

**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.)	
)	

**NOTICE OF SUPPLEMENTAL AUTHORITY AND
RESPONSE TO APPELLANT’S NOTICE OF SUPPLEMENTAL AUTHORITY**

The Government Appellee Indian Health Service (IHS) hereby gives notice of additional authority issued since oral argument and the close of briefing on its Motion to Dismiss and Cross Motion for Partial Summary Judgment, and responds to Appellant’s Notice of Supplemental Authority filed on January 14, 2008

In support of its Motion to Dismiss, the Government cited the Federal Circuit decision in *John R Sand & Gravel v United States*, 457 F.3d 1345 (Fed. Cir. 2006), to support its position that the Contract Disputes Act (“CDA”) is not subject to tolling considerations. (Appellee’s Reply to Appellant’s Response to Motion to Dismiss at 7-8.) Appellant had urged the Board to look to the Tucker Act when deciding whether the CDA’s six-year presentment period could be tolled. (Appellant’s Response to the IHS Motion to Dismiss at 27.) Indeed, Appellant argued that Congress specifically modeled the six-year limitation period in the CDA after the Tucker Act

and the interpretation of that statute is relevant to determining whether tolling is applicable under the CDA. (*Id.*) (“The general statute of limitation in 28 U.S.C. § 2501 was on Congress’s mind when drafting the CDA and the interpretation of that statute is relevant here. *See, e.g.* H.R. Rep. 95-1556 at 12-13 (1978).”)

The United States Supreme Court recently affirmed the Federal Circuit’s holding that the six year period under the Tucker Act is jurisdictional, and may not be waived. *John R. Sand & Gravel Co. v. United States*, 552 U.S. ___, 2008 WL 65445 (January 8, 2008). In rejecting the petitioner’s argument that the Tucker Act should be subject to waiver, the Court recognized that some statutes of limitations “seek not so much to protect a defendant’s case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims... limiting the scope of a governmental waiver of sovereign immunity, *see, e.g., United States v. Dalm*, 494 U.S. 596, 609-610 (1990), or promoting judicial efficiency, *see, e.g., Bowles v. Russell*, 551 U.S. ___, ___ - ___ (2007) (slip op., at 7-8)” *Id.*, 552 U.S. at ___, 2008 WL 65445, *3. For these statutes, the Court “has often read the time limits ... as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period.” *Id.* (citing *Bowles v. Russell* and *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)). As “convenient shorthand,” the Court “has sometimes referred to the time limits in such statutes as ‘jurisdictional.’” *Id.* (citation omitted). For the Tucker Act, “This Court has long interpreted the court of claims limitations statute as setting forth this second, more absolute kind of limitations period.” *Id.*

The Supreme Court cited *Kendall v. United States*, 107 U.S. 123 (1883), and *Finn v. United States*, 123 U.S. 227 (1887), to illustrate the long history interpreting the court of claims limitations statute (28 U.S.C. § 2501) as absolute, and not subject to tolling. *John R. Sand & Gravel*, 552 U.S. at ___, 2008 WL 65445 at *4-5. The Court also reviewed other cases decided after *Kendall* and *Finn*, where it reiterated the absolute nature of the Tucker Act's limitations period. *Id.* at *4-6. See e.g. *Soriano v. United States*, 352 U.S. 270 (1957). Importantly, the Supreme Court held that this precedent was not overturned by its decision in *Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89 (1990). *John R. Sand & Gravel*, 552 U.S. at ___, 2008 WL 65445 at *5. This decision removes any doubt that the Tucker Act "forbid[s] a court to consider whether certain equitable considerations warrant extending [its] limitations period." *Id.* at *3. If Appellant is correct that Congress contemplated the Tucker Act when enacting the CDA, this decision supports the Government's Motion to Dismiss.

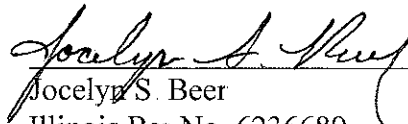
In Appellant's Notice of Supplemental Authority filed on January 14, 2008, Appellant cited two decisions from the Court of Federal Claims as authority for the proposition that 28 U.S.C. § 2501 may be equitably tolled. *Athey v. United States*, 78 Fed. Cl. 157 (2007); *Solow v. United States*, 78 Fed. Cl. 86 (2007). However, these two recent decisions now must be viewed in light of the Supreme Court's decision in *John R. Sand & Gravel*. There, the Supreme Court made it quite clear that the Tucker Act's limitation period is absolute and, therefore, not subject to equitable considerations. Since the opinions in *Athey* and *Solow* are irreconcilable with that decision, they do not add any relevant supplemental authority.

The third case cited by Appellant, *GHS Health Maintenance Organization, Inc. v. United*

States, 76 Fed. Cl. 339 (2007) (on appeal No. 07-5143), is contrary to binding Federal Circuit precedent. See *Whittaker Elec. Sys. v. Dalton*, 124 F.3d 1443, 1446 (Fed. Cir. 1997); *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1563 (Fed. Cir. 1990); *Do-Well Mach. Shop, Inc. v. United States*, 870 F.2d 637, 641 (Fed. Cir. 1989); *E. Walters & Co. v. United States*, 576 F.2d 362, 368 (Cl. Ct. 1978). It also conflicts with other decisions of the Court of Federal Claims. See *ConocoPhillips v. United States*, 73 Fed. Cl. 46, 56-58 (2006), *aff'd in pertinent part* by 501 F.3d 1374, 1378-80 (Fed. Cir. 2007); *Mexican Intermodal Equip., S A de C V. v. United States*, 61 Fed. Cl. 55, 70 (2004); *Flink/Vulcan v. United States*, 63 Fed. Cl. 292, 307-08 (2004), *aff'd on other grounds*, No. 05-5048, 2006 WL 222995 (Fed. Cir. Jan. 12, 2006); *Hermes Consol, Inc. v. United States*, 58 Fed. Cl. 409, 417 (2003), *rev'd on other grounds sub nom., Tesoro Haw. Corp v. United States*, 405 F.3d 1339 (Fed. Cir. 2005); *PCL Const. Servs., Inc. v. United States*, 41 Fed. Cl. 242, 252 (1998), *aff'd on other grounds*, No. 03-5060, 2004 WL 842984 (Fed. Cir. Apr. 7, 2004); *Reservation Ranch v. United States*, 39 Fed. Cl. 696, 712 (1997), *aff'd on other grounds*, 217 F.3d 850 (Fed. Cir. Sept. 9, 1999) (unpublished mem.); *Aleutian Constructors v. United States*, 24 Cl. Ct. 372, 384 (1991); *Appeal of USD Techs., Inc.*, ASBCA No. 31305, 1987 WL 40766 (Mar. 12, 1987), *aff'd without opinion*, (Fed. Cir. Feb. 3, 1988). For these reasons, the Board should disregard *GHS Health*.

Respectfully submitted,

January 30, 2008



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