

UNITED STATES CIVILIAN BOARD OF CONTRACT APPEALS

2010 OCT 15 P 3: 07

ARCTIC SLOPE NATIVE ASSOCIATION,)
LTD.,)
)
 Appellant,)
)
 vs.)
)
 DEPARTMENT OF HEALTH AND)
 HUMAN SERVICES,)
)
 Respondent.)
_____)

CIVILIAN BOARD OF
CONTRACT APPEALS
CBCA 1953 (190-ISDA)-REM,
CBCA 1954 (289-ISDA)-REM,
CBCA 1955 (290-ISDA)-REM,
CBCA 1956 (291-ISDA)-REM,
CBCA 1957 (292-ISDA)-REM, and
CBCA 1958 (293-ISDA)-REM

**MEMORANDUM OF ARCTIC SLOPE NATIVE ASSOCIATION
IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT
ON THE ISSUE OF EQUITABLE TOLLING**

The Federal Circuit has remanded these appeals “for the Board to determine whether, on the facts of these cases, the appellants have established their entitlement to suspension of the limitations period” set forth in 41 U.S.C. § 605(a) of the Contract Disputes Act (CDA), under principles of equitable tolling. *Arctic Slope Native Association, Ltd. v. Sebelius*, 583 F.3d 785, 798 (Fed. Cir. 2009), *reversing in part Arctic Slope Native Assoc., Ltd. v. Sebelius*, 08-2 B.C.A. (CCH) ¶ 33,923 (“CBCA Op. at ___”). Pursuant to the Board’s scheduling order, the Arctic Slope Native Association (ASNA) now moves for partial summary judgment holding that, based upon the undisputed facts, ASNA’s presentment of its fiscal year 1996, 1997 and 1998 contract claims against the Indian Health Service (IHS) in September 2005 was timely because the CDA’s six-year statute of limitation was equitably tolled as of September 10, 2001 and that tolling continued until the date on which ASNA presented its claims.

In *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89 (1990), the Supreme Court held that equitable tolling can arise where “[a] claimant has actively pursued his judicial remedies by

filing a defective pleading during the statutory period,” *id.* at 96, and it cited as one example “purported class members” who rely on a “defective class action.” *Id.* at 96 n.3. The specific issue presented here is whether, under *Irwin*, the time for ASNA to present its claims was equitably tolled during the period in which ASNA, reasonably and in good faith, relied on the September 10, 2001 filing of a class action complaint against IHS which by its express terms included ASNA as a “purported class member[],” particularly under circumstances where: (1) ASNA was already a class member in a parallel 1990 certified class action lawsuit against the Bureau of Indian Affairs (BIA); (2) ASNA had begun to recover damages in that parallel class action; (3) the district judge handling that class action had expressly ruled that ASNA and other class members did not need to have individually presented their separate contract claims to the agency in order to be included in the class; (4) IHS in another class action lawsuit had asserted that tribal contractors who had individually presented their separate contract claims were precluded from participating in any class action by virtue of that presentment; and (5) as soon as IHS in 2005 changed its position and asserted that individual presentment was necessary to qualify for class membership, ASNA promptly presented its claims.

INTRODUCTION

ASNA is an inter-tribal consortium of seven federally recognized Tribes situated across the North Slope of Alaska. It is organized as a nonprofit corporation under Alaska law and is a “tribal organization” under section 4(l) of the Indian Self-Determination and Education Assistance Act of 1975, as amended (ISDA), 25 U.S.C. § 450b(l). The Indian Health Service (IHS) is an agency within the Department of Health and Human Services (DHHS).

In fiscal years 1996, 1997 and 1998, ASNA contracted with IHS to operate IHS’s hospital in Barrow, Alaska. The contracts were entered into pursuant to the ISDA, which

provides a process for tribal organizations to contract with IHS to operate IHS facilities. In return, IHS promised to pay certain sums called the “secretarial amount” and other sums called “contract support costs.” *Thompson v. Cherokee Nation*, 334 F.3d 1075, 1080-81 (2003), *aff’d sub nom. Cherokee Nation v. Leavitt*, 543 U.S. 631, 634 (2005). *See generally Cherokee Nation*, 543 U.S. at 634 (discussing the statutory and contracting regime).

As this Board is well aware, these appeals seek to hold the government liable for failing to pay ASNA its “contract support costs.” These are the amounts that comprise the “funding for the additional administrative costs which tribes incur[] in running health services programs.” CBCA Op. at 4. The ISDA provides that “contract support 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” 25 U.S.C. § 450j-1(a)(2). Despite the mandate to pay these costs, the Secretary has for years failed to pay them in full—even in years like 1996 and 1997 (two of the three contract years at issue here) when the agency had ample lump-sum appropriations from which to do so. *See Cherokee Nation, supra* (holding the government liable for failing to pay these costs in fiscal years 1994 through 1997). Indeed, it was the Secretary’s past failure to pay these costs in full that first led Congress to place the payment duty right into the statute, *Thompson*, 334 F.3d at 1080-81, a failure which (as the *Cherokee* litigation demonstrates) nonetheless continues unabated. This appeal is therefore properly framed as part of a very long effort by ASNA and other tribal contractors to vindicate their rights under the ISDA, to enforce their contracts with the Secretary, and to recover damages for the Secretary’s failure to pay those costs in full.

Each of ASNA’s three contract claims accrued on the last day of the fiscal year covered by each contract—that is, September 30 of each year. In the absence of equitable tolling of the

six-year statute of limitations set forth in section 605(a) of the CDA, the period for ASNA to “present” its FY 1996 claim to a contracting officer ran to September 30, 2002, the period to present the FY 1997 claim ran to September 30, 2003, and the period to present the FY 1998 claim ran to September 30, 2004.¹ ASNA presented these claims (for all three years) on September 1, 2005, approximately two years and 11 months after the end of the oldest presentment period, one year and 11 months after the end of the second presentment period, and 11 months after the end of the most recent presentment period. Accordingly, the presentments were timely only if the presentment periods were equitably tolled under the *Irwin* and *Arctic Slope* decisions.

This motion establishes that these three presentment periods were indeed equitably tolled by ASNA’s reasonable reliance on what the Supreme Court in *Irwin* called a “defective pleading,” namely ASNA’s good faith reliance on an unsuccessful but timely class action complaint that was filed on September 10, 2001. *Irwin*, 498 U.S. at 96 and n.3 (discussing a “defective class action”). Below we discuss the additional facts pertinent to this question, all of which are either a matter of public record or are established in the Affidavit of Eben Hopson, Jr., the former President of ASNA, accompanying this motion. We then discuss the law applicable to those facts.

¹ 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. *Motorola, Inc. v. West*, 125 F.3d 1470, 1473-1474 (Fed. Cir. 1997). *See also Menominee Indian Tribe v. United States*, 614 F.3d 519, 531 (D.C. Cir. 2010). Since ASNA’s fiscal year 1996 contract was a partial year contract awarded in January 1996, it is covered by the CDA’s new six-year rule.

STATEMENT OF FACTS

In 1990, the Ramah Navajo Chapter, a tribal ISDA contractor, filed a class action lawsuit against the Secretary of the Interior to recover damages under the CDA for the underpayment of contract support costs under contracts awarded by the Bureau of Indian Affairs (BIA). *Ramah Navajo Chapter v. Lujan*, No. 90-0957 (D.N.M.). The action was filed in federal court in the District of New Mexico and was assigned to U.S. District Judge Leroy Hansen. Initially the action challenged the BIA's miscalculation of the CSC amounts owed to tribal contractors; in due course it was expanded to cover the BIA's failure to pay even the undercalculated amounts, and later its failure to pay any "direct" contract support costs. In 1993, and over the BIA's objections, Judge Hansen certified a nationwide class of all tribal contractors who had contracted with the BIA. *Ramah*, Order of Oct. 1, 1993 at 1 (Dkt. No. 96) (Simon Decl. Exh. A) (certifying a class of "all Indian tribes and organizations who have contracted with the Secretary of the Interior under the [ISDA]"). Since ASNA had ISDA contracts with the BIA, ASNA automatically was a member of the certified class.

Importantly, in his class certification decision Judge Hansen also specifically ruled that tribal contractors could be members of the class even if they had not administratively presented their individual CSC claims to the BIA. *Ramah*, Mem. Op. of Oct. 1, 1993 (Dkt. No. 95) at 5 (Simon Decl. Exh. A) ("[I]t is not necessary that each member of the proposed class exhaust its administrative remedies under the Contract Disputes Act."). In other words, Judge Hansen squarely held that, for purposes of a class action, the CDA presentment requirement was satisfied through the timely presentment of one representative claim by just the class representative, the Ramah Navajo Chapter. Other tribal contractors could participate in and benefit from the class

proceeding even if they had not each separately presented their own claims. Ramah, too, could participate as to its other unrepresented claims. The government never appealed this ruling.

In a 1997 decision in this case, the Tenth Circuit found the Government liable in damages for miscalculating the contract support cost requirements of all the class member tribes and tribal organizations (like ASNA) that had contracted with the BIA. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). On remand the government settled a portion of those damages claims involving pre-1994 contracts, and in 1999 the district court approved a \$76 million partial settlement. *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999). In 2002, the district court approved a second partial settlement of \$29 million, which covered pre-1994 class claims arising from the unpaid portion of the undercalculated costs, plus class claims arising from pre-1995 unpaid “direct” contract support costs. *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002).²

Even though ASNA had never presented any individual claims to a BIA contracting officer under section 605(a), ASNA participated as a full member of the *Ramah* class and it eventually received payments from both of the *Ramah* class settlements. Hopson Aff. at ¶¶ 9 and 10; *e.g. Ramah*, No. 90-0957 (Feb. 15, 2001) (unnumbered docket entry naming ASNA as recipient of settlement funds) (Simon Decl. Exh. C).

Thus, for over 17 years, beginning with Judge Hansen’s 1993 order certifying a class, ASNA has relied on the *Ramah* class action as the vehicle to vindicate its contract support cost damage claims against the BIA. That reliance has certainly been warranted, for as a class

² Other claims that arose in later fiscal years were not settled, and eventually those claims were dismissed by the district court. *Ramah*, No. 90-0957, slip op. (D.N.M. Aug. 31, 2006), *appeal pending* No. 08-2262 (10th Cir.). They are currently on appeal to the Tenth Circuit.

member ASNA has actually recovered compensatory damages arising out of the BIA's CSC underpayments to ASNA.

Notably, the *Ramah* litigation against the BIA was active during precisely the same time frame—FY 1996 through FY 1998—in which ASNA was accruing its parallel CSC damage claims against IHS that are at issue here. Indeed, the first payment of class damages to ASNA from the *Ramah* litigation occurred in February 2001, well before the expiration of the six-year limitations period for ASNA to present its FY 1996 claims against IHS (September 30, 2002), and well within the limitations period for presentment of ASNA's more recent FY 1997 and 1998 claims.

On September 10, 2001—still more than a year before the expiration of the period for ASNA to present even the oldest of its claims to IHS, and only seven months after ASNA's first recovery in the *Ramah* case—the Pueblo of Zuni filed a parallel class action lawsuit against IHS seeking damages for CSC underpayments and miscalculated CSC payments. *Pueblo of Zuni v. United States*, No. CV 01-1046 (D.N.M.) (“*Zuni*”). The *Zuni* case against IHS was in every way parallel to the *Ramah* case against the BIA. Like *Ramah*, the *Zuni* case was also filed in the New Mexico federal district court. Like *Ramah*, it was also assigned to Judge Hansen. Like *Ramah*, the *Zuni* complaint also sought certification of a class; indeed, it sought certification of a class against IHS that was virtually identical to the *Ramah* class that Judge Hansen actually certified in 1993 against the BIA—a class comprised of “all tribes and tribal organizations contracting with IHS under the ISDA between the years 1993 to the present.” *Zuni* Complaint ¶ 53 (Simon Decl. Exh. D).

ASNA was plainly a “tribal organization[] contracting with IHS under the ISDA,” and it was therefore within the scope of the described putative *Zuni* class, just as it was an actual

member of the certified *Ramah* class. Since ASNA's claims against IHS for CSC underpayments for FY 1996, 1997 and 1998 were encompassed within the scope of the class described in the *Zuni* complaint, ASNA's claims would have been adjudicated in the *Zuni* case had Judge Hansen certified the class as so defined, just as he had done in *Ramah*.

In light of the New Mexico district court's rulings in *Ramah*, and in reliance on the filing of the *Zuni* class action on September 10, 2001, ASNA did not present its individual claims to an IHS contracting officer. Hopson Aff. at ¶ 12. Indeed, at the time of the filing of the *Zuni* class complaint—which was still 1 year and 20 days before the six-year period would run on ASNA's oldest claims—the government was taking the position in parallel litigation that to individually present a claim would affirmatively disqualify a contractor from participating in any CSC-related class action. That is, in a third CSC case brought by the Cherokee Nation the government had argued that tribal contractors should be excluded from a class if they “are litigating or have litigated cases in other judicial or administrative forums” *Cherokee Nation v. United States*, 199 F.R.D. 357, 362 (E.D. Okla. 2001) (emphasis added).³ The government took the position in *Cherokee* that administrative presentment of claims was a bar to participation in a class action, not a prerequisite to it. In its brief in opposition to class certification in *Cherokee*, filed in April 2000, the government argued that the class claim was over-inclusive and thus failed to meet the “numerosity” requirement of Rule 23, Fed. R. Civ. P., in part because the plaintiffs had asserted a class of “all” tribal ISDA contractors even though “numerous” putative class members already had CSC claims pending in “federal courts or administrative forums” and were therefore (the government now contended) not eligible to be in the class. See Defendant's Opposition to

³ After class certification in *Cherokee* was denied in February 2001, the litigation continued as an individual action, *Cherokee Nation v. United States*, 190 F. Supp. 2d 1248 (E.D. Okla. 2001), culminating in the Supreme Court's March 2005 decision in *Cherokee v. Leavitt*.

Plaintiff's Motion for Class Certification, filed in *Cherokee Nation of Oklahoma, et al. v. United States*, No. CIV-99-092-S (E.D. Okla.) (April 19, 2000) at 12-13 (Simon Decl. Exh. B). In support of this contention, the government cited several tribal contractors from whom "IHS has received claims under the Contract Disputes Act for additional contract support costs." *Id.* at n.3. The only fair reading of the government's argument at the time was that a tribal contractor who had administratively presented a claim for unpaid CSCs could not participate as a class member in class litigation seeking damages for such claims.

In December 2001, shortly after the filing of the *Zuni* class complaint, Judge Hansen entered a stay of all proceeding in *Zuni* (including all proceedings relating to class certification). *Zuni*, Order of Dec. 28, 2001 (Dkt. No. 8) (Simon Decl. Exh. E). The purpose of the stay was to await resolution of the parallel *Cherokee* litigation, then pending in the Tenth Circuit as an individual action following denial of class certification and then dismissal on the merits. *Supra* at 8 n.3. The *Cherokee* case presented issues on the merits identical to those in the *Zuni* case, concerning IHS's obligation to pay contract support costs, so the Tenth Circuit decision would set law binding on the New Mexico district court in the *Zuni* case.⁴

Once the *Zuni* class complaint had been filed in September 2001, and thereafter throughout the pendency of the putative *Zuni* class action, ASNA continued not to administratively present its claims to an IHS contracting officer. Hopson Aff. at ¶ 12. ASNA took this position (1) because it was a member of the putative *Zuni* class pending before Judge Hansen, (2) because Judge Hansen had already ruled in the parallel *Ramah* case that putative class members did not need to individually present their claims so long as the class

⁴ The *Cherokee* case was one of two cases that ultimately culminated in a unanimous decision by the Supreme Court in March 2005, holding that IHS's underpayments of contract support costs had been contrary to law. *See Cherokee*, 543 U.S. at 634.

representative had satisfied the presentment requirement, (3) because ASNA was now recovering damages in the parallel *Ramah* case (notwithstanding the fact that it had not presented its claims to the agency), and (4) because the government had indicated in the *Cherokee* case that presenting an individual claim would actually bar ASNA from participating in the *Zuni* class. *Id.*

Thus, the filing of the *Zuni* class complaint in September 2001 (well within the six-year presentment period for ASNA's claims), encompassing both ASNA and ASNA's FY 1996-98 claims, was, on its face and under the then-governing law of the same district court, equivalent to a timely action brought by ASNA for those claims within the six-year presentment period—assuming that Judge Hansen's rulings on class certification in the *Zuni* case would eventually mirror his 1993 rulings in the *Ramah* case (including his ruling that class members need not separately present their claims in order to be members of the certified class). And given the law at the time and IHS's position in *Cherokee*, there was no reason for ASNA to think otherwise.

Following the Supreme Court's 2005 ruling in *Cherokee*, the stay in the *Zuni* case was lifted. But then events took an unexpected turn. In May 2005, the government attacked Judge Hansen's 1993 ruling in *Ramah* that presentment was not a jurisdictional prerequisite for all class members. The government argued that, even if a class might otherwise be appropriate, the only tribal contractors who were eligible to be class members were those contractors who had already individually presented timely claims under the CDA. *See* Memorandum in Support of Defendants' Motion to Dismiss in Part for Lack of Subject Matter Jurisdiction at 15-17, filed in *Pueblo of Zuni v. United States*, No. CV 01-1046 (D.N.M) (May 23, 2005) (Simon Decl. Exh. F). Claims that were not timely presented could not be in the class, the government now argued.

The government's request to the New Mexico district court to revisit the issue of class eligibility was a surprise, since the district court in *Ramah* had ruled to the contrary in 1993, over

\$100 million dollars had already been paid to *Ramah* class members (including class members like ASNA who had not individually presented claims), and the government had advocated precisely the opposite position five years earlier in *Cherokee*. Hopson Aff. at ¶ 14.

To summarize, at the time the *Zuni* class complaint was filed in 2001, and until the Summer of 2005, the governing law, as set forth in the *Ramah* case, was that presentment was not required for a tribal contractor to participate in a class. And the message from the government, as set forth in its 2000 briefing in the *Cherokee* case, was that presentment would actually disqualify a tribal contractor from participating in any CSC class. It was therefore a dramatic turnabout in 2005 for the government in *Zuni* to then argue for the first time that presentment was required in order for a tribal contractor to participate in a class.

ASNA immediately responded to these changing circumstances. On September 1, 2005, within weeks of learning about the government's new argument in *Zuni*, ASNA calculated its claim amounts and presented all of its claims for FY 1996 through FY 1998 to ASNA's contracting officer (along with other more recent claims). Hopson Aff. at ¶ 14.

In October 2006, the *Zuni* court (per Judge William Johnson, to whom the case had been transferred) rejected the *Ramah* ruling as "not binding" and dismissed claims by the class representative that had not been presented within the six-year limitations period. *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1113 (D.N.M. 2006). In March 2007, Judge Johnson denied class certification, ruling that the class complaint failed to meet the prerequisites of Fed. R. Civ. P. 23. *Pueblo of Zuni v. United States*, 243 F.R.D. 436 (D.N.M. 2007). The 2007 denial of class certification in *Zuni* left ASNA with only one option: to continue prosecuting its individual claims, which by then were on appeal to this Board.

As the foregoing facts show, ASNA in 2001 made every reasonable effort to pursue its FY 1996, 1997 and 1998 claims in a timely manner, given the circumstances and the law at the time. Its efforts to vindicate its claims against IHS through the vehicle of the timely *Zuni* class action—which was filed when one year and 20 days still remained for ASNA to present even its oldest claims—was reasonable, timely, diligent and efficient. It was consistent with the law at the time, it was consistent with the government’s position at the time, and it was consistent with ASNA’s successful vindication of its identical claims against the BIA in the parallel *Ramah* class litigation.

As we next show, on the facts presented here the law supports the application of equitable tolling from Sept. 10, 2001 until the claims were individually presented on Sept. 1, 2005.

ARGUMENT

I. EQUITABLE TOLLING APPLIES WHERE A PARTY HAS DILIGENTLY PURSUED ITS CLAIMS BY RELYING ON A “DEFECTIVE PLEADING,” INCLUDING PARTICIPATION AS A “PURPORTED CLASS MEMBER[]” OF A “DEFECTIVE CLASS ACTION.”

The Federal Circuit in this case held that “equitable tolling applies to the six-year time limitation set forth in section 605(a).” *Arctic Slope*, 583 F.3d at 798. The Circuit reached its conclusion primarily by applying the so-called “*Irwin* presumption”—the statement by the Supreme Court in *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) that, as a general rule, “the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States.” The Federal Circuit said that under *Irwin*, a court must assume that Congress intended equitable tolling to apply “unless there is a good reason to believe otherwise.” *Arctic Slope*, 583 F.3d at 798. The Circuit found nothing in the language or structure of section 605(a) to support any inference that Congress did not intend tolling to apply. *Id.* at 799 (noting that “the language of the time limitation in section

605(a) is anything but emphatic”). More recently, the D.C. Circuit reached the same conclusion. *Menominee*, 614 F.3d at 529-31.

The equitable principles that give rise to tolling were set forth by the Supreme Court in *Irwin*. Although granted “sparingly,” the Court said that “[w]e have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.” 498 U.S. at 96 (emphasis added). The Court noted that it has been “less forgiving” in applying equitable tolling “where the claimant failed to exercise due diligence in preserving his legal rights,” and also that principles of equitable tolling do not extend to “a garden variety claim of excusable neglect.” *Id.*

The Court offered two paradigm situations for the application of equitable tolling: first, where a claimant, though diligent, filed a “defective pleading” within the limitations period; or second, where the claimant was “tricked” by his adversary’s “misconduct” into allowing a filing deadline to lapse. *Irwin*, 498 U.S. at 96; see *Jaquay v. Principi*, 304 F.3d 1276, 1282-83 (Fed. Cir. 2002) (*en banc*), *overruled on other grounds by Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (*en banc*) (“Equitable tolling is generally available in two types of situations”); *Arakaki v. United States*, 62 Fed. Cl. 244, 250 (Fed. Cl. 2004) (“The court in *Irwin* described two types of cases that merit equitable tolling of limitations periods”).⁵

⁵ Since *Irwin* the Supreme Court has acknowledged that “tolling might be appropriate in other cases,” too. *Young v. United States*, 535 U.S. 43, 50 (2002); see also *Baldwin Cnty. Welcome Center v. Brown*, 466 U.S. 147, 151 (1984). *Accord Mapu v. Nicholson*, 397 F.3d 1375, 1380 (Fed. Cir. 2005) (“We again reject the suggestion that equitable tolling is limited to a small and closed set of factual patterns”); *Barrett v. Principi*, 363 F.3d 1316, 1318 (Fed. Cir. 2004) (“[E]quitable tolling is available in a variety of circumstances”); *Nunnally v. MacCausland*, 996 F.2d 1, 5 n.7 (1st Cir. 1993) (“A fair reading of *Irwin*, however, shows that the Court did not undertake an exhaustive list of factors that may be considered in the equitable weighing process.”).

Importantly, the Court footnoted each of the two prongs of equitable tolling with citations providing illustrative examples. 498 U.S. at 96 nn.3 and 4. With regard to tolling that is justified by the diligent filing of a “defective pleading,” the Court provided three examples. *See Arakaki*, 62 Fed. Cl. at 251 (“*Irwin* cited to three cases ... as examples of lawsuits where a timely but defective filing merited tolling of a statutory limitations period.”).

First, it cited *Burnett v. New York Central R.R. Co.*, 380 U.S. 424 (1965), in which the Court held that a two-year statute of limitations under the Federal Employers’ Liability Act (FELA) was tolled by the plaintiff’s erroneous filing of his complaint in a state court in which venue was improper. After the state court dismissed the action for improper venue, the plaintiff re-filed in federal court, but the second filing came after the expiration of the statute of limitations. The Supreme Court said “that when a plaintiff begins a timely FELA action in a state court of competent jurisdiction, service of process is made upon the opposing party, and the state court action is later dismissed because of improper venue, the FELA limitation is tolled during the pendency of the state action.” 380 U.S. at 428. Equitable tolling of the FELA limitations period occasioned by filing in the wrong forum, the Court said, “effectuates the basic congressional purposes in enacting this humane and remedial Act.” *Id.* at 427. The Court noted that the plaintiff “did not sleep on his rights but brought an action within the statutory period in the state court of competent jurisdiction,” *id.* at 429, albeit one of improper venue. Further, the Court stressed, the defendant was served with process within the limitations period and therefore was on notice of the claim against it. The “policy of repose” served by a statute of limitations for the benefit of defendants “is frequently outweighed ... where the interests of justice require vindication of the plaintiff’s rights.” *Id.* at 428.

The second *Irwin* example of a “defective pleading” is *Herb v. Pitcairn*, 325 U.S. 77 (1945). There, a plaintiff filed an FELA action in a state court that lacked jurisdiction. The Supreme Court held that the action had been “commenced” for purposes of the two-year statute of limitations “when instituted by service of process issued out of a state court, even if one which itself is unable to proceed to judgment,” where state law permitted the transfer of the case to a court with jurisdiction. 325 U.S. at 78-79.

The third *Irwin* example of a “defective pleading” giving rise to equitable tolling is the one most germane here—*American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). The *Irwin* footnote cites *American Pipe* and then parenthetically explains the basis for equitable tolling in the class setting: where “plaintiff’s timely filing of a defective class action tolled the limitations period as to the individual claims of purported class members.” 498 U.S. at 96 n.3 (emphasis added). That is, as framed by *Irwin* specifically in the context of equitable tolling, the Supreme Court will treat the filing of a “defective class action” as a “defective pleading” that gives rise to equitable tolling of the statute of limitations for the “individual claims” that are subsequently pursued by “purported class members.”

This both makes sense and is consistent with the Federal Circuit’s decision here. Although the Federal Circuit ruled that automatic (or legal) class action tolling is not available to toll presentment under the CDA, *Arctic Slope*, 583 F.3d at 797, it also held that equitable tolling under *Irwin* is available. And under *Irwin*, ASNA’s reliance on a “defective class action” complaint can satisfy the standard for equitable tolling. As the Federal Circuit more recently explained in a post-*Arctic Slope* decision discussing both legal class action tolling and equitable tolling, “the two concepts are different.” *Bright v. United States*, 603 F.3d 1273, 1287 (Fed. Cir. 2010). Equitable tolling “is a principle that permits courts to modify a statutory time limit and

‘extend equitable relief’ when appropriate.” *Id.* (quoting *Irwin*, 498 U.S. at 96). Legal class action tolling, by contrast, “does not modify a statutory time limit ‘or extend equitable relief.’ Rather, it is a procedure that suspends or tolls the running of the limitations period for all purported members of a class once a class suit has been commenced, in a manner consistent with the proper function of a statute of limitations.” *Id.* at 1288.

The distinction between automatic class action tolling and equitable tolling is well illustrated by the Ninth Circuit’s recent decision in *Hatfield v. Halifax PLC*, 564 F.3d 1177 (9th Cir. 2009). There, an investor filed a putative nationwide class action in New Jersey state court against a commercial enterprise. The New Jersey suit was dismissed and the suit was then re-filed in federal court in California. The federal district court dismissed the California suit, both as to the individual plaintiff and as to the putative class members because it was filed after the expiration of the applicable statute of limitations.

On appeal the Ninth Circuit concluded that the plaintiff’s individual claims “were equitably tolled” by the timely filing of the New Jersey class suit. 564 F.3d at 1184-85. It reasoned that the defendant had received “timely notice” through the original class action lawsuit, the defendant had not been prejudiced “in gathering evidence to defend against the second claim,” and there was “good faith and reasonable conduct by the plaintiff in filing the second claim.” *Id.* at 1185. *See also id.* at 1185 (“application of the equitable tolling doctrine requires a balancing of the injustice to the plaintiff occasioned by the bar of his claim against the effect upon the important public interest or policy expressed by the ... limitations statute”), 1186 (“the equities demand that tolling be permitted ... because the substantive class and individual claims were sufficiently similar to give [the defendant] notice of the litigation for purposes of applying the tolling rule. * * * [E]quitable tolling ... focuses on a plaintiff’s good faith and

reasonable conduct in filing a second action. Here, Hatfield acted in a good faith belief that the six-year statute of limitation was tolled during the pendency of the [first] action.”) (citations and internal quotations omitted).

In fact, the Circuit went even further to find that equitable tolling extended to the putative class members, too. Thus, while the Circuit held that class action tolling for those members was unavailable “where a plaintiff sought to use a class action filed in one jurisdiction to toll an action later filed in another,” *id.* at 1187 (citing *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017 (9th Cir. 2008)), the Circuit held that California law—like federal law, as made plain by *Irwin*—“does not dictate a similar rejection of California’s equitable tolling doctrine” *Id.* at 1187-88. The Court added:

Although the two types of tolling – equitable and *American Pipe* – overlap to some extent, and even though California courts have treated them at times as interchangeable, they are not congruent [T]he class-action tolling discussed in *American Pipe* and *Crown* is a species of legal tolling, not equitable tolling. Thus, by the Halifax Appellees’ own admission, *Clemens*, which only rejected the application of *American Pipe* tolling in a cross-jurisdictional action, does not affect the application of California’s equitable tolling doctrine, which covers situations beyond those covered by *American Pipe*.

Id. at 1188 (internal quotations and citations omitted) (emphasis added). The Ninth Circuit underscored that the purpose of equitable tolling “is to toll the statute of limitations in favor of a plaintiff who acted in good faith where the defendant is not prejudiced by having to defend against a second action.” *Id.* Applying this hornbook standard, and notwithstanding its conclusion that class action tolling was inapplicable as a matter of law, the court relied on the pendency of the New Jersey class action to toll—on equitable grounds—the limitations period for the putative class in the second case.

To summarize, although the Ninth Circuit concluded that *American Pipe* class action tolling did not apply as a matter of law to toll the limitations period for either the named plaintiff

or the unnamed putative class members in the defective first class action, the Circuit held squarely that equitable tolling did apply to both.

II. ASNA’S REASONABLE RELIANCE ON THE FILING OF A “DEFECTIVE CLASS ACTION”—THE *ZUNI* CLASS ACTION—JUSTIFIES EQUITABLE TOLLING OF THE SECTION 605(a) LIMITATIONS PERIOD.

Under the foregoing law, this case warrants the application of equitable tolling. Tolling is warranted because (1) well within the applicable limitations period, ASNA acted reasonably and diligently in relying on the filing of the *Zuni* class action to pursue its claims and to notify the government of those claims, even though that case eventually turned out to be a “defective class action;” (2) ASNA acted in good faith in 2005 in proceeding with a second action by swiftly presenting its individual claims as soon as the circumstances changed; and (3) defendants can show no prejudice by the application of equitable tolling under these circumstances.

Here, ASNA’s reliance is key. ASNA quite reasonably relied on the timely filing of the *Zuni* class complaint in September 2001 (1 year and 20 days before the six-year limitations period ran on ASNA’s oldest FY 1996 claim) as an effective and proper means by which its claims for CSC underpayments could and would be adjudicated. After all, the *Zuni* complaint on its face included ASNA in the putative class since ASNA was a “tribal organization[] contracting with IHS under the ISDA between the years 1993 to the present [2001].” *Zuni* Complaint ¶ 53 (Simon Decl. Exh. D). Further, the complaint sought recovery of IHS underpayments for contract support costs—precisely the claim that ASNA wished to assert. It was thus certainly reasonable for ASNA to conclude (as it did) that, had the district court in *Zuni* certified the class described in the complaint, ASNA’s FY 1996-1998 claims over CSC underpayments would be adjudicated, just as similar claims had been successfully adjudicated in *Ramah*. In other words, the filing of the *Zuni* class complaint encompassing both ASNA and the claims asserted by

ASNA was, for all practical purposes the equivalent of a pleading timely filed by ASNA to litigate those claims.

It turned out, of course, that the *Zuni* complaint was a “defective pleading” because the district court six years later would conclude that class certification was not warranted after all. But the flaws in the class complaint are precisely what constitute the pleading “defects” that give rise to equitable tolling under *Irwin*: the class complaint sought certification of a class that was later determined to be impermissible *per se* (because it did not meet the requirements of Rule 23). And, the Supreme Court in *Irwin* made plain that a class complaint that is “defective” because it fails to meet the prerequisites of Rule 23 is no different for these purposes than a complaint that is “defective” because it is filed in a court without jurisdiction, *e.g.*, *Herb v. Pitcairn*, *supra*, or in a court of improper venue, *e.g.*, *Burnett*, *supra*. In all these situations, a plaintiff institutes and relies on a timely action to have a court adjudicate its claims, but the effort founders because of some defect in the pleading. The same is true for a putative class member described in a class complaint in a case where class certification is eventually denied. The fact that the Supreme Court in *Irwin* discussed a “defective class action” as a third kind of “defective pleading” that justifies equitable tolling only underscores the proposition that actual reliance on a failed class complaint does give rise to such tolling.⁶

⁶ In *Land Grantors in Henderson Union, et al. v. United States*, 64 Fed. Cl. 661 (2005), the court found a statute of limitations to be equitably tolled, in part, because the plaintiffs relied on the filing of a class action complaint that failed to survive a motion to dismiss. The court noted that the complaint “was never certified as a class and was dismissed on jurisdictional grounds,” 64 Fed. Cl. at 714, but then said that “the United States Supreme Court specifically has ‘allowed equitable tolling in situations where the claimant has actively pursued ... judicial remedies by filing a defective pleading during the statutory period.’” *Id.* (quoting *Irwin*, 498 U.S. at 96). With regard to the plaintiffs’ reliance on the unsuccessful class action, the court noted that the plaintiffs “may have assumed, erroneously, that sufficient efforts were made to preserve their legal rights to benefit from the doctrine of equitable tolling by the filing of the [class] complaint.” 64 Fed. Cl. at 715.

Of course, equity must still dictate good grounds for tolling, and here, it does so.

First, ASNA’s reliance on the filing of the *Zuni* class action was reasonable and in good faith, and its actions were diligent. As the Supreme Court recently stated, “The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence.” *Holland v. Florida*, 130 S. Ct. 2549, 2565 (2010) (internal quotations and citations omitted). Not only was ASNA’s reliance on the class complaint *per se* reasonable, ASNA’s good faith reliance was particularly warranted because, unlike more routine equitable tolling situations (like *Hatfield*), here the ongoing *Ramah* case had already established that (1) such a class was sound, (2) ASNA was a member of the *Ramah* class, (3) administrative presentment by ASNA was not required to participate in the *Ramah* class, and (4) ASNA had actually been successful in recovering damages in the *Ramah* class—all this at the very same time that ASNA was relying on the parallel 2001 *Zuni* complaint. Indeed, ASNA’s reliance on the *Ramah* precedent was mostly obviously reasonable because it was issued by the same district court, and by the same judge, before whom the *Zuni* class complaint was now pending. The proposition that ASNA was aware of the *Ramah* precedent is unassailable, for ASNA was a member of the *Ramah* class, it received class notices in that case, and it received class recoveries in that case—all this notwithstanding the fact that it had never presented its own individual claims. Accordingly, it was particularly appropriate and reasonable for ASNA to rely on the filing of the new 2001 *Zuni* class action, and to believe in good faith that the same judge who certified the *Ramah* class and who included non-presenters in that class would decide the same issue the same way in *Zuni*. Thus, from the timely filing of the *Zuni* complaint in 2001 through the period of the stay in the

Zuni litigation in 2005, the *Ramah* precedent squarely supported ASNA’s good faith belief that it had taken sufficient timely steps for its CSC claims to be adjudicated.⁷

Given the foregoing, ASNA’s failure to individually present its FY 1996 claim within the six-year limitations period (that is, by September 30, 2002) was not due to any lack of diligence, and the same is true of its FY 1997 and 1998 claims as well. As the Supreme Court noted about the petitioner in *Burnett*, he “failed to file an FELA action in the federal courts, not because he was disinterested, but solely because he felt that his state action was sufficient.” 380 U.S. at 429. So too, here, ASNA certainly was not “disinterested” in vindicating its contract rights, but instead was actively involved in *Ramah* and reasonably believed that the filing of the *Zuni* class complaint in 2001 was “sufficient” to vindicate those rights.

Second, at the time the *Zuni* class complaint was filed, the government was telling tribal contractors in the *Cherokee* class litigation that if putative class members wanted to participate in a class action, they should not present their claims administratively—and, moreover, that doing so would actually exclude them from any class. *Supra* at 8. Thus, a tribal contractor who wished to participate in a class action and who, like ASNA, was paying close attention to the government’s litigating position would reasonably conclude, not that administrative presentment

⁷ Cf. *Townsend v. Knowles*, 562 F.3d 1200 (9th Cir. 2009) (equitable tolling of statute of limitations in the Antiterrorism and Effective Death Penalty Act is warranted where petitioner delayed in filing habeas petition in reliance on circuit precedent that was subsequently declared to be legally erroneous); *Harris v. Carter*, 515 F.3d 1051 (9th Cir. 2008) (same); accord *York v. Galetka*, 314 F.3d 522 (10th Cir. 2003) (equitable tolling of limitations period to file habeas petition is warranted where petitioner relied on “unsettled” circuit precedent about whether filing deadline was tolled); *Clymore v. United States*, 217 F.3d 370, 375 (5th Cir. 2000) (equitable tolling warranted given “the unsettled state of the law” regarding venue for a Rule 41(e) motion to return property, so that “even an experienced and able attorney would have had to guess as to the proper venue in which to bring the claim”); *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1174-75 (9th Cir. 1986) (equitable tolling of statute of limitations is warranted where controlling law was “unclear” about whether federal courts had exclusive jurisdiction over Title VII claims, and petitioner filed in state law, which dismissed the action).

was required for participation in a class, but rather that administrative presentment was to be avoided.

Perhaps it does not rise to the level of affirmative misconduct by the government that it subsequently changed its litigating position and, following the lengthy stay in *Zuni*, then opposed certification of any class by arguing that a class could include only presenters. But the government's switch in position certainly explains the trap that was set for a diligent tribal contractor monitoring all these events. After being first told that presentment would bar participation in a class, ASNA withheld presentment, only then to be told that presentment was required for it to participate in a class—but then also that it was too late to present, either for purposes of participating in a class or for purposes of litigating individual claims before the Board.

On the other side of the ledger of equities, the filing of the *Zuni* class complaint protected the legitimate interests of the agency by putting it on notice of the nature and scope of the claims asserted against it, and “[s]tatutes of limitations are primarily designed to assure fairness to defendants.” *Burnett*, 380 U.S. at 428. They are “designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.” *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348-49 (1944).

This policy is fully served where, as here, the “defective pleading” has been filed well within the limitations period, and where that pleading has fully informed the defendant of the precise nature and scope of the covered claims. The 2001 filing of the *Zuni* complaint was well within the six-year limitations period for the earliest of ASNA's claims, and it put IHS on timely notice that ASNA and other tribal contractors were asserting claims for underpayment of CSCs

within the prior six-year period. *E.g.*, *Jaquay*, 304 F.3d at 1287 (“the diligence requirement is more relaxed for cases where the claimant filed a pleading in the wrong place as opposed to filing it after a statutory deadline.”); *see also Moreno v. United States*, 88 Fed. Cl. 266, 282 (2009) (deadline for filing of claim under Fair Labor Standards Act is equitably tolled based on claimant’s “defective pleading timely filed in the wrong court”). Indeed, IHS already knew that it had underpaid ASNA its CSC requirements because, for years, IHS had included ASNA on IHS’s “queue” lists of those contractors awaiting CSC payment. *Miscellaneous ISD Queue Priority Lists, 1996-98* (Simon Decl. Exh. G). Under all these circumstances, equitable tolling of the statute of limitations to 2005 works no harm to the defendant.

Nor, on the facts here, is there any other prejudice to the government. In rejecting a government defense of laches against ten-year old CSC damage claims presented by another tribal contractor, a federal district court recently found no prejudice to the government in allowing the litigation to proceed:

[T]he Council’s claims involve issues of statutory and contract interpretation, and the defendants concede that ‘the contract documents themselves should dispose of this case.’ The defendants neither show why testimony from these witnesses would be necessary nor provide any evidence supporting their claim that these witness’ memories have actually faded.

Council of Athabascan Tribal Gov’ts v. United States, 693 F. Supp. 2d 116, 123 (D.D.C. 2010) (“CATG”). There, as here, “an administrative record exists containing the contract and all modifications. The existence of the administrative record substantially mitigates any possibility of evidentiary prejudice ... as the contract documents will likely be dispositive.” *Id.* The D.C. Circuit in the *Menominee* CSC litigation agreed with this view, reversing the district court’s dismissal of Menominee’s similar FY 1995 CSC claim on laches grounds, and noting: “We fail to see how the tribe’s delay prejudiced the government.” 614 F.3d at 532. If the ten-year

presentment periods in *CATG* and *Menominee* did not prejudice the government, *a fortiori* the eight-year, seven-year and six-year presentment periods at issue here did not prejudice the government—especially because the *Zuni* complaint provided the defendants ample and timely notice five years into those periods.

CONCLUSION

The Federal Circuit found that the six-year presentment period in § 605(a) is subject to equitable tolling, and it directed the Board to make “a determination as to whether, under the circumstances of these cases, the limitations period should be tolled.” *Arctic Slope*, 583 F.3d at 800. The “circumstances” here are that ASNA did not present its FY 1996-1998 claims to IHS until 2005: (1) because it reasonably relied on having those claims adjudicated through the vehicle of the *Zuni* class action that was timely filed in 2001 and which encompassed ASNA’s claims; (2) because participating in the *Zuni* case, had a class been certified, would have been an efficient and cost-effective means of for ASNA to vindicate its rights; (3) because ASNA also reasonably relied on the precedent established in the parallel *Ramah* case by the same court and by the same judge that such a class was proper and that presentment was not necessary for ASNA to participate in the *Zuni* class; (4) because ASNA was a member of the *Ramah* class and had successfully recovered damages through that class action; (5) because ASNA took seriously the government’s position at the time that presenting claims to the agency would affirmatively disqualify it from participating in the *Zuni* class action; and (6) because ASNA promptly and in good faith presented its own claims outside the class framework as soon as IHS changed its position on whether presentment was required. *Cf. Menominee*, 614 F.3d at 531-32 (“laches’ ... ‘attaches only to parties who have *unjustifiably* delayed in bringing suit.’ The doctrine is equitable in nature, and its application ‘turns on whether the party seeking relief “delayed

inexcusably or unreasonably in filing suit,” not simply whether the party delayed.”) (citations omitted).

In relying on *Zuni*, ASNA was neither negligent nor inattentive to its rights and obligations. It relied on the law as it was, and on the filing of the *Zuni* class action. Taking into account the pertinent law, the circumstances at the time, and the government’s litigating position, ASNA did everything that due diligence could fairly require of it. As for the defendants, the two-year delay in ASNA’s presentment of even its oldest claims worked no prejudice, both because defendants had ample notice of the claims from the timely filing of the *Zuni* case, and because the underlying claims ultimately depend upon “contract documents,” not witness testimony.

ASNA’s diligence proved insufficient only because the law changed unpredictably and, in part for that reason, the *Zuni* class complaint on which ASNA relied became a “defective pleading” for purposes of vindicating ASNA’s claims. Under *Irwin*, however, this is one of the paradigm situations in which equitable tolling can apply.

“[U]nder the circumstances of these cases,” *Arctic Slope*, 583 F.3d at 800, the Board should conclude that the doctrine of equitable tolling applies, and that ASNA’s presentation of its FY 1996, 1997 and 1998 claims on September 1, 2005 was timely because ASNA’s reliance on the *Zuni* class action, filed on September 10, 2001 – well within the untolled presentment periods – was reasonable and in good faith; ASNA’s subsequent presentment in 2005 was diligent and in good faith; and the government was not prejudiced by the presentment delay.

Respectfully submitted this 15th day of October 2010.

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