

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

MENOMINEE INDIAN TRIBE)
OF WISCONSIN,)
)
 PLAINTIFF,)
)
 v.)
)
UNITED STATES OF AMERICA,)
MICHAEL O. LEAVITT, Secretary of the)
Department of Health & Human Services, and)
CHARLES W. GRIM, Director of the)
Indian Health Service,)
)
 DEFENDANTS.)

Case No.: 1:07cv00812
Hon. Rosemary M. Collyer

PLAINTIFF'S MOTION FOR PARTIAL RECONSIDERATION

Plaintiff, the Menominee Indian Tribe of Wisconsin (the "Tribe"), by and through undersigned counsel, respectfully moves pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and Local Rule 7 for partial reconsideration of the Court's Memorandum Opinion and Order dated March 14, 2008 ("Mem. Op."). Specifically, the Tribe requests that the Court reconsider that portion of its Order dismissing the Tribe's claims for years 1995-1998 because of a lack of subject matter jurisdiction under rule 12(b)(1). Mem. Op. at 2-3.

The grounds for this motion are that the Court relied on case law that was discussed by the Government for the first time in its Reply. Specifically, the Court relied on *NuFarm Am., Inc. v. United States*, 398 F.Supp.2d 1338 (Ct. Int'l Trade 2005) for the proposition that class members who are later found to be outside of the Court's jurisdiction are not entitled to tolling. The briefing schedule afforded no opportunity for the Tribe to respond to this argument in writing, nor did it come up at oral argument. The *NuFarm* case is in direct conflict with the

Supreme Court's ruling in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974).

We request the opportunity to brief the court on the grounds for that assertion.

In addition, this court, once again relying on the Government's argument in reply, held that the Tribe's claim for 1995 was barred by laches. However, there is direct precedent against this court's holding that eleven years is a significant time period as well as this Court's agreement with the Government's view that there is an economic harm to the Government based on lapsed appropriations.

The above grounds are fully set forth in a Memorandum of Points and Authorities filed herewith. Wherefore, the Tribe respectfully requests that the court grant this Motion. In addition, the Tribe requests an oral hearing on this Motion pursuant to Local Rule 7(f).

Respectfully Submitted,

/s/

F. Michael Willis
Geoffrey Strommer
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street, NW, Suite 700
Washington, DC 20037
202-822-8282 (Tel.)
202-296-8834 (Fax)

Attorneys for the Menominee Indian Tribe
of Wisconsin

Of Counsel:
Marsha K. Schmidt
Hobbs Straus Dean & Walker

DATED: March 24, 2008.

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

MENOMINEE INDIAN TRIBE)	
OF WISCONSIN,)	
)	
PLAINTIFF,)	
)	Case No.: 1:07cv00812
v.)	
)	Hon. Rosemary M. Collyer
UNITED STATES OF AMERICA,)	
MICHAEL O. LEAVITT, Secretary of the)	
Department of Health & Human Services, and)	
CHARLES W. GRIM, Director of the)	
Indian Health Service,)	
)	
DEFENDANTS.)	

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR PARTIAL RECONSIDERATION**

As stated in Plaintiff's Motion, this Court ruled largely without having heard from the Plaintiff either in writing or during the oral argument on arguments and cases raised for the first time in the Defendants' Reply brief. The Tribe believes reconsideration of the Court's Memorandum Opinion of March 14, 2008 is warranted for the reasons below.

I. Standards Governing Reconsideration

This court has broad discretion to grant a motion for partial reconsideration "as justice requires." *See Childers v. Slater*, 197 F.R.D. 185, 190, 48 Fed.R.Serv.3d 396 (D.D.C. 2000), *citing* FED. R. CIV. P. 60(b) Advisory Committee Notes ("interlocutory judgments are not brought within the restrictions of [Rule 60(b)], but rather they are left subject to the complete power of the court rendering them to afford such relief from them *as justice requires*") (emphasis added).

In *Powell v. Castaneda*, 247 F.R.D. 179, 181 (D.D.C. 2007), the court explained that the "as justice requires" standard "amounts to determining 'whether reconsideration is necessary under the relevant circumstances,'" citing *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004).

In *Defense of Animals v. National Institutes of Health*, 527 F.Supp.2d 23, 28-29 (D.D.C. 2007) (Kollar-Kotelly, J.) this Court stated: "Considerations a court may take into account under the 'as justice requires' standard include whether the court 'patently' misunderstood the parties, made a decision beyond the adversarial issues presented, made an error in failing to consider controlling decisions or data, or whether a controlling or significant change in the law has occurred," citing *Singh v. George Washington University*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005). Judge Kollar-Kotelly further explained:

Cobell also suggests that even if justice does not "require" reconsideration of an interlocutory ruling, a decision to reconsider is nonetheless within the court's discretion: "[E]ven if the appropriate legal standard does not indicate that reconsideration is warranted, the Court may nevertheless elect to grant a motion for reconsideration if there are other good reasons for doing so." *Id.* at 540. However, the efficient administration of justice requires that a court at the very least have good reason to reconsider an issue which has already been litigated by the parties: "The district court's discretion to reconsider a non-final ruling is, however, limited by the law of the case doctrine and 'subject to the caveat that where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again.'" *Singh*, 383 F.Supp.2d at 101 (quoting *In re Ski Train Fire in Kaprun, Austria, on November 11, 2000*, 224 F.R.D. 543, 546 (S.D.N.Y. 2004)). Thus, if the court chooses to reconsider a motion even if justice does not so require, there must be a "good reason" underlying the parties' re-addressing an already decided issue.

Id. at 29.

We are mindful that the tribe bears the burden to "demonstrate that some harm, legal or at least tangible, would flow from a denial of reconsideration." *Cobell v. Norton*, 355 F.Supp.2d 531, 540 (D.D.C. 2005). We believe that such is the case here. The Court's opinion dismisses a large swath of Plaintiff's claims without having heard from the Plaintiff on controlling precedent.

The reconsideration requested here is "necessary under the relevant circumstances" of this case, and there are "good reasons" for reconsidering whether tolling applied to the statute of limitations and whether laches applies. Given the lack of opportunity to respond to the Government's late assertion of new authority and facts, which we had hoped and expected would be part of the oral argument, the Court did not have the benefit of the Plaintiff's analysis and may not, as a result, been fully aware of the pertinent case law on the subject.

II. Reconsideration Is Warranted In This Case.

A. This Court Should Reconsider Its Reliance on the *NuFarm* Case Since that Decision Conflicts with Supreme Court Precedent

The Tribe asks this court to reconsider its ruling in which it declined to apply tolling to the CDA's six-year statute of limitations to present a claim to the contracting officer. The ruling, as explained in footnote 2 of the opinion, relies largely on the reasoning of *NuFarm Am., Inc., v. United States*, 398 F. Supp. 2d 1338 (Ct. Int'l Trade 2005). This decision, now on appeal to the Federal Circuit, held without support that a putative class member that must exhaust administrative remedies is not within the Court's jurisdiction and therefore could not be the beneficiary of class action tolling.¹

NuFarm's holding is directly contrary to applicable Supreme Court precedent and flies in the face of the purpose of tolling as it has developed in class action cases. In fact, there are many cases in which courts have been presented with a putative class defined in a complaint that is not later certified on any number of grounds or that lead the court to decline to exercise jurisdiction over certain class members. We could find no instance in which a claimant who was excluded

¹ While we understand that presentment as required by § 605 is necessary for court jurisdiction, we disagree with the conclusion that the statute of limitations for presentment may not be tolled. See discussion below at 8-11.

from a class was later held to be barred from bringing an individual claim because of lack of tolling.

1. A Putative Class Member Is Within the Jurisdiction and Protection of the Court Until a Certification is Decided.

NuFarm held that if a class is not proper because the class members cannot meet the Court's jurisdictional requirements, then tolling could never have occurred. That is, tolling only applies if the court later finds it has jurisdiction over the class member. This holding is directly contrary to the notion that "Because of the representative nature of class litigation, it is settled that only the class representative must satisfy the requirements of subject matter jurisdiction, venue, and service of process on the named defendants in order to commence a suit styled as a class action." Newberg on Class Actions, § 1:3. In addition, those in the putative class are absent class members under the protection of the court and they are entitled to remain passive until the class issues are resolved. *Id.*

The Supreme Court made it clear in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538 (1974), 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. If the class is not certified, is modified, or is otherwise resolved against the putative class member, the complaint is then to be amended to conform to the court's ruling. If the court declines to certify, or modifies the class to exclude certain members, then the excluded claimant has the right to proceed to pursue an individual claim, and at that time must meet the re-started applicable statute of limitations. See Wright, Miller & Kane, 7B Fed. Prac. & Proc., § 1795. See also Newberg on Class Actions, § 7:28 "[A] class complaint is presumed to

state a class action for purposes of tolling the statute of limitations for absent class members, before a formal class ruling, even if the class is ultimately denied."

The *NuFarm* court's holding denying tolling turns *American Pipe* and the Rule 23 legal tolling rule on its head, ignores the purposes of tolling, and leaves unsuspecting class members, particularly those who have knowledge of the pendency of the class, subject to loss of significant due process rights. Wright, Miller, & Kane, *supra*.

2. The Basis of *American Pipe* and Its Application.

As explained in *American Pipe*, in the prior iteration of Rule 23, classes were spurious in that they were essentially joinder actions. The courts had split on whether those joining could meet timeliness requirements based on the filing of the initial complaint or whether each individual claimant had to meet timeliness requirements as they filed to join the action. 414 U.S. at 550-551. This in turn raised the thorny problem of what to do about limitations if the class certification was denied. Wright, Miller & Kane, 7B Fed. Prac. & Proc., § 1795.

The Supreme Court answered that question directly in *American Pipe* when it recognized that some potential class members may not qualify or the class might be denied in its entirety:

"[T]he commencement of the action satisfied the purpose of the limitation provision as to all those who *might* subsequently participate in the suit as well as for the named plaintiffs. To hold to the contrary would frustrate the principal function of a class suit...." 414 U.S. at 551 (emphasis added).

"[A] rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions. We are convinced that the rule most consistent with federal class action procedure must be 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.*" *Id.* at 554 (emphasis added).²

² The D.C. Circuit has followed *American Pipe*. See, e.g., *McCarthy v. Kleindienst*, 562 F.2d 1269 (D.C. Cir. 1977).

NuFarm clearly violates these stated principles by refusing tolling for those who *might* have been members of a class or those who were *asserted* to be class members.

3. Administrative Exhaustion Cases Follow *American Pipe* and Place in the Court the Discretion to Address the Issue.

There are several cases that address the issue of exhaustion and how it may be addressed in a class action tolling situation. In most cases, the courts agree that tolling is applied until resolution of certification and the court determines whether the excluded class member can then proceed to exhaustion. For example, in *Barrett v. United States Civil Service Commission*, 439 F.Supp. 216, 218 (D.D.C. 1977), in the context of an administrative class action, the Court considered "the effect of decertification of the class on the running of the statute of limitations." *Id.* at 217. The plaintiffs argued that the statute of limitations was tolled for all purported class members in a discrimination case until the Court resolved the class certification issue. The Government argued that since the class was only conditionally certified, the statute was not tolled for those who we later declared to be excluded from the class. The Court agreed that the tolling was applicable 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 then held that those excluded 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.*

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, which is the initial presentment of a claim under the ADEA, as well as the 90-day period for filing suit in federal court after notice of

dismissal of the charge. 138 F.3d at 1392-1393. Here, too, the court examined the factual circumstances of those excluded and set forth specific orders as to who could proceed to exhaust administrative remedies and who would be barred, e.g., those whose claims had lapsed before the class was filed were barred and those who had not presented could proceed. *Id.*

At least two 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).

Indeed, as one commentator noted:

"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." Newberg on Class Actions, § 5:15.

Thus, the question of exhaustion or remedies is not a new one and *NuFarm* failed to deal with or even cite to the analysis of these cases. Further, *NuFarm* failed to cite to any case to

suggest that class members are outside of a court's jurisdiction prior to resolution of class certification.

4. The Presentment Requirement Does Not Preclude Tolling.

This Court also held in footnote 2 that administrative presentment is a mandatory jurisdictional requirement and, following *NuFarm*, further held that without presentment, jurisdiction did not attach and therefore tolling was inapplicable.

As we establish above, tolling does attach to a putative class member, even if the Court later concludes certain members are not within its jurisdiction. The narrower issue is whether a class action may toll a statute of limitations for presentment while the class issue is being decided. The answer is most assuredly, yes. The Government's position is that if the limitations period is jurisdictional it cannot be tolled. U.S. Reply Brief at 4-5. But the Supreme Court rejected this very argument in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). In *Irwin*, the Supreme Court expressly considered a statute of limitations that the Government argued was a jurisdictional statutory filing deadline. *Id.* at 93-94. The Court, per Chief Justice Rehnquist, was undeterred holding that there would be a general tolling rule applicable to suits against the Government. *Id.* at 457. Surely, if jurisdictional limitations can be tolled equitably, they can be legally tolled under Rule 23.³

³ The Government cites to an FTCA case for the proposition that presentment is jurisdictional. *Founding Church of Christ Scientology of Washington D.C. v. Director*, 459 F.Supp. 748 (D.C.D.C. 1978). U.S. Reply Brief at 6. While we agree that this pre-*Irwin* case stands for the proposition that under the FTCA the exhaustion requirement can defeat a class action, it does not address tolling the exhaustion period. In fact, the court states that the FTCA expressly precludes waiver of the exhaustion requirement for Rule 23. *Id.* at 755. Thus, this is one of those unique statutes referred to by Newberg in the quote above at page 7. Moreover, the FTCA cases are based on the specific FTCA regulations that preclude a class representative from fulfilling the administrative exhaustion requirement. The FTCA regulations required that the claim be presented "by the injured person" or his authorized representative, 28 C.F.R § 14.3. See *Caidin v. United States*, 564 F.2d 284, 286 (9th Cir. 1977). In the case of the ISDEAA or the CDA, there are no such restrictive regulations. We also note that the FTCA specifically permits claimants who have proceeded to court without exhausting an opportunity to go forward. 28 U.S.C. § 2679(d)(5). Thus there

