

Tribe in its appeal before this Board, all of which address the tolling of a statute of limitations. The Court in *Bowles* states plainly that it is addressing a time frame set by statute which defines the jurisdiction of a court, not rules for claims processing. Slip Op. at 8.

Throughout this proceeding the Indian Health Service (IHS) has argued that the Contract Disputes Act (CDA) filing requirements are mandatory and jurisdictional. However, they do not carefully parse through the CDA requirements. We agree that *presentment* of a claim to a contracting officer is mandatory and jurisdictional. The Tribe has met that requirement. It did present its claims.

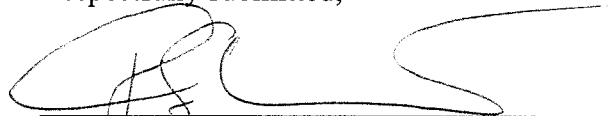
However, the IHS then attempts to attach that mandatory requirement to the six year statute of limitations, to argue that if presentment is mandatory, then so is the deadline for presentment. But the cases are clear--and the Supreme Court's ruling in *Bowles* does not change this clarity--that statute of limitations, in certain circumstances may be waived or tolled. The six year deadline at 41 U.S.C. §605(a) is just such a statute of limitations. *See* the Tribe's Brief dated Nov. 30, 2006, p. 7, which discusses the general statute of limitations 28 U.S.C. §2501 and its relation to §605.

In his dissent, Justice Souter makes this very important distinction and the majority does not disagree that such a distinction exists. "The time limit at issue here...is much more like a statute of limitations, which provides an affirmative defense, see Fed. Rule Civ. Proc. 8(c), and is not jurisdictional. *Day v. McDonough*, 547 U.S. 198, 205 (2006). Statute of limitations may be waived, *id.*, at 207-208, or excused by rules, such as equitable tolling, that alleviate hardship and unfairness, see *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)." Slip op. dissenting opinion, p. 5. While

the IHS may argue that *Bowles* stands for the proposition that any limitation period in a statute is jurisdictional and cannot be tolled, that argument would not be correct. *Irwin* involved a statute, 42 U.S.C. §2000e-16(c), and *Bowles* does not overrule *Irwin* or any other Supreme Court case on tolling statutes of limitations.

Finally, the more analogous sections of the CDA to the statute at issue in *Bowles* is 41 U.S.C. §606 or §609 which both provide the time frame within which an appeal of a contracting officer's decision may be filed. These sections set the jurisdiction of the agency board or the district court to hear an appeal. *Bowles* appears to control the interpretation of these sections of the CDA. But neither of these sections is at issue in this appeal.

Respectfully submitted,



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