No. 2008-1532

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.

Appellant,

v.

Mike Leavitt, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellee.

Appeal from the Civilian Board of Contract Appeals in case nos. 289-ISDA through 293-ISDA, Administrative Judge Candida S. Steel.

# OPENING BRIEF OF APPELLANT ARCTIC SLOPE NATIVE ASSOCIATION, LTD.

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1. The full name of every party or amicus represented by me is:

   Arctic Slope Native Association, Ltd.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   N/A

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or agency or are expected to appear in this court are:

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*/s/ Lloyd B. Miller*

November 17, 2008

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U.S. Comm'n on Civil Rights, *Broken Promises: Evaluating the Native American Health Care System* (Sept. 2004) *available at* http://www.usccr.gov/pubs/nahealth/nabroken.pdf . . . . . . . . . . . . . . . . . 47

## STATEMENT OF RELATED CASES

1. There are presently two appeals pending before this Circuit that involve identical issues concerning the tolling of the six year statute of limitation for Indian tribal contractors to present "contract support cost" damage claims to an agency contracting officer under the Indian Self-Determination Act, 25 U.S.C. §§ 450-458bbb-2, and the Contract Disputes Act, 41 U.S.C. §§ 601-613:

(a) *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Mike Leavitt, Secretary of Health & Human Services*, No. 2008-1607 (appeal docketed Sept. 30, 2008);

(b) *Metlakatla Indian Community v. Mike Leavitt, Secretary of Health & Human Services*, No. 2009-1004 (appeal docketed Oct. 6, 2008).

2. There are also currently pending before the United States Civilian Board of Contract Appeals approximately 22 appeals by Indian tribal contractors in which the identical tolling issue presented in this appeal is also presented. As of the filing of this brief, all proceedings in those cases have been stayed pending the disposition of this appeal.

# INTRODUCTION

This appeal is a follow-on to *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), which affirmed this Circuit's decision against the government in *Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003): it involves nearly identical "contract support cost" claims against the U.S. Indian Health Service (IHS) brought by an Indian tribal organization administering a federal hospital under the Indian Self-Determination Act, 25 U.S.C. §§ 450-458bbb-2 (ISDA). In the *Cherokee* litigation, this Circuit unanimously declared illegal the underpayments that resulted from a Secretarial "allocation policy" that, precisely as occurred here during the very same years, improperly limited the amounts the Secretary paid for certain contract support costs that were due under the contracts. *Thompson*, 334 F.3d at 1082 n.3.

The claims at issue here relate to contracts for services provided in 1996, 1997 and 1998, and were filed under the ISDA and the Contract Disputes Act, 41 U.S.C. §§ 601-613 (CDA). In 2001, well within the six year statute of limitations applicable to these claims (as specified in § 605(a)), a nationwide class action was filed in federal district court in New Mexico on behalf of a putative class of all ISDA tribal contractors—including Appellant here—to recover on their CSC underpayment claims. *Pueblo of Zuni v. United States*, No. 01-1046 (D.N.M. Sept. 10, 2001). The

*Zuni* class action remained pending until 2007 when, after extensive discovery and briefing, the New Mexico court denied class certification.

In 2005, while the New Mexico class action was still pending, Appellant initiated this action by submitting its CSC underpayment claims to an IHS contracting officer. The claims were thereafter deemed denied by inaction, and Appellant appealed those denials to the Civilian Board of Contract Appeals (CBCA). The CBCA dismissed the claims as untimely, accepting the government's argument that the claims were barred because they were presented after expiration of the CDA's six year statute of limitations.

But the CBCA erred: the running of the limitations period was tolled during the pendency of the *Zuni* class action. The CBCA's decision to the contrary is directly at odds with long-established rules of class action procedure under Federal Rule of Civil Procedure 23, which provides precisely for such tolling of putative class member claims as explained in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983); and *Stone Container Corp. v. United States*, 229 F.3d 1345 (Fed. Cir. 2000). The decision below is also at odds with controlling rules of equitable tolling announced in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), and most recently applied by this Court in *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed. Cir. 2007) (*en banc*).

Under either theory of tolling, the Appellant's claims were presented to IHS in a timely manner. The CBCA's decision to the contrary should be reversed so that the claims can be heard on the merits.

## STATEMENT OF JURISDICTION

On September 30, 2005, the Arctic Slope Native Association (ASNA) presented to an IHS contracting officer various contract claims, brought pursuant to § 450m-1(d) of the ISDA (providing that the Contract Disputes Act shall apply to ISDA contracts). J.A. 20, 25, 30. When no decision had been issued after eleven months, the claims were deemed denied by operation of law. 41 U.S.C. § 605(c)(5); 25 C.F.R. § 900.224.

On August 24, 2006, the Interior Board of Contract Appeals (IBCA) docketed timely consolidated appeals pursuant to § 450m-1(d) of the ISDA ("all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals"). J.A. 413. On January 6, 2007, the appeals were transferred to the Civilian Board of Contract Appeals (CBCA) pursuant to § 847 of the National Defense Authorization Act for Fiscal Year 2006. Pub. L. No. 109-163, 119 Stat. 3136, 3391-3395 (2006).

By decision entered July 28, 2008, the CBCA dismissed the appeals. Add. 1a-10a. On August 22, 2008, this Court docketed ASNA's timely Notice of Appeal. *See* 41 U.S.C. § 607(g)(1)(A) (providing 120 days to appeal).

**STATEMENT OF ISSUES PRESENTED**

The issues presented are whether, under the ISDA and the CDA, the six year statute of limitations for a tribal contractor to present a claim to a contracting officer:

> (1) is subject to mandatory class action tolling under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983); and *Stone Container Corp. v. United States*, 229 F.3d 1345 (Fed. Cir. 2000), during the period in which the contractor was a putative class member in an action raising the same claims; and
>
> (2) is otherwise subject to equitable tolling under *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), and *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed. Cir. 2007) (*en banc*).

**STATEMENT OF THE CASE**

This is a breach of contract action. ASNA entered into and fully performed three ISDA contracts with the Secretary of Health and Human Services. ASNA alleges that each contract required the Secretary to pay certain contract support costs (CSCs) which the Secretary failed to pay in full. 25 U.S.C. §§ 450j-1(a)(2), (g). The contracts covered a portion of fiscal year 1996, and all of fiscal years 1997 and 1998. The law controlling the first two of these fiscal years was the subject of the Supreme

Court's decision in *Cherokee*, which found the Secretary's underpayment of contract support costs to be illegal.

In 2001, five years after the oldest of ASNA's contracts was breached, a class action lawsuit was filed against IHS in federal district court in New Mexico, seeking damages for CSC underpayments on behalf of a nationwide class of all ISDA contractors. *Infra* at 15. As of September 2005, class certification proceedings were ongoing in that case and would not be resolved until 2007. ASNA was a member of the putative class.[1]

In September 2005, while the New Mexico class action was still pending, ASNA presented certified contract claims to IHS. J.A. 20, 25, 30. When eleven months later the contracting officer had failed to issue any decisions, ASNA filed an appeal and Complaint with the IBCA. J.A. 391, 397. In November 2006 IHS filed a Motion to Dismiss, and ASNA responded with a Motion for Partial Summary Judgment of Liability. J.A. 11 (Doc. No. 2), 13 (Doc. No. 27). Also in December 2006, the IBCA granted ASNA's motion to file an Amended Complaint to add a third cause of action. J.A. 15 (Doc. No. 47), 508. Following the January 2007 transfer of

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[1] The IHS class action suit was similar to a then-pending class action suit filed in 1990 against the Secretary of Interior and the Bureau of Indian Affairs (BIA), on behalf of a near-identical nationwide class of ISDA tribal contractors seeking damages for the BIA's failure to fully pay CSCs. *Infra* at 14-15.

these consolidated appeals to the CBCA (*supra* at 3), the Board in due course announced that it would be issuing interim rulings in this and two other CSC cases limited (insofar as pertinent here) to one question: "were the claim filing requirements of the CDA tolled by legal or equitable tolling such that the claims filed with the contracting officer were timely?" J.A. 625.

By decision entered July 28, 2008, the Board answered that question in the negative and dismissed ASNA's appeals for lack of subject matter jurisdiction. Add. 1a-10a. Relying almost entirely on a single decision of the Armed Services Board of Contract Appeals that never discusses tolling, *Gray Personnel, Inc.*, ASBCA No. 54652, 06-2 BCA ¶ 33,378, 2006 WL 2390292 (Aug. 9, 2006), and quoting that Board's citation to other cases that likewise never discuss tolling, the Board reasoned that the CDA's six year "time limit" in 41 U.S.C. § 605(a) for presenting a claim to a contracting officer is "jurisdiction[al]" because the "time limit" is a "prerequisite to our jurisdiction." Add. 6a. Leaping from that proposition to the tolling issue, the Board concluded:

> ASNA's failure to submit its FY 1996 through FY 1998 claims to the awarding official within six years after they accrued, as required by section 605(a) of the CDA, deprived this Board of jurisdiction to consider these claims. 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 of these requirements of section 605, we lack jurisdiction to consider an appeal.

Add. 7a. The Board never explained how its "jurisdictional" determination was relevant either to the Rule 23 or equitable tolling issues presented here. This appeal followed.[2]

## STATEMENT OF THE FACTS

The fact that ASNA filed its claims more than six years after they accrued is undisputed. Whether that fact is dispositive of this case, however, can only be understood in the context of the ISDA's statutory scheme, the relevant Appropriations Acts, the agency conduct that led to the underpayment claims, and the class action that was filed to contest those agency underpayments.

### 1. The Indian Self-Determination Act

As this Circuit noted in *Thompson*, "[b]efore the enactment of the ISDA in 1975, service programs benefitting the Indian tribes were operated almost exclusively by the federal government. The ISDA was designed to make a major change in this approach." 334 F.3d at 1079. Toward that end, Congress set as a national goal the promotion of tribal "self-determination" and the elimination of "Federal domination

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[2] The Board also addressed consolidated claims involving two later fiscal year contracts, but the claims under those contracts were not dismissed. Add. 8a-9a.

of Indian service programs [that] ha[d] served to retard . . . the realization of [tribal] self-government." 25 U.S.C. § 450(a)(1). *See generally Cherokee*, 543 U.S. at 639 (discussing the ISDA). The Indian service programs covered by the ISDA are carried out either by Appellee Secretary of Health and Human Services (primarily through the Indian Health Service) or by the Secretary of the Interior (primarily through the Bureau of Indian Affairs). § 450b(i).

"In order to transfer the programs from federal to tribal control, the statute required the Secretary to enter into contracts with the tribes, under which the tribes would administer the previously federal programs." *Thompson*, 334 F.3d at 1080 (emphasis added) (discussing 25 U.S.C. § 450f(a)(1)). The Act thus required the Secretary to do the bureaucratically unthinkable: "to divest" himself upon demand not only of all authority to operate his own programs, but of all associated funding too. S. Rep. No. 100-274, at 6 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2625 (Senate Report). Not surprisingly, "[t]he transition . . . was not without problems." *Thompson*, 334 F.3d at 1080.[3]

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[3] Senate Report at 7-10, 20-21, 30-31 (detailing agency misconduct). *See also Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462-63 (10th Cir. 1997) and *Ramah Navajo School Bd. v. Babbitt*, 87 F.3d 1338, 1344-45 (D.C. Cir. 1996) (discussing agencies' failures).

In the wake of the ISDA's enactment Congress witnessed the "agencies' consistent failures . . . to administer self-determination contracts in conformity with the law," with IHS and the BIA "systematically violat[ing]" tribal contractors' rights. Senate Report at 37. Far and away "the single most serious problem with implementation of the Indian self-determination policy ha[d] been the failure of the [BIA] and [IHS] to provide funding for the indirect costs associated with self-determination contracts." *Id.* at 8, *quoted in Thompson*, 334 F.3d at 1080-1081. This "practice . . . require[d] tribal contractors to absorb all or part of such indirect costs within the program level of funding, thus reducing the amount available to provide services to Indians as a direct consequence of contracting." *Id.* at 33. The agencies' failures to pay in full various contract "indirect costs" (later called "contract support costs" or "CSCs") also resulted in a "tremendous drain on tribal financial resources," *id.* at 7, because tribal contractors were compelled to "subsidize" the contracted programs, *id.* at 9 (quoted in *Thompson*, 334 F.3d at 1080-1081).[4]

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[4] In response, the Senate Indian Affairs Committee declared that "[IHS] must cease the practice of requiring tribal contractors to take indirect costs from the direct program costs, which results in decreased amounts of funds for services." Senate Report at 12. *See generally Thompson*, 334 F.3d at 1080-1082 (discussing these contract funding problems); *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1380-84 (Fed. Cir. 1999) (Gajarsa, J., concurring) (same).

By the mid-1990s, Congress had twice substantially rewritten the Act to constrain as much as possible the Secretary's contracting discretion, and to guarantee full funding of all contract costs, including CSCs, subject only to the availability of appropriations. *See* Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (1988); Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (1994). The Act in subsection 450j-1(a) now expressly required that, in addition to the "secretarial amount" to be paid under subparagraph (1) (*i.e.*, the Indian service program funds that support the contracted program, *see Thompson*, 334 F.3d at 1080), "[t]here shall be added . . . <u>contract support costs</u>." § 450j-1(a)(2) (emphasis added). The Act explained these costs "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." *Id.* As such, the amended Act "reflects a congressional concern with [the] Government's past failure adequately to reimburse tribes' indirect administrative costs and a congressional decision to require payment of those costs in the future." *Cherokee*, 543 U.S. at 639.

To reinforce this mandate "to reimburse tribes' indirect administrative costs," Congress also made plain that the ISDA involves the execution of legally binding contracts, *Cherokee*, 543 U.S. at 639, and made them enforceable through

incorporation of the "money damages" remedy available in the CDA. § 450m-1(a), (d). This new remedy was a direct result of past contract funding problems:

> The[se] strong remedies . . . are required because of th[e] agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs. Existing law affords such contractors no effective remedy for redressing such violations.

Senate Report at 37. At the same time—but unlike routine government contractors—Congress gave ISDA tribal contractors the additional option of pursuing their contract damage claims in local federal district courts. 25 U.S.C. § 450m-1(a). (This remedy is in addition to a government contractor's usual option of appealing to a contract appeals board or to the Court of Federal Claims, *see* 41 U.S.C. § 606 (Board), § 609(a)(1) (CoFC).) Further, Congress directed that, when a contractor opts for a contract appeals board, all appeals would go to the Interior Board of Contract Appeals, including those like ASNA's involving IHS. § 450m-1(d).[5]

Lastly, and in a final move to limit any further agency discretion, the ISDA also sets forth (1) a statutory model agreement, codified at § 450*l*(c), which the Secretary must use and which includes, *inter alia*, the mandatory incorporation into the contract

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[5] Previously, appeals from contract disputes involving IHS contracts were heard by the Armed Services Board of Contract Appeals. *See*, *e.g.*, *Puyallup Tribe of Indians*, ASBCA No. 29802, 88-2 BCA ¶ 20640, 1988 WL 44381 (Mar. 2, 1988).

of all provisions of the Act (sec. 1(a)(1)); (2) a repetition of the Act's funding mandate directing that "the total amount specified in the annual funding agreement . . . shall not be less than the applicable amount determined pursuant to [§ 450j-1(a)]"(sec. 1(b)(4)); and (3) a mandatory rule of construction directing that "[e]ach provision of the [ISDA] and each provision of this Contract shall be liberally construed for the benefit of the Contractor." (sec. 1(a)(2)).

### 2. The Relevant Appropriations Acts

The three successive "initial or expanded" contracts at issue in this case were each to be paid from one of three annual IHS Appropriations Acts. *See* Pub. L. No. 104-134, 110 Stat. 1321, 1321-189 (1996) (FY1996); Pub. L. No. 104-208, 110 Stat. 3009, 3009-212 (1996) (FY1997); Pub. L. No. 105-83, 111 Stat. 1543, 1582 (1998) (FY1998). With respect to CSCs associated with "initial or expanded" contracts like ASNA's, all three Acts specified that:

> of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts . . . with the [IHS] under the provisions of the [ISDA].

*E.g.,* 110 Stat. at 1321-189 (ISD Fund). In *Cherokee*, the Supreme Court affirmed this Court's determination that the quoted language did not cap the payment of CSCs associated with initial or expanded contracts, but only created "carryover authority"

for any unexpended funds. 543 U.S. at 644-645; *Thompson*, 334 F.3d at 1090. The same law controls ASNA's contract claims here.

**3. IHS's Unauthorized CSC Funding Procedures**

Despite the ISDA and the terms of the Appropriations Acts, CSC underpayments like those at issue here and in *Cherokee* occurred because in the mid-1990s IHS imposed upon tribal contractors an unpublished internal "allocation policy" that compelled the underpayments. *Thompson*, 334 F.3d at 1082 n.3; *see also* J.A. 250 (IHS Circular 96-04). IHS gathered together all "initial (also called 'new') and expanded" contracts like ASNA's on a "queue," with the oldest ones on top. *E.g.*, J.A. 498. Then, each year IHS limited its CSC payments to the $7.5 million in carryover funds discussed *supra* at 12-13, paying only those contracts at the top of the queue until the $7.5 million was exhausted. *Thompson*, 334 F.3d at 1082 n.3 (explaining process under IHS Cir. 96-04). By this device, in a given year IHS usually paid no CSCs at all to the remaining contracts lower down on the list. In *Thompson* this Court overturned IHS's practice, finding IHS had acted contrary to law when claiming that it was subject to a $7.5 million aggregate cap for payment of these initial/new or expanded contracts, and when claiming that its lump-sum appropriation was therefore not legally available to pay these contracts in full. *Id.* at 1090, *affirmed Cherokee*, 543 U.S. at 644-645. This Court and the Supreme Court ruled that IHS's

multi-billion dollar lump-sum appropriation in fact was available to pay its contractual obligations.

### 4. Related Class Action Litigation

a. The *Ramah* class action over BIA contract support costs.

In 1990, shortly after Congress added the CSC provisions and made ISDA contracts uniquely enforceable through CDA appeals in the district courts, the Ramah Navajo Chapter filed a nationwide class action against the BIA in the New Mexico District Court. *Ramah Navajo Chapter v. Lujan*, No. 90-0957 (D.N.M. Oct. 4, 1990) ("*Ramah*"). The action initially alleged that the BIA was underpaying CSCs by miscalculating them, but later alleged the BIA was not paying in full even the miscalculated amounts.

In 1993 District Judge Leroy Hansen certified a class of "all Indian tribes and organizations who have contracted with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act." *Ramah*, Order of Oct. 1, 1993 (Dkt. No. 96). J.A. 491. As so certified, the *Ramah* class included ASNA, which had long contracted with the BIA as well as IHS. Significantly, Judge Hansen also ruled that the class could proceed without individual class members first presenting formal claims to the BIA. *Id.* ("[I]t is not necessary that each member of the proposed class exhaust its administrative remedies under the Contract Disputes Act.")

In 1997, while ASNA's contracts with IHS were getting underway, the Tenth Circuit held the BIA liable for failing to calculate tribal CSC requirements properly. *Ramah Navajo Chapter v. Lujan*, 112 F.3d at 1463. Judge Hansen subsequently approved a $76 million partial settlement for the class against the BIA covering certain claims arising under fiscal year 1989 through 1993 ISDA contracts, *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999). ASNA participated in the ensuing distribution. *Ramah*, Unnumbered Docket Entry (Feb. 15, 2001) (naming ASNA). More recently, Judge Hansen approved a $29 million second partial settlement for the class covering additional 1992-1994 contract claims against the BIA, *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002).

b. <u>The *Zuni* class action over IHS contract support costs</u>.

On September 10, 2001—still over one year before expiration of the limitations period to present the oldest of ASNA's three contract claims against IHS—the Pueblo of Zuni filed a nationwide class action against IHS in federal district court in New Mexico, challenging IHS's failure to pay contract support costs in full to ISDA tribal contractors. *Pueblo of Zuni v. United States*, No. 01-1046 (D.N.M. Sept. 10, 2001). Like *Ramah*, the case was assigned to Judge Hansen. The Complaint sought certification of a class against IHS virtually identical to the certified 1993 *Ramah* class against the BIA, comprised of "all tribes and tribal organizations contracting with IHS

under the ISDA between fiscal years 1993 to the present." J.A. 477. As so described, ASNA was a member of that putative class.

On December 28, 2001, and acting at the joint suggestion of IHS and the plaintiffs, Judge Hansen entered an Order staying the *Zuni* litigation pending the outcome of *Cherokee Nation & Shoshone-Paiute Tribes v. Thompson*, 311 F.3d 1054 (10th Cir. 2002), *rev'd sub nom. Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), a case then pending before the Tenth Circuit which involved identical claims of CSC underpayments by IHS. J.A. 487. (The Supreme Court later consolidated this case with this Circuit's *Thompson v. Cherokee Nation* decision, *see* 541 U.S. 934 (2004).)[6]

The *Zuni* case remained stayed until March 17, 2005, when Judge Hansen lifted the stay in the wake of the Supreme Court's *Cherokee* decision. J.A. 489. Contested proceedings on class certification followed, and on May 22, 2007, approximately five years and eight months after the *Zuni* case was first filed, Judge William Johnson (to whom the case had been transferred) denied certification of the class, effectively ending that case. *Pueblo of Zuni v. United States*, 243 F.R.D. 436 (D.N.M. 2007).

### 5. Facts Pertaining to ASNA

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[6] The Tenth Circuit *Cherokee* case was also initially filed as a class action but in February 2001 the Oklahoma district court denied certification. *Cherokee Nation & Shoshone-Paiute Tribes v. United States*, 199 F.R.D. 357, 366 (E.D. Okla. 2001). The case thereafter proceeded on behalf of the two named tribal ISDA contractors.

ASNA is a not-for-profit corporation organized as a "tribal organization" (§ 450b(*l*)) and controlled by the governing bodies of the eight federally-recognized Tribes occupying the North Slope of Alaska: the Native Village of Atqasuk, the Native Village of Anaktuvuk Pass (Naqsragmiut), the Native Village of Barrow Inupiat Traditional Government, the Kaktovik Tribal Council, the Native Village of Nuiqsut, the Native Village of Point Hope, the Native Village of Point Lay, and the Village of Wainwright. J.A. 68.

In January 1995 ASNA submitted a proposal to IHS to assume by contract the operation of IHS's Samuel Simmonds Hospital in Barrow, Alaska. J.A. 83. Effective January 18, 1996, ASNA signed a multi-year umbrella contract and an FY1996 Annual Funding Agreement (AFA) to begin hospital operations. J.A. 35, 53; J.A. 38, 68; J.A. 272. During the intervening negotiations, ASNA and IHS determined that ASNA's annualized contract support cost requirement for operating the Hospital was $2,301,842. J.A. 284, *modifying* J.A. 274. But contrary to the law as later confirmed in *Cherokee* and *Thompson*, IHS informed ASNA that no 'new or expanded' CSC funds would be made available because that year's $7.5 million allocation had already been expended. J.A. 107, 114-115. Instead, IHS posted ASNA on its CSC queue lists maintained for new/initial and expanded contracts. *See* J.A. 498 (ISD Queue dated July 2, 1996, showing ASNA's CSC amount as $2,301,842).

The same action occurred after signing the next year's FY1997 AFA. IHS informed ASNA that "we are aware of ASNA's need for additional [CSC] funds. If at all possible, given available funds, we will provide additional indirect shortfall funds toward the latter part of this fiscal year." J.A. 232. But no further CSC payments were made, and instead IHS once again posted ASNA on the CSC queue list for new/initial and expanded contracts. J.A. 501 (ISD Queue dated Sept. 17, 1997, showing $2,301,842).[7]

In FY1998, IHS for the first time paid ASNA some 'new or expanded' CSC funding from the $7.5 million allocation (because under IHS's allocation policy, ASNA had finally risen high enough on the CSC queue list). But portions of ASNA's CSC requirement remained unpaid and once again IHS left ASNA on the CSC queue for initial/new and expanded contracts.[8]

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[7] Inconsistent with IHS's position about the absence of available funding, in each of these two years IHS paid ASNA small sums from outside the $7.5 million CSC account which ASNA was authorized to spend for contract support purposes. *E.g,* J.A. 53-54 ($100,000 payment in FY1996).

[8] J.A. 506 (ISD Queue dated Mar. 31, 1998, showing $142,342 for Arctic Slope); J.A. 504 (ISD Queue dated May 1998, with ASNA at top of list at $1,000,000); J.A. 565 (ISD Queue dated Oct. 23, 1998, showing $493,618 as "Remaining amount from FY-98 ISD pay"). *See also* J.A. 235 (IHS letter explaining ASNA's payment status); J.A. 212 n.5 (FY1999 AFA) ("ASNA is pending in the queue for ISD funds of $2,130,451."); J.A. 273 (IHS "Verification of ISD Queue Figures," including Arctic Slope).

For the entire period between September 2001 when the *Zuni* class action was filed, and May 22, 2007 when class certification in *Zuni* was denied, ASNA remained a putative member of the *Zuni* class. In May 2005, IHS filed a motion in the *Zuni* case to dismiss certain claims, arguing, *inter alia*, that the 1993 decision in *Ramah* excusing class members from presenting individual claims to a contracting officer "was error." J.A. 512, 526. Concerned about IHS's position, ASNA on September 30, 2005, presented to IHS the three certified claim letters that are associated with this appeal. J.A. 20, 25, 30.

## SUMMARY OF ARGUMENT

I. ASNA's claims were timely presented under § 605(a) of the CDA because that section's six year presentment period was tolled by the pendency of the *Zuni* class action, and all three claims at issue here were filed well within that period, as tolled. "[T]he commencement of a class action [under Rule 23] suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action," *American Pipe*, 414 U.S. at 554, and "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Crown*, 462 U.S. at 354. Rule 23 tolling is mandatory because, for this and all other Federal Rules of Procedure, Congress has declared that "'[a]ll laws in conflict with [the Rules]

shall be of no further force or effect after such rules have taken effect,'" *Stone*, 229 F.3d at 1354 (quoting 28 U.S.C. § 2702(b)). The Rules accordingly "are 'as binding as any federal statute.'" *Id.* (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988)).

Nothing in the CDA or the ISDA even remotely suggests that Congress intended the CDA to override any of the Rules that govern ISDA contract litigation brought in the district courts. To the contrary, Congress enacted §§ 450m-1(a) and (d) of the ISDA, precisely to expand remedies against the government, not to contract them. Thus, neither the ISDA nor the CDA comes close to meeting the "direct expression" test for rare legislation that overrides a Rule. *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1007 (D.C. Cir. 1986).

Once Rule 23 tolling is triggered, it serves to toll the time for an individual class member not only to file suit, but also to present an administrative claim to a contracting officer under the ISDA and CDA, consistent with the decisions of the First, Sixth and Eleventh Circuits. The point of a class action is to eliminate the need for putative class members to litigate their claims on their own. Since the agency is already on notice of all class member claims and of the need to preserve evidence relating to the claims, *Crown*, 462 U.S. at 353, it makes no sense to require those same

class members to start a separate track of litigation by filing administratively the very same claims that would be resolved in the pending class litigation.

Thus, by operation of Rule 23, ASNA's September 2005 claims were timely filed under § 605(a) of the CDA, because the filing of the *Zuni* class action in September 2001 (about a year before the deadline for ASNA to file the oldest of its claims) tolled the running of the limitations period until May 22, 2007 (when class certification was denied). As tolled, the renewed deadline for ASNA to file its claims was June 2008, and ASNA filed well before then.

The Board erred in concluding that labeling the CDA's presentment requirement as "jurisdictional" trumps the application of Rule 23. Since Rule 23 has the force of law, the Board had no discretion to countermand either the Rule or the mandatory tolling principle that is a part of the Rule. The Rule applies by operation of law, absent a direct expression from Congress to the contrary.

II. Even in the absence of Rule 23 class action tolling, the six year presentment period set forth in § 605(a) is subject to equitable tolling and estoppel under *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, and *Kirkendall v. Department of the Army*, 479 F.3d 830. "Ordinarily limitations statutes use fairly simple language, which one can often plausibly read as containing an implied 'equitable tolling' exception," absent "unusually emphatic form" of legislation

commanding otherwise. *United States v. Brockamp*, 519 U.S. 347, 350 (1997). That description fits § 605(a) perfectly. Section 605(a) lacks any meaningful detail or emphasis, it is simple and free of technical language, it lacks exceptions, and the underlying subject matter in the context of the ISDA is to provide Indian tribes with special remedies against the government for contract violations. Far from setting forth an "unusually generous" time frame, *United States v. Beggerly*, 524 U.S. 38, 48-49 (1998), § 605(a) is entirely typical of comparable state statutes of limitation.

Nothing in the CDA amendment adding the six year provision to § 605(a), and nothing in the ISDA's amendment adopting enhanced CDA remedies for tribal contractors, suggests a congressional intent to override the *Irwin* tolling rule. The CDA amendment was intended simply to establish a limitations period where none previously existed, while the ISDA amendment was intended to strengthen tribal remedies against the government "because of th[e] agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law . . . particularly in the area of funding indirect costs," an area where "[e]xisting law affords such contractors no effective remedy for redressing such violations." Senate Report at 37. Indeed, preservation of the usual *Irwin* presumption in ISDA contract litigation accords with the government's high trust responsibility to protect and advance tribal interests. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17

(1831); 450*l*(c) (sec. 1(d)(1)(B)); 25 U.S.C. §§ 450n(2); 458aaa-6(g); 458aaa-14(b). In this special context, like the veterans context, it would be "'particularly inappropriate' to foreclose equitable relief." *Kirkendall*, 479 F.3d at 841-842 (quoting *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982)).

As with Rule 23 tolling, the CBCA again erred in concluding that the supposedly "jurisdictional" character of § 605(a) forecloses equitable tolling. Generally speaking, "time prescriptions, however emphatic, are not properly typed 'jurisdictional.'" *Kirkendall*, 479 F.3d at 842 (other quotation and citation omitted). Although the tolling presumption applies equally to a time prescription that is a first-level deadline to begin the legal process, and to a time prescription defining a "timing of review" provision for initiating an appeal, *id*. at 842-843, it has special force in the former setting where the absence of tolling effectively denies a claimant's 'day in court.' This outcome is consistent with *Bowles v. Russell*, ___ U.S. ___ , 127 S. Ct. 2360, 2366 (2007), which established a *per se* rule for the deadline to appeal from a district court to a court of appeals, and with *John R. Sand & Gravel v. United States*, __ U.S. ___, 128 S. Ct. 750 (2008), which applied *stare decisis* to deny tolling under the Tucker Act.

The Board's construction of the CDA to reach a contrary conclusion got it exactly backwards, since Congress's decision to place the six year presentment

provision in § 605(a), instead of in the timing of review provisions of §§ 606 or 609, confirms that the presentment provision was not to be treated as rigidly as might the time periods set forth in those other sections. Finally, even if the Board were correct that the six year provision is "jurisdictional," that "does not mean that courts may never recognize equitable tolling of statutory limitations periods in suits against the government." *Martinez v. United States*, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (*en banc*). The Board's contrary conclusion must therefore be reversed.

## ARGUMENT

### I. THE STANDARD OF REVIEW IS *DE NOVO*

This Circuit reviews *de novo* a Board's decisions on questions of law, *Lear Siegler Servs., Inc. v. Rumsfeld*, 457 F.3d 1262, 1265-1266 (Fed. Cir. 2006), consistent with the CDA's instruction that "the decision of the agency board on any question of law shall not be final or conclusive." 41 U.S.C. § 609(b). Here, whether claims under the CDA and the ISDA are subject to class action or equitable tolling are exclusively questions of law.

## II. UNDER RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE, ASNA TIMELY PRESENTED ITS CLAIMS IN SEPTEMBER 2005

The Board believed that the CDA's six year limitations period to submit a claim to a contracting officer was "jurisdiction[al]," and that it therefore lacked the power to "suspend" that period. Add. 7a. But the Board erred as a matter of law by disregarding the mandatory tolling of the limitations period that is imposed by Rule 23 during the pendency of a class action. This tolling is not discretionary, but rather has the force of law, so that, properly understood, the Board lacked the power to disregard it. For this reason, ASNA's claims were timely presented under § 605(a) of the CDA, because the six year presentment period was tolled by the pendency of the *Zuni* class action and all three claims at issue here were filed well within that period, as tolled.

### A. Rule 23 Provides for Mandatory Tolling of Statutes of Limitation for All Putative Class Members

The *Zuni* class action was filed under Federal Rule of Civil Procedure 23 in a federal district court, as specially authorized by § 450m-1(a) of the ISDA. The Supreme Court has long held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *American Pipe*, 414 U.S. at 554; *see also Stone*, 229 F.3d at 1354. "Once the statute of

limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Crown*, 462 U.S. at 354.

The reason for the rule, as this Court explained in *Stone*, is that "the contrary approach 'would frustrate the principal function of a class suit' by forcing putative class members to file suit to protect their rights." 229 F.3d at 1354 (quoting *American Pipe,* 414 U.S. at 551). Unless a statute of limitations is tolled by the filing of a class action, "[t]he result would be a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American Pipe* were designed to avoid." *Stone*, 229 F.3d at 1354 (quoting *Crown*, 462 U.S. at 351).

Rule 23 tolling "is statutory rather than equitable," and therefore mandatory. *Stone*, 229 F.3d at 1354. The mandatory nature of the tolling stems from the mandatory nature of the Federal Civil Rules themselves. As this Circuit explained in *Stone*, since Congress has declared that "'[a]ll laws in conflict with [the Rules] shall be of no further force or effect after such rules have taken effect,'" *id.* at 1354 (quoting 28 U.S.C. § 2072(b)), the Rules "are 'as binding as any federal statute.'" *Id.* (quoting *Bank of Nova Scotia*, 487 U.S. at 255); *see also Altamiranda Vale v. Avila*, 538 F.3d 581, 585 (7th Cir. 2008) (Rule 60(b) has "force of a federal statute"); *Atchison, Topeka & Santa Fe Ry. Co. v. Hercules, Inc.*, 146 F.3d 1071, 1074 (9th Cir.

1998) ("federal courts have no more discretion to disregard [a Rule's] mandate than they do to disregard constitutional or statutory provisions") (quoting *Bank of Nova Scotia*, 487 U.S. at 255) (alteration in original).

To be sure, a later-enacted statute can limit the application of a Rule, but even there, only to the extent of an actual conflict, *Harris v. Garner*, 216 F.3d 970, 982 (11th Cir. 2000), and only where Congress's intent to limit a Rule has been clearly expressed. *Walsh*, 807 F.2d at 1007 (requiring "a *direct expression* of congressional intent to the contrary" that Rules are not to apply). But nothing in the CDA or the ISDA even remotely suggests that Congress intended the CDA to override any of the Rules that govern ISDA contract litigation brought in the district courts. To the contrary, Congress enacted sections 450m-1(a) and (d) of the ISDA, which is quintessentially remedial legislation, in order to expand remedies against the government, not to contract them, because until then "contractors [had] no effective remedy for redressing [past agency] violations" "particularly in the area of funding indirect costs." Senate Report at 37. Such a protective Act cannot be read as limiting tribal rights under the Rules, all the more so when Congress has directed that the Act "shall be liberally construed for the benefit of the Contractor." § 450*l*(c) (sec. 1(a)(2)). Nor is there anything in the CDA, either generally or in § 605(a)'s six

year limitations provision, that hints at a congressional intent to override the Rules, much less anything that meets the strict "direct expression" test.

Since the Rule 23 tolling rule is statutory and thus mandatory, it applies equally in litigation against the government, precisely as this Court held in *Stone*:

> Having determined that Rule 23 tolling is statutory rather than equitable, it follows that the rule of *American Pipe* applies to the government just as it does to private parties, both generally and in this particular case.

229 F.3d at 1354; *see also Wood-Ivey Sys. Corp. v. United States*, 4 F.3d 961 (Fed. Cir. 1993) (Federal Rules of Civil Procedure govern tolling against the government).

Finally, this Court has held that Rule 23 tolling applies equally both to putative members of the class who seek to intervene in an unsuccessful class action after certification has been denied (the situation in *American Pipe*), and to asserted members of the class who choose to "subsequently file their own suits." *Stone*, 229 F.3d at 1354 (discussing *Crown*). As to the latter, the Rule also applies "to class members who file individual suits before class certification is resolved" (as occurred here). *In re WorldCom Sec. Litig.*, 496 F.3d 245, 254-255 (2nd Cir. 2007).

> Nothing in the Supreme Court decisions described above suggests that the rule should be otherwise for a plaintiff who files an individual action before certification is resolved. . . .
>
> . . . A defendant is no less on notice when putative class members file individual suits before certification.

> . . . .
>
> . . . The *American Pipe* tolling doctrine was created to protect class members from being *forced* to file individual suits in order to preserve their claims. It was not meant to induce class members to forgo their right to sue individually.
>
> We hold that because Appellants were members of a class asserted in a class action complaint, their limitations period was tolled under the doctrine of *American Pipe* until such time as they ceased to be members of the asserted class, notwithstanding that they also filed individual actions prior to the class certification decision.

*Id.* at 255-256. *See also In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009 (9th Cir. 2008) (agreeing with *Worldcom* and noting "They have a right to file at the time of their choosing and denying tolling would diminish that right."); *Lehman v. United Parcel Serv., Inc.*, 443 F. Supp. 2d 1146, 1151 (W.D. Mo. 2006) ("There is nothing in that language [in *Crown*] that suggests the statute of limitations is only tolled for those plaintiffs who wait to file suit until there is a ruling on class certification. . . . It would turn the purpose of the statute of limitations on its head to say that Lehman must wait until the dispute is more stale before he can file his individual case.")[9]

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[9] In a supplemental post-briefing filing, the Secretary suggested to the Board that the so-called 'anti-stacking' rule should be applied to foreclose tolling under *Zuni*, because a similar class action had been filed two years earlier in Oklahoma, *see Cherokee Nation & Shoshone-Paiute Tribes* (discussed *supra* 16 n.6). J.A. 14 (Doc. No. 40) (discussing *In re Vioxx Products Liability Litigation*, 478 F. Supp. 2d 897 (E.D. La. 2007)). But the 'anti-stacking' rule only applies when plaintiffs seek to

### B. The Rule 23 Tolling Rule Applies to Toll the Time to Present a Claim to a Contracting Officer under the ISDA and CDA

IHS argued to the Board that, even if Rule 23 tolling otherwise applied to the CDA, it did not apply to the time for the first level presentation of a claim to a contracting officer, but only the follow-on time to file a lawsuit in the CoFC or a district court after a claim is initially denied. J.A. 14 (Doc. No. 30). IHS's position is not supported in the law and makes no sense.

Neither the Supreme Court nor this Circuit has discussed the application of Rule 23 tolling specifically to the CDA, or more generally to administrative proceedings. Although some cases have embraced a distinction, the better-reasoned decisions have not, including those from the First, Sixth and Eleventh Circuits. These courts have reasoned that since the point of a class action is to eliminate the need for putative class members to litigate on their own, it makes no sense to require those same class members to start the litigation process by pursuing administrative procedures:

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"receive the benefit of tolling [from the first action] in a second subsequently filed class action," *In re Vioxx,* 478 F. Supp 2d at 907, so that a second tolling period is being 'stacked' or 'piggybacked' on top of a first tolling period. *Id.* Here, the *Zuni* action did not rely on any tolling from the *Cherokee Nation & Shoshone-Paiute Tribes* action, and likewise ASNA does not rely on any tolling from that earlier action. This is so because when the *Zuni* action was filed, ample time still remained for ASNA to present its claims without regard to the earlier action. Thus, this case presents no issue of "stacking."

> Nor are we convinced by the defendants' argument that tolling should not apply because the limitations period at issue in this case is an administrative rather than a statutory period. We have found no case adopting a rule based upon such a distinction. The only courts to have considered the question have concluded that[:]
>
>> [a]pplying 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 class action will avoid encouraging all putative class members to file separate claims with the EEOC.

*Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994) (quoting *Sharpe v. Am. Express Co.*, 689 F. Supp. 294, 300 (S.D.N.Y. 1988)); *see also Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1393 (11th Cir. 1998). The First Circuit and the Sixth Circuit have reached the same conclusion. *See Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988) ("we agree with the district court that the thirty day limitations period for filing individual administrative complaints was tolled during the pendency of the earlier class actions"); *McDonald v. Sec'y of Health & Human Servs.*, 834 F.2d 1085, 1091-92 (1st Cir. 1987) (to same effect and concluding that under *American Pipe* and *Crown*, class members facing administrative limitations periods may "go forward from the point where they left off during pendency of the class action"). *See also Zapata v. IBP, Inc.*, No. Civ. A 93-2366-EEO, 1998 WL 717621, at *6 (D. Kan. Sept. 29, 1998) (unpub'd) ("We find that plaintiff had a right to rely on the general rule that

he did not have to file an administrative claim until after the class action certification motion was denied").

A contrary rule would make little sense, especially in the current context. A holding that Rule 23 tolling only applies to the filing of law suits in a district court or the CoFC, but not to the administrative presentment of claims to the agency contracting officer that actually begins all CDA proceedings, is to effectively undo the tolling rule altogether, since once the claim is filed the rest of the litigation process must follow, including the 90-day period to file an appeal with the CBCA from the contracting officer's denial of a claim, or the 12-month period from a decision to file a law suit in a district court or the CoFC. *Infra* at 50-51 (discussing 41 U.S.C. §§ 606 & 609); *supra* at 11 (discussing 25 U.S.C. §§ 450m-1(a) & (d)).

In sum, if the tolling rule did not reach the first step of the litigation process, all class members would have to submit their claims to contracting officers, and then in turn follow up on those claims with CBCA, CoFC or district court appeals—the very proliferation of litigation that the Rule 23 tolling rule was intended to prevent. Nothing in the rationale or policy of the tolling rule supports application of the rule to toll some, but not all, of the time frames that govern the CDA process as a whole.

### C. ASNA's September 30, 2005 Claims Were Timely Presented

Section 605(a) of the CDA provides as follows:

> 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.

ASNA's oldest breach of contract claim accrued September 30, 1996. That was the last day of the fiscal year and the last day of ASNA's FY1996 Annual Funding Agreement. The six year limitations period under the CDA for presenting a claim to the IHS contracting officer would therefore run until September 30, 2002. But on September 10, 2001, the *Zuni* class action was filed—1 year and 20 days prior to the deadline for presenting a claim. That is when Rule 23 tolling began.

No intervening action occurred in the *Zuni* case on class certification issues (other than the establishment of a class discovery schedule) before September 30, 2005, when ASNA proceeded on its own and presented its claim to its contracting officer. On that day there was still 1 year and 20 days for ASNA to act. Accordingly, ASNA timely presented its claims.

Viewed another way, Rule 23 tolling started with the filing of the class action on September 10, 2001, and lasted until the date that class certification was denied on May 22, 2007. At that point, the running of the limitations period resumed, and ran for 1 year and 20 days, or until June 11, 2008. Any claim presented after that date

would be untimely, but the ASNA claim was presented more than 2 years and 8 months before that.

It is true that the Rule 23 tolling period here is somewhat longer than common, because of the stay entered in the *Zuni* proceedings pending final disposition of the *Cherokee* case. But *American Pipe* and *Crown* do not set an outer limit on Rule 23 tolling. Moreover, Rule 23(c) no longer requires that a class certification decision be made "as soon as practicable after commencement of an action," *see* Fed. R. Civ. P. 23 advisory committee's note on 2003 Amendments, and the nearly four-year stay in *Zuni* was the direct result of the district court's decision to maximize judicial efficiency by waiting for the outcome of appellate proceedings in the *Cherokee* litigation (since a defeat for the Tribes in *Cherokee* would have mooted the *Zuni* case altogether). Thus, while ASNA's rights as an "asserted member[ ] of the class," *American Pipe*, 414 U.S. at 554, were lengthened during the district court's prolonged management of the *Zuni* litigation, that fact does not detract from the ordinary application of mandatory Rule 23 tolling.

Short or long, the Rule 23 tolling rule applies for the very reason that informs it, which is that once a class action is filed, defendants are on notice "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 555. "The defendant will be aware of the need to preserve evidence and witnesses respecting the claims of all the members of the class. Tolling the statute of limitations thus creates no potential for unfair surprise, regardless of the method class members choose to enforce their rights upon denial of class certification." *Crown*, 462 U.S. at 353.

### D. The Board Erred in Concluding That the "Jurisdictional" Nature of the CDA's Presentment Requirement Trumps the Application of Rule 23

The Board missed the import of *Stone* and this Circuit's discussion of *American Pipe* and *Crown*. It erroneously assumed that it was being asked to "suspend" the CDA's limitations period for presenting a claim to a contracting officer, and it then concluded that since timely presentment is "jurisdictional" it lacked the power to suspend it.

But as the Supreme Court explained in *American Pipe*, it is "the commencement of a class action [that] suspends the applicable statute of limitations," 414 U.S. at 554. 'Suspension' in this context is the direct product of a Rule that has the force of a law, not the product of a judge's or a board's discretionary decision. Since a judge has no authority to countermand the Rules, any more than may a judge countermand a statute, the Board was <u>required</u> both to recognize the Rule and to apply the tolling principle that is a part of it. The Board had no choice in the matter. Casting the presentment

period as "jurisdictional" simply introduced an element that had nothing to do with the Rule's application. Tellingly, the Board cited no authority for its decision to approach Rule 23 in this manner.

In sum, whether or not the CDA's six year timing provision is itself "jurisdictional" (and putting aside the differing meanings of that term (discussed *infra* at 47-49, 52)), mandatory tolling under Rule 23 applies by operation of law, in the absence of a "direct expression" from Congress of a contrary intent. Since no such expression can be found here, the Board erred in failing to apply the Rule 23 tolling rule. Properly applied, the claims at issue here were presented by ASNA within the CDA's six year limitations period, as tolled by the pendency of the *Zuni* class action.

## II. IN THE ALTERNATIVE, THE TIME TO PRESENT A CLAIM UNDER 41 U.S.C. § 605(a) WAS SUBJECT TO EQUITABLE TOLLING UNDER *IRWIN* AND *KIRKENDALL*

In addition to the mandatory operation of Rule 23 tolling, the CDA's limitations period for presenting claims is also subject to equitable tolling. But here, too, the Board erred in concluding that the supposedly "jurisdictional" nature of § 605(a)'s six year limitations period precluded equitable tolling as a matter of law. Since by this means the Board categorically foreclosed equitable tolling as a matter of law, the Board never considered the equities presented in this case, a matter that would have

to be addressed in the first instance upon remand in the event this Court reverses the Board's legal conclusion.[10]

### A. Under *Irwin* and *Kirkendall* the CDA's Presentment Period Is Subject to Equitable Tolling

It is now settled law that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin*, 498 U.S. at 95-96. *See also id.* at 94 (explaining Court's decision to address "the general question whether principles of equiptable tolling, waiver, and estoppel apply against the Government when it involves a statutory filing deadline"). The presumption applies because "[o]nce Congress has made such a waiver [of sovereign immunity from suit], we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Irwin*, 498 U.S. at 95. *See also Chung v. U.S. Dep't of Justice*, 333 F.3d 273, 275-76 (D.C. Cir. 2003) ("In litigation between private parties, courts have long invoked waiver, estoppel, and equitable tolling to ameliorate the inequities that can arise from

[10] Equitable tolling is an alternative argument, and one which this Court need only reach if the Court concludes that Rule 23 did not toll the time to present ASNA's claims.

strict application of a statute of limitations") (citing *Irwin* and applying tolling and estoppel principles to suit against the government).

Although the *Irwin* presumption applies "when permitted in analogous private litigation," *Kirkendall*, 479 F.3d at 836, "[a] precise private analogue is not required; only that there be sufficient similarity between the suits." *Id.* (discussing *Scarborough v. Principi*, 541 U.S. 401, 422 (2004)). Here, of course, a CDA breach of contract action has a direct analogue in private breach of contract litigation, and so no further discussion on this score is necessary.

Thus, the only remaining issue is to consider the five post-*Irwin* factors that have been developed to guide the assessment of whether "there [is] good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *Brockamp*, 519 U.S. at 350. As summarized by this Circuit, the five *Brockamp* factors are:

> "[1] the statute's detail, [2] its technical language, [3] its multiple iterations of the limitations period in procedural and substantive form, [4] its explicit inclusion of exceptions, and [5] its underlying subject matter." *Brice v. Sec'y of Health & Human Servs.*, 240 F.3d 1367, 1372 (Fed. Cir. 2001) (citing *Brockamp*, 519 U.S. at 350-52). Every factor need not be present to find that Congress intended to preclude tolling, *Brice*, 240 F.3d at 1372-73, and while unlikely, it is possible for a single factor to be dispositive.

*Kirkendall*, 479 F.3d at 836-837. Here, application of those five factors is straightforward.

First, the CDA's presentment period is brief and wanting in either significant detail or particular emphasis:

> Each claim by a contractor against the government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim.

41 U.S.C. § 605(a). This is a plain vanilla, non-emphatic and unremarkable provision that lacks any meaningful detail and does not even hint at a congressional intent in 1994 (when it was enacted) to overcome the *Irwin* presumption.

Importantly, § 605(a) compares favorably—in other words, as consistent with the *Irwin* tolling presumption—

> (1) with the more emphatic "in no event" language in *Kirkendall*, 479 F.3d at 837-841 (but that this Circuit even there ultimately found "little more than a neutral factor" in the *Brockamp* analysis, 479 F.3d at 838);
>
> (2) with the "seemingly stringent language" of the Tucker Act (28 U.S.C. § 2501) ("shall be barred"), *see Kirkendall*, 479 F.3d at 838 (discussing *Irwin*, 498 U.S. at 94-95) that would not have overcome the presumption but for *stare decisis* concerns (*see infra* at 49 n.13) (discussing *Sand*, 128 S. Ct. 750);
>
> (3) with the "no suit . . . shall in any case be maintainable" language at issue in *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1874), *see Kirkendall*, 479 F.3d at 838 (discussing *Bailey v. Glover*); and
>
> (4) with the "[n]o action shall be maintained . . . unless commenced" language at issue in *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), also discussed in *Kirkendall*, 479 F.3d at 838-839.

Further, and unlike the detailed Title VII statute at issue in *Irwin* and the detailed veterans statute at issue in *Bailey v. West*, 160 F.3d 1360, 1362-1363 (Fed. Cir. 1998) (*en banc*) (discussing 38 U.S.C. § 7266)—both of which were nonetheless found to be consistent with tolling—the CDA language contains no meaningful detail whatsoever.

In sum, § 605(a) is considerably <u>less</u> emphatic and <u>less</u> detailed in its statement of limitation than the several other laws that this Court or the Supreme Court has found <u>not</u> to overcome the presumption of equitable tolling. This aspect of § 605 sets that limitations provision far apart from the instances where other statutes have been found incompatible with the equitable tolling presumption.

<u>Second</u>, § 605(a) is not cast in technical language. To the contrary, § 605(a) is almost colloquial ("shall be submitted within 6 years"), and thus, even more so than the veterans statute addressed in *Kirkendall*, it contrasts favorably "to the tax statute at issue in *Brockamp* and the securities statute at issue in [*Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991)]." *Kirkendall*, 479 F.3d at 841. Indeed, § 605(a) fits comfortably into *Brockamp*'s description of a tollable limitations provision: "Ordinarily limitations statutes use fairly simple language, which one can often plausibly read as containing an implied 'equitable tolling' exception," absent

"unusually emphatic form" of legislation commanding otherwise. *Brockamp*, 519 U.S. at 350. That description fits § 605(a) to a tee.

Third, § 605(a) is nowhere repeated in the CDA, again warranting a favorable comparison to the tax provision at issue in *Brockamp*.

Fourth, § 605(a) does not contain its own exceptions, whose presence would otherwise suggest an implied congressional intent to foreclose additional exceptions. To the contrary, the lone sentence simply says a claim "shall be submitted within 6 years after the accrual of the claim." In this respect, too, § 605(a) compares favorably with other regimes, such as the statute at issue in *Bailey v. West* (which likewise did not contain exceptions to its timing rule). At the same time, § 605(a) offers a good contrast to the statutes that have precluded an additional tolling exception because they already contained exceptions, *see, e.g.*, *Brockamp*, 519 U.S. at 351-352 (discussing 26 U.S.C. § 6511 and the statute's "explicit exceptions" to the basic limitations period); *Martinez v. United States*, 333 F.3d 1295, 1318 (Fed. Cir. 2003) (*en banc*) (discussing statute's exception for "persons 'under a legal disability'"); *Brice*, 240 F.3d at 1373 (discussing exception for improperly filed petitions). And while § 605(a)'s six year limitations provision is longer than some of the periods involved in other equitable tolling cases (many of which address second level "time for review" appeal-type periods), this period is far shorter than the Quiet Title Act's

"unusually generous" twelve-year period at issue in *Beggerly*, 524 U.S. at 48-49 (discussing 28 U.S.C. § 2409a).

Indeed, far from being "unusually generous," § 605(a)'s six year timing provision is the most common limitations period for contract actions. Thus, twenty-two States have a six year statute of limitation for breach of contract actions on written contracts. *See* ASNA Add. at 37a -41a (collecting state statutes of limitation for breach of contract actions on written contracts). Ten States have longer limitations periods, ranging between eight and fifteen years, while nineteen States have shorter limitations periods ranging between three and five years. Thus, far from being "unusually generous," § 605 is utterly typical.

Finally, the overall purpose of both the CDA and the ISDA forecloses reading either Act as reflecting an affirmative congressional intent to override the *Irwin* presumption. Section 605(a) was added to the CDA by the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, § 2351, 108 Stat. 3243, 3322 (1994). The amendment added a limitations period where none previously existed, applicable to contracts awarded on or after October 1, 1995. *See Motorola, Inc. v. West*, 125 F.3d 1470, 1473-1474 (Fed. Cir. 1997).

The legislative history points to nothing unusual about the addition of this routine limitations provision. *See e.g.*, H.R. Rep. No. 103-712 at 203 (1994) (Conf.

Rep.), *reprinted in* 1994 U.S.C.C.A.N. 2607, 2633 ("The Senate bill contained a provision (sec. 2552) that would amend the Contract Disputes Act to clarify the periods for filing claims. . . . The House recedes with an amendment that would measure the six year limitation for filing claims from the 'accrual' of the claim"). Though not stated, the evident purpose was to replace the former regime, under which the doctrine of laches was the only limitation that existed on the pursuit of contract claims against the government. *See*, *e.g.*, *Bd. of Governors v. United States*, 10 Cl. Ct. 27, 30, 31 n.6 (1986) (stating that while there is no statute of limitations in the CDA, the doctrine of laches applies). By adding a limitations provision, the CDA amendment placed government contract litigation more in line with private contract litigation. Considering that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals," *Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002) (quoting *Mobil Oil Exploration & Producing Se., Inc. v. United States*, 530 U.S. 604, 607 (2000)), it only makes sense to construe Congress's silence as conveying an intent that the equitable rules governing the latter would continue to apply to the former.[11]

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[11] An added reason to favor tolling as a policy matter stems from the fact that § 605(a) is a two-way measure, aimed equally to the time for the government to bring claims against contractors. ("Each claim by a contractor against the government

In contrast to Congress's utter silence in the history of § 605(a) regarding any intent to deny contractors the benefits of equitable tolling, Congress spoke loudly when it comes to § 450m-1(a) of the ISDA—the provision that makes the CDA applicable to self-determination contracts. Here, Congress made it abundantly clear that it intended to expand tribal contractor remedies, even beyond the remedies available to ordinary government contractors. *Supra* at 11. All this was part of a larger Congressional mission to end federal domination of Indian life by giving Tribes the tools necessary to take back control over certain core governmental services through the vehicle of a contract. The incorporation of the CDA remedy into the ISDA was critical to achieving this goal, in order to expand the range of remedies that Tribes would have against federal agencies that had been thwarting Congress's original intent:

> The[se] strong remedies . . . are required because of th[e] agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the

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relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within six years after the accrual of the claim.") (Emphasis added.) This factor counsels in favor of an interpretation that preserves the rights of all claimants, because an interpretation denying tolling would equally apply to limit contract claims by the government, a disfavored result. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 127 S. Ct. 638, 646 (2006) (limitations on government's right to bring suit are "construed narrowly").

> area of funding indirect costs. Existing law affords such contractors no effective remedy for redressing such violations.

Senate Report at 37. It is counterintuitive to suppose that in aggressively seeking to grant tribal contractors new and special rights, Congress silently intended to curtail existing rights by overriding the usual *Irwin* presumption in favor of tolling.

This is all the more so when the circumstances at hand concern an agency—the Indian Health Service—that carries out the Federal Government's trust responsibility to protect the interests of Tribes. The United States generally, and the Indian Health Service in particular, have a trust responsibility to ASNA's constituent Tribes—a duty that is well established in law and dates back to Chief Justice Marshall's seminal decision in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 17 (characterizing the relationship between the United States and the Tribes as that "of a ward to his guardian"). *See also United States v. White Mountain Apache Tribe*, 537 U.S. 465, 476 n.3 (2003)*; United States v. Mitchell*, 463 U.S. 206, 225 (1983) (there is a "general trust relationship between the United States and the Indian people"). This trust responsibility is recognized and repeatedly reinforced in the ISDA. 25 U.S.C. § 450n(2) ("Nothing in this subchapter shall be construed as . . . authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people"); § 450*l*(c) (sec. 1(d)(1)(B)) ("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 responsibility") (repeated in 42 C.F.R. § 137.3(b)); § 458aaa-6(g) ("The Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions") (repeated in 42 C.F.R. § 137.2(f)); § 458aaa-14(b) ("Nothing in this subchapter shall be construed to diminish in any way the trust responsibility of the United States to Indian tribes and individual Indians that exists under treaties, Executive orders, or other laws and court decisions") (repeated in 42 C.F.R. § 137.2(e)).

As with veterans, Tribes depend upon IHS as their trustee to protect their interests. Thus, in this context, like the veterans context, it would be "'particularly inappropriate' to foreclose equitable relief." *Kirkendall*, 479 F.3d at 841-842 (quoting *Zipes*, 455 U.S. at 397).[12]

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[12] For a discussion of the Secretary's trust responsibility to provide health care services to Indian Tribes, *see generally* U.S. Comm'n on Civil Rights, *Broken Promises: Evaluating the Native American Health Care System* (Sept. 2004) available at http:// www.usccr.gov/pubs/nahealth/nabroken.pdf; *McNabb v. Bowen*, 829 F.2d 787, 791-93 (9th Cir. 1987); *White v. Califano*, 437 F. Supp. 543, 555 (D.S.D. 1977), *aff'd* 581 F.2d 697 (8th Cir. 1978).

### B. The Supposedly "Jurisdictional" Character of § 605(a) Does Not Foreclose Equitable Tolling under *Irwin* and *Kirkendall*

The Board below concluded that the six year limitations period in § 605(a) was of a jurisdictional character, and for that reason alone, tolling could not apply. But that was error, both because the time prescription in § 605(a) is not "jurisdictional," and because even if it was, that characterization alone would not control the tolling issue.

It may be an understatement to say that invoking the word "jurisdictional" has resulted in no small amount of confusion, leading the Supreme Court to remark frequently that "'[j]urisdiction . . . is a word of many, too many, meanings.'" *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 90 (1998) (quoting *United States v. Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996)); *see also Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 127 S. Ct. 1397, 1405 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (all quoting *Steel Co.*). But last year in *Kirkendall*, this Court sitting *en banc* could not have been clearer that a simple time limitation is not "jurisdictional:"

> [T]he Supreme Court has "clarified that time prescriptions, however emphatic, 'are not properly typed "jurisdictional."'''*Arbaugh v. Y & H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 1242 (2006) (quoting *Scarborough v. Principi*, 541 U.S. 401, 414 (2004)). In *Eberhart v. United States*, 546 U.S. 12, 126 S. Ct. 403, 405 (2005), the Court stated: "'Clarity would be facilitated,' we have said, 'if courts and litigants used the label

> "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.'" (Quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)). The Court acknowledged that its "repetition of the phrase 'mandatory and jurisdictional' ha[d] understandably led the lower courts to err on the side of caution by giving [certain time limitations] the force of subject-matter jurisdiction." *Eberhart*, 126 S. Ct. at 407.

479 F.3d at 842 (emphasis added) (citation updated). The Board below made precisely this "err[or]" by reading § 605(a)'s "time prescription"—which is decidedly not "emphatic," *supra* at 39-40—as nonetheless "jurisdictional."

Admittedly, in other settings involving "timing of review" provisions (*i.e.*, where a form of appellate review is involved), the matter has been less clear. As the competing opinions in *Kirkendall* reflect, some cases have suggested a distinction between "'statutes of limitation on one side of the *Irwin* presumption and statutes of timing of review on the other.'" 479 F.3d at 842 (quoting *Bailey v. West*, 160 F.3d at 1367). *Compare id.* at 859-860 (Moore, J., concurring in part and dissenting in part) (favoring giving additional weight in an *Irwin* analysis to "timing of review" provisions). The concept here appears to be that the time to commence a claim and to receive a decision on its merits is one thing, while the time to secure "review" of that decision at a higher level is another. But in *Kirkendall* this Court once again rejected that distinction, pointing out that the Supreme Court had long applied the

equitable tolling principle to "timing of review" provisions, beginning with *Irwin* itself. *Id.* at 842-843.[13]

It is true that, apparently without regard to *Irwin*, the Supreme Court has laid down a *per se* rule against equitable tolling in one sub-class of "timing of review" provisions, those dealing with "the timely filing of a notice of appeal in a civil case." *Bowles*, 127 S. Ct. at 2366. (Of course, a bar against tolling a "timing of review" provision, such as an appeal deadline, still leaves intact a claimant's fundamental ability to at least have had its 'day in court' on the merits *ab initio*.) But for purposes of this case, the debate over whether (or how) to apply *Irwin* to "timing of review" provisions is irrelevant, for § 605(a) is obviously not such a provision. It is a simple, first level, statute of limitation for securing an initial decision on the merits of one's claim. In contrast, the CDA's three other timing provisions, which do involve "timing of review" periods, are decidedly not at issue here. *Compare* 41 U.S.C. § 606

[13] The Supreme Court's opinion in *Sand*, 128 S. Ct. 750, is consistent with the general proposition that initial claim filing periods are not jurisdictional and are thus subject to tolling and waiver—the notable exception being (as *Sand* demonstrates) when *stare decisis* concerns foreclose overruling prior precedent holding otherwise. *Id.* at 756-757. *See also Diaz v. Kelly*, 515 F.3d 149, 153-154 (2nd Cir. 2008) ("The Court [in *Sand*] noted that most limitations periods are non-jurisdictional affirmative defenses and are subject to equitable tolling, . . . and viewed the limitations period governing suits against the United States in the Court of Federal Claims as jurisdictional only because a long line of prior decisions has so held and were entitled to adherence under principles of *stare decisis*."). No such *stare decisis* concerns are present here in connection with the CDA.

("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"); § 607(g)(1) ("The decision of an agency board of contract appeals shall be final, except that– (A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision"); and § 609(a)(1) ("[I]n 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," and providing (in subparagraph (3)) that such action "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").

The only reasoning offered by the Board (through its endorsement of *Gray Personnel*) in support of its conclusion that the CDA's six year provision should be viewed as "jurisdictional" is "'the placement of the six-year provision in § 605(a)'" "'rather than, for example, [in] 41 U.S.C. §§ 606 or 609, establishing filing periods at the boards and the United States Court of Federal Claims.'" Add. 7a (quoting *Gray Personnel*, 06-02 BCA ¶ 33,378 at 165,474-75. Not only is this "placement" rationale a slender reed on which to base a "jurisdictional" conclusion; it makes no sense. Sections 606 and 609 are "timing of review provisions"—they both deal with appeals

once a contracting officer's decision is made. If anything, the placement of the six year presentment provision in a separate section dealing with initial claims, well apart from the "timing of review" provisions contained in §§ 606 and 609, makes it less likely the six year provision was to be considered anything other than a routine limitations provision. Moreover, it would have made no sense to put the six year timing provision for submitting a claim to a contracting officer in either §§ 606 or 609, since neither of those provisions deals with contracting officers.

Ultimately the Board got it exactly backwards: by not placing the six year presentment period in § § 606 or 609, where a stronger no-tolling argument might be made for those two "timing of review" periods, Congress made plain that the *Irwin* tolling presumption should remain in place for the separate presentment period it located in § 605. Thus, the Board's only rationale for characterizing the six year timing provision as "jurisdictional" does not withstand analysis. (This is not to say that the duty to submit a claim to a contracting officer is not a necessary prerequisite to proceeding to the next 'appellate' level of a board or the CoFC, but only to say that the six year period for doing so is not a "jurisdictional" limitations provision that cannot be tolled in appropriate circumstances. The Board's analysis appears to have conflated the considerations that attach to whether a claim must be presented in the

first place, with the considerations that inform whether the time for doing so can be equitably tolled.)

Finally, even if the six year period in § 605(a) is viewed as "jurisdictional," tolling would still apply. In years past when such provisions were, unlike today, more commonly characterized as "jurisdictional," they were still considered tollable. Thus in *Martinez*, this Circuit explained:

> 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. As the Supreme Court has explained, however, that does not mean that courts may never recognize equitable tolling of statutory limitations periods in suits against the government.

333 F.3d at 1316 (internal citations omitted). *See also Bailey v. West*, 160 F.3d at 1366 (noting "mandatory and jurisdictional" nature of "[t]he statute in question in *Irwin*"). Thus, simply labeling the six year presentment period in § 605(a) as "jurisdictional" does not contribute to, much less determine, the issue of tolling. By

resting on its characterization alone, the Board erred by failing to undertake the separate tolling analysis required by *Irwin, Brockamp* and *Kirkendall*.

Since the Board categorically foreclosed the application of equitable tolling and estoppel principles to § 605(a)'s limitations period, the Board never considered the proper standard for applying those principles under the CDA and the ISDA, nor did it consider the application of that standard to the facts presented here. If the Board's decision is reversed, as it should be, this is a task the Board will have to undertake in the first instance.

## CONCLUSION

For the foregoing reasons, the Order below dismissing ASNA's September 2005 claims as time-barred should be reversed.

Under the Rule 23 tolling rule discussed in *American Pipe*, *Crown* and *Stone*, this Court should find that ASNA's September 2005 claims were timely filed under § 605(a) of the CDA because the time to file those claims was tolled as a matter of law, from September 2001 when the *Zuni* class action was filed, until May 2007 when a decision denying class certification in *Zuni* was issued.

Alternatively, the Court should rule that the time to file ASNA's claims under § 605(a) of the CDA was subject to equitable tolling under *Irwin* and *Kirkendall*, and

the case should be remanded to the Board to apply equitable tolling and estoppel principles to the facts presented here.

Respectfully submitted this 17th day of November, 2008.

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# ADDENDUM

**ADDENDUM INDEX**

1. *Arctic Slope Native Ass'n v. Dep't of Health & Human Servs.*, CBCA No. 190-ISDA, 289-ISDA–293-ISDA, 08-___ BCA ¶ ___ (July 28, 2008) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 1a

2. Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, §§ 1-11, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450-458bbb-2 (2008)) (excerpts) . . . . . . . . . . . . . . . . . . . . 11a

3. Contract Disputes Act, 41 U.S.C. §§ 601-613 (2008) (excerpts) . . . . . . . . . . 27a

4. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189 (1996) . . . . . . . . . . . . . 30a

5. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-12–3009-13 (1996) . . . . . . . 32a

6. Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1582-1583 (1997) . . . . . . . . . . . . . . 34a

7. State Statutes of Limitation for Claims Involving Written Contracts . . . . . . 36a

2. The Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450-458bbb-2, provides in relevant part as follows:

**§ 450. Congressional statement of findings**

**(a) [Findings respecting historical and special legal relationship, and resultant responsibilities]***

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.

* * * * *

**§ 450a. Congressional declaration of policy**

**(a) [Recognition of obligation of United States]***

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.

*Bracketed headings added by codifiers.

**(b) [Declaration of commitment]***

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.

* * * * *

**§ 450b. Definitions**

For purposes of this subchapter, the term –

* * * * *

(i) "Secretary", unless otherwise designated, means either the Secretary of Health and Human Services or the Secretary of the Interior or both;

(j) "self-determination contract" means a contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this subchapter between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law: *Provided*, That except as provided the last proviso in section 450j(a) of this title, no contract (or grant or cooperative agreement utilized under section 450e-1 of this title) entered into under part A of this subchapter shall be construed to be a procurement contract;

* * * * *

*Bracketed headings added by codifiers.

(l) "tribal organization" means the recognized governing body of any Indian tribe; any legally established organization of Indians which is controlled, sanctioned, or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities: Provided, That in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant; and

* * * * *

**§ 450f . Self-determination contracts**

**(a) [Request by tribe; authorized programs]***

(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 [25 U.S.C. 452 et seq.];

(B) which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208) [25 U.S.C. 13], 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 [42 U.S.C. 2001 et seq.];

(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

*Bracketed headings added by codifiers.

(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.

* * * * *

**§ 450j-1. Contract funding and indirect costs**

**(a) [Amount of funds provided]***

(1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter 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 contractable, 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

*Bracketed headings added by codifiers.

(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 subchapter 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 subsection (a)(1) of this section.

(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 subchapter, 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.

* * * * *

(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.

**(b) [Reductions and increases in amount of funds provided]***

The amount of funds required by subsection (a) of this section–

(1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary;

(2) shall not be reduced by the Secretary in subsequent years 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;

(3) shall not be reduced by the Secretary to pay for Federal functions, including, but not limited to, Federal pay costs, Federal employee retirement benefits, automated data processing, contract technical assistance or contract monitoring;

(4) shall not be reduced by the Secretary to pay for the costs of Federal personnel displaced by a self-determination contract; and

*Bracketed headings added by codifiers.

(5) may, at the request of the tribal organization, be increased by the

Secretary if necessary to carry out this subchapter or as provided in section 450j(c) of this title.

Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

**(c) [Annual reports]***

Not later than May 15 of each year, the Secretary shall prepare and submit to Congress an annual report on the implementation of this subchapter. Such report shall include–

(1) an accounting of the total amounts of funds provided for each program and the budget activity for direct program costs and contract support costs of tribal organizations under self-determination;

(2) an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted;

(3) the indirect cost rate and type of rate for each tribal organization that has been negotiated with the appropriate Secretary;

(4) the direct cost base and type of base from which the indirect cost rate is determined for each tribal organization;

(5) the indirect cost pool amounts and the types of costs included in the indirect cost pool; and

(6) an accounting of any deficiency in funds needed to maintain the preexisting level of services to any Indian tribes affected by contracting activities under this subchapter, and a statement of the amount of funds needed for transitional

*Bracketed headings added by codifiers.

purposes to enable contractors to convert from a Federal fiscal year accounting cycle, as authorized by section 450j(d) of this title.

*  *  *  *  *

**(g) [Addition to contract of full amount contractor entitled; adjustment]***

Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under subsection (a) of this section, subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

*  *  *  *  *

**§ 450k. Rules and regulations**

**(a) [Authority of Secretaries of the Interior and of Health and Human Services to promulgate; time restriction]***

(1) Except as may be specifically authorized in this subsection, or in any other provision of this subchapter, 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 subchapter relating to chapter 171 of Title 28, 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 450h of this title, property donation procedures arising under section 450j(f) of this title, internal agency procedures relating to the implementation of this subchapter, retrocession and tribal organization relinquishment procedures, contract proposal contents, conflicts of interest, construction, programmatic reports and data requirements, procurement

*Bracketed headings added by codifiers.

standards, property management standards, and financial management standards.

* * * * *

**§ 450*l*. Contract or grant specifications**

**(a) [Terms]***

Each self-determination contract entered into under this subchapter shall–

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

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

* * * * *

**(c) [Model agreement]***

The model agreement referred to in subsection (a)(1) of this section 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 or 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 __________

*Bracketed headings added by codifiers.

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 the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractable 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.–**

* * * * *

“(2) **Effective date.**–This Contract shall become effective upon the date of the approval and execution by the Contractor and the Secretary, unless the Contractor and the Secretary agree on an effective date other than the date specified in this paragraph.

* * * * *

“(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-1).

“(5) **Limitation of costs.**–The Contractor shall not be obligated to continue performance that requires an expenditure of funds in excess of the amount of funds awarded under this Contract. If, at any time, the Contractor has reason to believe that the total amount required for performance of this Contract or a specific activity conducted under this Contract would be greater

than the amount of funds awarded under this Contract, the Contractor shall provide reasonable notice to the appropriate Secretary. If the appropriate Secretary does not take such action as may be necessary to increase the amount of funds awarded under this Contract, the Contractor may suspend performance of the contract until such time as additional funds are awarded.

**"(6) Payment.–**

**"(A) In general.**–Payments to the Contractor under this Contract shall–

"(i) be made as expeditiously as practicable; and

"(ii) include financial arrangements to cover funding during periods covered by joint resolutions adopted by Congress making continuing appropriations, to the extent permitted by such resolutions.

**"(B) Quarterly, semiannual, lump-sum, and other methods of payment.–**

"(i) In general.–Pursuant to section 108(b) of the Indian Self-Determination and Education Assistance Act, and notwithstanding any other provision of law, for each fiscal year covered by this Contract, the Secretary shall make available to the Contractor the funds specified for the fiscal year under the annual funding agreement incorporated by reference pursuant to subsection (f)(2) by paying to the Contractor, on a quarterly basis, one-quarter of the total amount provided for in the annual funding agreement for that fiscal year, in a lump-sum payment or as semiannual payments, or any other method of payment authorized by law, in accordance with such method as may be requested by the Contractor and specified in the annual funding agreement.

"(ii) Method of quarterly payment.–If quarterly payments are specified in the annual funding agreement incorporated by reference pursuant to subsection (f)(2), each quarterly payment

made pursuant to clause (i) shall be made on the first day of each quarter of the fiscal year, except that in any case in which the Contract year coincides with the Federal fiscal year, payment for the first quarter shall be made not later than the date that is 10 calendar days after the date on which the Office of Management and Budget apportions the appropriations for the fiscal year for the programs, services, functions, and activities subject to this Contract.

"(iii) Applicability.–Chapter 39 of title 31, United States Code, shall apply to the payment of funds due under this Contract and the annual funding agreement referred to in clause (i).

* * * * *

**"(11) Federal program guidelines, manuals, or policy directives.**–Except as specifically provided in the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) the Contractor is not required to abide by program guidelines, manuals, or policy directives of the Secretary, unless otherwise agreed to by the Contractor and the Secretary, or otherwise required by law.

* * * * *

**"(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.–**

* * * * *

**“(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 responsibility.

**“(2) Good faith.**–To the extent that health programs are included inthis 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.).

* * * * *

**“(e) Other provisions.–**

* * * * *

**“(2) Contract modifications or amendment.–**

**“(A) In general.**–Except as provided in subparagraph (B), no modification to this Contract shall take effect unless such modification is made in the form of a written amendment to the Contract, and the Contractor and the Secretary provide written consent for the modification.

**“(B) Exception.**–The addition of supplemental funds for programs, functions, and activities (or portions thereof) already included in the annual funding agreement under subsection (f)(2), and the reduction of funds pursuant to section 106(b)(2), shall not be subject to subparagraph (A).

* * * * *

**“(f) Attachments.**–

* * * * *

“**(2) Annual funding agreement.**–

**“(A) In general.**–The annual funding agreement under this Contract shall only contain–

“(i) terms that identify the programs, services, functions, and activities to be performed or administered, the general budget category assigned, the funds to be provided, and the time and method of payment; and

“(ii) such other provisions, including a brief description of the programs, services, functions, and activities to be performed (including those supported by financial resources other than those provided by the Secretary), to which the parties agree.

**“(B) Incorporation by reference.**–The annual funding agreement is hereby incorporated in its entirety in this Contract and attached to this Contract as attachment 2.”

* * * * *

## § 450m-1. Contract disputes and claims

### (a) [Civil actions; concurrent jurisdiction; relief]*

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter 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 subchapter. 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 subchapter 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 subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

### (b) [Revision of contracts]*

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

* * * * *

### (d) [Application of Contract Disputes Act]*

The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) [41 U.S.C. 601 et seq.] 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).

* * * * *

*Bracketed headings added by codifiers.

**§ 450n. Sovereign immunity and trusteeship rights unaffected**

Nothing in this subchapter 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.

* * * * *

**§ 458aaa–6. Provisions relating to the Secretary**

* * * * *

**(g) [Trust responsibility]***

The Secretary is prohibited from waiving, modifying, or diminishing in any way the trust responsibility of the United States with respect to Indian tribes and individual Indians that exists under treaties, Executive orders, other laws, or court decisions.

* * * * *

**§ 458aaa-14. Disclaimers**

* * * * *

**(b) [Federal trust and treaty responsibilities]***

Nothing in this subchapter shall be construed to diminish in any way the trust responsibility of the United States to Indian tribes and individual Indians that exists under treaties, Executive orders, or other laws and court decisions.

* * * * *

*Bracketed headings added by codifiers.

3. The Contract Disputes Act, 41 U.S.C. §§ 601-613, provides in relevant part as follows:

**§ 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.

* * * * *

**(c) Amount of claim; certification; notification; time of issuance; presumption**

* * * * *

(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.

* * * * *

**§ 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**

Each agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal. 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.

* * * * *

**(g) Review**

(1) The decision of an agency board of contract appeals shall be final, except that–

(A) a contractor may appeal such a decision to the United States Court of Appeals for the Federal Circuit within one hundred twenty days after the date of receipt of a copy of such decision, or

(B) the agency head, if he determines that an appeal should be taken, and with the prior approval of the Attorney General, transmits the decision of the board of contract appeals to the Court of Appeals for the Federal Circuit for judicial review under section 1295 of Title 28, within one hundred and twenty days from the date of the agency's receipt of a copy of the board's decision.

* * * * *

**§ 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.

* * * * *

4. The Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321, 1321-189 (1996), provides in relevant part as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

* * * * *

Making appropriations for the Departments of the Interior and related agencies for the fiscal year ending September 30, 1996, and for other purposes.

* * * * *

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $1,747,842,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 300aaa-2 for services furnished by the Indian Health Service: *Provided*, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2203; 25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: *Provided further*, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: *Provided further*, That $350,564,000 for contract medical care shall remain available for obligation until September 30, 1997: *Provided further*, That of the funds provided, not less than $11,306,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act, as amended: *Provided further*, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: *Provided further*, That the amounts

collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care Improvement Act shall be available for two fiscal years after the fiscal year in which they were collected, for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): *Provided further*, That of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act: *Provided further*, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 1997: *Provided further*, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act, as amended, shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended.

* * * * *

5. The Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, 110 Stat. 3009, 3009-12–3009-13 (1996), provides in relevant part as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

* * * * *

Making appropriations for the Department of the Interior, and related agencies for the fiscal year ending September 30, 1997, and for other purposes.

* * * * *

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $1,806,269,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 238(b) for services furnished by the Indian Health Service: *Provided*, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: *Provided further*, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: *Provided further*, That $356,325,000 for contract medical care shall remain available for obligation until September 30, 1998: *Provided further*, That of the funds provided, not less than $11,706,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act: *Provided further*, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: *Provided further*, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health Care

Improvement Act shall remain available until expended for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): *Provided further*, That of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, compacts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act: *Provided further*, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 1998: *Provided further*, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended.

* * * * *

6. The Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. 105-83, 111 Stat. 1543, 1582-1583 (1997), provides in relevant part as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 1998, and for other purposes, namely:

* * * * *

INDIAN HEALTH SERVICE

INDIAN HEALTH SERVICES

For expenses necessary to carry out the Act of August 5, 1954 (68 Stat. 674), the Indian Self-Determination Act, the Indian Health Care Improvement Act, and titles II and III of the Public Health Service Act with respect to the Indian Health Service, $1,841,074,000, together with payments received during the fiscal year pursuant to 42 U.S.C. 238(b) for services furnished by the Indian Health Service: *Provided*, That funds made available to tribes and tribal organizations through contracts, grant agreements, or any other agreements or compacts authorized by the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. 450), shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation: *Provided further*, That $12,000,000 shall remain available until expended, for the Indian Catastrophic Health Emergency Fund: *Provided further*, That $361,375,000 for contract medical care shall remain available for obligation until September 30, 1999: *Provided further*, That of the funds provided, not less than $11,889,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act: *Provided further*, That funds provided in this Act may be used for one-year contracts and grants which are to be performed in two fiscal years, so long as the total obligation is recorded in the year for which the funds are appropriated: *Provided further*, That the amounts collected by the Secretary of Health and Human Services under the authority of title IV of the Indian Health
Care Improvement Act shall remain available until expended for the purpose of achieving compliance with the applicable conditions and requirements of titles XVIII

and XIX of the Social Security Act (exclusive of planning, design, or construction of new facilities): *Provided further*, That of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination Fund, which shall be available for the transitional costs of initial or expanded tribal contracts, compacts, grants or cooperative agreements with the Indian Health Service under the provisions of the Indian Self-Determination Act: *Provided further*, That funding contained herein, and in any earlier appropriations Acts for scholarship programs under the Indian Health Care Improvement Act (25 U.S.C. 1613) shall remain available for obligation until September 30, 1999: *Provided further*, That amounts received by tribes and tribal organizations under title IV of the Indian Health Care Improvement Act shall be reported and accounted for and available to the receiving tribes and tribal organizations until expended: *Provided further*, That not to exceed $168,702,000 shall be for payments to tribes and tribal organizations for contract support costs associated with ongoing contracts or grants or compacts entered into with the Indian Health Service prior to fiscal year 1998, as authorized by the Indian Self-Determination Act of 1975, as amended.

* * * * *

7. State Statutes of Limitation for Claims Involving Written Contracts

| State | Statute | Limitations Period |
|---|---|---|
| Alabama | Ala. Code § 6-2-33<br><br>Ala. Code § 6-2-34 | 10 years for "actions founded upon any contract or writing under seal."<br>6 years for "actions upon any simple contract" |
| Alaska | Alaska Stat. § 09.10.053 | 3 years |
| Arizona | Ariz. Rev. Stat. § 12-548<br>Ariz. Rev. Stat. § 12-544 | 6 years for contract in writing within state<br>4 years for written contracts executed outside the state |
| Arkansas | Ark. Code Ann. § 16-56-111 | 5 years for written contracts |
| California | Cal. Civ. Proc. Code § 337 | 4 years for written contract |
| Colorado | Colo. Rev. Stat. § 13-80-101 | 3 years |
| Connecticut | Conn. Gen. Stat. § 52-576 | 6 years for "any simple or implied contract, or on any contract in writing" |
| Delaware | Del. Code. Ann. tit. 10, § 8106 | 3 years: "no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations . . . shall be brought after the expiration of three years from the accruing of the cause" |

| **State** | **Statute** | **Limitations Period** |
|---|---|---|
| Florida | Fla. Stat. § 95.11(2)(b) | 5 years |
| Georgia | Ga. Code Ann. § 9-3-24 | 6 years for simple contracts in writing |
| Hawaii | Haw. Rev. Stat. § 657-1 | 6 years |
| Idaho | Idaho Code Ann. § 5-216 | 5 years for written contracts |
| Illinois | 735 Ill. Comp. Stat. 5/13-206 | 10 years for written contracts |
| Indiana | Ind. Code § 34-11-2-9<br><br>Ind. Code § 34-11-2-11 | 6 years for "an action upon . . . other written contracts for the payment of money."<br>10 years for "an action upon contracts in writing other than those for the payment of money" |
| Iowa | Iowa Code § 614.1(5) | 10 years for written contracts |
| Kansas | Kan. Stat. Ann. § 60-511 | 5 years for written contracts |
| Kentucky | Ky. Rev. Stat. Ann. § 413.090(2) | 15 years for written contracts |
| Louisiana | La. Civ. Code art. 3501 | 10 years |
| Maine | Me. Rev. Stat. Ann. tit.14, § 752 | 6 years |
| Maryland | Md. Code Ann. Cts. & Jud. Proc. § 5-101 | 3 years |
| Massachusetts | Mass. Gen. Laws ch. 260, § 2 | 6 years |
| **State** | **Statute** | **Limitations Period** |

<table>
<tr><td>Michigan</td><td>Mich. Comp. Laws<br>§ 600.5807</td><td>6 years</td></tr>
<tr><td>Minnesota</td><td>Minn. Stat.<br>§ 541.05(1)</td><td>6 years</td></tr>
<tr><td>Mississippi</td><td>Miss. Code Ann.<br>§ 15-1-49</td><td>3 years</td></tr>
<tr><td>Missouri</td><td>Mo. Rev. Stat.<br>§ 516.110</td><td>10 years for “an action upon any writing, whether sealed or unsealed for the payment of money or property”</td></tr>
<tr><td>Montana</td><td>Mont. Code Ann.<br>§ 27-2-202</td><td>8 years for written contracts</td></tr>
<tr><td>Nebraska</td><td>Neb. Rev. Stat.<br>§ 25-205</td><td>5 years for written contracts</td></tr>
<tr><td>Nevada</td><td>Nev. Rev. Stat.<br>§ 11.190</td><td>6 years for written contracts</td></tr>
<tr><td>New Hampshire</td><td>N.H. Rev. Stat. Ann.<br>§ 508:4</td><td>3 years for “all personal actions”</td></tr>
<tr><td>New Jersey</td><td>N.J. Stat. Ann.<br>§ 2A:14-1</td><td>6 years</td></tr>
<tr><td>New Mexico</td><td>N.M. Stat. § 37-1-3</td><td>6 years for contracts in writing</td></tr>
<tr><td>New York</td><td>N.Y. C.P.L.R. 213</td><td>6 years</td></tr>
<tr><td>North Carolina</td><td>N.C. Gen. Stat. § 1-52</td><td>3 years for express and implied contracts</td></tr>
<tr><td>North Dakota</td><td>N.D. Cent. Code<br>§ 28-01-16</td><td>6 years for express and implied contracts</td></tr>
<tr><td>Ohio</td><td>Ohio Rev. Code Ann.<br>§ 2305.06</td><td>15 years for a contract in writing</td></tr>
<tr><td>State</td><td>Statute</td><td>Limitations Period</td></tr>
</table>

| | | |
|---|---|---|
| Oklahoma | Okla. Stat. tit. 12, § 95 | 5 years for a contract in writing |
| Oregon | Or. Rev. Stat. § 12.080 | 6 years for express or implied contracts |
| Pennsylvania | 42 Pa. Cons. Stat. Ann. § 5525 | 4 years |
| Rhode Island | R.I. Gen. Laws § 9-1-13 | 10 years |
| South Carolina | S.C. Code Ann. § 15-3-530 | 3 years for express or implied contracts |
| South Dakota | S.D. Codified Laws § 15-2-13 | 6 years |
| Tennessee | Tenn. Code Ann. § 28-3-109 | 6 years |
| Texas | Tex. Civ. Prac. & Rem. Code Ann. § 16.004 | 4 years for debt |
| Utah | Utah Code Ann. § 78B-2-309 | 6 years for contracts in writing |
| Vermont | Vt. Stat. Ann. tit.12, § 511 | 6 years |
| Virginia | Va. Code Ann. § 8.01-246 | 5 years for contracts in writing |
| Washington | Wash. Rev. Code § 4.16.040 | 6 years for written contracts |
| West Virginia | W. Va. Code § 55-2-6 | 10 years for contracts in writing not under seal |
| Wisconsin | Wis. Stat. § 893.43 | 6 years |

| State | Statute | Limitations Period |
|---|---|---|
| Wyoming | Wyo. Stat. Ann. § 1-3-105 | 10 years for contracts in writing |
| Washington, D.C. | D.C. Code § 12-301 | 3 years for a simple contract, express or implied |

## CERTIFICATE OF SERVICE

I, Lloyd B. Miller, hereby certify and attest that:

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

2. That on the 17th day of November 2008 I caused to be delivered by Federal Express the original and eleven (11) true and correct copies of the Opening Brief of Appellant Arctic Slope Native Association, Ltd. to the following for filing:

Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, NW
Washington, D.C. 20439

3. That on the 17th day of November 2008 I caused to be served by e-mail one (1) true and correct copy of the Opening Brief of Appellant Arctic Slope Native Association, Ltd. and by Federal Express two (2) true and correct copies of the Opening Brief of Appellant Arctic Slope Native Association, Ltd. upon the following:

Robert E. Chandler
Department of Justice
Commercial Litigation Branch
1100 L Street, NW, Room 12002
Washington, D.C. 20530
E-Mail: Robert.Chandler@usdoj.gov

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Dated this 17th day of November 2008.

SONOSKY CHAMBERS SACHSE
MILLER & MUNSON, LLP
Attorneys for Appellant

*/s/ Lloyd B. Miller*
By:______________________________
Lloyd B. Miller

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

I, Lloyd B. Miller, hereby certify and attest that:

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

2. The Opening Brief of Appellant Arctic Slope Native Association, Ltd. complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) or FRAP 28.1(e). The Opening Brief of Appellant Arctic Slope Native Association, Ltd. contains 13,012 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

3. The Opening Brief of Appellant Arctic Slope Native Association, Ltd. complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or FRAP 28.1(e) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The Opening Brief of Appellant Arctic Slope Native Association, Ltd. has been prepared in a proportionally spaced typeface using Corel WordPerfect X3 in 14-point, Times New Roman font.

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Dated this 17th day of November 2008.

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MILLER & MUNSON, LLP
Attorneys for Appellant

*/s/ Lloyd B. Miller*
By:______________________________
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