

UNITED STATES GENERAL SERVICES ADMINISTRATION
CIVILIAN BOARD OF CONTRACT APPEALS

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CONFEDERATED TRIBES OF COOS, LOWER)	CBCA 171-ISDA
UMPQUA, AND SIUSLAW INDIANS,)	CBCA 235-ISDA
)	CBCA 236-ISDA
)	CBCA 237-ISDA
	Appellant,)	
	v.)	
)	(formerly IBCA 4724-4727/2005)
INDIAN HEALTH SERVICE, Dr. Charles Grim,)	
Director,)	
)	
	Appellee.)	
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GOVERNMENT-APPELLEE'S SUPPLEMENTAL BRIEF
ON *BOWLES v. RUSSELL*

In accordance with the Board's invitation of June 19, 2007, Appellee, the Indian Health Service ("IHS") submits this memorandum on the Supreme Court's decision in *Bowles v. Russell*, ___ U.S. ___, 127 S. Ct. 2360, 2007 WL 1702870 (June 14, 2007). The rule to be taken from *Bowles* is that time limits mandated in statute by Congress are jurisdictional and courts have no authority to equitably modify them. The decision supports IHS's position that the statutory presentment requirement and associated deadline under the Contract Disputes Act (CDA) are mandatory and jurisdictional and are not subject to equitable modification by the Board. In *Bowles*, the Supreme Court ruled that the courts have no power to extend a party's time for filing an appeal beyond the period allowed by statute.¹ Relevant to this Appeal, the Court in *Bowles* reaffirmed the jurisdictional nature of statutory time limits despite recent court

decisions that have called into question whether time limits are ever properly termed “jurisdictional”. *Id.* at 2365.² The Court held that the “timely filing of a notice of appeal in a civil case is a jurisdictional requirement” and that the Court “has no authority to create equitable exceptions to jurisdictional requirements.” *Id.* at 2366.

The Court differentiates the concept of a jurisdictional statutory time limit, which is not subject to equitable modification, from a court promulgated “claim processing rule,” which is subject to equitable modification, noting:

Jurisdictional treatment of statutory time limits makes good sense. Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.

Id. at 2365. To illustrate an example of a jurisdictional statutory time limit, the Court cites with approval to a footnote from one of its earlier opinions noting that it has already construed 28 U.S.C. § 2107 to include “the type of statutory time constraints that would limit a court’s jurisdiction.” *Id.* at 2365 citing *Kontrick v. Ryan*, 540 U.S. 443, 453 n.8 (2004). Relevant here, however, is that the footnote the *Bowles* Court cites from *Kontrick* also references, as jurisdictional statutory time constraints: (1) the two-year time period to present a tort claim against the United States to the appropriate federal agency under 28 U.S.C. § 2401; and (2) the six-month deadline to file civil action after notice of final denial of the tort claim by the agency

¹ A United States district court had extended the petitioner’s time for filing an appeal under 28 U.S.C. § 2107(c) beyond the 14-day period allowed by statute.

² In this respect, the Court’s decision does appear to contradict the Federal Circuit’s past interpretation of *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). See *Bath Iron Works Corp. v. U.S.*, 20 F.3d 1567, 1572 n. 2 (Fed. Cir. 1994) (“Presumably, therefore, *Irwin*

to which it was presented, also under 28 U.S.C. § 2401. Logically, therefore, the scope of the *Bowles* decision is not limited to the time limit for filing an appeal in federal appellate court. Moreover, presenting a tort claim to the appropriate agency under 28 U.S.C. § 2401 is analogous to presenting a contract claim to the appropriate contracting officer under the CDA.

A United States district court has analyzed *Bowles* in the context of administrative exhaustion under 28 U.S.C. § 2241, noting the difference between exhaustion that is statutorily mandated and exhaustion that is judicially imposed. *See Jones v. Zenk* --- F.Supp.2d ----, 2007 WL 1799683 at *9 (N.D.Ga. 2007) ("The exhaustion requirement imposed in § 2241 cases has judicial, and not statutory, underpinnings. In accordance with Article III, Section 1 of the Constitution, that requirement may not be considered a limitation on the Court's subject-matter jurisdiction. *Bowles*, --- U.S. ----, at ----, 127 S.Ct. 2360, --- L.Ed.2d ----, at ----, 2007 WL 1702870, at *4. Because the exhaustion requirement is judicially fashioned, a court has discretion to waive the requirement in its "sound judicial discretion.") (other citations omitted); *cf. Roxco, Ltd v. U.S.*, --- Fed.Cl. ----, 2007 WL 1805167 at *5 (Fed.Cl. 2007) ("A claim by a contractor against the government or a claim by the government against a contractor, under the CDA, must be "submitted within 6 years after the accrual of the claim." *Id.* § 605(a)."). The CDA's presentment requirement and its built-in time constraint are mandated by statute, and therefore the conclusion that timely presentment is jurisdictional is well-founded, and should be adopted by this Board.

merely holds that those time limits, while jurisdictional, can be equitably tolled in certain circumstances.").

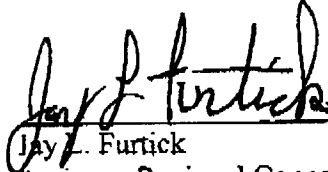
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For the foregoing reasons, *Bowles* provides yet additional support for IHS's motion to dismiss this Appeal.

Date. July 9, 2007.

Respectfully Submitted,



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