

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.

Appellant,

v.

Charles E. Johnson,
ACTING SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellee.

Appeal from the Civilian Board of Contract Appeals in case nos. 289-ISDA
through 293-ISDA, Administrative Judge Candida S. Steel.

**REPLY BRIEF OF APPELLANT
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CERTIFICATE OF INTEREST

Counsel for the Appellant Arctic Slope Native Association, Ltd. certifies the following:

1. The full name of every party or amicus represented by me is:

Arctic Slope Native Association, Ltd.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

N/A

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or agency or are expected to appear in this court are:

Sonosky, Chambers, Sachse, Miller & Munson, LLP; Lloyd B. Miller; Donald J. Simon; Arthur Lazarus, Jr., of counsel; Peter G. Ashman, of counsel; Melanie B. Osborne; Vanessa L. Ray-Hodge; Hilary V. Martin; Michael E. Douglas

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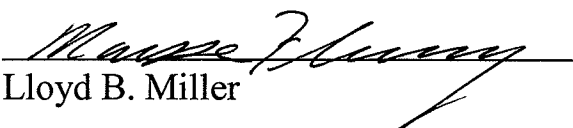

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STATEMENT OF RELATED CASES

1. There are presently three appeals pending before this Circuit that involve identical issues concerning the tolling of the six year statute of limitation for Indian tribal contractors to present “contract support cost” damage claims to an agency contracting officer under the Indian Self-Determination Act, 25 U.S.C. §§ 450-458bbb-2, and the Contract Disputes Act, 41 U.S.C. §§ 601-613:

- (a) *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Mike Leavitt, Secretary of Health & Human Services*, No. 2008-1607 (appeal docketed Sept. 30, 2008);
- (b) *Metlakatla Indian Community v. Mike Leavitt, Secretary of Health & Human Services*, No. 2009-1004 (appeal docketed Oct. 6, 2008).
- (c) *Ramah Navajo School Board, Inc. v. United States*, No. 2009-5016 (appeal docketed Nov. 25, 2008).*

2. There are also currently pending before the United States Civilian Board of Contract Appeals approximately 22 appeals by Indian tribal contractors in which the identical tolling issue presented in this appeal is also presented. As of the filing of this brief, all proceedings in those cases have remained stayed pending the disposition of this appeal.

* This is a new appeal. Although the CFC dismissed this action under 28 U.S.C. § 1500, in *dictum* it also ruled the claims time-barred under the Contract Disputes Act. *Ramah Navajo School Board, Inc. v. United States*, 83 Fed. Cl. 786, 796-800 (2008).

ARGUMENT

I. IHS HAS FAILED TO MEET ITS HIGH BURDEN OF OVERCOMING IRWIN'S PRESUMPTION IN FAVOR OF TOLLING

A. Irwin's Tolling Presumption Cannot Be Displaced Merely by Labeling a Statute "Jurisdictional"

1. IHS's argument against tolling boils down to labeling: by insisting that (a) "jurisdictional" statutes can never be tolled because their limitations are a condition on the government's sovereign immunity waiver, and (b) the six year presentment period in 41 U.S.C. § 605(a) is "jurisdictional," IHS reaches the conclusion that (c) section 605(a) cannot be tolled.

IHS's conclusion is wrong because its starting assumption is wrong. The Supreme Court in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990), squarely held that a statute of limitations is presumptively subject to tolling even though it is part of the government's waiver of sovereign immunity and is in that sense "jurisdictional":

Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver.

See also Scarborough v. Principi, 541 U.S. 401, 421 (2004) (same); *Kirkendall v. Department of the Army*, 479 F.3d 830, 836 (Fed. Cir. 2007) (en banc) (same, quoting

Irwin). As this Court has observed, “jurisdictional” statutes of limitation that are part of the government’s sovereign immunity waiver are necessarily controlled by *Irwin*’s tolling presumption:

It is well established that statutes of limitations for causes of action against the United States, being conditions on the waiver of sovereign immunity, are jurisdictional in nature. As the Supreme Court has explained, however, that does not mean that courts may never recognize equitable tolling of statutory limitations periods in suits against the government. Instead, the Court has made clear that whether equitable tolling is available in suits against the Government turns on congressional intent, i.e., whether Congress intended the particular statute at issue to be subject to tolling and, if so, under what circumstances.

Martinez v. United States, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (internal citations omitted; emphasis added). *See also Bath Iron Works Corp. v United States*, 20 F.3d 1567, 1572 n.2 (Fed. Cir. 1994) (noting, with reference to the time limits in § 609(a) of the CDA, “*Irwin* merely holds that those time limits, while jurisdictional, can be equitably tolled in certain circumstances”).

2. Contrary to IHS’s assertion that “the ground has shifted” under *Irwin* (IHS Br. at 13), the two Supreme Court cases IHS cites in support of that claim actually acknowledge the *Irwin* tolling presumption by faithfully applying it.

For instance—and far from abandoning *Irwin*—the Court in *John R. Sand & Gravel Co. v. United States*, ___ U.S. ___, 128 S. Ct. 750, 755 (2008), reaffirms *Irwin*

by noting that its presumption in favor of tolling is “a more general rule” than “our prior ad hoc approach” for determining when tolling applies. The Court makes clear that the tolling presumption has utility in producing statutory interpretations “that will more accurately reflect Congress’ likely meaning” as to whether a limitations period should be subject to tolling. *Id.* at 756.

Thus, under *Sand*, just as it was under *Irwin*, the touchstone in the analysis is not the label “jurisdictional” (as IHS would have it), but congressional intent—and specifically a congressional intent to overcome the tolling presumption, for Congress always “may provide otherwise if it wishes to do so.” *Irwin*, 498 U.S. at 96. In *Sand*, the Court found that a Congressional intent to overcome the *Irwin* presumption could be demonstrated either by “[s]pecific statutory language” or by “a definitive earlier interpretation of the statute, finding similar congressional intent.” 128 S. Ct. at 756. Ultimately, the Court in *Sand* found precisely such “a definitive earlier interpretation” of 28 U.S.C. § 2501 in the Court’s prior decisions, and for reasons of stare decisis the Court declined to revisit those decisions. *Id.* at 756-757.

Far from marking a “shift[]” away from *Irwin*, *Sand* reflects a faithful application of it. It also illustrates *Irwin*’s force—that the starting presumption is always in favor of tolling, and that in each statutory setting the burden is then on the government to rebut the presumption and demonstrate that Congress clearly intended

to deny tolling, either by something pellucid in the language of the statute or by a “definitive earlier interpretation” of it.

Sand also illustrates the error in IHS’s repeated substitution of the label “jurisdictional” for reasoned analysis. Although § 2501 is plainly “jurisdictional,” the Court in *Sand* never stated that this automatically meant that § 2501’s limitations period could not be tolled. Indeed, the Court was dismissive of the label “jurisdictional,” calling it just a “convenient shorthand” that the Court “sometimes” uses to describe the “more absolute” types of limitations statutes where tolling is not permitted. *Id.* at 753-754. In other words, the term “jurisdictional” has utility in describing the results when the *Irwin* tolling presumption is rebutted, but it has no utility in supplanting the *Irwin* test, much less substituting for a reasoned examination into congressional intent.

Bowles v. Russell, 551 U.S. 205, 127 S. Ct. 2360 (2007), is the only other Supreme Court decision IHS advances to demonstrate that somehow the ground has “shifted” under *Irwin*. But that case involved a statute fundamentally different from the statutes of limitation at issue in *Irwin* or *Sand*, or the one at issue here. *Bowles* addressed whether tolling applies to the appellate timing-of-review provision of 28 U.S.C. § 2107 (which governs the time for taking an appeal from a district court to a court of appeals). *Id.* at 2363. As in *Sand*, the Court relied on a long line of prior

interpretations to conclude that it “has long held” § 2107 is not subject to equitable exceptions. *Id.* In so holding, the Court reaffirmed longstanding principles regarding appellate filing deadlines stretching back nearly 160 years. *Id.* at 2364 (discussing, *inter alia*, *United States v. Curry*, 47 U.S. (6 How.) 106 (1848)). Nothing in *Bowles* even remotely suggests the Court *sub silencio* rejected *Irwin* and its progeny.

3. That there is a presumption in favor of tolling, and that the government bears the burden of showing a congressional intent to overcome that presumption and bar tolling, are propositions only confirmed by the Supreme Court’s subsequent formulation of the *Irwin* presumption in *United States v. Brockamp*, 519 U.S. 347 (1997). There, the Court restated “*Irwin*’s negatively phrased question: Is there good reason to believe that Congress did *not* want the equitable tolling doctrine to apply?” *Id.* at 350 (emphasis in original). IHS itself quotes this passage, but then improperly reverses its meaning by flipping the test, saying: “In reality, there is just one ‘*Brockamp* factor’—whether Congress intended for equitable tolling to apply.” IHS Br. at 18. That gets the controlling test exactly backwards, for it is clear from the express terms of the Supreme Court’s “negatively phrased question” that the issue is whether there is reason to believe Congress did not want tolling to apply, not whether there is affirmative evidence that Congress did. *See also Kirkendall*, 479 F.3d at 836 (“[W]e look to the *Brockamp* factors to determine whether Congress expressed a

‘clear intent’ that equitable tolling not apply”) (emphasis added); *Bailey v. West*, 160 F.3d 1360, 1368 (Fed. Cir. 1998) (en banc) (tolling presumption applies “absent a clear contrary intent of Congress”).

In sum, the ground under *Irwin* remains firm; it has not “shifted” one bit.

B. There is No Reason to Believe Congress Did Not Want Tolling to Apply to Section 605(a)

1. The statute at issue here—§ 605(a) of the Contract Disputes Act—could not be more unlike the statutes at issue in *Sand* and *Bowles*. First, and most significantly, here there is no precedent—much less any “definitive” Supreme Court precedent, much less a long line of such precedent—that has held § 605(a)’s statute of limitations to be exempt from tolling. So much for the direct application of *Sand* and *Bowles*.

Second, no other indication exists that Congress intended § 605(a)’s time limit for presenting claims to a contracting officer to be so “absolute” as to override the *Irwin* presumption that it is subject to tolling. ASNA Br. at 37-46. When IHS finally turns to the *Brockamp* test in search of such indicia, IHS fails to meet its burden. Indeed, IHS’s main argument on congressional intent does not even address § 605(a); instead, IHS focuses on an entirely different statute—§ 2501 (the one at issue in

Sand). But this case concerns § 605(a), not § 2501, and the fact that the latter cannot be tolled tells us nothing about the former.

IHS's reasoning consists of little more than pointing out that § 605(a), like § 2501 (and like 28 U.S.C. § 2401, too) all have six year limitations periods. IHS Br. at 18-19. For IHS, this similarity among the three statutes, standing alone, is sufficient to constitute "a comprehensive statutory scheme," *id.* at 18, "part of the same framework," *id.* at 19, and a "complementary statutory scheme," *id.* at 20, and therefore that § 605(a) "is intended to dovetail" with the other two statutes. *Id.* at 19. On this basis alone, IHS concludes that "Congress intended to preclude tolling here." *Id.* That is quite a stretch, and much as Justice Breyer wrote in *Sand*, "these few swallows cannot make [IHS's] summer." 128 S. Ct. at 755.

And for much the same reason: in *Sand* the Court said that § 2501 was not subject to tolling even though in *Irwin* it had held that another limitations period was. *Sand*, 128 S. Ct. at 756-757. The holding in *Irwin* was not controlling in *Sand* precisely because "*Irwin* dealt with a different limitations statute." *Id.* at 755. So too here, *Sand* is not controlling on § 605(a), because *Sand* "dealt with a different limitations statute." The happenstance that § 605(a) and § 2501 both refer to six year periods says nothing about whether, when enacting § 605(a), Congress intended to bar tolling. Indeed, under IHS's reasoning, every six year statute of limitations for

