

UNITED STATES GENERAL SERVICES ADMINISTRATION  
CIVILIAN BOARD OF CONTRACT APPEALS  
1800 F Street, N.W.  
Washington, D.C. 20405

METLAKATLA INDIAN COMMUNITY,	)	
	)	CBCA 181-ISDA
	)	CBCA 279-ISDA
Appellant,	)	to
	)	CBCA 282-ISDA
v.	)	
	)	
INDIAN HEALTH SERVICE, DEPARTMENT OF	)	(formerly IBCA
HEALTH AND HUMAN SERVICES,	)	4767-4771/2006)
	)	
Appellee.	)	

METLAKATLA INDIAN COMMUNITY'S SUPPLEMENTAL BRIEF  
ON BOWLES v. RUSSELL

Per this Court's request of June 19, 2007, the Metlakatla Indian Community hereby files this supplemental response to the recent ruling issued by the Supreme Court in *Bowles v. Russell*, 551 U.S. \_\_\_, Slip Op. dated June 14, 2007. *Bowles* addressed the question of whether the Federal Rule of Appellate Procedure 4(a) and 28 U.S.C. 2107(c) which set forth the time within which to file an appeal, are jurisdictional and therefore not waivable by a court. The Supreme Court held that because the time frame for filing an appeal is set by statute, it is mandatory and jurisdictional and not subject to equitable waiver.

This ruling is notable for what it does not address. First, it is clearly limited to the issue of the filing of appeals in federal appellate court. Second, the ruling does not address a statute of limitations. The Court does not overrule any case relied upon by the

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.

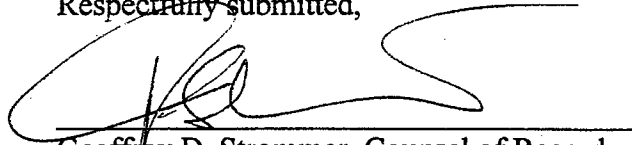
However, the IHS then attempts to attach that mandatory requirement to the six year statute of limitations, to argue that if presentment is mandatory, then so is the deadline for presentment. But the cases are clear--and the Supreme Court's ruling in *Bowles* does not change this clarity--that statute 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. 20, 2006, pp. 27-28, 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,



Geoffrey D. Strommer, Counsel of Record  
Marsha K. Schmidt, Counsel  
Stephen D. Osborne, Counsel

Hobbs, Straus, Dean & Walker, LLP  
806 SW Broadway, Suite 900  
Portland, OR 97205  
(503) 242-1745

June 20, 2007

# HOBBS, STRAUS, DEAN & WALKER, LLP

ATTORNEYS AT LAW

806 SW BROADWAY, SUITE 900, PORTLAND, OREGON 97205

TEL: 503.242.1745 • FAX: 503.242.1072

WWW.HSDWLAW.COM

June 20, 2007

***Via Telefax and Certified Mail***

Administrative Judge Candida Steel  
Civilian Board of Contract Appeals  
1800 F Street, NW  
Washington, DC 20405

***Re: Metlakatla Indian Community v. IHS  
CBCA 181-ISDA; CBCA 279-ISDA to CBCA 282-ISDA***

Dear Judge Steel:

Enclosed please find the original and one copy of the *Metlakatla Indian Community's Supplemental Brief on Bowles v. Russell*, together with a certification that a copy of this letter and the enclosed document has been served upon counsel for the Indian Health Service.

Sincerely,

HOBBS, STRAUS, DEAN & WALKER, LLP

By:

  
Geoffrey D. Strommer

Enclosures

cc: Lisa DeCora, Esq.  
Jocelyn S. Beer, Esq.