

UNITED STATES GENERAL SERVICES ADMINISTRATION  
CIVILIAN 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

APPELLEE'S RESPONSE TO NOTICE OF ADDITIONAL AUTHORITY

Appellee Indian Health Service takes this opportunity to respond to Appellant Arctic Slope Native Association, Ltd.'s (ASNA) Notice of Additional Authority, which advised the Board of the decision by the Court of Appeals for the Federal Circuit in Kirkendall v. Dep't. of the Army, \_\_ F.3d \_\_, 2007 WL 675744 (Fed. Cir. 2007).

IHS's position that class action tolling under Rule 23 of the Federal Rules of Civil Procedure is unavailable to litigants under the CDA before presentment to the agency is unaffected by Kirkendall. Kirkendall did not involve class action tolling under Rule 23. In the few cases that have addressed class tolling in the context of statutory administrative time periods, it has been permitted where the administrative requirement itself, associated with the time period, could be waived or excused. See Appellee's January 23, 2007 Brief at 2-7. To summarize that position, class tolling under Rule 23 does not stop the six year presentment deadline because the CDA presentment requirement is jurisdictional, it may not be waived or excused, and must be

met by each individual contractor.

The Federal Circuit's decision in Kirkendall, neither contradicts nor rejects the position taken by IHS in this Appeal with respect to equitable tolling. Specifically, IHS did not take the position in this Appeal that equitable tolling is unavailable under the Contract Disputes Act (CDA) only because the CDA's presentment deadline is jurisdictional. Rather, IHS referred to the jurisdictional nature of presentment itself to militate against finding equitable tolling under the CDA. See Dec.11th, 2006 Brief at 10.

IHS recognizes that the Federal Circuit has taken the view, since the Supreme Court's decision in Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990), that even "jurisdictional" time limits can be equitably tolled in certain circumstances. See e.g., Bath Iron Works Corp. v. U.S., 20 F.3d 1567, 1572 n. 2 (Fed. Cir. 1994) ("Presumably, therefore, Irwin merely holds that those time limits, while jurisdictional, can be equitably tolled in certain circumstances."). Kirkendall essentially clarifies the Bath Iron Works Corp. in the context of recent Supreme Court decisions, including Eberhart v. U.S., 546 U.S. 12 (2005), holding that the term "jurisdictional" is not properly used to refer to time limits. Id. at 8. Nothing in Kirkendall changes the position that CDA presentment is a jurisdictional prerequisite that must be met before bringing a contract action before this Board, a United States District Court, or the Federal Court of Claims.

Under Kirkendall and Bath Iron Works Corp., the Federal Circuit still looked at factors enumerated by the Supreme Court in past decisions to determine whether equitable tolling was available before applying it to the facts. Id. at \*2. Therefore, this Board must look at the same factors in the context of the CDA. For the reasons offered in IHS's previous briefs, equitable

tolling is not available under the CDA; and the facts of this case do not warrant tolling even if it was available.

Moreover, it is not credible for Appellant to draw any similarity between; (1) a missed 15-day deadline by a veteran with organic brain syndrome<sup>1</sup>, and (2) a 6-year deadline missed by Appellant, a sophisticated Tribal Organization, presumably “capable of administering quality programs” and developing the economy of its respective community under its ISDEAA contract. 25 U.S.C. § 450a. “[S]tatutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress or relief from the government.” Rosebud Sioux Tribe v. U.S., 75 Fed.Cl. 15, 23 (Fed.Cl. 2007), quoting, Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1576 (Fed.Cir.1988). Nevertheless, Kirkendall must be read in accord with Eberhart, and therefore this Board must recognize that “its duty to dismiss the appeal [is] mandatory” when the Government raises untimely filing. See Eberhart at 406.

Respectfully submitted,

Sean Dooley  
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Office of the General Counsel

Date: March 30, 2007

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<sup>1</sup> The Government conceded that equitable tolling could be applied to the 60-day filing limit. Id. at \*4. Additionally, in Kirkendall, the plaintiff claimed active pursuit of his legal rights and argued that his failure to meet the required deadlines was due to mental incapacity caused by his disability. Kirkendall, 2007WL 675744 at \*37 (“[I]n this case the appellant urges that he was disabled from filing an appeal because of mental incapacity.”)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Indian Health Service's Response to Appellant's Notice of Additional Authority was sent via email and mail this 30nd day of March, 2007 to:

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