

[NO DATE HAS BEEN SET FOR ORAL ARGUMENT]

No. 09-5005

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**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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MENOMINEE INDIAN TRIBE,

Appellant

v.

UNITED STATES OF AMERICA, et al.,

Appellees.

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Appeal from the U.S. District Court for the District of Columbia

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**OPENING BRIEF OF APPELLANT MENOMINEE INDIAN TRIBE**

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

(A) **Parties and Amici.** The following were parties to the district court action and are parties to this appeal: The Menominee Indian Tribe of Wisconsin; United States of America; Secretary of Health and Human Services; and Director, Indian Health Service. Amici Arctic Slope Native Association, et al. have requested permission to file an amicus curiae brief in this appeal.<sup>1</sup> The National Congress of American Indians (“NCAI”) intends to request permission to file an amicus curiae brief in this appeal. No amici participated in the district court action.

(B) **Rulings Under Review.** The rulings under review are (1) the U.S. District Court for the District of Columbia's memorandum opinion and accompanying order, dated March 14, 2008, in *Menominee Indian Tribe of Wisconsin v. United States*, No. 1:07-cv-00812-RMC, District Judge Rosemary M. Collyer, reported at 539 F. Supp. 2d 152 (D.D.C. 2008), included in the Appendix, pp. 1-4; and (2) Judge Collyer's order and final judgment in the same case, dated November 24, 2008; included in the Appendix, pp. 5-6.

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<sup>1</sup> In addition to the Arctic Slope Native Association, the amici are: Alaska Native Tribal Consortium, Assiniboine and Sioux Tribes of the Fort Peck Reservation, Chickasaw Nation, Choctaw Nation of Oklahoma, Chugachmiut, Citizen Potawatomi Nation, Fond du Lac Band of Lake Superior Chippewa, Forest County Potawatomi, Kodiak Area Native Association, Port Gamble S'Klallam Tribe, Southcentral Foundation, Southeast Alaska Regional Health Consortium, St. Croix Chippewa Indians of Wisconsin, and Tanana Chiefs Conference.

(C) **Related Cases.** The case on review has not previously been before this court or any other court, aside from the U.S. District Court for the District of Columbia. There are four related cases of which Appellant is aware involving substantially similar issues: (1) *Metlakatla Indian Community v. Secretary of Health and Human Services*, No. 2009-1004 (Fed. Cir.) ("*Metlakatla*"); (2) *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Secretary of Health and Human Services*, No. 2008-1607 (Fed. Cir.) (appeal consolidated with *Metlakatla*); (3) *Arctic Slope Native Association, Ltd. v. Secretary of Health and Human Services*, No. 2008-1532 (Fed. Cir.); and (4) *Ramah Navajo School Board, Inc. v. United States*, No. 2009-5016 (Fed. Cir.).

Respectfully submitted,

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## GLOSSARY

ADEA	Age Discrimination in Employment Act
AFA	annual funding agreement
CBCA	Civilian Board of Contract Appeals
CDA	Contract Disputes Act
CSC	contract support costs
CY	calendar year
EEOC	Equal Employment Opportunity Commission
FAR	Federal Acquisition Regulation
FASA	Federal Acquisition Streamlining Act
FY	fiscal year
IHS	Indian Health Service
IRS	Internal Revenue Service
ISDA	Indian Self-Determination and Education Assistance Act
PFSAs	programs, functions, services, and activities
Secretary	Secretary of Health and Human Services

## I. JURISDICTIONAL STATEMENT

This is a claim for breach of contract under the Indian Self Determination and Education Assistance Act, 25 U.S.C. § 450 et seq. ("ISDA"). The ISDA incorporates by reference the Contract Disputes Act, 41 U.S.C. § 601 et seq. ("CDA"), and grants to the federal district court original subject matter jurisdiction pursuant to 25 U.S.C. § 450m-1(a) and (d).

The Court of Appeals has jurisdiction over an appeal of a final order of the federal district court pursuant to 28 U.S.C. § 1291. The federal district court issued a final order disposing of all parties' claims on November 24, 2008. *See Menominee Indian Tribe v. United States*, 539 F. Supp. 2d 152 (2008). The Tribe filed a timely notice of appeal under Fed. R. App. P. 4(a)(1) on December 31, 2008, and it was docketed on January 5, 2009.

## II. STATEMENT OF THE ISSUES

1. Did the district court err in finding that the statute of limitations for filing a claim with the contracting officer under the CDA, 41 U.S.C. § 605(a), had not been tolled, either legally or equitably, despite the fact that a class action was pending during that time and the Tribe was a member of the putative class?

2. Did the district court err in holding that laches barred the Tribe's claim for FY 1995 when

(a) the Tribe's delay was less than ten years, and for six of those years class action litigation in which the Tribe was a putative class member asserting identical claims was pending;

(b) the agency incurred no economic prejudice because damages sought by the Tribe will be paid out of the Judgment Fund and not from expired appropriations?

The pertinent statutes and regulations are reproduced in the Addendum, p. 20a et seq.

### **III. STATEMENT OF THE CASE**

This case is an extension of the continuing controversy over the extent to which the Secretary of Health and Human Services ("Secretary"), through the Indian Health Service ("IHS"), has a duty to fully fund contract support costs ("CSC") for agreements entered into under the ISDA, which governs the contracting of government programs offered to American Indians and Alaska Natives.

Funding under the ISDA is "subject to the availability of appropriations." 25 U.S.C. § 450j-1(b). From 1994 through 1997, Congress appropriated to the IHS millions of dollars in lump-sum appropriations for Indian health care. Despite the availability of these funds, the Secretary maintained that the "availability" proviso gave him discretion to limit "available" funds for CSC to the amounts

recommended in Congressional committee reports accompanying the appropriations bills.

The Secretary was sued over this chronic underfunding and after years of litigation, the Supreme Court confirmed that if the Government has a lump-sum appropriation available, it has a duty to honor the promises made in its ISDA contracts, including the duty to fully fund contract support costs. *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005) ("*Cherokee*") *affing* *Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003) ("*Thompson*") *and rev'ing* *Cherokee Nation of Oklahoma v. Thompson*, 311 F.3d 1054 (10th Cir. 2002).

Having failed in its duty to pay full funding, the Government now seeks to prevent tribal contractors like the Menominee Tribe from gaining a day in court by asserting a myriad of procedural defenses, including statute of limitations and laches.

#### **A. The Cherokee Litigation.**

On March 5, 1999, the Cherokee Nation of Oklahoma filed a complaint and a request for the certification of a class action in the federal District Court for the Eastern District of Oklahoma. The proposed class included "[a]ll Indian tribes and tribal organizations operating Indian Health Service programs under contracts, compacts, or annual funding agreements authorized by the [ISDA] that were not fully paid their contract support cost needs, as determined by IHS, at any time

between 1988 and the present." *Cherokee Nation of Oklahoma v. United States*, 199 F.R.D. 357, 360 (E.D. Okla. 2001). The Tribe fit within this definition and as part of the putative class would have been bound by any judgment had the class been certified, unless they opted out. As part of the class, the Tribe, like many other tribal contractors, awaited the outcome of the certification request.

Almost two years later, on February 9, 2001, the court denied class certification. *Id.* at 366.<sup>2</sup> The district court and the Tenth Circuit then went on to rule on the merits. The Tenth Circuit held that the IHS's duty to pay CSC was limited to amounts identified in the committee reports accompanying the appropriations acts and the IHS had no duty to reprogram funds to meet its statutory or contractual obligations. *Cherokee Nation of Oklahoma v. Thompson*, 311 F.3d 1054, 1063 (10th Cir. 2002). The denial of class certification was not appealed.

At the same time, another case concerning CSC was being prosecuted. In *Thompson v. Cherokee Nation*, 334 F.3d 1075 (Fed. Cir. 2003), the Federal Circuit affirmed a ruling by the former Interior Board of Contract Appeals upholding the right of tribal contractors to full CSC funding. The Federal Circuit stated its

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<sup>2</sup> After the *Cherokee Nation* court denied class certification in 2001, a second CSC class action was filed by the Pueblo of Zuni. Class certification was denied in that case in 2007. *Pueblo of Zuni v. United States*, 243 F.R.D. 436 (D.N.M. 2007). The Tribe does not rely on *Zuni* for legal or equitable tolling.

disagreement with the Tenth Circuit, holding that the Secretary had no valid excuse for failing to meet his contractual obligations "to pay full contract support." 334 F.3d at 1088. In 2005 a unanimous Supreme Court affirmed this ruling and overturned the Tenth Circuit in *Cherokee Nation v. Leavitt*, 543 U.S. 631 (2005), holding that the Secretary's interpretation of his discretion in contract funding was wrong. Rather the Secretary had a duty to reprogram funds from the agency's unrestricted lump-sum appropriation to meet its contractual obligations to pay tribal contractors their full CSC.

#### **B. Filing of Individual Claims.**

Once the Supreme Court finally decided *Cherokee*, the Tribe, like many other putative members of the now uncertified class, sought full funding of CSC as provided for in *Cherokee* by filing an individual claim under the Contract Disputes Act, 41 U.S.C. § 601 et seq. *See* 25 U.S.C. § 450m-1(d) (incorporating by reference the CDA as a contract remedy); 25 C.F.R. Part 900, Subpart N. The CDA provides:

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim.

41 U.S.C. § 605(a). Based on the tolling of the limitations period during the

pendency of the class action, the Tribe timely filed claims with the contracting officer for full CSC funding for the years 1995 through 2004 on September 7, 2005.<sup>3</sup>

In letters dated April 28, 2006, the agency denied the claims. The contracting officer concluded, among the reasons for denial, that the claims were barred by the statute of limitations or laches.

### **C. The District Court's Ruling.**

The Tribe appealed the denials directly to the federal district court as permitted by 25 U.S.C. § 450m-1 and 41 U.S.C. § 609.<sup>4</sup> There is no dispute that the Tribe presented its claims to the contracting officer in writing as required by the statute. However, IHS filed a motion to dismiss certain of the Tribe's claims for lack of subject matter jurisdiction on the ground that the requests for

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<sup>3</sup> Assuming the statute was tolled upon the filing of the class action that included the Tribe, the statute remained tolled until February 9, 2001 when the *Cherokee Nation* court denied the motion for class certification. *Cherokee Nation of Oklahoma v. United States*, 199 F.R.D. 357 (E.D. Okla. 2001). The time elapsed between the filing of the class action complaint on March 5, 1999 and the ruling denying certification on February 9, 2001, was one year and 341 days. The Tribe's claim for CY 1996 (which was under a two year obligation authority for contract funding) and CY 1997 began to run on January 1, 1998. Under the six-year limitations, claims had to have been filed by January 1, 2004, but the tolling of the statute extended the deadline to December 8, 2005. The claim for CY 1998 had to have been filed by January 1, 2005, but with tolling was extended to December 8, 2006. The Tribe filed its claims on September 7, 2005.

<sup>4</sup> As part of a stipulation between the parties, the only years at issue in this appeal are 1995 through 1998.

contracting officer's decisions were not filed within six years of accrual—at the earliest, the end of the contract year at issue.

Section 605(a) requires that all claims "shall be in writing and shall be submitted to the contracting officer." Courts have held that these presentment requirements are jurisdictional prerequisites before an appeal may proceed to an agency board or federal court. The Government argued that the statute of limitations set out in § 605(a) is also a part of the presentment requirement and is therefore also jurisdictional. The Government further reasoned that since the Tribe did not meet the statutory deadline and since the court did not have the authority to toll a jurisdictional requirement, the claims were barred.

The Tribe argued that the time limit in § 605(a) is not jurisdictional and even if it were, it was legally and equitably tolled because the Tribe was part of the putative class in the *Cherokee* case.

The issue of whether the statute of limitations in § 605 can be tolled is an issue of first impression. Even so, without more than two paragraphs of analysis, the district court held that the Tribe's claims for contract support for 1996 to 1998 were barred by the statute of limitations. The Court agreed that the limitations were jurisdictional and held that it had no power to toll the statute. The court dismissed the Tribe's arguments on legal and equitable tolling in a footnote with no analysis whatsoever, simply saying the presentment requirement was mandatory

and tolling could not apply. *Menominee Indian Tribe v. United States*, 539 F. Supp. 2d 152, 154 n.2 (D.D.C. 2008).

The Court also held that the Tribe's 1995 claim for CSC was barred by laches. The Court did so without any significant analysis of the few facts offered by the Government. The court cited the Tribe's "11-year delay" (which was actually 9 years and 9 months)<sup>5</sup> with no analysis of why that delay was unreasonable given the factual context. The Court was required to determine if it was unreasonable to the point that the Government was prejudiced because it relied on the delay to its economic detriment. The Government provided no such evidence. It claimed economic prejudice because appropriations for FY 1995 had expired. The court summarily agreed and dismissed the claim without addressing the facts.

#### **IV. STATEMENT OF FACTS**

##### **A. The ISDA and the Duty to Fully Fund Contract Support Costs.**

The ISDA was enacted in 1975 to redress "the prolonged Federal domination of Indian service programs" by allowing tribes to exercise increased control over those programs. 25 U.S.C. § 450(a)(1). The ISDA authorizes tribes to enter into agreements with the Secretary to assume responsibility to provide contractible programs, functions, services and activities ("PFSAs") that are

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<sup>5</sup> The claim accrued, at the earliest, on January 1, 1996, when the contract term expired. The claim was filed on September 7, 2005.

provided for the benefit of tribal members and other beneficiaries that the Secretary would otherwise have administered directly. The mechanism for doing so relevant to this action is the self-determination contract under Title I of the ISDA. For many years the Tribe, under its Title I contracts and annual funding agreements ("AFAs"), has contracted to operate a comprehensive health services program, including medical, dental, and community health services.

As part of the agreement, the statute at § 106(a) requires the Secretary to provide two types of funding: (1) "program" funds, the amount the Secretary would have provided for the PFSAAs had the IHS retained responsibility for them, *see* 25 U.S.C. § 450j-1(a)(1); and (2) CSC, which cover reasonable administrative and overhead costs associated with carrying out the PFSAAs, *id* §§ 450j-1(a)(2), (3), and (5). The latter category is the subject of the underlying dispute out of which this appeal arises.

#### **B. Statutory Funding Requirement.**

In 1988 Congress amended the ISDA to address "[t]he consistent failure of federal agencies to fully fund tribal indirect costs." S. Rep. 100-274, at 8 (Dec. 21, 1987). The Senate committee emphasized that funding of full CSC was the core policy of the ISDA: "Full funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to succeed." *Id.* at 13.

While §106, as amended, required full payment of CSC from available appropriations, the IHS continued to underpay tribal contractors considerably. It did so based on the agency's interpretation of section 106(b), which makes funding "subject to the availability of appropriations." 25 U.S.C. § 450j-1(b). From 1994 through 1997, the IHS maintained that the Secretary had the discretion to limit "available" funds to the amounts recommended in committee reports on the appropriations bills.<sup>6</sup> Therefore, in every one of the claim years, the IHS severely underpaid the CSC of tribal contractors, including the Tribe, a fact documented in the agency's annual "shortfall reports."<sup>7</sup>

As explained above, the Supreme Court in *Cherokee* held that the Secretary's interpretation of Section 106 was wrong and held there is a duty to fully fund contract support costs from the agency's lump-sum appropriation since it is "available."

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<sup>6</sup> See *Thompson v. Cherokee Nation*, 334 F.3d 1075, 1087-88 (Fed. Cir. 2003) (summarizing and rejecting Secretary's interpretation, and holding that funds available for payment of CSC included agency's entire unrestricted lump-sum appropriation); *Cherokee Nation*, 543 U.S. at 644 (same).

<sup>7</sup> Section 106(c) requires that the Secretary provide Congress an annual report that includes "an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted." 25 U.S.C. § 450j-1(c)(2). These "shortfall reports" are to include detailed information for each tribal contractor on direct cost bases, indirect cost rates, and indirect cost shortfalls, if any. See *id.* § 450j-1(c). The Tribe appears on these lists as having been underpaid in the years pertinent to this appeal.

## V. THE STANDARD OF REVIEW

The standard of review for a motion to dismiss under Rule 12(b)(1) or (6) is *de novo*. *Barr v. Clinton*, 370 F.3d 1196, 1201 (D.C. Cir. 2004); *Wilson v. Pena*, 79 F.3d 154, 160 (D.C. Cir. 1996); *Jung v. Mundy, Holt & Mance*, 372 F.3d 429, 432 (D.C. Cir. 2004). Where, as here, the district court made virtually no factual findings in support of its legal conclusion as to laches, *de novo* review is appropriate. *Daingerfield Island Protective Soc'y v. Lujan*, 920 F.2d 32, 38 (D.C. Cir. 1990) (no deference to district court's laches decision when court applied wrong legal standard). *But see Pro Football, Inc., v. Harjo*, 415 F.3d 44, 50 (D.C. Cir. 2005) (showing that Court of Appeals has applied both abuse of discretion and *de novo* review to laches).

Under the ISDA, the court is required to apply a statutory rule of construction that requires a liberal interpretation of the statute and the contract in favor of the Tribe. 25 U.S.C. § 450l(c) (§ 1(a)(2) of mandatory model agreement).

## VI. SUMMARY OF ARGUMENT

In general, class actions toll the running of a statute of limitations for all class members. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). Class action tolling is a legal and mandatory requirement that springs from the application of Rule 23. *Id.*; *Stone Container v. United States*, 229 F.3d 1345, 1353-54 (Fed. Cir. 2000). The Supreme Court has been clear that putative class

members are protected by tolling and there is no need for class members to take any other action to preserve their rights until the class status has been decided. The facts fully supported finding the statute had been tolled because the Tribe had been part of the putative class action, which sought full payment of CSC for all similarly situated contractors.

The facts also supported equitable tolling. Section 605(a) presents a traditional statute of limitations for filing claims, and the Supreme Court has consistently held that there is a rebuttable presumption that limitations of this type are subject to equitable tolling unless Congress has indicated a contrary intention. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). Congress did not indicate any such intention in the ISDA or the CDA.

This Court should reject the district court's grounds for refusing to apply legal or equitable tolling. The court stated simply that "[s]tatutory time limits are jurisdictional in nature, and courts do not have the power to create equitable exceptions to them." 539 F. Supp. 2d at 154. First, the court's statement fails to account for the legal (not equitable) basis of class-action tolling. Second, the court's pronouncement is plain error given the Supreme Court's repeated holdings that statutory time limits can be—and in fact, presumptively are to be—tolled under certain circumstances. Further, the statute and applicable ISDA regulations, which define a proper CDA claim under the ISDA, do not state a limitations

requirement. The Tribe met the ISDA prerequisites for filing a valid claim and the district court had no authority to engraft other jurisdictional prerequisites.

Even if the limitations period was "jurisdictional," the Supreme Court has made it clear that this designation alone is not sufficient to find a prohibition on tolling. The district court was required to analyze Congressional intent and it failed to do so. Had it done so, it would have found nothing to support its conclusion that tolling was precluded. There is no evidence that Congress intended that the legal tolling doctrine be ignored. Nor is there any evidence to rebut the *Irwin* presumption that equitable tolling applies.

The district court also erred in concluding that the claim for FY 1995 was barred by laches. The filing delay was not unreasonable given the pending class action. Moreover, the Government failed to meet its burden of proof to establish economic prejudice, which requires a showing that the Government relied upon or changed its position to its economic detriment. The only assertion made by the Government and accepted by the district court was that the appropriations had expired. This fact, even if true, was irrelevant since a CDA claim for breach of contract damages is to be paid from the Judgment Fund, not expired appropriations.

Since there is no real dispute of fact—a class action was filed and pending during the statute of limitations period—the Tribe respectfully asks this Court to

reverse the district court and find that the statute was tolled on legal or equitable grounds, during the class action. The Tribe further requests that this Court find that the Government failed to meet its burden to establish laches and reinstate the claim for FY 1995.

## VII. ARGUMENT

### A. The Statute of Limitations Was Legally and Equitably Tolled.

The district court erred in failing to apply well-established principles of legal and equitable tolling based on the filing of the *Cherokee* class action.

#### 1. *Class Action Tolling Under Rule 23 is Legal and Mandatory and the District Court Was Required to Apply It.*

In *American Pipe & Constr. Co. v. Utah*, the Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. 538, 554 (1974). The Court reasoned that without this rule, every potential class member would have to file its own action or motion to intervene in order to protect itself in case class certification was later denied, "precisely the multiplicity of activity which Rule 23 was designed to avoid." *Id.* at 551. At the same time, the Court noted that "[t]his [tolling] rule is in no way inconsistent with the functional operation of a statute of limitations." *Id.* at 554.

As later described by the Supreme Court in extending the class-action tolling rule, statutes of limitations "are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights ... but these ends are met when a class action is commenced." *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 352 (1983) (citations omitted). The Supreme Court also clarified that tolling extends not only to plaintiffs who intervene in the pending action, but also to would-be class members who file actions of their own. *Id.* at 350. The Court confirmed, "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied," at which point "class members may choose to file their own suits or to intervene as plaintiffs in the pending action." *Id.* at 354.

This Court has recognized class action tolling should be broadly construed and may apply so long as the defendants have received adequate notice of the pending claims. *McCarthy v. Kleindienst*, 562 F.2d 1269, 1273 (D.C. Cir. 1997); *See also Curtin v. United Airlines*, 275 F.3d 88, 93 (D.C. Cir. 2001) ("class action tolls the statute of limitations as to all asserted members of the class").

Numerous courts have held that the tolling announced in *American Pipe* is legal, not equitable tolling, and therefore is required by the federal rules. In *Stone Container v. United States*, 229 F.3d 1345, 1353 (Fed. Cir. 2000), the Federal Circuit held that class action tolling is not equitable because it is "mandated by

statute" (Fed. R. Civ. P. 23).<sup>8</sup> As such Rule 23 tolling applies to the government. "Having determined that Rule 23 tolling is statutory rather than equitable, it follows that the rule of *American Pipe* applies to the government just as it does to private parties...." *Id.* at 1354. See also *Joseph v. Wiles*, 223 F.3d 1155, 1166-67 (10th Cir. 2000) (legal tolling occurs in class actions); *Schimmer v. State Farm Mut. Auto. 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).

The purpose of tolling—to promote administrative and judicial economy—was carried out in classic fashion in this case. The *Cherokee* class action was filed and tribes relied on that class action to vindicate their rights, as Rule 23 encouraged them to do. *American Pipe* and *Crown, Cork* assured them that the statute of limitations on their claims would be tolled in the interim. Had they not relied on the tolling rule, these tribes would have flooded the IHS with claims, filed merely to preserve their rights to participate in the proposed class. Once the

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<sup>8</sup> Because "[a]ll laws in conflict with [the Federal Rules of Civil Procedure] shall be of no further force or effect after such rules have taken effect," 28 U.S.C. § 2072(b), the Supreme Court has said they are "as binding as any federal statute." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988) (quoted in *Stone*, 229 F.3d at 1354).

IHS denied the claims, tribes would then have had to appeal them to the agency board or a federal court, again to preserve them, since the IHS would surely have argued that the limitations periods in the CDA, 41 U.S.C. §§ 606 and 609(a), could not be tolled. As a result, the IHS, the administrative board, and the courts would have been inundated with thousands of claims, appeals and actions. Reliance on tolling avoided this result, precisely as contemplated by Rule 23 and *American Pipe*, and significant judicial resources were conserved. This is the point of judicial economy and the point of the tolling rule.

Given this body of law, it is unquestionable that the filing of the *Cherokee* class action tolled the running of the statute of limitations in § 605(a) as a matter of law until class certification was denied, and the failure of the district court to apply that principle was a clear error. The district court's ruling ignores significant Supreme Court precedent, and if left to stand, the claims of every putative class member who may now be pursuing individual CSC claims could be dismissed because they rightly relied on the existing class action rules to protect them. To the extent the court relied on the administrative process as a barrier to tolling, it has been held repeatedly that simply because putative class members have administrative remedies to navigate does not change the tolling rule. "When exhaustion of administrative remedies is a precondition for suit, the satisfaction of this requirement by the class plaintiff normally will avoid the necessity for each

class member to satisfy this requirement independently." 2 NEWBERG ON CLASS ACTIONS § 5:15.

**2. Tolling Applies to the Filing of Administrative Claims.**

The rationale of using tolling to promote judicial economy also applies to administrative class actions. "[T]he Supreme Court has held that class members need not exhaust administrative remedies individually in order to participate as a member of the class." 1 NEWBERG ON CLASS ACTIONS § 1:3.

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Supreme Court rejected an argument that damages could not be awarded to unnamed class members who had not filed administrative claims under Title VII of the Civil Rights Act. 422 U.S. at 414 n.8. Similarly, the better authority under the ISDA was that a class representative who had exhausted administrative remedies was sufficient to meet the exhaustion requirement for all class members in an ISDA CSC class action. *Ramah Navajo Chapter v. Lujan*, No. CIV 90-0957 LH/RWM, Order, (D.N.M. 1993) (holding exhaustion by the class representative sufficient because the class action challenged the legality of uniform agency policy) (included in Addendum, pp. 1a-6a); *see also Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) (holding for tribal class on merits). *But see Pueblo of Zuni v. United States*, 243 F.R.D. 436 (D.N.M. 2007) (stating disagreement with exhaustion reasoning).

Several cases that address the relationship between class action tolling and administrative exhaustion confirm the general rule set out in *Albemarle*. These courts agree that *American Pipe* Rule 23 tolling applies in the administrative claim context until the court resolves class certification.

In *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374 (11th Cir. 1998), the Court of Appeals held that the pendency of a class action tolled both the initial administrative charge period under the Age Discrimination in Employment Act ("ADEA"), which governs the initial presentment of a claim under the ADEA, and the 90-day period for filing suit in federal court after notice of dismissal of the charge. 138 F.3d at 1392-93. In fashioning the definition of the class members the court had to consider what to do about those excluded from the class. The court set forth specific orders as to who qualified to proceed to exhaust administrative remedies and who would be barred. It held that those whose claims had lapsed before the class was filed were time barred, while those who had not presented but whose claims had not lapsed prior to the filing of the class action could proceed.

*Id.*

In *Barrett v. United States Civil Service Commission*, 439 F. Supp. 216 (D.D.C. 1977), the Court considered "the effect of the decertification of the class on the running of the statute of limitations," in the context of an administrative class action. *Id.* at 217. The Government argued that since the class was only

conditionally certified, the statute was not tolled for those who were later declared to be excluded from the class. The Court disagreed, holding that tolling applied at the administrative level and included those individuals the Court later found were not proper class members. *Id.* at 218. "[T]he tolling rule protects all persons who were asserted to be members of the class, even if they later were removed." *Id.* The Court held that those excluded from the class could proceed administratively with individual claims and fashioned an order defining who could and could not proceed individually based on the application of tolling. *Id.*

At least three other federal courts have agreed that administrative claims are tolled during the class action period. "Applying the tolling rule to the filing of administrative claims will have the same salutary effect as exists for the filing of lawsuits. In both cases, tolling the statute of limitations during the pendency of a class action will avoid encouraging all putative class members to file separate claims with the EEOC and the respective state agencies in deferral states.... This Court concludes that the *American Pipe-Parker* analysis applies equally well to putative class members who have yet to file an administrative claim." *Sharpe v. American Express Co.*, 689 F. Supp. 294, 300-01 (S.D.N.Y. 1988); *cited with approval in Griffin v. Singletary*, 17 F.3d 356, 360 (11th Cir. 1994); *see also McDonald v. Sec'y of Health & Human Servs.*, 834 F.2d 1085, 1092 (1st Cir. 1987).

Under the reasoning of both *Armstrong* and *Barrett*, and many other cases that have considered administrative class action tolling, the Tribe in the present case would have been permitted to proceed, as it did. The district court diverged from this case with little analysis or explanation of why these cases did not control.

**3. *The District Court Failed to Apply the Longstanding Rule on Administrative Class Actions.***

The district court rejected any application of tolling in a three-sentence footnote, which began with the premise that CDA administrative presentment is "a mandatory jurisdictional requirement." 539 F.Supp.2d at 154, n.2. From that it rejected tolling, concluding, "Because federal court jurisdiction cannot attach until there has been administrative presentment, tolling does not apply." *Id.*, citing to *NuFarm America's, Inc. v. United States*, 398 F. Supp. 2d 1338 (CIT 2005), *aff'd on other grounds*, 521 F.3d 1366, 1371 (Fed. Cir. 2008) (appeal of class certification dismissed as moot). *NuFarm* is so poorly reasoned and at odds with the weight of cases applying class action tolling to administrative cases that the district court's reliance is not supportable.

In considering the Rule 23 numerosity requirement, the *NuFarm* court had to address the fact that many class members had failed to exhaust their administrative remedies. One argument the court considered was whether the failure to timely exhaust could be excused. 398 F. Supp. 2d at 1352. The class representative argued that the statute of limitations for filing an administrative claim would have

been tolled. The court disagreed, holding that exhaustion was a jurisdictional requirement and each putative class member was required to exhaust remedies in order to participate in the class. Failure to do so meant that the court had no jurisdiction over the claims of unnamed class members in the first instance. The court appears to conclude that tolling could not overcome the requirement to timely exhaust. *NuFarm*, 398 F. Supp. 2d at 1352-53.<sup>9</sup> *NuFarm* appears then to require putative class members to take action to prosecute their claims in order to take advantage of class tolling.

Relying on *NuFarm*, the Government below similarly reasoned that the CDA required exhaustion in a timely fashion and that the Tribe could not benefit from class action tolling since without exhaustion it could not have been a member of the class to whom tolling would apply. The district court agreed, following *NuFarm* with no explanation or analysis. It did so contrary to the Supreme Court's holding in *Albemarle* and to all of the numerous cases that have considered and rejected the argument that tolling cannot apply in an administrative class action context. The district court's lack of analysis highlights the fact that *NuFarm* is an aberration.

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<sup>9</sup> Notably, the class representative in *NuFarm* had exhausted but the CIT did not consider whether the filing of the class action complaint tolled the statute as to putative class member's administrative claims because this question was not before the court. *Id.* at 1353. This leaves doubt about whether this ruling even applies to tolling cases.

Essentially the district court is saying that in order for tolling to apply, the Tribe must be a class member and the only way to be a class member is for the tribe to exhaust and present its administrative claim under the CDA. But if the claim is presented, tolling is irrelevant. The district court ruling makes tolling a nullity. If this reasoning is followed then all of the putative class members would be swept into the administrative process so that after the request for contracting officer's decision is filed and a ruling is issued, class members would then have to comply with the rules for appeal from a final contracting officer's decision or risk losing their right of review. It is simply improbable that all of the class members would file claims at the same time and arrive at a moment for judicial review that coincided with the filing of a class action. This is exactly why tolling applies. If it did not, class actions for administrative claims could never be brought.

As explained in Newberg,

It is now settled that proceedings for judicial review of a governmental agency decision may be maintained as a class action. Some courts have held that certain statutes require each individual class member to exhaust administrative remedies, thus precluding a representative class suit. Because virtually all statutes that provide an administrative remedy that must be exhausted before judicial relief is available require individual exhaustion, those decisions holding that administrative exhaustion precludes class actions either do not survive the ruling or are based on genuinely unique statutory requirements."

2 NEWBERG ON CLASS ACTIONS § 5:15 (emphasis added).

*NuFarm* simply cannot be reconciled with the general purposes of tolling and the myriad cases that have applied tolling in the administrative claim context. The Supreme Court made it clear in *American Pipe* that *all* members of the putative class, that is, those members of the class *as defined in the complaint*, are to be given the benefit of tolling until the class certification and the definition of the class is resolved, which is to say, until the court addresses whatever grounds for class opposition are raised. 414 U.S. at 552; *Crown Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983). In addition, § 605(a) is intended to prevent stale claims and a class action puts the Government on notice of such claims. *Crown Cork*, 462 U.S. at 352-53. Nothing more is required.

**4. *In the Alternative, the Statute of Limitations Was Equitably Tolloed by the Cherokee Class Action.***

If a statute is legally tolled, the court need not address equitable tolling. *Stone Container*, 229 F.3d at 1353; *Schimmer*, 2006 WL 2361810 at \*4, n.4. As an alternative, the Tribe argued that equitable tolling also applied.

In *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990), the Supreme Court set forth a broad general rule that addresses the equitable tolling of statutes of limitations for claims against the United States. The Court held that even though a waiver of sovereign immunity is to be strictly construed, once Congress has waived immunity, "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.... We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so." *Id.* at 95-96. The Supreme Court has confirmed this ruling in several subsequent cases. *E.g.*, *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 755-56 (2007) (*Irwin* set out a prospective rule of a rebuttable presumption of tolling); *Scarborough v. Principi*, 541 U.S. 401, 420 (2004); *Young v. United States*, 535 U.S. 43, 49 (2002); *United States v. Brockamp*, 519 U.S. 347, 350 (1997).

Under *Irwin*, the presumption in favor of tolling can be rebutted if either (a) tolling would not be applicable in a similar suit between private parties, or (b) Congress did not want tolling to apply. *United States v. Brockamp*, 519 U.S. 347, 350 (1997); *Kirkendall v. Dep't of the Army*, 479 F.3d 830, 836 (Fed. Cir.), *cert denied*, 128 S. Ct. 375 (2007). The CDA statute of limitations at § 605(a) does not meet either one of these elements and thus the presumption in favor of tolling cannot be rebutted.

*a. Tolling Would Apply.*

First, tolling would apply in a private action when a class action is pending. Class action tolling is available in disputes between private litigants, as in *Crown, Cork*. A class action involving claims for breach of contract under the ISDA has

also been established. See *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999) (approving class settlement for CSC claims against Bureau of Indian Affairs); *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002) (approving second class settlement). Courts routinely apply tolling doctrines to breach of contract actions between private parties.<sup>10</sup>

*b. Congress Expressed No Intention that Tolling Would Not Apply.*

Second, there is no evidence that Congress did not intend tolling to apply to § 605(a). An analysis of the statute focuses on "*Irwin's* negatively phrased question: Is there good reason to believe that Congress did not want the equitable tolling doctrine to apply?" *Brockamp*, 519 U.S. at 350 (1997) (court's emphasis). Rebutting the *Irwin* presumption in favor of tolling thus requires positive evidence of Congressional intent otherwise with respect to the particular statute at issue. In *Brockamp*, the Supreme Court confirmed the *Irwin* analytical framework and added more detail to the questions to be asked in examining Congressional intent: (1) the statute's detail and technical language; (2) whether the limitations were reiterated substantively and procedurally; (3) whether explicit exceptions to

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<sup>10</sup> See, e.g., *NN&R v. One Beacon Ins. Group*, 2006 WL 1765077 at \*8 (D. N.J. 2006) (applying New Jersey law to toll statute as to breach of contract claim against insurer); *Bridgeway Corp. v. Citibank, N.A.*, 132 F. Supp. 2d 297, 304 (S.D.N.Y. 2001) (holding that "the statutes of limitations for plaintiff's claims of breach of contract ... are equitably tolled"); *In re Fruehauf Trailer Corp.*, 250 B.R. 168, 194 (D. Del. 2000) (tolling Delaware statute of limitations on breach of contract and other claims).

limitations were included; and (4) the underlying subject matter of the statute. *Id.* at 352.

Applying the *Brockamp* factors, the text of the CDA does not indicate that Congress intended to preclude equitable tolling. Section 605(a) says that, "Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim." 41 U.S.C. § 605(a). On its face this language does not preclude tolling. If anything, starting the running of the statute from "accrual" indicates that Congress intended the limitations period to be flexible under appropriate circumstances since accrual is fact and circumstance dependent. Nor does the underlying subject matter of the CDA, contract claims, raise the policy arguments against equitable exceptions that tax law and land ownership did in *Brockamp* and *United States v. Beggerly*, 524 U.S. 38 (1998) (Quiet Title Act), respectively.

The CDA is not "detailed" or "technical" as to the statute of limitations. Nor does the CDA provide specific exceptions or reiterate the statute of limitations "several times in several different ways" in both substantive and procedural forms, as in *Brockamp*. 519 U.S. at 351. Indeed, Congress very carefully delineated distinct limitations periods, separating the statute of limitations in § 605(a) from the timing of review provisions in 605(b), 606 and 609(a)(3).

The scant legislative history contains no indication that Congress intended otherwise. The general purposes of the CDA were "to provide for a fair and balanced system of administrative and judicial procedures for the settlement of claims and disputes relating to government contracts,"<sup>11</sup> and to "equalize the bargaining power of the parties when a dispute exists."<sup>12</sup> This emphasis on fairness supports the presumption that Congress intended tolling to be available to contractors' claims.

As enacted in 1978, the CDA had no statute of limitations period for presenting claims to the contracting officer.<sup>13</sup> The only time limitation on CDA claims was laches. *Bd. of Governors v. United States*, 10 Cl. Ct. 27, 31 and n.6 (1986). The fact that Congress did not place any limitations period in the original version of the law undermines the district court's position that a later-enacted time limit is an inflexible "jurisdictional" requirement.

In 1994, Congress enacted the Federal Acquisition Streamlining Act ("FASA"), which amended the CDA, 41 U.S.C. § 605(a), to include the six-year limitation. Pub. L. No. 103-355 § 2351, 108 Stat. 3243, 3322 (Oct. 13, 1994).

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<sup>11</sup> H. R. Rep. No. 95-1556, at 5.

<sup>12</sup> S. Rep. No. 95-1118, at 1 (Aug. 15, 1978).

<sup>13</sup> Contract Disputes Act of 1978, Pub. L. No. 95-563 § 6, 92 Stat. 2384 (Nov. 1, 1978).

Neither the FASA itself nor its legislative history discusses the reason for adding the six-year limitation to § 605(a). Since Congress did not impose any time limitation at all on the waiver of sovereign immunity for 16 years, it is very unlikely that it suddenly intended to impose a categorical "jurisdictional" six-year deadline with no explanation. Absent a clear statement to the contrary, Congress must be presumed to have intended tolling to be available. *Young*, 535 U.S. at 49-50.

As written, the timing limitation in § 605(a) is a traditional statute of limitations for filing a claim similar to that at issue in *Irwin*. These types of limitations are generally considered an affirmative defense subject to tolling. *Kontrick v. Ryan*, 540 U.S. 443, 458 (2004); *Day v. McDonough*, 547 U.S. 198, 205 (2006); *Diaz v. Kelly*, 515 F.3d 149, 153-54 (2d Cir. 2008) (most statutes of limitations are affirmative defenses subject to equitable tolling, as confirmed by Supreme Court in *John R. Sand*).<sup>14</sup> Unlike § 605(b), it is not emphatic ("final and conclusive"). It is not a timing of review provision. It is a simple, straightforward statute of limitations for making a claim. "It is hornbook law that limitations periods are customarily subject to equitable tolling, ... [and] Congress must be presumed to draft limitations periods in light of this background principle." *Young*

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<sup>14</sup> See also Fed. R. Civ. P. 8(c) (listing statute of limitations among affirmative defenses).

*v. United States*, 535 U.S. 43, 49-50 (2002) (citations and internal quotation marks omitted). Since Congress is expected to understand this distinction when it drafts waivers of immunity, and since the § 605 limitations period was added after *Irwin* was decided, the clear presumption is that tolling applies.

*c. Congressional Intent in Incorporating the CDA into the ISDA Is Relevant.*

The application of the CDA to the ISDA is also relevant to an assessment of legislative intent in the *Irwin* context. The CDA has applied to ISDA disputes since 1988, long before this statute of limitations was added. *See* Pub. L. No. 100-472 § 206(a) (Oct. 5, 1988) (adding the current Section 110 of the ISDA, which incorporates by reference the CDA). In 1988, when Congress extended the CDA remedy to ISDA contracting, it was addressing an issue identical to that being litigated in this case today—the failure of agencies to fully fund CSC requirements under the statute. At the time, the BIA argued the contractor had no remedy for this breach. Congress gave tribal contractors one by expressly applying the CDA.

Section 110(d) subjects self-determination contracts to the Contract Disputes Act, thereby affording self-determination contractors the procedural protections now given other federal contractors by that Act.

\*\*\* 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."

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The strong remedies provided in these amendments are required because of [IHS's and BIA's] 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.

S. Rep. No. 100-274 at 36-38 (Dec. 21, 1987). Thus, the ISDA does not suggest any intention to restrict access to CDA remedies. Rather it supports a flexible, broad reading of the statute.

Consistent with its remedial nature and the federal trust responsibility to tribes, the ISDA requires liberal interpretation in favor of tribes. 25 U.S.C. § 450l(c) (setting forth liberal construction rule in section 1(a)(2) of mandatory model contract); *id.* § 450n(2) (affirming "trust responsibility of the United States with respect to the Indian people"); *Samish Indian Nation v. United States*, 419 F.3d 1355, 1367 (Fed. Cir. 2005) (discussing remedial nature of ISDA and liberal construction canon). In this context, it would be inappropriate to deny equitable tolling for the Tribe. *See Kirkendall*, 479 F.3d at 843-44 (discussing canon of construction in favor of veterans).

Because of the lack of any evidence of Congressional intent to preclude tolling, under *Irwin/Brockamp* the doctrine of equitable tolling should apply and

the failure of the district court to apply equitable tolling, like its failure to apply legal tolling, is a clear error.

**B. The Six-Year Limitation Period Is Not "Jurisdictional," and Even if It Were, It Can Be Subject to Tolling.**

The district court rejected the application of tolling by concluding without analysis that § 605(a) was a waiver of immunity contained in a statute and was therefore jurisdictional. 539 F. Supp. 2d at 154. As such, the court concluded the limitations was not subject to tolling. But the Supreme Court created the *Irwin* presumption of tolling in the context of a statutory waiver of immunity. The district court made a classic error in connecting the term jurisdictional with the preclusion of tolling.

The Supreme Court has identified two different types of time limitations: (1) a traditional statute of limitations, which protects a defendant against stale claims, and which is treated as an affirmative defense; and (2) limitations for filing an appeal or otherwise geared to facilitating judicial efficiency, or which delineate the subject matter jurisdiction of a court. *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 753 (2008). *Cf. Kirkendall*, 479 F.3d at 842; *Socop-Gonzalez v. Immigration and Naturalization Services*, 272 F.3d 1176, 1192 (9th Cir. 2001) (en banc). The distinction as to the type of limitation is important since all statutes permitting suit against the Government are waivers of immunity and are in some sense jurisdictional. Neither the "waiver of immunity" nor the "jurisdictional"

label controls the application of tolling however. If it did, no statute of limitations attached to a waiver of immunity could ever be tolled. Rather, the Supreme Court has allowed tolling of a limitations period depending on its type—traditional limitations may be tolled, more absolute limitations may not. The CDA limitations period does not fit within that absolute type.

***1. The "Jurisdictional" Label Does Not Control Whether Tolling May Apply.***

In *Irwin*, the Supreme Court considered the waiver of immunity issue when it considered a time limit set forth in Title VII of the Civil Rights Act. Specifically, the statute provided that a "complaint against the Federal Government under Title VII must be filed '[w]ithin thirty days of the receipt of notice of final action taken' by the EEOC." 498 U.S. at 92. This is a timeline for filing a claim against the Government, a traditional statute of limitations much like that set forth in § 605(a). The petitioner did not file timely but argued that the statute was tolled. The Court of Appeals disagreed and held that since the statute was a waiver of immunity, the statute had to be strictly construed and therefore, the timeline was "jurisdictional." 498 U.S. at 93-94.

On review, the Court admitted that cases addressing time limits against the Government "have not been entirely consistent." *Id.* at 94. The Court then set out to adopt "a more general rule to govern the applicability of equitable tolling in suits against the Government." *Id.* at 95. Recognizing that it was dealing with a waiver

of immunity, the *Irwin* court nevertheless concluded that a "rebuttable presumption of equitable tolling" applied. *Id.* at 95-96.<sup>15</sup>

Indeed, when assessing limitations, the confusion for courts lies in the use of the words "mandatory" and "jurisdictional." The Supreme Court has admitted that the Court has been "less than meticulous" in its use of the word "jurisdictional" when applied to time prescriptions. *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004). The Supreme Court has also reiterated that limitations can be wrongly defined. "[T]ime prescriptions, however emphatic, are not properly typed jurisdictional." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006) (citations and internal quotation marks omitted). *See also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-94 (1982) (time period for filing initial claim not "jurisdictional" when "it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts").

In *Kirkendall v. Dep't of the Army*, 479 F.3d 830 (Fed. Cir.), *cert denied*, 128 S. Ct. 375 (2007), the Federal Circuit considered whether certain timing provisions under the Veterans Employment Opportunities Act were subject to equitable tolling under *Irwin*. The Court noted that the presumption of tolling applies to waivers of immunity and it rejected the "jurisdictional" notation as

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<sup>15</sup> Because *Irwin* did not make his factual case for tolling, the Court affirmed the dismissal for lack of jurisdiction. *Irwin*, 498 U.S. at 92. The "jurisdictional" nature of the statute did not preclude tolling, only the facts did.

controlling. 479 F.3d at 836. The court cited to *Eberhart v. United States*, 546 U.S. 12 (2005) for the proposition that "[c]larity would be facilitated" if courts did not use the term "jurisdictional" to apply to claims processing rules, like traditional limitations, that serve as an affirmative defense, rather than timing of review limitations, which serve as "prescriptions delineating a class of cases (subject matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." 479 F.3d at 842 (citations and internal quotes omitted).<sup>16</sup>

Concluding that a waiver of immunity is jurisdictional and cannot be tolled is illogical because all statutes that constitute a waiver of immunity are in some sense jurisdictional. The lesson of *Irwin* and progeny is that tolling may still apply to such waivers. *Irwin*, 498 U.S. at 95; *United States v. Dalm*, 494 U.S. 596, 608 (1990). *See also Martinez v. United States*, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (en banc) (recognizing that statutes of limitations on actions against United States, as conditions on waiver of sovereign immunity, "are jurisdictional in nature ... [but] that does not mean that courts may never recognize equitable tolling of statutory limitations periods in suits against the government"); *Bath Iron Works Corp. v. U. S.*, 20 F.3d 1567, 1572 n.2 (Fed. Cir. 1994) ("Presumably, therefore,

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<sup>16</sup> In *Kirkendall*, the court considered a limitation for filing an appeal and a limitation that provided "a complaint under this subsection must be filed within 60 days after the date of the alleged violation," what would be considered a traditional statute of limitations. The government correctly conceded the latter limitation, as a traditional defense, was subject to tolling. *Id.* at 837.

*Irwin* merely holds that those time limits, while jurisdictional, can be equitably tolled in certain circumstances."); *Young v. United States*, 535 U.S. at 49 (2002) ("*all* limitations periods are 'substantive'" yet "[i]t is hornbook law that limitations periods" are subject to equitable tolling, citing to *Irwin*) (emphasis in original).

Because "jurisdictional" is an imprecise term, *Irwin* and its progeny require that every statute be examined to determine Congressional intent. The district court made the very mistake identified by the Supreme Court when it rejected tolling out of hand simply because the § 605 limitation period is part of a statutory waiver of immunity.

**2. *The Time Limit in § 605(a) Is a Traditional Limitations Period, Not a More Absolute Limitation that Cannot Be Tolle*d.**

The word "jurisdictional" is not controlling, but the Supreme Court has created a distinction between time limits for review, which are considered more absolute and not subject to tolling, and those time limits for filing a claim, which are affirmative defenses.

In *Bowles v. Russell*, 127 S. Ct. 2360 (2007), the Supreme Court considered a time limit for filing a notice of appeal, a timing of review limitations period. In finding it was not subject to waiver, the Court did not indicate any intention to overrule *Irwin* or otherwise suggest that it was not good law. The Court stated, "Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Id.* at

2365. *Bowles*, then, is consistent with *Irwin* in relying on the language of the statute and Congressional intent to determine if the statute may be tolled. *See Blueport Co. v. United States*, 533 F.3d 1374, 1379-80 (Fed. Cir. 2008) (whether limitation is jurisdictional or an affirmative defense depends on language and context of the statute). Under this construct, § 605(a) is not a timing of review limitations and Congress has not defined it in absolute terms. Rather, it is a traditional statute of limitations, an affirmative defense that is not regarded as jurisdictional. *Diaz v. Kelly*, 515 F.3d 149, 153 (2d Cir. 2008) ; *see also Henderson v. Peake*, 22 Vet. App. 217, 200 (2008) (*Irwin* continues to apply to claims processing rules such as limitations but not to judicial review periods).

Thus when the district court cited *Bowles* for the proposition that "[s]tatutory time limits are jurisdictional in nature, and courts do not have the power to create equitable exceptions to them," 539 F. Supp. 2d at 154, it was a clear misreading since *Bowles* did not overrule *Irwin* or any of the Supreme Court's many other cases applying tolling analysis to statutory time limitations. *See, e.g., Diaz v. Kelly*, 515 F.3d 149, 153 (2d Cir. 2008) ("[I]t would be an unwarranted extension of *Bowles* to think that the court was impliedly rendering equitable tolling inapplicable to limitations periods just because they are set forth in statutes.")

In fact, after *Bowles*, the Supreme Court reaffirmed that *Irwin* provides the "general prospective rule" on equitable tolling. *John R. Sand & Gravel Co. v.*

*United States*, 128 S. Ct. 750, 756 (2008). In assessing whether tolling applied to 28 U.S.C. § 2501, the Court noted that *Irwin* applied tolling to a statute of limitations applicable to the Government that was "linguistically similar" to § 2501. 128 S. Ct. at 755. The Court, however, declined to fully apply *Irwin* to § 2501 because "*Irwin* dealt with a different limitations statute. That statute, while similar to the present statute in language, is unlike the present statute in the key respect that the Court had not previously provided a definitive interpretation." *Id.* Given the Tucker Act's long history of interpretation, the Court concluded that *stare decisis* controlled and the statute's historical interpretation as an absolute limitation not subject to waiver was not overturned by *Irwin*. Significantly, the Court reasoned that the *Irwin* test was met because Congress's presumed acquiescence in the Court's longstanding interpretation was enough to rebut the presumption of intent that tolling apply. 128 S. Ct. at 756.

In *Sand*, the Court set out to give some meaning to the distinction between limitations that can be tolled and those that cannot. The Court recognized the distinction between statutes of limitations meant to protect a litigant from stale claims, which are generally raised as an affirmative defense, and those statutes that limit the scope of governmental waiver or that facilitate the administration of claims and judicial efficiency (timing of review statutes). 128 S. Ct. at 753. The court noted that this latter group is sometimes referred to as "jurisdictional," citing

to *Bowles, supra*, but characterized this label as merely "convenient shorthand."

*Id.*

In *Sand*, the Court looked back to three specific cases for examples of "more absolute" limitations provisions. First, it referred to *United States v. Brockamp*, 519 U.S. 347 (1997), as an example of a statute "facilitating the administration of claims." *Brockamp* involved a limitations period for filing refund claims with the Internal Revenue Service ("IRS"). After analyzing the detailed structure of the refund process and limitations period in that case, the Court pointed out that the IRS makes 90 million tax refunds a year. To insert equitable tolling into an administrative claims and refund system of that detail and magnitude would have such an impact that the Court concluded Congress would have made tolling an explicit exception if it intended to allow it. 519 U.S. at 352-53.

The CDA does not in any way resemble the IRS tax refund mechanism, which is intended to process millions of potential tax refund claims every year. The CDA applies to a limited set of contracts in a specific context, much more like the statutes for processing veterans' claims in *Irwin*.

Second, the Supreme Court cited to *U.S. v. Dalm*, 494 U.S. 596 (1990), as an instance of a "more absolute" limitation on the scope of the United States' waiver of sovereign immunity. *Sand*, 128 S. Ct. at 753. *Irwin* considered a waiver of immunity so there was something more in *Dalm* that made the difference. *Dalm*

considered a limitations provision in another part of the federal tax code related to filing a tax refund claim. The Court stated, "[A]lthough we should not construe such a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would extend the waiver beyond that which Congress intended." 494 U.S. at 608 (citations and internal quotes omitted). In other words, there was no conclusion in *Dalm* that a limitations provision is not waivable without examination. Rather, Congressional intent is key. Because Congress had specifically defined a valid claim as one filed timely, and since Congress expressly provided for exceptions to that limitations period, the Court would not extend Congress's waiver to other exceptions. 494 U.S. at 610, 611. This is a standard *Irwin/Brockamp* analysis.

The CDA is unlike the tax provisions in *Dalm*. As we have established, the CDA gives no indication that Congress intended to preclude tolling of the limitations period. There is no statutory set of exceptions and indeed, the CDA in comparison to the detailed tax code is bare-bones.

Finally, the Court in *Sand* cited to *Bowles*, *supra*, as an example of a more absolute limitation meant to promote judicial efficiency. 128 S. Ct. at 753. At issue in *Bowles* was a timing of review limitation that governed the time to reopen the period in which to file a notice of appeal with a federal appellate court under 28 U.S.C. § 2107(c). The Court held that generally timing of review provisions are

jurisdictional because the time for taking an appeal has been considered mandatory and not subject to modification. 127 S. Ct. at 2363-64.

Section 605(a) is unlike the statute in *Bowles*. It says nothing about the jurisdiction of a body reviewing a denied claim; it is not a limitation period for filing an appeal to another forum, or specifying a time for review (as is true in § 605(b) and 606); and it is not intended to address judicial efficiency. The other limitations in the CDA illustrate the difference in the types of limitations identified in *Bowles*. Sections 605(b), 606, and 609 are timing of review provisions that speak to the jurisdiction of a court or appeals board. Section 605(a) is not.

Had the district court examined the CDA limitations in detail, it would have found that § 605 is unlike any of the more absolute statutes of limitations. It is simply a garden variety claims processing rule for filing an initial claim with the agency, the type the Supreme Court held tollable in *Irwin* and other cases. *E.g.*, *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004).

**3. *Under the Appropriate Regulatory Framework, It Is Clear That § 605(a) Is Not Part of the Presentment Requirements.***

The district court held first that the CDA is a waiver of immunity and that the time limitations are a condition on the waiver. 539 F. Supp. 2d at 154. The Court cited to *James M. Ellett Constr. Co., Inc. v. United States*, 93 F.3d 1537, 1541-42 (Fed. Cir 1996). However, *Ellett* addressed the Court's jurisdiction and the limitations under § 609, a timing of review statute. Moreover, *Ellett* stands for the

proposition that in order for a court to have jurisdiction over a claim, there must be a "valid claim." The Court stated, "[T]he controlling question here is whether *Ellett* submitted a proper claim upon which the contracting officer has issued a decision. Our answer is based on the FAR definition of a claim, the contract language, and the facts of the case." 93 F.3d at 1542. But the district court did not focus on this detail. It simply concluded without examination that the time limit in § 605(a) is jurisdictional in nature. The Court appears to have reasoned that since administrative presentment is a mandatory jurisdictional prerequisite, so is the time limitation on presentment. 539 F. Supp. 2d at 154, n.2.<sup>17</sup>

While a "valid claim" is a jurisdictional prerequisite, *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995), the CDA does not define a "valid claim" and the courts must look to applicable regulations to determine if an appeal has been properly filed and therefore meets the jurisdictional prerequisites and the conditions of the waiver. Most courts, like *Ellett*, have looked to the Federal Acquisition Regulations ("FAR") to establish exhaustion of remedies and finality,

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<sup>17</sup> We note that the district court cited to *Pueblo of Zuni v. United States*, 467 F.Supp.2d 1099 (D.N.M. 2006) for the proposition that administrative presentment is mandatory and jurisdictional. We do not contest the idea that presenting a claim to a contracting officer is a jurisdictional prerequisite. We do contest the conclusion that the limitations period is absolutely jurisdictional under the statute and regulations and cannot be tolled. *Zuni* does not support that conclusion, because the claims there were dismissed for failure to present at all, not failure to present on time.

which are jurisdictional prerequisites to any appeal or court action on a claim. *See e.g., England v. The Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004) (applying FAR definition of "claim"); *Axion Corp. v. United States*, 68 Fed. Cl. 468, 480 (2005) (FAR defines accrual for limitations purposes).

These courts recognize that the CDA does not define a valid claim for the purposes of an appeal, and applicable regulations must be referenced to further define the conditions to be met for a court to have jurisdiction. If a valid claim is defined by regulations, the district court should have considered the ISDA.<sup>18</sup>

It is the ISDA regulations that specifically define a proper CDA claim for the purposes of an ISDA contract and for appeal to the district court. 25 C.F.R. § 900.218. The only jurisdictional prerequisites for an ISDA claim are a written, certified claim demanding a sum certain. The ISDA regulations do not mention the six-year limitation period. Title 25 C.F.R. § 900.218, which defines a CDA

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<sup>18</sup> Congress specifically exempted ISDA agreements from the FAR. *See* 25 U.S.C. § 450j(a)(1) (contracts "shall not be subject to Federal contracting or cooperative agreement laws (including any regulations), except to the extent that such laws expressly apply to Indian tribes"); S. Rep. No. 100-274, at 29 (1987) (stating intent of amendment to § 450j(a) that "the system of federal acquisition regulations contained in Title 41 and Title 48 of the Code of Federal Regulations shall not apply to Indian self-determination contracts"). *See also* 25 U.S.C. § 450b(j) (providing, in definition of "self-determination contract," that "no contract shall be construed to be a procurement contract"); S. Rep. No. 100-274, at 18 (1987) (stating that definition of "self-determination contract" makes clear that "the system of federal acquisition regulations ... should not apply to self-determination contracts"); *Cherokee*, 543 U.S. at 640 (recognizing that exemption from FAR designed to reduce bureaucratic burdens on tribes).

claim for the purposes of Title I of the ISDA, was promulgated on June 24, 1996, almost two years *after* the CDA was amended to include the six-year limitations in § 605(a) in 1994. Indian Self-Determination and Education Assistance Act Amendments; Final Rule, 61 Fed. Reg. 32482 (June 24, 1996). It is reasonable to assume that if the agency believed that the six-year limitations period was part of a proper claim it would have included this requirement in § 900.218. It did not do so. Almost six years later, on May 17, 2002, the agency promulgated 42 C.F.R. § 137.412, which incorporated by reference the 25 C.F.R. § 900.218 definition of a CDA claim for purposes of Title V of the ISDA. Once again the agency failed to include in the definition any indication that the six-year limitation was a requirement for a proper "claim."

The question then is whether the Tribe had met the definition of a filing a valid CDA claim under the ISDA regulations, and no one disputes that they did. Meeting the regulatory requirements of filing a claim under the ISDA is sufficient to establish the jurisdictional prerequisites for a CDA appeal under the ISDA. To conclude differently ignores the agency's own interpretation of what constitutes a valid CDA claim under regulations that the agency itself promulgated. Furthermore, filing a proper claim, and receiving the contracting officer's decisions denying those claims, satisfied the two requirements that courts have consistently identified as prerequisites to their jurisdiction. *Zuni*, 467 F. Supp. 2d at 1106 ("two

jurisdictional requirements" under CDA are presentment of a proper claim and either a contracting officer's decision or a deemed denial); *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 852 (Fed. Cir. 2004) (same). While ISDA claims are subject to the six-year limitation under the CDA, that limitations period was not inserted into the regulatory definition of a proper "claim" so as to make it a jurisdictional prerequisite to an appeal. It stands as a separate traditional limitations period, to which tolling may or may not apply, depending on the court's application of established tolling rules to the statute and facts at hand. The district court erred in short-circuiting this entire analysis by imputing the jurisdictional nature of presentment to the time limitation.

The Tribe also met the statutory jurisdictional prerequisites for an appeal to the district court. Section 605(b) defines a federal court's jurisdiction over a contracting officer's decision: "The contracting officer's decision on the claim shall be final and conclusive *and not subject to review in any forum*, tribunal, or Government agency, *unless an appeal or suit is timely commenced* as authorized by this chapter." (Emphasis added). Section 609(a)(3) then goes on to specify the timing of review: "Any action ... shall be filed within twelve months from the date of the receipt of by the contractor of the decision of the contracting officer concerning the claim...." These two provisions are the finality and timing of review provisions that govern federal court jurisdiction. No one disputes that the

Tribe met the deadline set forth in § 609. The district court erred in basing its own jurisdiction (or lack thereof) on a time limitation directed at contractors and the agency contracting officer instead of the CDA provisions that define the court's jurisdiction.

**C. The Tribe's Claim for CY 1995 Was Not Barred By Laches.**

The defense of laches requires a showing of (a) an unreasonable and unexcused delay which is translated into an assessment of the lack of diligence by the plaintiff, and (b) prejudice to the defendant, either economic or in the ability to mount a defense. *Pro-Football, Inc., v. Harjo*, 415 F.3d 44, 47 (D.C. Cir. 2005); *Gull Airborne Instrument, Inc., v. Weinberger*, 694 F.2d 838, 843 (D.C. Cir. 1982). The burden of proof rests with the defendant and both parts of the test must be satisfied. *Costello v. United States*, 365 U.S. 265, 282 (1961); *Daingerfield Island Protective Society v. Lujan*, 920 F.2d 32, 37 (D.C. Cir. 1990) . Here, Defendants did not meet their burden on either showing.<sup>19</sup>

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<sup>19</sup> In 1994, when Congress enacted the six-year limitation for filing a claim with the contracting officer, it was not immediately implemented upon adoption. Pub. L. No. 103-355 § 2351, 108 Stat. 3243, 3322 (Oct. 13, 1994), § 10001(c). Instead, Congress required implementation of its statute of limitations "in the manner prescribed in the final regulations [to be] promulgated pursuant to section 10002." *Id.* § 10001(b)(2), 108 Stat. at 3404; *see also Motorola, Inc. v. West*, 125 F.3d 1470, 1473 (Fed. Cir. 1997) (describing CDA amendment by FASA). The Federal Acquisition Regulation (FAR) implementing the statute of limitations was published at 60 Fed. Reg. 48224, 48230 (Sept. 18, 1995), and provided: "Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties

***1. The Tribe's Delay Was Reasonable Given the Pending Class Actions.***

The Tribe argued below that its delay was reasonable since it was awaiting the outcome of a class action and that, given the suspension of the limitations period while the class action was pending, the Tribe's claim was timely filed. The Tribe's CY 1995 claim was only a little over three years old when the *Cherokee Nation* class action was filed on March 5, 1999. The class action aimed to recover CSC claims for all tribal contractors from 1988 forward. *Cherokee Nation*, 199 F.R.D. at 360. The Tribe fit within the putative class member definition and therefore the Tribe's decision to await the outcome of the case was entirely reasonable. In 2001, the Pueblo of Zuni filed a second contract support cost class action, which, if certified, would also have included the Menominee Tribe. The class certification decision in that case was still pending when the Tribe filed its claim in 2005. *See Pueblo of Zuni v. United States*, 243 F.R.D. 436 (D.N.M. 2007) (denying class certification). Thus, for the nine years and nine months between

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agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995." 48 C.F.R. § 33.206(a). Courts have read this regulation to mean the statutory six-year limitation lacks retroactive effect. *Motorola, Inc. v. West*, 125 F.3d 1470, 1474 (Fed. Cir. 1997) (Office of Federal Procurement Policy's "implementing regulation made the FASA statute of limitations applicable to contracts prospectively" only). Since the statute of limitations in Section 605 does not apply to claims arising from contracts, like the Tribe's CY 1995 contract, awarded prior to October 1 of that year, the Government raised laches as a defense to the Tribe's claim for CSC for CY 1995.

accrual of the Tribe's CY 1995 claim and its filing, the claim was part of a pending class action for six of those years. As stated by the Supreme Court in *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 352-53 (1983), "Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims."

The Government failed to meet its burden as to the unreasonableness of the delay. It showed no real prejudice but argued summarily that there was an 11-year delay (which was actually 9 years and 9 months, *see supra* at 8 n.4) and that reliance on the class action was unwarranted. The district court did not mention let alone weigh whether reliance on the class actions was reasonable or excused the delay. Instead, the court focused entirely on the length of the delay. But the length of delay alone is not enough to establish laches. *Gull Airborne*, 694 F.2d at 843. The question is whether the delay was inexcusable or unreasonable in a way that prejudiced the other party. *Id.*; *Pro-Football*, 415 F.3d at 47. "Prejudice may not be assumed based on the length of delay." *Cornetta v. United States*, 851 F.2d 1372, 1380 (Fed. Cir. 1988).

To gauge the reasonableness of the Tribe's delay, the court referenced the statute of limitations time frame of six years. But "the existence of laches should not be determined merely by a reference to and a mechanical application of the

statute of limitations. The equities must be considered as well." *Gardner v. Panama Railroad Co.*, 342 U.S. 29, 31 (1951). By failing to consider the facts behind the delay, the district court failed to consider the equities, a fundamental error in applying laches. "Laches is not, like limitations, a mere matter of time." *Pro Football*, 415 F.3d at 49, quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). The delay must have been unreasonable "in a way that was prejudicial." *Id.* The district court mentioned only in passing that the delay caused prejudice. On that ground, the district court failed to apply the correct test as to the reasonableness of the delay and therefore it is entitled to no deference. *Daingerfield*, 920 F.2d at 38.

## **2. *The Government Suffered No Prejudice From the Delay.***

Two types of prejudice may arise from laches: (1) evidence or witness prejudice and (2) economic prejudice in which "the defendant may have changed its position in a manner that would not have occurred but for the plaintiff's delay." *Gull Airborne*, 694 F.2d at 844.

The Government claimed that it suffered economic prejudice from the Tribe's delay in filing on the ground that the appropriations that could have been used to pay the Tribe under its contract were expired. Essentially, the Government's claim is that once the appropriations expire, there is no possibility of

the Tribe, or anyone for that matter, bringing a claim for breach of contract damages for a contract paid out of those appropriations.

Using the expiration of the appropriations as a basis for economic prejudice and laches is nonsensical and results in a situation where the Government will always win. For fiscal year contracts, laches would bar the claim the moment it accrued. The Government made this same argument in the past and courts soundly rejected it. When faced with an identical claim for failure to pay full CSC in *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075 (Fed. Cir. 2003), the Government argued that the claim for damages was moot or barred since the appropriation had expired. One of the years at issue in that case was FY 1995, the same year at issue here. The Federal Circuit answered,

The issue in this case under the availability clause, however, is whether funds were available for the Secretary to meet his contract obligations, not whether those funds *remain available* now. The courts have long entertained breach of contract claims against the government filed long after the relevant fiscal years have expired. In such case, the damages are awarded from the judgment fund created by 31 U.S.C. § 1304. *Lee v. United States*, 129 F.3d 1482, 1484 (Fed. Cir. 1997)."

334 F.3d at 1092 (court's italics; underlining added). The Supreme Court affirmed this reasoning. 543 U.S. at 639 (ISDA says "if the Government refuses to pay [CSC], then contractors are entitled to 'money damages' in accordance with the

Contract Disputes Act, 25 U.S.C. § 450m-1(a).").<sup>20</sup> Thus, the Government's claim that it was prejudiced because the appropriations had expired and the district court's reliance on this single factor was a clear error.

As was true in *Cherokee*, the Menominee Tribe's claim is a damages action for breach of contract. The Government failed to fully pay all of the CSC owed under its contract as it was required to do and this failure to pay constitutes a breach of contract. The Tribe does not seek payment from the appropriation. It seeks damages and the CDA provides that an award of damages for breach of contract can be paid out of the Judgment Fund. 41 U.S.C. § 612.

The Government responded that forcing it to pay damages by using the Judgment Fund was prejudicial because, even if it was available as a source of appropriations to pay damages, the statute required the agency to pay the money back. The fact that the Government may have to pay back the money it takes from the Judgment Fund is immaterial. That a defendant may have to pay damages cannot serve as a basis for economic prejudice. Indeed, if that were the test, then no party could ever prevail under laches because any claim for damages would be conclusively prejudicial. *See Cornetta*, 851 F.2d at 1381; *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020, 1033 (Fed. Cir 1992) (en banc).

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<sup>20</sup> *See also Appeals of Mississippi Band of Choctaw Indians*, 06-1 BCA ¶ 33253, 2006 WL 1009210 (I.B.C.A.) (2006) (awarding \$4,231,391 from Judgment Fund despite government's argument that entire appropriation had been expended).

In any event, the Government's arguments are diversions because they do not address the real question in assessing economic prejudice: whether damages could have been prevented or whether the Government changed its position in reliance on the delay. *Cornetta*, 851 F.2d at 1382 (finding that delay in filing did not increase potential liability of defendant); *Pro-Football*, 415 F.3d at 50 (posing question whether defendant "would have taken a different course" if the plaintiff had "acted more diligently"); *CarrAmerica Realty Corp. v. Kaidanow*, 321 F.3d 165, 172 (D.C. Cir. 2003) (addressing whether defendant could have extricated itself from problems but for the delay); *Gull Airborne*, 694 F.2d at 845 (finding that defendant did not change its position in a way that would not have occurred but for the delay). In this case, the answer is a resounding "no," and the Government brought forth no evidence to establish otherwise. The Government implemented its policy of underfunding before the class action and continued it even after the Supreme Court decided the *Cherokee* case.

Finally, analyzing virtually identical facts as in this case, the Civilian Board of Contract Appeals ("CBCA") reached the opposite conclusion from the district court below and rejected the laches defense to another tribe's FY 1995 claim filed in 2005. *Metlakatla Indian Community v. Dep't of Health & Human Servs.*, CBCA No. 281-ISDA and 282-ISDA, Order Partially Granting and Partially Denying

Motion to Dismiss (July 28, 2008) (Addendum at 12a-14a).<sup>21</sup> Unlike the district court, the CBCA analyzed the factual context of the delay rather than its mere length, and found the delay reasonable. The CBCA pointed out that the Tribe filed its claims approximately four years after class certification was denied in *Cherokee*, and only two months after the Supreme Court's decision in that case. The delay was reasonable given this other litigation, the CBCA held. Addendum at 13a, citing *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1033, 1038 (Fed. Cir. 1992) (en banc). The CBCA further held that IHS had shown no proof of prejudice, especially given that the class action had placed IHS on notice of the claims and its need to preserve relevant documents. Addendum at 13a-14a.

Given the district court's application of an improper standard and its inadequate factual analysis, the district court's dismissal of the Tribe's claim for CY 1995 should be reversed.

## CONCLUSION

Since there are no significant facts in dispute, the Tribe asks this Court to hold that the statute of limitations in § 605 was tolled during the pendency of the *Cherokee* class action, either on a legal or equitable basis. Further, the Tribe asks

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<sup>21</sup> The CBCA issued a virtually identical order rejecting the laches defense in *Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Dep't of Health & Human Servs.*, CBCA No. 235-ISDA and 236-ISDA, Order Partially Granting and Partially Denying Motion to Dismiss (July 28, 2008).

this court to find that the Government failed to meet its burden of proof as to laches and find that the claim for CY 1995 is not subject to dismissal.

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**CERTIFICATE OF COMPLIANCE WITH  
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I, Geoffrey D. Strommer, hereby certify that:

1. I am counsel of record for Appellant in the above-captioned matter.
2. The Opening Brief of Appellant Menominee Indian Tribe ("Opening Brief") complies with the type-volume limitation of Federal Rule of Appellate Procedure ("FRAP") 32(a)(7)(B). The Opening Brief contains 13,585 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).
3. The Opening Brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6). The Opening Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, Times New Roman font.

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