

**UNITED STATES GENERAL SERVICES ADMINISTRATION  
CIVILIAN BOARD OF CONTRACT APPEALS**

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

THE GOVERNMENT’S OBJECTION AND MOTION TO RECONSIDER CONVERSION OF  
DISPOSITIVE MOTIONS TO MOTIONS IN LIMINE

The Appellee Indian Health Service (IHS) hereby objects and moves for reconsideration of the Board’s January 11, 2008 Order indicating that it will treat two questions raised by the parties’ pending dispositive motions as motions in limine. The Order does not state what effect the Board’s decision on the “motions in limine” would have. Insofar as a decision on the “motions in limine” would resolve either question, it would be contrary to CBCA Rules 1(e) and 8(c) which require that dispositive motions be decided by a panel as dispositive motions, and not converted to interim, interlocutory motions. If the decision on the “motions in limine” is instead intended as a preliminary evaluation of the merits to promote settlement, it will likely prove fruitless since the parties are seeking an authoritative decision on the law, not an interim interlocutory decision.

On October 30, 2006, the Government filed a motion to dismiss Appellant’s claims from

fiscal years 1996-1997 for lack of jurisdiction because Appellant did not present its claim within the six years required by 41 U.S.C. § 605(a). *See* Motion to Dismiss at 11-18. The Government also moved to dismiss Appellant's claims from fiscal years 1998-1999 because the statutory cap on the use of appropriations bars awarding additional relief to Appellants. *See* Motion to Dismiss at 18-20. As reflected by the Order, the parties thoroughly briefed these two questions, which, if decided in the Government's favor, would completely dispose of the case.

The Board issued an order dated January 11, 2008,<sup>1</sup> that appears to state that it would treat two issues raised by the Government's pending motion to dismiss as if they were motions in limine. (The Order does not identify the motion at issue, but does state that it will consider timeliness and the effect of the Congressional appropriations caps.)

The common law, including the decisions of the predecessor Interior Board of Contract Appeals, provides that motions in limine are preliminary motions generally made to exclude irrelevant or prejudicial evidence. *See Appeals of Peter Kiewit Sons' Co.*, IBCA No. 3535-95, 2000 WL 1101233 \*7 ("One purpose of a motion in limine is to prevent a party before trial from encumbering the record with irrelevant, immaterial or cumulative matters and thus to make the trial more efficient."). *See also* Rule 10, 41 C.F.R. 6101.10(a) (authorizing the Board to exclude evidence using the Federal Rules of Evidence as guidance). Unlike dispositive motions, a ruling on a motion in limine is preliminary and subject to change. *Appeals of Peter Kiewit Sons' Co.* at \*7. *See also United States v. Luce*, 469 U.S. 38 (1984) (ruling on motion in limine not sufficient

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<sup>1</sup> The Order is dated January 11, 2008, but was received by Counsel for the Government on January 10, 2008.

to preserve objection for appeal because ruling might change during trial). In this case, neither party has moved to exclude evidence. Instead, the pending motion to dismiss primarily concerns questions of law

The Board's rules do not mention motions in limine. However, courts have held that it is improper for litigants to file motions in limine when they are seeking summary judgment or dismissal. *See Natural Resources Defense Council v. Rodgers*, 2005 WL 1388671 n 2 (E.D.Cal.) (“Motions in limine are inappropriate devices for resolving substantive issues”); *Provident Life & Accident Ins. Co v Adie*, 176 F.R.D. 246, 250 (D.Mich.1997) (“Motions in limine are not to be used as sweeping means of testing issues of law”). *See also* 75 Am.Jur 2d *Trial* § 99 (2004) (explaining that motions in limine are improper vehicles to raise motions for summary judgment or motions to dismiss) The Government was unable to locate a case where a *court* properly converted a motion for summary judgment or motion to dismiss into a motion in limine *sua sponte*. Therefore, we are unaware of any procedural basis to treat the pending motion to dismiss as a motion in limine.

A motion that raises the defenses of the statute of limitations and the Congressional cap on appropriations remains a dispositive motion even if it is styled a “motion in limine.” The Government's pending motion to dismiss asserts that the Board lacks jurisdiction to grant the relief requested by the Appellant. CBCA Rule 8(c)(1) provides that “[t]he following dispositive motions may properly be made before the Board: ... Motions to dismiss for lack of jurisdiction or for failure to state a claim upon which relief can be granted.” 41 C.F.R. § 6101 8(c)(1). The Board's rules further provide that dispositive motions “are decided for the Board by a majority of

the panel.” CBCA Rule 1(e), 41 C.F.R. § 6101.1(e). Anything less than a panel ruling on the issues raised by the motion to dismiss would be contrary to the Board’s rules.

The Order appears to contemplate issuing preliminary rulings as settlement guidance, with final rulings to be issued later. The Government respectfully reminds the Board that neither party requested this treatment. Both parties filed dispositive motions instead of negotiating settlement because they are seeking an authoritative decision on the issue of timeliness.

Appellant asserts that the six year period to present its claims was tolled, and the Government responds that tolling is unavailable under the statute and unwarranted by the facts. On the issue of the caps, the Government submits that the Federal Circuit has already resolved this issue in the Government’s favor in *Babbitt v. Oglala Sioux Tribal Public Safety Dept.*, 194 F.3d 1374 (1999).

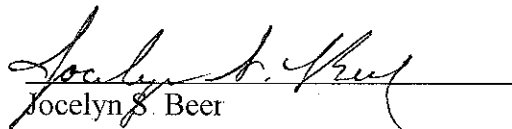
An interim ruling adverse to the Government on either issue is thus unlikely to promote settlement, but instead could needlessly prolong the proceedings.

For these reasons, the Government respectfully requests that the Board reconsider its Order dated January 11, 2008, and requests that a three judge panel decide the fully briefed motion to dismiss in accordance with the Board’s rules.

Pursuant to Rule 8(a), 41 C.F.R. §6101.8(a), Counsel for the Government has conferred with Counsel for Appellant and is authorized to say that the Appellant does not join the Government's Objection.

Respectfully submitted,

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