IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2008-1607, 2009-1004

CONFEDERATED TRIBES OF COOS, LOWER UMPQUA,
and SIUSLAW INDIANS,

Appellant,

v.

Mike Leavitt, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellee.

METLAKATLA INDIAN COMMUNITY,

Appellant,

v.

Mike Leavitt, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellee.

Appeals from the Civilian Board of Contract Appeals in case nos. 235-ISDA, 236-ISDA, 280-ISDA, and 281-ISDA, Administrative Judge Candida S. Steel.

BRIEF *AMICUS CURIAE* OF THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF APPELLANTS AND FOR REVERSAL OF THE DECISIONS BELOW

John Dossett
General Counsel
National Congress of American Indians
1301 Connecticut Ave., N.W., Suite 200
Washington, DC 20036

Michael P. Gross
(Counsel of record)
M.P. Gross Law Firm, P.C.
460 St. Michael's Drive, Suite 401
Santa Fe, New Mexico 87505

Daniel H. MacMeekin
(Of counsel)
1776 Massachusetts Avenue, NW, Suite 801
Washington, DC 20036

CERTIFICATE OF INTEREST

Counsel for Amicus certify the following:

1. The full name of the Amicus represented by the undersigned is the National Congress of American Indians (NCAI). There is no other real party in interest

2. Amicus NCAI is a non-profit organization. NCAI has no parent corporation and, as it has no stock, no publicly held company owns 10 percent or more of its stock

3. The names of the law firms, partners and associates who have appeared for Amicus or who are expected to appear are:

M.P. Gross Law Firm, PC

Michael P. Gross

Dan MacMeekin, Attorney at Law

Daniel H. MacMeekin

John Dossett

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STATEMENT OF *AMICUS CURIAE* INTEREST

The National Congress of American Indians (NCAI) was founded in 1944 and is the largest tribal government organization in the United States. NCAI serves as a forum for consensus-based policy development among its over 250 member tribal governments from every region of the country. NCAI's mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights and a broad range of federal policy issues affecting tribal governments. NCAI participated in settlement in the Ramah contract support cost class action under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq*. (ISDA). *RNC v. Babbitt*, 50 F.Supp. 2d 1091, 1095 (D.N.M. 1999).

NCAI submits this brief with the consent of all parties to this appeal to help the Court understand the questions presented in a broader context framed by the specific history of the ISDA and the national policy of tribal self-determination. Full payment of contract support costs to Indian tribes under ISDA contracts has been in controversy since ISDA became law in 1975 and remains a top priority of NCAI. NCAI supports the position of the Appellants Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians and the Metlakatla Indian Community ("the Tribes") and urges reversal of the decisions of the Civilian Board of Contract Appeals below.

INTRODUCTION

In March 1999, the Cherokee Nation of Oklahoma filed a complaint in federal district court in Oklahoma alleging that contract support costs had not been paid in ISDA contracts administered by the Indian Health Service. The complaint requested class certification. The Appellants in this appeal were members of the putative class. When the Cherokee Nation filed its complaint, its lawyers notified tribes and tribal leaders throughout the Nation of its intent to pursue these claims on their behalf through the class action. *See* Addenda.

Previously, the Tribes had been unnamed class members in a certified class action alleging that contract support costs had not been paid on ISDA contracts administered by the Bureau of Indian Affairs. That action had been successful, and the Tribes had received their share of damages paid in settlement. *Ramah Navajo Chapter v. Lujan,* 112 F.3d 1455 (10th Cir. 1997); U.S. Dep't of Interior, Bureau of Indian Affairs, *Notice of Publication of Final Share Percentage Schedule: Ramah Navajo Chapter v. Bruce Babbitt*, 65 Fed. Reg. 70580, 70582 (Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians), 70584 (Metlakatla Indian Community) (2000).

In short, the Tribes, like other tribes throughout the nation, had every reason to rely on the *Cherokee* class action to vindicate their claims against the IHS.

In February 2001, the district court denied class certification in the *Cherokee* case. *Cherokee Nation v. United States*, 199 F.R.D. 357, 366 (E.D. Okla.). The Cherokee Nation went on to win its case, ultimately through a unanimous landmark decision of the United States Supreme Court. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 634 (2005).

Under the Supreme Court's rulings in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), Rule 23 of the Federal Rules of Civil Procedure—carrying the force of a statute[1]—requires that statutes of limitations for initiating other litigation be tolled during the pendency of a class action. The question presented here is whether anything in the remedial provisions of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* ("ISDA"), or in that Act's incorporation by reference of Contract Disputes Act remedies makes Rule 23 tolling inapplicable to administrative presentment of claims by ISDA contractors.

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[1] *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988). For the sake of convenience, this brief occasionally refers to Rule 23 as a statute.

The Civilian Board of Contract Appeals ("CBCA") ruled below that the administrative presentment requirement in the Contract Disputes Act, 41 U.S.C. § 605, is not subject to Rule 23 tolling. The net effect of the CBCA rulings is to categorically preclude Appellants from having their day in court on their claims that they too were unlawfully underpaid contract support costs due from the Indian Health Service ("IHS") in the very same years, and under the very same circumstances, that had been vindicated by the Supreme Court's *Cherokee* decision.

The Indian Self-Determination Act. Federal policy with respect to the Indian Tribes has passed through many phases over the course of American history. *See*, *e.g*., *United States v. Lara*, 541 U.S. 193, 201-204 (2004). The enactment of ISDA in 1975 marked the radical reversal of a dismal period in tribal relations, characterized at best as an enervating federal paternalism and at worst by an express policy of terminating the legal recognition of tribal identity. President Nixon in a landmark message to Congress in 1970 had called for a new approach, "explicitly affirm[ing] the integrity and right to continued existence of all Indian Tribes."[2] Under the new regime, the United States reaffirmed its responsibility to Indian peoples, and committed to discharge that responsibility by rebuilding tribal

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[2] Special Message to Congress on Indian Affairs, 1970 Pub. Papers 564, 567 (July 8, 1970).

leadership and institutions and pursuing government-to-government relationships with the Tribes. *See United States v. Lara*, 541 U.S. at 202; *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 840 (1982).

This philosophy of self-determination found concrete expression in a number of new federal statutes, "most notably" ISDA. *Ramah*, 458 U.S. at 840. In enacting ISDA, Congress found that:

> [T]he prolonged Federal domination of Indian service programs has served to retard rather than enhance the progress of Indian people and their communities by depriving Indians of the full opportunity to develop leadership skills crucial to the realization of self-government, and has denied to the Indian people an effective voice in the planning and implementation of programs for the benefit of Indians which are responsive to the true needs of Indian communities[.]

Pub. L. No. 93-638, 88 Stat. 2203, § 2(a)(1), *codified at* 25 U.S.C. § 450(a)(1). Contracts are the principal mechanism Congress used to implement the policy of self-determination because of the enforceability of contracts under federal law.

> Congress, *in respect to a promise's binding nature*, meant to treat alike promises made under [ISDA] and ordinary contractual promises. The Act uses "contract" 426 times to describe the nature of the Government's promise, and "contract" normally refers to "a promise . . . for the breach of which the law gives a remedy, or the performance of which the law . . . recognizes as a duty,"

Cherokee Nation v. Leavitt, 543 U.S. 631, 632 (2005) (emphasis and ellipses by the Court; citation omitted). In fact ISDA not only "authorizes" but "directs" the Secretary to award an ISDA contract to qualified tribes. 25 U.S.C. § 450f(a)(1). ISDA is remedial, seeking in its key funding provisions to ensure that tribes and tribal organizations may exercise their right to contract without suffering a diminution of services by choosing to run those services themselves.[3]

The *Busby* and *Papago* decisions. In 1985, the Court of Claims ruled in *Busby School of the Northern Cheyenne Tribe v. United States*, 8 Cl.Ct. 596, that ISDA contractors with contract claims could not take advantage of the remedies available to other federal contractors under the Contract Disputes Act. The court characterized ISDA contracts as "sociological type contracts designed to accomplish government social policy goals" that were outside the coverage of the CDA. *Id*. at 600.

A year later, the Interior Board of Contract Appeals ruled that contract disputes before the Board involving ISDA contracts were not subject to the Contract Disputes Act. *Appeals of Papago Indian Tribe of Arizona*, 86-2 BCA 18,859, 22 Interior Dec. 191, 1986 WL 20760 (IBCA 1986).

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[3] *See* 25 U.S.C. § 450j-1(a), (b), and (g); *id*. § 450*l*(c) *Model Agreement sec.* 1(b)(4).

The 1988 Amendments. A dozen years after enactment of the ISDA, Congress undertook a "comprehensive reexamination" to address significant problems with contract support in implementation of the Act. S. Rep. 100-274, at 8-13 (1987).

The 1988 amendments added contract support costs as a mandatory funding component for every ISDA contract. The amendments ensure that contracted programs are sufficiently funded so tribes can operate those programs at the same level they would previously have been operated by distant federal bureaucracies. *Id.* at 8, 12, 16, 30.

Among the comprehensive 1988 amendments was this:

> The Contract Disputes Act (Public Law 95–563, Act of November 1, 1978; 92 Stat. 2383, as amended) shall apply to self-determination contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).

Pub. L. 100-472 § 110(d), *codified at* 25 U.S.C. § 450m-1(d).[4]

The legislative history of this provision demonstrates that it was enacted in direct response to—and intended to legislatively overrule—the *Busby* and *Papago* holdings, which were cited with opprobrium. S. Rep. No.

[4] As of January 6, 2007, the jurisdiction of the Interior Board of Contract Appeals was transferred to the new Civilian Board of Contract Appeals. 41 U.S.C. § 438; Pub. L. 109–163, § 847(c), (e), (g), 119 Stat. 3136, 3391 (2006).

100-274, at 34-37 (1987). *See also Appeal of Papago Tribe of Arizona*, 90-3 BCA 22,965, 97 Interior Dec. 181, 1990 WL 169271 (IBCA, May 29, 1990) ("[The] legislative history removes all reasonable doubt that the Congress had the *Papago* case in mind as it enacted the statute").

The 1988 amendments thus made clear that an ISDA contract indeed is binding, like any other contract. The Senate Report on the amendments discusses the remedial purposes evident in the words of the statute:

> The amendments made by section 110 are necessary to give self-determination contractors viable remedies for compelling BIA and IHS compliance with the Self-Determination Act. The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs. Existing law affords such contractors no effective remedy for redressing such violations. . . .
>
> Not only does existing law make it virtually impossible for self-determination contractors to enforce their rights under the Act, but the Bureau of Indian Affairs has also taken to arguing that such contractors have no legal remedies at all by which to redress the Bureau's failure to fund their contracts with indirect costs at the level mandated by law and by their contract terms.

S. Rep. 100-274, at 37 (1987).

The 1994 Amendments. In 1994, finding the BIA and IHS still intransigent, S. Rep. 103-374, at 2 (1994), Congress enacted more

amendments. Over the strong opposition of the Executive Branch, *id*. at 16, Congress in Public Law 103-413, 108 Stat. 4250, removed most of the agencies' rule-making authority, 25 U.S.C. § 450k; re-emphasized that full contract support costs must be paid to ensure delivery of services at the same level at which the Secretary would have provided them, *id*. § 450j-1(g); and mandated a model contract to be used for all ISDA contracts, *id*. § 450*l*(c). The model contract incorporated ISDA *in toto*, *id*. § 450*l*(c) *Model Agreement* sec. 1(a)(1), and required that each provision in ISDA and each provision in the contract be liberally construed in favor of the contractor. *Id*., *Model Agreement* sec. 1(a)(2).

* * *

From this thumbnail history of ISDA, two fundamental principles stand out: (1) When Congress in 1988 amended ISDA, itself a remedial statute, to make Contract Disputes Act remedies available to tribal contractors, its intention was to expand the remedies available to ISDA contractors; and (2) Congress has mandated that ambiguities in the construction of ISDA and in the construction of ISDA contracts be resolved in favor of ISDA contractors. Those fundamental principles should inform this Court's resolution of this appeal.

ARGUMENT

IN THIS CASE RULE 23 REQUIRES APPLICATION OF TOLLING BECAUSE OF THE SUPREME COURT'S AUTHORITATIVE INTERPRETATION, BUT IF APPLICATION OF TOLLING IN THE CIRCUMSTANCES HERE IS DEEMED IN ANY WAY UNCERTAIN THE CONTRACT REQUIRES THAT THE TRIBES' INTERPRETATION CONTROLS.

The issue presented by this appeal is whether the administrative presentment of ISDA contract claims is exempted from the usual operation of Rule 23 of the Federal Rules of Civil Procedure, as authoritatively construed in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983); and *Stone Container Corp. v. United States*, 229 F.3d 1345 (Fed. Cir. 2000), *cert. denied sub nom. Smurfit-Stone Container Corp. v. United States*, 532 U.S. 971 (2001).

The Tribes' brief in chief demonstrates that the administrative presentment of ISDA contract claims is not exempt from the usual operation of Rule 23. But, should there be any doubt whatsoever, the Indian canon of construction—incorporated into each and every ISDA contract—requires that doubt to be resolved in favor of the contractor.

ISDA is a statute fraught with ambiguity. The late Judge Bernard V. Parrette, of the old Interior Board of Contract Appeals, handled many ISDA cases over the years. He concluded that:

> It is difficult to imagine an arena of the law more tortuous or surrounded by legal mine fields than the first 30 years of the Indian Self-Determination Act (ISDA), Pub. L. 93-638, Jan. 4, 1975. Typically, the Indians experience a real or perceived injustice and go to the Congress for relief; Congress passes a law; the Government ignores or circumvents the law; and the Indians then have to go to court or back to the Congress for a decision so that the issue can be contested all over again.

Consolidated Appeals of Alamo Navajo School Board, Inc., *et al.*, IBCA Nos. 4539 through 4545, 2005 WL 40927 (2005).

Statutes in cases involving Indian law are governed by the "Indian canon" of construction.

> The standard principles of statutory construction do not have their usual force in cases involving Indian law. . . . The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. . . .
>
> . . . Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." [*Montana v. Blackfeet Tribe*, 471 U.S. 759], 766, 105 S.Ct. at 2403 [(1985)]. If there is any ambiguity as to the inconsistency and/or the repeal of the Curtis Act, the OIWA must be construed in favor of the Indians, *i.e.*, as repealing the Curtis Act and permitting the establishment of Tribal Courts. The result, then, is that if the OIWA can reasonably be construed as the Tribe would have it construed, it must be construed that way.

Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444-45 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989) (footnote and internal editing omitted).[5] *See also* Felix Cohen's Handbook of Federal Indian Law, § 3.02[1], at 121 (rev. ed. 2005).

Because ISDA was often construed to reach results contrary to congressional intent, Congress decided to go beyond the Indian canon. It incorporated the Indian canon as an explicit, binding, enforceable provision in each and every ISDA contract. Any ambiguity in the contract or the statute (also incorporated into each ISDA contract) must be resolved *ab initio* in the contractor's favor.

> Section 1(a)(2) of the model contract, as revised, incorporates the longstanding canon of statutory interpretation that laws enacted for the benefit of Indians are to be liberally construed in their favor . . . .

S. Rep. 103-374, at 11. *See Ramah Navajo Chapter v. Lujan,* 112 F.3d 1455, 1460-1462 (10th Circuit 1997) (applying Indian canon in contract

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[5] The Indian canon dovetails with the rule governing non-Indian federal contract cases: "Plaintiff is not required to have construed the ambiguous provision in a more reasonable manner than did defendant. Rather, if 'the contractor follows an interpretation that is reasonable, this interpretation will prevail over one advanced by the Government, even though the Government's interpretation may be a more reasonable one since the Government drafted the contract." *Neal & Co. v. United States,* 19 Cl Ct. 463, 473 (1990), citing *United Pacific Ins. Co. v. United States*, 497 F.2d 1402 (Ct. Cl. 1974).

support costs case involving contracts administered by the Bureau of Indian Affairs).

In short, ISDA's rule for the resolution of ambiguities eliminates the need to resort to any other rule of construction. Any uncertainty as to whether Rule 23 tolls the six-year presentment requirement during pendency of a class action embracing the claim to be presented must be resolved in favor of the ISDA contractor.

When the CDA was incorporated into ISDA, the CDA did not include a time limit for filing an administrative dispute. In 1994, the CDA was amended to provide a time limit.[6] Neither that 1994 CDA amendment nor its legislative history provides any evidence that Congress intended to exempt the administrative time limit for presenting an ISDA contract dispute to the contracting officer from the normal tolling principle of Rule 23. Likewise, there is certainly no evidence of a congressional intent to restrict remedies, as would be the result under the decision below.

There is no support for the CBCA's holding that Congress intended the administrative presentment time limit in the CDA to deny to ISDA contractors the right to and benefit of tolling while putative class actions embracing their claims are pending. Aside from the harm to administrative

[6] Pub. L. 103-355, § 2351(a)(1), 108 Stat. 3243, 3322 (1994), *codified at* 41 U.S.C. § 605(a).

and judicial economy from that holding, the practical effect is to force all tribes, many of them small and impoverished, to press their own damage claims rather than rely on class-action standard bearers. That is utterly inconsistent with the congressional intent in making CDA remedies available to ISDA contractors and with Rule 23. If the time for filing an administrative claim was not tolled by the filing of the *Cherokee* class action, the *Cherokee* class members could not rely on that class action to protect their rights. *See Crown, Cork & Seal Co.*, 462 U.S. at 350, citing *American Pipe*. Denying the protection of tolling to class members is contrary to the purposes of Rule 23.

The NCAI therefore urges the Court to resolve this case on the basis of the contract at issue. The application of Rule 23 including its tolling rule should be accepted as part of the legislative scheme that informs and makes up the contract, in this case a contract encompassing by incorporation the Contract Disputes Act and the Rules of Civil Procedure. *Watson's Estate v. Blumenthal,* 586 F.2d 925, 930 (2d Cir. 1978) (regulations surrounding statutes authorizing federal contracts are part of the contract). If the Court agrees with the Tribes that the application of Rule 23 and its tolling principle are a clear and unambiguous adjunct of the Contract Disputes Act and ISDA, then the matter ends. But if the Court is uncertain, then as a matter of

contract interpretation the ambiguity must be resolved in favor of the contractor under model agreement clause 1(a)(2), 25 U.S.C. § 450*l*(c) section (1)(a)(2).

Just as the court in *Ramah Navajo Chapter v. Lujan*, 112 F.3d at 1461, found the words "associated with" in 25 U.S.C. § 450j-1(d)(2) to be ambiguous, the Court here would be justified in considering the ISDA scheme with respect to Rule 23 to be ambiguous. There is, after all, no reference anywhere in the language or the legislative history of ISDA or of the Contract Disputes Act to class actions, let alone whether Congress intended to remove tolling as to administrative presentment for ISDA contractors in a Rule 23 situation. The absence of any statutory text bearing on the issue or guidance from Congress helps determine the existence of ambiguity. *Neal & Co.*, 19 Cl. Ct. at 473 ("the ambiguity was a subtle one").

Reference statutes are notoriously prone to uncertainty. One example comes from the world of federal workers' compensation. In 1927 Congress enacted the Longshoremens' and Harbor Workers' Compensation Act (LHWCA), 44 Stat. 1424 (codified at 33 U.S.C. §§ 901-950). This Act provided compensation for on-the-job injuries to port and harbor workers. It contained a remedial provision setting forth how claims must be made and provided for judicial review of initial decisions. The entire adjudicatory

process was keyed to the federal district in which the injury took place. In 1941, Congress, realizing that the LHWCA did not protect workers on overseas military projects, enacted the Defense Base Act (DBA), 55 Stat. 622 (codified at 42 U.S.C. §§ 1651-1654). Because the LHWCA did not contain a procedure for overseas workers to make claims or appeal of benefits determinations, the DBA enacted in section 3 a tailor-made system for them. At the same time, the DBA extended the benefits already established by the LHWCA, as amended, to the newly covered base workers by incorporating the LHWCA in section 1 of the DBA, 42 U.S.C. § 1651(a). At first the two statutes operated well together.

In 1972, however, Congress made two changes in the LHWCA's procedures without referencing the DBA. The details of these changes and the confusion they caused in interpreting the DBA make up the web of cases subsequently flooding the courts, the confusion centering on which courts had jurisdiction over DBA claim appeals. This history is neatly summarized in *Hice v. Director, Office of Workers Comp. Programs*, 156 F.3d 214 (D.C. Cir. 1998) (Tatel, J.).

Suffice to say, most of the DBA cases focus on the interpretation of the general reference provision of the DBA incorporating LHWCA whose subsequent amendment creates the problem, such as *AFIA/CIGNA*

Worldwide v. Felkner, 930 F.2d 1111 (5th Cir. 1991), *cert. denied*, 502 U.S. 906 (1991), *Pearce v. Director, Office of Workers Comp. Programs*, 603 F.2d 763 (9th Cir. 1979), and *Home Indemnity Co. v. Stillwell*, 597 F.2d 87 (6th Cir. 1979). But *Hice* focuses persuasively on the ambiguity of the later amendment to the incorporated statute, just as here there exists a possible ambiguity in the administrative statute of limitations amendment to the incorporated statute, the CDA.

In *Hice* the Court found that the 1972 amendment to the LHWCA was ambiguous as to overseas workers: ". . . Congress made no corresponding change in the [DBA], leaving workers injured outside the United States with some uncertainty about which courts had jurisdiction to hear their appeals." 156 F.3d at 215. Judge Tatel asked: ". . .[D[id Congress really intend to create a dual scheme under which workers injured within the United States would appeal Benefits Review Board decisions directly to courts of appeals, while workers injured on military bases outside the country would appeal first to district courts and then to courts of appeal?" *Id*. In resolving the ambiguity Judge Tatel relied on the precise language of the DBA and that Act's aim of providing benefits to or a judicial remedy for their denial to injured overseas workers. *Id*. This did not end the inquiry, however, since the D.C. Circuit still had to determine whether under

the 1972 LHWCA amendments it was required to transfer the case to the district court. Calling it "the sensible position" Judge Tatel and the panel held that in light of the purposes of the DBA and its express language, the case should be transferred to the district court, thereby holding the 1972 LHWCA amendment inapplicable.

The following can be learned from the DBA line: Statutes incorporated into other legislative schemes are often filled with uncertainty. This uncertainty may inhere in either the general reference statute or the later amendment to the incorporated statute. Resolution of the uncertainty rests on rules of construction, starting with plain language and if that does not produce a clear answer, resort to legislative history and associated rules of construction. Here the determination of ambiguity, if any, stems primarily from the absence of guidance from Congress either in the CDA amendment of 1994 or in Rule 23 as to the precise question presented: Whether Rule 23 tolling applies to ISDA contractors in the presentment phase of the adjudicatory process, a similar posture to the one presented in the DBA cases.

Noteworthy in the DBA cases whatever tack they took was their concern not to close the courthouse door. *See*, *e.g.*, *Pearce*, 603 F.2d at 771: "We transfer this case, rather than dismissing it, because we see no reason to

require Pearce to start all over again. Moreover, were we to dismiss, and were Pearce then to petition the Seventh Circuit, he would probably be held to be time barred . . . [or face] an argument that his application should be denied on the ground of administrative *res judicata*, or the defense of finality of administrative action."

All of these factors apply to the Tribes and their contracts now before this Court. Were the Court to affirm, these Tribes would lose their causes of action. Congress' purpose in adopting ISDA and incorporating the CDA to provide a remedial system based on normal federal contract law would be perversely turned into a restriction barring relief. The purpose of Rule 23 to avoid flooding the courts would be undermined.

Most especially, the Court will have ignored a fundamental contract law principle—to apply the contract as written by the parties. The uncertainty, if any, as to whether Rule 23 tolling applies to preserve the Tribes' causes of action is resolved in their favor by Section 1(a)(2) of the parties' contract:

> "(2) *Purpose*.—Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor to transfer the funding and the following related functions, services, activities, and programs (or portions thereof), that are otherwise contractable under section 102(a) of such Act, including all related administrative functions, from the Federal Government

to the Contractor: (List functions, services, activities, and programs).

Failure to reverse the decisions below would be a profound injustice contrary to the purposes of the Indian Self-Determination Act and its model agreement.

Respectfully submitted this 30th day of December, 2008.

John Dossett
General Counsel
National Congress of American Indians
1301 Connecticut Ave., N.W., Suite 200
Washington, DC 20036
Telephone:

/s/ Michael P. Gross
Michael P. Gross
(Counsel of record)
M.P. Gross Law Firm, P.C.
460 St. Michael's Drive, Suite 401
Santa Fe, New Mexico 87505
Telephone: (505) 995-8066
Fax: (505) 989-1096
E-mail: mpgross@cnsp.com

Daniel H. MacMeekin
(Of counsel)
1776 Massachusetts Avenue, NW, Suite 801
Washington, DC 20036
Telephone: (202) 223-1717
Fax: (202) 223-1459
E-mail: dan@macmeekin.com

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s/ Michael P. Gross__
Counsel of Record
Dated: December 30, 2008

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2008, I served the foregoing brief on the parties by e-mail and by depositing two copies each in the United States mail, first-class postage prepaid, addressed to:

Geoffrey D. Strommer, Esq.
Hobbs, Straus, Dean & Walker, LLP
806 S.W. Broadway, Suite 900
Portland, OR 92705

GStrommer@hobbsstraus.com

Robert E. Chandler, Esq.
Commercial Litigation Branch
Civil Division
Department of Justice
1100 L Street, N.W.
Washington, D.C. 20530

Robert.chandler@usdoj.gov

s/ Michael P. Gross__
Counsel of Record
Dated: December 30, 2008