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February 1, 2008

***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 Response to the Government-Appellee's Notice of Supplemental Authority*, 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: Jocelyn S. Beer, Esq.

## Certificate of Service

I hereby certify that on this 1<sup>st</sup> day of February, 2008, a copy of the *Metlakatla Indian Community's Response to the Government-Appellee's Notice of Supplemental Authority* was served via telefax and USPS certified mail upon the following:

Jocelyn S. Beer, Counsel  
DHHS – Office of the General Counsel  
Public Health Division  
5600 Fishers Lane, Room 4A53  
Rockville, MD 20857



Geoffrey D. Strommer

February 1, 2008

**UNITED STATES CIVILIAN BOARD OF CONTRACT APPEALS**

1800 F Street, N.W.  
Washington, D.C. 20405

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

**METLAKATLA INDIAN COMMUNITY'S RESPONSE TO THE  
GOVERNMENT-APPELLEE'S NOTICE OF SUPPLEMENTAL AUTHORITY**

On January 30, 2008, the Indian Health Service ("IHS") filed a notice of supplemental authority regarding the recent Supreme Court ruling in *John R. Sand & Gravel v. United States*, 552 U.S. \_\_\_, 2008 WL 65445 (Jan. 8, 2008). In this case, the Supreme Court affirmed a Federal Circuit holding that the statute of limitations in the Tucker Act, 28 U.S.C. §2501 cannot be waived, and the timeliness of suits in the Court of Federal Claims may be raised *sua sponte* by the court. In that same brief, the IHS answered the supplemental authorities filed by the Tribe on January 14, 2008. We will answer each in turn.

A. Tolling. Given the number of cases cited and supplemental authorities that have now been provided to the Board regarding tolling, we think that it is useful to summarize the argument presented in this case by the Tribe in support of its position.

1. Legal Tolling. The primary argument being relied upon by the Tribe is that a class action tolls a statute of limitations. This tolling is legal and mandatory. For this proposition the Tribe has cited to two Supreme Court cases, *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974); *Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983). As further support we cited to *Stone Container Corp. v. United States*, 229 F.3d 1345 (Fed. Cir. 2000).<sup>1</sup> In *Stone Container*, the Court discussed *Irwin* and *Brockamp* and equitable tolling, *id.*, at 1352-54. However, the Federal Circuit ultimately held that class action tolling is not equitable, but rather it is mandated by statute. *Id.* at 1354. This ruling was applied to a statute of limitations for tax suits, which the court defined as constituting a waiver of immunity. *Id.* at 1352. We also relied on a ruling in *Barbieri v. United States*, 15 Cl. Ct. 747 (1988), which addressed legal class action tolling and its interplay with 28 U.S.C. §2501. Relying on *American Pipe*, the court held that §2501 was legally tolled. *Id.* at 751. We also filed a notice of supplemental authorities discussing several recent rulings that apply the legal tolling principle--*Solow v. United States*, 78 Fed. Cl. 86 (2007) and *Athey v. United States*, 78 Fed. Cl. 157 (2007). In *Solow*, the Court refers to equitable tolling under *Irwin*, but ultimately relies on the *American Pipe* class action tolling precedent. 78 Fed. Cl. at 88-89. *Athey* did likewise. 78 Fed. Cl. at 160 (citing *Barbieri, supra*).

The IHS argues that these recent authorities are irreconcilable with the *John R. Sand & Gravel* ruling. To the contrary, *John R Sand & Gravel* does not in any way

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<sup>1</sup> We also cited *Joseph v. Wiles*, 223 F.3d 1155, 1166-67 (10th Cir. 2000) (legal tolling occurs in class actions); *Schimmer v. State Farm Mutual Automobile Ins. Co.*, 2006 WL 2361810 at \*4 (D. Colo. 2006) (class action tolling is a form of legal rather than equitable tolling); *In re Discovery Zone Securities Litigation*, 181 F.R.D. 582, 600, n.11 (N.D. Ill. 1998) (same); *Salkind v. Wang*, 1995 WL 170122, at \*3 (D. Mass. 1995) (same); *Mott v. R.G. Dickinson and Co.*, 1993 WL 63445 at \*5 (D. Kan. 1993) (same).

impact these holdings since that case dealt with *equitable* tolling, not legal tolling. *American Pipe* and *Crown, Cork* are still good law. This distinction is important, because as the Federal Circuit in *Stone Container, supra*, held, legal tolling is not based in equity.

So far, the IHS has not presented any case law that refutes the law set forth in any of these cases—that as a matter of law the filing of a class action legally tolls a statute of limitations.<sup>2</sup>

2. Equitable Tolling. The case of *John R. Sand & Gravel* goes to equitable tolling. The Tribe has taken the position that if this Board finds that a class action does not legally toll the limitations period, then in the alternative, the Board should hold that the equitable tolling analysis in the *Irwin/Brockamp* line of cases applies to the facts on hand. The argument is straightforward—that under the *Irwin* test, nothing in the statutory language or history of the Contract Disputes Act (“CDA”) or the Indian Self-Determination and Education Assistance Act (“ISDEAA”) rebuts the presumption that the statute of limitations can be tolled. We later filed a supplemental authority, *Kirkendall v. Dep't of the Army*, 479 F.3d 830 (Fed. Cir. 2007), in which the Federal Circuit applied the *Irwin* presumption and held that the statute of limitations period was tolled, despite the government’s argument that the time period was “mandatory and jurisdictional.” See Tribe's Supplemental Brief on New Authority (March 23, 2007).

This Board later asked the parties to address the recent Supreme Court decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), which held that a jurisdictional time limit for filing an appeal was not subject to equitable waiver. We pointed out that the limitations

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<sup>2</sup> IHS avoids addressing this issue head on and instead focuses on the requirement to exhaust administratively, but that is a separate point that we do not discuss here.

period at issue in that case was held to be jurisdictional. No such holding has been made as to the CDA provision at issue in this appeal, 41 U.S.C. §605.

Now, in the *John R. Sand & Gravel* decision, the Supreme Court, affirming a ruling of the Federal Circuit, has held that §2501 is jurisdictional and may not be *equitably waived* by the government. 2008 WL 65445 at \*2; 457 F.3d at 1355. In so doing, the Supreme Court did not overrule the *Irwin* test but rather relied largely on *stare decisis*. The Court held that §2501 has long been considered by the Court to be jurisdictional and not subject to equitable waiver, citing cases back to 1883. In addressing *Irwin*, the Court acknowledged the presumption of waivability, but it read *Irwin* as a “prospective rule, which does not imply revisiting past precedents.” 2008 WL 65445 at \*5 (citation omitted). In other words, *Irwin* did not overrule prior cases interpreting §2501 as not subject to tolling. Importantly, however, the court further acknowledged that other statutes could be read differently under *Irwin*, and that this case was decided based on the longstanding interpretation of §2501 by the Court. The Court made clear: “Any anomaly the old cases and *Irwin* together create is not critical; at most, it reflects a different judicial assumption about the comparative weight Congress would likely have attached to competing legitimate interests. Moreover, the earlier cases lead, at worst, to different interpretations of different, but similarly worded statutes, they do not produce ‘unworkable’ law.” *Id.* at \*6.

Thus, the Supreme Court was very careful to say that *Irwin* continues to apply and that under the *Irwin* presumption, other statutes may fare differently. Justice Ginsberg noted in her dissent that because of the majority's use of *stare decisis* for this one statute, other statutes, although nearly identical, such as 28 U.S.C. §2401, may be construed

differently under *Irwin*. 2008 WL 65445 at \*10. The majority did not disagree, but rather acknowledged that anomaly in the text quoted above.

The Supreme Court was also very careful to make clear in the *John R. Sand & Gravel* decision that the “jurisdictional” label is only a “convenient shorthand” for statutes “more absolute” than ordinary statutes of limitations. 2008 WL 65445 at \*3. This clarification of the Court’s understanding of the use of the term “jurisdictional” when examining statutes of limitations refutes the IHS’s reading of the *Bowles* case that all statutory time limits are “jurisdictional” and thus cannot be tolled.<sup>3</sup>

Of course, 41 U.S.C §605 has never been interpreted by the Supreme Court to permit or deny tolling. There are no prior precedents directly on point that suggest §605 is jurisdictional. While IHS quotes at length *John R Sand & Grave ’sl* discussion of the factors that suggest a statute of limitations is jurisdictional, the IHS does not explain how these factors render §605 jurisdictional or subject to the same interpretation as the Tucker Act. The fact is that the Court was quite clear that each statute is judged on its own language and history. The Supreme Court’s narrow ruling does not mean that the *Irwin* test would not otherwise apply to judge whether §605 may be tolled. The history of 28 U.S.C. §2501 is not the history of §605 and does not control its interpretation.

In our prior discussions of and citations to §2501, we argued that §2501 is a useful reference point for assessing the legislative history on whether §605(a) can be equitably tolled. We noted that in 1994, at the time the limitation period was added to §605, Congress discussed §2501 as a reference point to set the parameters of the statute of limitations. At that time, there was existing case law that the limitations period set

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<sup>3</sup> See Government-Appellee’s Supplemental Brief on *Bowles v. Russell* at 1 (“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.”)

forth in §2501 could be *legally* tolled. *See, e.g., Barbieri, supra.* The Court in *Irwin* suggested that the court had overruled *Soriano* and the other older cases that had held §2501 could not be *equitably* tolled.<sup>4</sup> The Supreme Court has now said in the *John R. Sand & Gravel* decision that *Irwin* did not overrule *Soriano* and other cases that held §2501 could not be *equitably* tolled. Even so, when enacted, *Irwin* was the ruling on the books. We argued that Congress had the opportunity to make §605 different from §2501; that is, it could have taken steps to prevent the application of tolling, but it did not do so. The fact is that Congress did not make it clear when it amended §605 that *Irwin*'s presumption does not apply. Being silent in the face of the precedents that were in place at the time §605 was being amended has meaning when examining the legislative history. Whatever the explanation, it is clear that Congress made no effort in 1994 to rebut the presumption of tolling as required under the *Irwin/Brockamp* analysis.

Under these facts and circumstances, the *John R. Sand & Gravel* decision supports the Tribe's analysis of §2501, leaves the *Irwin* test for assessing §605 intact, and says nothing at all about legal tolling.

B. Supplemental Authorities. We discuss IHS's response to *Athey* and *Solow* above at p. 2. We filed the *GHS Health Maintenance Organization, Inc. v. United States*, 76 Fed. Cl. 339 (2007) (on appeal No. 07-5143) case as a supplement to our argument that statutory rights cannot be waived by contract. In response, IHS provides a dense string cite in opposition without explanation. Some of these cases have been cited by the parties in their previous submissions. *See, e.g., Whittaker, Hermes, and Tesaro.* Others

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<sup>4</sup> *See Irwin*, 498 U.S. 89, 98 (1990) (White J., concurring in part and concurring in the judgment) (complaining that the majority “directly overrules a prior decision by this court, *Soriano v. United States*”). The majority opinion did not dispute Justice White's assertion; indeed, it expressly called *Soriano* into question. *Id.* at 95.

appear to be new citations to old cases that were available to the IHS at the time of the original briefing. It seems to us that if these cases were relevant to our argument at the time, they should have been brought forward substantively and discussed fully. To provide a long list of cases, some cases cited date back 20 years, at this late date in response to a newly decided supplemental authority without discussion is inappropriate at this stage and we believe this string cite should be stricken or disregarded by the Board.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'G. Strommer', is written over a horizontal line. The signature is stylized and somewhat cursive.

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