore, J., dissenting). Indeed, application of tolling to the CDA and ISDA is particularly appropriate after *Kirkendall*, considering that the dissenting judges there rested a contrary assessment largely on statutory language not present either in the CDA or the ISDA, *see id.* at *21-24 (Moore, J., dissenting) (discussing statute’s “in no event” language)

Respectfully submitted this 19th day of March 2007.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed, or caused to be mailed, a true and correct copy of the foregoing document by electronic mail and first class mail to the following parties of record this 19th day of March 2007:

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