



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel

Public Health Division  
Room 4A-53, Parklawn Bldg.  
5800 Fishers Lane  
Rockville, Maryland 20857  
(301) 443-2644  
(301) 443-2639 - Fax

July 10, 2007

By Fax and Mail: (202) 606-0019

The Honorable Candida S. Steel  
Administrative Judge  
Civilian Board of Contract Appeals  
1800 F Street, NW  
Washington, D.C. 20405

Re: Appeals of the Metlakatla Indian Community,  
CBCA Nos. 181-ISDA, 279-ISDA to 282-ISDA  
(Formerly IBCA 4857-2006 to 4861-2006)

Dear Judge Steel:

This letter responds to the Board's invitation to file a supplemental brief discussing the U.S. Supreme Court's decision in Bowles v. Russell. The position of the Indian Health Service was set forth in the brief it filed in Appeals of Arctic Slope, which is attached and has been served on Counsel for the Appellant.

Please accept my apologies for the late response due to an office mix up and the overlapping vacation schedules of co-counsel and myself. I regret any inconvenience this may have caused the Board or Counsel for the Appellant.

Respectfully submitted,

Jocelyn S. Beer  
Counsel for the Government Appellee

enclosure

cc: Lisa M. DeCora  
Geoffrey D. Strommer  
Marsha K. Schmidt  
Stephen D. Osborne

UNITED STATES GENERAL SERVICES ADMINISTRATION  
CIVILIAN BOARD OF CONTRACT APPEALS

ARCTIC SLOPE NATIVE ASSOCIATION,  
LTD.

Appellant,

v.

MICHAEL O. LEAVITT, SECRETARY, U.S.  
DEPARTMENT OF HEALTH AND HUMAN  
SERVICES; CHARLES GRIM, DIRECTOR,  
INDIAN HEALTH SERVICE; UNITED  
STATES OF AMERICA

Appellees.

CBCA Nos. 190-ISDA,

CBCA 289-ISDA thru CBCA 297-ISDA

INDIAN HEALTH SERVICE'S SUPPLEMENTAL  
BRIEF ON BOWLES v. RUSSELL

Per the Board's invitation of June 19, 2007, Appellee 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.<sup>1</sup> 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.<sup>2</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> 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 merely holds that those time limits, while jurisdictional, can be equitably tolled in certain circumstances.”).


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 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. Sarang Corp. v. U.S., --- Fed.Cl. ---, 2007 WL 1530371 at \*4 (Fed.Cl. 2007) ("Under the CDA, a plaintiff must exhaust available administrative remedies by first submitting a "claim" to and obtaining a "final decision" from the contracting officer. See 41 U.S.C. § 605(a)."); 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.

For the foregoing reasons, Bowles provides yet additional support for IHS's motion to dismiss this Appeal, and this Board should enter the order dismissing all of Arctic Slope Native Association Ltd.'s claims.

Respectfully submitted,



Sean Dooley  
Senior Attorney,  
Department of Health and Human Services  
Office of the General Counsel

Date: June 29, 2007