UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS GRANTED: June 9, 2011

CBCA 1953(190-ISDA)-REM, 1954(289-ISDA)-REM, 1955(290-ISDA)-REM, 1956(291-ISDA)-REM, 1957(292-ISDA)-REM, 1958(293-ISDA)-REM

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Lloyd Benton Miller and Donald J. Simon of Sonosky, Chambers, Sachse, Miller & Munson, LLP, Anchorage, AK, counsel for Appellant.

Sean Dooley, Office of General Counsel, Department of Health and Human Services, Rockville, MD, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **STEEL**.

Opinion for the Board by Board Judge **SOMERS**. Board Judge **STEEL** dissents.

In July 2008, in ruling on the Government's motion to dismiss, we determined that we could not entertain these appeals because the appellant, Arctic Slope Native Association, Ltd. (ASNA), did not submit its claims to the contracting officer for the Department of Health and Human Services, Indian Health Service (IHS), within six years of the accrual of the claims. *Arctic Slope Native Association, Ltd. v. Department of Health and Human Services*, CBCA 190-ISDA, et al., 08-2 BCA ¶ 33,923. ASNA appealed, asserting among other things that the six-year time limit for submission of claims set forth in the Contract Disputes Act (CDA), 41 U.S.C. § 7103(a)(4)(A) (as codified by Pub. L. No. 111-350, 124 Stat. 3677, 3816-3826 (2011) (previously 41 U.S.C. § 605(a) (2006)), should be tolled on either of two

grounds. First, ASNA argued that the statutory presentment period was subject to equitable tolling. Second, ASNA concluded that the period was legally tolled by the pendency of two class action lawsuits in which it was a putative class member.

The Federal Circuit held that class action tolling did not apply to the six-year presentment period in these cases. However, the court remanded the appeals to the Board for us to determine whether ASNA meets the standards for equitable tolling. *Arctic Slope Native Association, Ltd, v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009), *reversing in part Arctic Slope*, 08-2 BCA ¶ 33,923.

For the reasons discussed below, we conclude that equitable tolling is not warranted. Accordingly, we dismiss the appeals as time-barred.

Background

The underlying facts in these appeals have been detailed extensively in our previous decision and that of the Federal Circuit. Knowledge of the facts presented in those opinions is presumed and we repeat only those facts necessary to this opinion.

In fiscal years (FYs) 1996, 1997, and 1998, ASNA contracted with IHS to operate a hospital in Barrow, Alaska. The parties entered into these contracts pursuant to the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. §§ 450-450n.

As originally enacted, the ISDA did not require the Government to pay the administrative costs that the tribes incurred to operate the programs. This changed in 1988, when Congress amended the ISDA to require the Federal Government to provide funds to pay the administrative expenses of covered programs. Those expenses included "contract support costs." This term encompasses those that a federal agency would not have directly incurred, but that tribal organizations, acting as contractors, reasonably incur in managing the programs. 25 U.S.C. § 450j-1(a)(2).

After the 1988 amendments took effect, several ISDA contractors asserted that the Government failed to fully fund their contract support costs and filed class action lawsuits. Three of these lawsuits figure prominently in ASNA's statement of facts. We discuss the relevant aspects of those class actions below.

The first lawsuit was instituted in 1990, when the Ramah Navajo Chapter filed a class action lawsuit in federal district court in New Mexico against the Secretary of the Interior to recover damages for the underpayment of contract support costs. The district court certified

a nationwide class of all tribes who had contracted with the Government. After extensive litigation, including an appeal to the Court of Appeals for the Tenth Circuit,[1] the district court approved partial settlements of the claims. *See Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999). ASNA participated as a full member of that class action lawsuit and received funds as a result of the settlements. *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002).

In the second class action lawsuit, the Cherokee Nation of Oklahoma and the Shoshone-Paiute Tribes of the Duck Valley Reservation moved for certification of a class of "[a]ll Indian tribes and tribal organizations operating Indian Health Service programs" who had not been fully paid their contract support cost needs "at any time between 1988 and the present." *Cherokee Nation of Oklahoma v. United States*, 199 F.R.D. 357, 362 (E.D. Okla. 2001) (*Cherokee*). The class, as described, potentially would have included contractors, like ASNA, who had yet to present any claims to the agency. The court denied class certification on February 1, 2001, finding that the requirements of typicality, commonality, and adequate representation had not been met. *Id*. at 366. The court subsequently ruled on the merits of the lawsuit, 190 F. Supp. 2d 1248 (2001). The tribes appealed the decision, and the case ultimately reached the Supreme Court.

A third class action lawsuit was filed on September 10, 2001, in the United States District Court for the District of New Mexico. ASNA claims to have been a member of the asserted class, which consisted of "all tribes and tribal organizations contracting with IHS under the ISDA between the years 1993 to the present." *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1105, *motion for reconsideration denied*, 467 F. Supp. 2d 1114 (D.N.M. 2006). This third class action lawsuit was stayed pending resolution of *Cherokee*, which had been appealed to the United States Supreme Court.

On September 30, 2005, after the Supreme Court issued its decision in *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005), and while the *Zuni* class action was still pending,[2] ASNA presented CDA claims to an IHS contracting officer. ASNA alleged that the IHS had failed to pay the full amount of the contract support costs that ASNA had incurred to operate the hospital.

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[1] *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997).

[2] The district court ultimately denied the named plaintiff's motion for class certification. *See Pueblo of Zuni v. United States*, 243 F.R.D. 436 (D.N.M. 2007).

Each of ASNA's contract claims accrued on the last day of the federal fiscal year covered by the contract in question, i.e., September 30 of each year. ASNA presented its claims to the contracting officer for FYs 1996, 1997, and 1998 after the six-year statute of limitations had expired.

Discussion

The Federal Circuit concluded that equitable tolling is available with respect to the presentment deadline set forth in what is now section 7103(a) of the CDA. Thus, we must evaluate whether ASNA has met its burden to establish the elements necessary for equitable tolling to apply to its claims.

The Supreme Court has held that a litigant seeking equitable tolling bears the burden of showing: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *See Holland v. Florida*, 130 S. Ct. 2549, 2563 (2010); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (*citing Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)).[3] The *Irwin* Court noted that it has been "less forgiving" in applying equitable tolling "where the claimant failed to exercise due diligence in preserving his legal rights," and also that principles of equitable tolling do not extend to a "garden variety claim of excusable neglect." 498 U.S. at 96.

ASNA contends that the CDA's six-year statute of limitations was equitably tolled as of September 10, 2001, the date that the Pueblo of Zuni filed its complaint, and that tolling continued until the date on which ASNA presented its claims to the contracting officer. ASNA believes that it can establish entitlement to equitable tolling because it relied upon the filing of the *Zuni* case, which ASNA alleges was almost identical to the previously filed *Ramah* case. As a result of the *Ramah* case, ASNA received compensation because it was considered a member of the certified class, even though it had never presented a claim to the contracting officer. Therefore, ASNA says, as in *Ramah*, it expected to be treated as a member of the class in the *Zuni* case, despite never having presented a claim. It thus asserts

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[3] One example of an extraordinary circumstance is when a movant shows that it was "induced or tricked by his adversary's misconduct" into missing filing deadlines. *See Irwin*, 498 U.S. at 96; *see also Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1238-39 (Fed. Cir. 2002); *Bonneville Associates Ltd. Partnership v. Barram*, 165 F.3d 1360, 1365 (Fed. Cir. 1999).

entitlement to equitable tolling not based upon the class action doctrine,[4] but, instead, upon a theory of equitable tolling created by reliance on what it identifies as a defective class action pleading. This legal position, even when evaluated in the context of the facts presented by ASNA, is insufficient to establish entitlement to equitable tolling.

First, contrary to ASNA's assertions, the *Ramah* case and the *Zuni* case differ in at least one material respect. Prior to 1994, no statute of limitations applied to the presentment of claims to a contracting officer. The CDA six-year statute of limitations did not come into existence until the passage of the Federal Acquisition Streamlining Act (FASA) of 1994, Pub. L. No. 103-355, § 2351(a), 108 Stat. 3243, 3322. Thus, because no statute of limitations applied to the presentment of the claims asserted in the *Ramah* case, the court had no need to determine whether members had filed their claims on a timely basis. Instead, when addressing the issue of presentment, the *Ramah* court determined that exhaustion of administrative remedies could be excused where, as alleged by the plaintiffs, the administrative remedies are "generally inadequate or futile" due to "structural or systemic failure." Because the plaintiffs' action challenged policies and practices of the Bureau of Indian Affairs, in addition to seeking systemwide reforms not limited to reimbursement of contract support costs, the court held that presentment would be futile. As a result, the court did not require all members to exhaust administrative remedies in order to be a member of the class.

By contrast, in the case of *Pueblo of Zuni*, filed after the enactment of FASA, the six-year requirement for presentment of claims to the contracting officer did apply. In May

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[4] The Government notes that ASNA relies solely upon *Zuni* to support its argument on equitable tolling. That may be because the Federal Circuit expressly refuted ASNA's reliance on *Ramah*, noting that:

> [T]he court in that case did not adopt the general principle that asserted class members need not exhaust their administrative remedies in an ISDA contract case. Instead, the court held that exhaustion of administrative remedies was not required under the circumstances of that case because it would have been futile. The appellants have not argued that any "futility" exception excuses their failure to make timely presentments of the disputed claims to the contracting officers.

Arctic Slope, 583 F.3d at 796 n.3.

2005, the Government moved to dismiss any claims that had not been presented to the agency prior to filing. The court dismissed those claims of the individual plaintiff that had not been presented to the agency,[5] and later, those of the putative class members that similarly had not been presented timely.[6] In this second ruling, relating to the putative class members, the court stated: "[T]here is no legal basis for the waiver of this requirement for Plaintiff or any putative class member, given the express mandate for presentment with the statutory language." These rulings occurred before the court issued its order denying certification of the class. *Zuni*, 243 F.R.D. at 442-43.

In sum, prior to FASA, the CDA did not require the filing of the claim with the contracting officer within any specified time period. The six-year statute of limitations did not become an issue until after FASA. *Ramah* was filed before the passage of FASA, *Zuni* was filed after. It is clear that the cases involved analyses of actions taken under different legal frameworks.

Second, ASNA asserts that a defective class action, like a defective pleading, can justify the application of equitable tolling under *Irwin* and *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). ASNA claims that *Irwin* permits it to reasonably rely on *Zuni*'s unsuccessful but timely-filed class action complaint. ASNA equates the complaint in the *Zuni* class action to a defective pleading, akin to one in which a party files a lawsuit in the wrong jurisdiction. Relying upon this analogy, ASNA asserts that "ASNA acted reasonably and diligently in relying on the filing of the *Zuni* class action to pursue its claims and to notify the government of those claims, even though that case eventually turned out to be a 'defective class action.'"

It seems that ASNA has conflated the concepts of equitable tolling and class action tolling in its attempt to show that the time for filing should be tolled. The fact that the district court denied certification of the class, finding that the requirements of Federal Rule of Civil Procedure 23(a) had not been met, does not lead to the inevitable conclusion that the complaint itself was defective. Indeed, in the *Zuni* litigation, the district court did not dismiss the complaint; it simply denied the motion to certify the class. *Zuni*, 243 F.R.D. at 452-53. Nothing precluded the named plaintiffs who had complied with the presentment requirement from proceeding with the litigation on the claims set forth in the amended complaint filed on December 12, 2001.

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[5] *Pueblo of Zuni v. United States*, 467 F. Supp. 2d at 1113.

[6] *Pueblo of Zuni,* 243 F.R.D. at 442-43.

In any event, even if the pleading had been considered defective, ASNA cannot rely upon that pleading to justify application of the equitable tolling doctrine because it could not have been a member of the class, even if the district court had certified the class. As the Supreme Court stated in *American Pipe & Construction Co.,*"the commencement of a class action" will in some cases "suspend[] 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. at 554. The Supreme Court restated this point in *Irwin*, when it held that the *American Pipe* rule applies regardless of whether a class is certified or denied, based on a defective pleading or otherwise. 498 U.S. at 96.

ASNA did not take the actions required to be considered a purported member of this class action. Therefore, it cannot rely upon a defective class action pleading in a case in which it could not have participated as a class member. Nothing in the *Irwin* Court's characterization of *American Pipe* changes this. ASNA does not become a member of the class action just because it thinks it should be. Nor can it rely upon a defective pleading from a class action lawsuit in which it is not a member to toll the time limits set forth by statute for presenting its claim. Thus, the very factors that prohibit ASNA from relying upon the class action lawsuit to toll the time limitations for presenting its claim also derail ASNA's argument that equitable tolling should apply because it had diligently attempted to pursue its claims. Although the United States Court of Appeals for the District of Columbia noted the following as relates to class action tolling, the sentiment applies equally here:

> We agree with the Federal Circuit that the *American Pipe* doctrine does not require courts to toll the time putative class members have to satisfy a jurisdictional prerequisite to judicial review when the failure to do so precludes them from obtaining relief via the class action. *See Arctic Slope*, 583 F.3d at 797. Until they satisfy the jurisdictional preconditions to class membership, putative class members have no reason to anticipate whether or not class certification will be granted and face none of the uncertainty class-action tolling is meant to ameliorate. Regardless of whether certification is granted, every contractor must submit its claim to the contracting officer.

Menominee Indian Tribe of Wisconsin v. United States, 614 F.3d 519, 528 (D.C. Cir. 2010). In this case, because ASNA could not have been a putative class member, it had no valid reason to anticipate that it could rely upon the filing of a class action suit to toll its six-year time limitation for presentment of its claims.

A case cited by both ASNA and the dissent, *Hatfield v. Halifax PLC*, 564 F.3d 1177 (9th Cir. 2009), is not helpful to ASNA's claims. ASNA cited *Hatfield* to distinguish between "equitable" and "class action" tolling in the context of a class action. However, *Hatfield* involved a cross-jurisdictional tolling issue in which *American Pipe* tolling is inapplicable. *Hatfield*, 564 F.3d at 1187 (relying on *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008) ("The rule of *American Pipe* – which allows tolling within the federal court system in federal question class actions – does not mandate cross-jurisdictional tolling as a matter of state procedure.")). The Ninth Circuit relied on tolling under California law, and not the federal tolling doctrine set forth by the Supreme Court in *Irwin* or *American Pipe*, to toll the claims of the named plaintiff and asserted members of the earlier class, who were California residents. In doing so, the court noted that it relied on California law only because the parties failed to brief the applicable English tolling law. *See Hatfield*, 564 F.3d at 1184 ("Because we hold that Hatfield's claims are governed by the English statute of limitations, the tolling law to be applied would be that of English law."). This case involves no cross-jurisdictional tolling issue. Accordingly, *American Pipe* governs, and as the Federal Circuit held, the rule does not save ASNA because it failed to take the action necessary to rely on the class action.

Third, ASNA claims that it decided not to file contract claims with the contracting officer earlier based upon the Government's litigation position in the case of *Cherokee Nation of Oklahoma*, 199 F.R.D. at 362. In that case, ASNA suggests the Government asserted, in a rather lengthy footnote, that tribal contractors which had individually presented their separate contract claims were precluded from participating in any class action because of this presentment.[7] ASNA says that it did not want to impact its ability to be part of the

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[7] The footnote, in its entirety, is reproduced here:

> *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996) (challenging Department of Interior disbursal plan for fiscal year 1995 contract support costs); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) (seeking additional indirect contract support costs from Department of Interior for fiscal year 1989); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F.Supp. 1306 (D. Or. 1999) (seeking additional contract support costs from IHS for 1996) (appeal pending); *California Rural Indian Health Bd., Inc. v. Shalala*, No. C-96-3526 DLJ (N.D. Cal. filed Sept. 27, 1996) (seeking additional contract support costs for IHS for fiscal years 1996

class action by presenting its claims. Later, ASNA contends, the Government "switched" litigation positions and opposed certification of any class that included tribal contractors who had not presented claims to the contracting officer.

The Government disputes this, stating that ASNA misconstrued the Government's argument and cannot justify its failure to file by relying upon the Government's alleged litigation position. Nowhere in the actual footnote does the Government assert that contractors which presented claims would be barred from participating in the putative *Cherokee* class, nor did the Government's brief argue that premise. Rather, the Government contended that the proposed class would be too broad because it would interfere with litigation already pending or finally adjudicated by individual tribes elsewhere. The Government's brief asserted that tribes with "judicial decisions on their claims cannot be included in the class because their claims would be barred by principles of *res judicata*." In that context, the Government was simply explaining that further claims were pending in the administrative process and that those could, at the option of the contractors, be pursued in a variety of forums and thus might not be eligible for inclusion in the class. Reasonably construed, the Government's argument in no way suggested that tribal contractors who complied with the CDA's requirements and presented their claims to the IHS would be unable to join the class if it was certified.

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and 1997); *Norton Sound Health Corp. v. Shalala*, No. A00-080 CV (D. Ark. filed March 23, 2000) (seeking additional contract support costs for fiscal year 1999 and alleging IHS' failure to pay in accordance with the queue system); *Appeals of Cherokee Nation of Okla. v. United States Dep't of Health and Human Servs. (Indian Health Serv.)*, IBCA Nos. 3877-3879/98 (challenging IHS' denial of additional contract support costs for fiscal years 1994-96); *Appeals of Seldovia Village Tribe v. Indian Health Serv.*, IBIA Nos. 3782, 3862-63/97 (challenging IHS' denial of additional contract support costs for fiscal years 1996-97); *Ninilchik Traditional Council v. Director, Alaska Area Native Health Servs., Indian Health Serv.*, Docket No. IBCA 99-72-A (appealing IHS' declination of contract support costs for fiscal year 1999). In addition, IHS has received claims under the Contract Disputes Act for additional contract support costs from the Metlakatla Indian Community, Southcentral Foundation, and Shoalwater Bay Indian Tribe, and claims from the Cherokee Nation of Oklahoma for fiscal years 1998-2000.

Moreover, statements like the one in the Government's footnote are not the type of misleading conduct that would serve as a basis for tolling the statute of limitations in this case.

> The very nature of litigation . . . assumes that the agency and the plaintiffs disagree on a point of law. If the fact that the agency expresses a position which turns out to be incorrect is a warrant for tolling, the limitations period would be suspended indefinitely.

Moreno v. United States, 82 Fed. Cl. 387, 403 (2008) (citations omitted). Further, for the purpose of extending equitable tolling, "relying on the legal opinion of another's attorney is unreasonable when both parties are aware adverse interests are being pursued." *Kregos v. Associated Press*, 3 F.3d 656, 661 (2d Cir. 1993).

Ultimately, ASNA had the responsibility to investigate the applicable case law in pursuing its claims and to make an independent and reasoned decision, rather than relying upon a presumed litigation position of an opposing party. ASNA has not established any conduct of its adversary that caused it to miss the statutory deadlines applicable to its claims. Mistakes in judgment, whether based upon erroneous legal advice from counsel or upon a poor litigation strategy, do not protect the tribe from the consequences of its own actions.

The dissent contends that because the appellant is a Native American tribe pursuing its claims under the ISDA, canons of construction require that equitable considerations must lie in favor of the tribe. Accepting this proposition, however, does not mean that ASNA need not establish the elements necessary for equitable tolling to apply to its claims.

The dissent suggests that the requirements of the CDA should be relaxed when construed under the auspices of an ISDA contract. This suggestion ignores the mandates of the Supreme Court, which, in *Cherokee Nation of Oklahoma*, expressly stated that, in the ISDA context, the tribal nation is acting "as a contractor." 543 U.S. at 634. Accordingly, the contract is to be treated, at least as to the binding nature of the contract, the same as ordinary procurement contracts. *Id.*; *see also Fort Mojave Indian Tribe v. Department of Health and Human Services*, CBCA 547-ISDA, 08-2 BCA ¶ 34,003. The Supreme Court examined the statute's statement that "no [self-determination] contract shall be construed to be a procurement contract," 25 U.S.C. § 450b(j), and found that, in context, the statement seemed designed to relieve the tribes of the technical burdens that accompany procurements, and did not weaken the contract's binding nature. 543 U.S. at 640. The Supreme Court recognized that ISDA contracts are governed by the CDA, 25 U.S.C. § 450m-1(d), and that the CDA

requires that "[a]ll claims by a contractor against the government . . . shall be submitted to the contracting officer for a decision . . . within 6 years after the accrual of the claim," 41 U.S.C. § 7103(a)(4)(A). *Id*. Nowhere does the Supreme Court suggest that the requirements of the CDA can be ignored when examining a contract issued under the ISDA.[8]

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[8] The Supreme Court has recently decided a case involving statutory interpretation without providing any particular deference to the fact that the plaintiffs were Native American tribes. In *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011), the Nation filed one case in federal district court and a second case alleging similar violations in the United States Court of Federal Claims (CFC). The Supreme Court held that 28 U.S.C. § 1500 applied to preclude jurisdiction in the United States Court of Federal Claims. In response to the Nation's allegation of hardship, the Court stated:

> Even were some hardship is to be shown, considerations of policy divorced from the statute's text and purpose could not override its meaning. Although Congress has permitted claims against the United States for monetary relief in the CFC, that relief is available by grace and not by right. *See Beers v. Arkansas*, 20 How. 527, 529 (1858). . . . If indeed the statute leads to incomplete relief, and if plaintiffs like the Nation are dissatisfied, they are free to direct their complaints to Congress. This Court "enjoy[s] no 'liberty to add an exception . . . to remove apparent hardship.'" *Keene* [*Corp. v. United States*], 508 U.S. [200,] at 217, 218 (1993) (quoting *Corona Coal Co. v. United States*, 263 U.S. 537, 540 (1924)).

Id. at 1731. The canon that statutes should be interpreted for the benefit of tribe does not mean that a statute should be interpreted in a manner divorced from the statute's text and purpose. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. Department of the Interior*, CBCA 2024-ISDA, 11-1 BCA ¶ 34,685, at 179,844. In this case, the jurisdictional requirements of the CDA are quite straightforward. The tribe is simply being asked to show that it has met the standards of equitable tolling. To use the canon of construction in the manner suggested by the dissent, which, in essence, calls for the CDA to be ignored, goes too far.

Notably, other tribunals have rejected the notion that the canon of construction in favor of Native Americans means that clear statutory language should be ignored. In its order denying plaintiff's motion for reconsideration, the *Zuni* court addressed this very issue by stating:

> The Court acknowledges that "federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit." *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461 (10th Cir. 1997) (citing *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989)). However, a favorable interpretation does not mean adding gloss to a provision which is not supported by the clear statutory language, or by case law.

Pueblo of Zuni, 467 F. Supp. 2d at 1116.

Supplementing its analysis, the dissent seeks to analogize ASNA to individual claimants seeking benefits under various statutory schemes that are to be construed in the beneficiaries' favor, citing to various cases in which equitable tolling has been applied. These cases are distinguishable.

For example, in *Bowen v. City of New York*, 476 U.S. 467 (1986), claimants seeking benefits for persons who suffered from a mental or physical disability brought a class action against the Secretary of Health and Human Services and the Social Security Administration, alleging that defendants had adopted an unlawful, unpublished policy that served to deny benefits to the claimants. The district court certified a class, including claimants who had not exhausted their administrative remedies. On appeal, the Supreme Court found that equitable tolling applied to those claimants who had failed to exhaust their administrative remedies, because the claimants could not have known that the adverse decisions denying them benefits had been made on the basis of a systematic procedural irregularity that rendered them subject to court challenge. *Id*. at 481. The Court noted, however, that exhaustion of administrative remedies is the rule in the vast majority of cases. *Id.* at 486. In the *Bowen* case, the claimants established entitlement to equitable tolling through the Government's improper actions. There are no allegations that the Government acted improperly here (other than shifting litigation positions) and, therefore, no similar basis for equitable tolling.

In *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed. Cir. 2007) (en banc), John Kirkendall, a disabled veteran, applied for a federal position with the Department of the

Army but was not selected. Kirkendall filed several complaints with the agency, which were denied. He subsequently filed a formal complaint with the Department of Labor, claiming a violation of his veterans' preference rights and discrimination based upon his disability. The administrative judge dismissed both claims for his failure to file his claims within the statutory deadlines. On appeal, a majority of the Federal Circuit determined that the Veterans Employment Opportunities Act of 1998 (VEOA), 5 U.S.C. § 3330a (2000), the statute applicable to one of Kirkendall's claims, was subject to equitable tolling, and remanded the case to the agency for further consideration. 479 F.3d at 853. Here, the Federal Circuit has already remanded the case for us to consider equitable tolling. Therefore, the relevance of *Kirkendall* to our determination as to whether ASNA has established the elements of equitable tolling is questionable. Of interest, however, is the Federal Circuit's statement that "veterans who seek to enforce their rights under the VEOA often proceed without the benefit of representation, just as Kirkendall did." *Id*. at 841. Unlike Mr. Kirkendall, ASNA has had the advantage of being represented by experienced counsel throughout this process.

Finally, the dissent points to the case of *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), for the proposition that the tribes are entitled to the same "unusual protectiveness towards certain government beneficiaries" as are veterans. In *Henderson*, the veteran, who possessed a 100% disability rating for paranoid schizophrenia, sought supplemental benefits. The agency and the Board of Veterans Appeals denied his claim. The veteran failed to file his notice of appeal to the United States Court of Veterans Claims within 120 days after the date when the Board's final decision was properly mailed. The issue before the Court was whether a veteran's failure to file a notice of appeal within the 120-day period should be regarded as having "jurisdictional" consequences. The Court found that it did not. The Court noted, however, in a footnote, that the parties had not asked for it to determine whether the 120-day deadline in 38 U.S.C. § 7266(a) is subject to equitable tolling, and, accordingly, the Court expressed no view on that question. 131 S. Ct. 1212. Again, the litigation posture of *Henderson* differs from this case. *Henderson* examined whether the statutory deadline was jurisdictional. Here, the Federal Circuit has already determined that the CDA time period for presenting a claim to the contracting officer is not jurisdictional. The issue is simply whether ASNA can establish entitlement to equitable tolling.

What the dissent wishes to establish by reference to these cases is that Native American tribes are entitled to protective treatment when seeking benefits under unique administrative programs. Like the veterans, the dissent says, the tribes should receive this unusually protective treatment. However, what the dissent fails to recognize is that the status of the tribes, having freely entered into self-determination contracts, differs from that of claimants seeking disability benefits.

One example of how the process is different for claimants as compared to tribes is explained by the Supreme Court in *Henderson*. As the Supreme Court notes, "[t]he VA's adjudicatory 'process is designed to function throughout with a high degree of informality and solicitude for the claimant'" 131 S. Ct. 1197 at 1200 (citations omitted). The Court noted that the veteran faces no time limit for filing a claim, and once a claim is filed, the VA's process for adjudicating it at the regional level and the Board of Veterans Appeals is *ex parte* and nonadversarial. *Id*. at 1200-01 (citing 38 C.F.R. 3.103(A), 20.700(C) (2010). It further noted that the VA has a statutory duty to assist veterans in developing the evidence necessary to substantiate their claims. *Id*. at 1201 (citing 38 U.S.C. §§ 5103(a), 5103A. And, when evaluating claims, the VA must give veterans the "benefit of the doubt" whenever positive and negative evidence on a material issue is roughly equal. *Id.* citing 38 U.S.C. § 5107(b).

By contrast, while the tribes may receive favorable treatment in many circumstances, such as liberal treatment in the construction of statutes and self-determination contracts, this favorable and liberal treatment does not mean that a tribe need not provide any persuasive evidence to show that it has met one of the elements justifying equitable tolling.

Decision

The respondent's motion to dismiss is **GRANTED**.

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JERI KAYLENE SOMERS
Board Judge

I concur:

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CATHERINE B. HYATT
Board Judge

STEEL, Board Judge, dissenting.

I respectfully dissent.

The majority finds that there is not enough evidence that the Arctic Slope Native Association, Ltd. (ASNA) sufficiently pursued its claim to support the granting of equitable tolling. If this were a garden-variety Contract Disputes Act (CDA) case, I might concur. But since it involves the Indian Self Determination and Education Assistance Act (ISDA), additional considerations come into play. While I agree that the evidence is not overwhelming, when viewed in light of 1) the federal responsibility for provision of health care to the appellant, 2) the Indian canon arising from the federal trust responsibility to the appellant, 3) the language of the ISDA, and 4) the language of the resulting contracts themselves, I would find equitable tolling of the administrative presentment requirement justifiable for these beneficiaries of the United States' trust responsibility.[1]

This is at best a close case. However, the fact that the appellant is a tribal organization pursuing its claim under the ISDA in my view tips the balance in favor of equitably tolling the administrative presentment requirement. The Federal Circuit noted that a careful study of the precedent of the Supreme Court, as well as that of the regional circuits, reveals that equitable tolling is available in a variety of circumstances – in particular, where the type of claimant involved and the purpose of the benefit system at issue suggest that the statute should be applied compassionately. *Barrett v. Principi*, 363 F.3d 1316, 1318 (Fed. Cir. 2004); *see also Bailey v. West*, 160 F.3d 1360, 1368 (Fed. Cir. 1998) (en banc).

When the underlying issue involves a governmental program beneficiary for which Congress has shown solicitude – for example, a beneficiary of a Social Security or veterans disability program – the courts have been more lenient in granting equitable tolling relief. For example, the Supreme Court granted equitable tolling to Social Security recipients who had not timely exhausted their administrative remedies. *Bowen v. City of New York*, 476 U.S.

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[1] If this had been the majority opinion, the result for the appellant, at least as to the later capped appropriation fiscal years, might be a pyrrhic victory, since appellant might not prevail on the merits of the case. *See Arctic Slope Native Association v. Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010) *(ASNA II)*. *But cf. Ramah Navajo Chapter v. Salazar*, No. 08-2262 (10th Cir. May 9, 2011) (claimants may recover even in years where Congress capped appropriation).

467, 480 (1986) (statute of limitations it construed is part of a statute that Congress designed to be unusually protective of claimants).

Similarly, the Federal Circuit applied equitable tolling in the context of a veteran's appeal in *Kirkendall v. Department of the Army*, 479 F.3d 830 (Fed. Cir. 2007) (en banc). Despite the fact that Kirkendall had missed two administrative filing deadlines, the court found the purpose of the Veterans Employment Opportunities Act of 1998, 5 U.S.C. § 3330a (2000), under which Kirkendall sought relief, "is to assist veterans in obtaining gainful employment with the federal government and to provide a mechanism for enforcing this right. In a very real sense, it is an expression of gratitude by the federal government to the men and women who have risked their lives in defense of the United States." 479 F.3d at 841. The Court continued, "Even if this were a close case, which it is not, the canon that veterans' benefits statutes should be construed in the veteran's favor would compel us to find that section 3330a is subject to equitable tolling." *Id.* at 843.

The Supreme Court recently reiterated this unusual protectiveness towards certain government beneficiaries in *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011). In *Henderson*, the Supreme Court noted that Congress has had a longstanding solicitude for veterans, which is plainly reflected in the statute there at issue and in subsequent laws that "place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of Veterans Affairs decisions." *Id.* at 1205 (citing *United States v. Oregon*, 366 U.S. 643, 647 (1961)).

The Supreme Court in *Henderson* also noted that many of the cases evaluating the equitable tolling tests in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), and *Bowen* involved review by Article III courts. 131 S. Ct. at 1204. By contrast, the Court suggested, *Henderson* involved review by an Article I tribunal as part of a unique administrative scheme. Instead of applying a categorical rule regarding review of administrative decisions, the Court attempted to ascertain Congress' intent regarding the particular type of review at issue in that case. Since, for the purposes of the instant case, this Board is also an Article I tribunal[2] which is part of a unique administrative scheme (the ISDA), it is appropriate to ascertain Congress' intent under the ISDA. That intent, the Court suggests, relaxes the standards applicable when an Article III court is reviewing the appropriateness of equitable tolling.

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[2] The Board is arguably an Article I tribunal for all purposes. *See* Pub. L. No. 109-163, § 847, 119 Stat. 3136, 3391-95 (2006); *cf. Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 889-90 (1991).

Congress and the courts have been at least as solicitous of the Indians as they have been of veterans and Social Security beneficiaries, and the same reasoning should apply to the administrative scheme set out in the ISDA. The ISDA itself reaffirms the "Federal Government's unique and continuing relationship with and responsibility to, individual Indian tribes and to the Indian people as a whole." 25 U.S.C. § 450a(a) (2006). The ISDA, and the ASNA contracts themselves, provide that each provision of the ISDA and each provision of the contracts shall be liberally construed for the benefit of the tribal contractor in transferring the funding and the related functions, services, activities, and programs.

A canon for the benefit of Indian tribes also exists. 42 C.J.S. *Indians* §5 (2011); *see also, e.g.*, *Ramah Navajo Chapter*, slip op. at 4 (court notes that this canon of construction requires that an act be construed in favor of a reasonable interpretation advanced by a tribe). Further, the Tenth Circuit in *Ramah Navajo Chapter* notes that the canon has been incorporated expressly in the ISDA's requirement that contracts be construed in favor of the contractor. This canon has also been included directly in the ASNA contract and the related annual funding agreements (AFAs). These documents each require that the statute and the pertinent agreements must be construed in favor of the tribal beneficiaries. Thus, according to section 2 of Executive Order 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000), in formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

> (a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

The December 1987 Senate Indian Affairs Committee Report accompanying the 1988 ISDA amendments, S. Rep. No. 100-274, at 8 (1987), *reprinted in* 1988 U.S.C.C.A.N. 2620, 2627-32, stated,

> Perhaps the single most serious problem with implementation of the Indian self-determination policy has been the failure of the Bureau of Indian Affairs and the Indian Health Service to provide funding for the indirect costs associated with self-determination contracts. The consistent failure of federal agencies to fully fund tribal indirect costs has resulted in financial management problems for tribes as they struggle to pay for federally mandated annual

> single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements. Tribal funds derived from trust resources, which are needed for community and economic development, must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility. It must be emphasized that tribes are operating federal programs and carrying out federal responsibilities when they operate self-determination contracts. Therefore, the Committee believes strongly that Indian tribes should not be forced to use their own financial resources to subsidize federal programs.

Thus, the ISDA's model agreement, 25 U.S.C. § 450(*l*)(c), at subsection (d)(1)(A), states, *inter alia*, that the United States reaffirms its trust responsibility to tribes and tribal organizations such as ASNA to protect and conserve the trust resources of the Indian tribes and the trust resources of individual Indians. Subsection (d) further provides that nothing in the contract may be construed to terminate, waive, modify, or reduce the trust responsibility of the United States to the tribes or individual Indians, and the Secretary shall act in good faith in upholding such trust responsibility. Likewise, the model agreement at subsection (a)(2) states,

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

The intent of this language is reaffirmed, for example, in the July 1, 1996, Annual Funding Agreement:

> Article I, Section 2 - Purpose.
>
> > (A) Policy. . . . to maintain and improve the health of the members of the Tribes served by ASNA consistent with and as required by the Federal Government's historical and unique legal relationship to the Tribes and their members (25 U.S.C. 1601(a)).

> (B) Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450 et seq.) and each provision of this Contract shall be liberally construed for the benefit of ASNA . . . .

Appeal File, Exhibit 3 at 34.

The ISDA itself suggests that the requirements of the CDA might properly be relaxed with regard to disputes arising under the ISDA. The ISDA specifically exempts tribes and tribal organizations from "the rigid procurement and contracting laws and regulations of the Federal Government" such as the Federal Acquisition Regulation. H.R. Rep. No. 93-1600, at 8, (1973), *reprinted in* 1974 U.S.C.C.A.N. 7775, 7778; *see also* S. Rep. No. 100-274 at 7 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2620, 2626. In addition, unlike other CDA claimants, an ISDA claimant may prosecute its claim in a United States District Court, where it is entitled to injunctive relief not available from a board of contract appeals. Finally, it is worth noting that the provision providing that ISDA disputes be resolved through the CDA predates the Federal Acquisition Streamlining Act (FASA), and when section 450m-1 was enacted, there was no six-year presentment requirement.

The relationship between the Government and each ISDA grantee is not, or at least should not be, adversarial. By contrast, the usual CDA government contractor is an equal private sector partner in the contracts it chooses to bid on and enter into, and is expected to perform the contract for a profit. The ISDA grantee, on the other hand, is performing federal functions for the benefit of its own members, and does so in the interest of tribal sovereignty, not for profit. The ISDA is a statute which is unusually protective of its beneficiaries, because of the special trust relationship between the Federal Government and the tribes and tribal organizations served. I consider the ISDA, not the CDA, the more significant framework for deciding this case.[3]

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[3] In its footnote 8, the majority states that in the recent case of *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011), the Supreme Court decided the case involving statutory interpretation without providing any particular deference to the fact that the plaintiffs were Indian tribes. The Indian canon of construction was not implicated in that case. Rather, the Supreme Court held that jurisdiction in the United States Court of Federal Claims was precluded by 28 U.S.C. § 1500 because the plaintiff had also filed suit in United States District Court under the same operative facts, although seeking different relief in each forum. The only nexus to the instant case was that it was filed by an Indian tribe. Unlike here, the *Tohono* case involved a jurisdictional statute. In fact, the "hardship" to which the

To place the matter in context, following is a summary of the facts as I see them. ASNA is a consortium of seven federally-recognized tribes located along the extremely remote North Slope of Alaska. In January 1996, ASNA began operating the Samuel Simmonds Memorial Hospital and associated programs, functions, and services in Barrow, Alaska, under Indian Health Service (IHS) contract 243-96-6025. The "Alaska Tribal Health Compact between Certain Alaska Native Tribes and the United States of America" (ATHC) and related negotiated AFAs authorized thirteen Alaskan tribes to operate health care programs. From October 1, 1997, to the present, ASNA has operated the Barrow Service Unit as a member of the ATHC, pursuant to the ISDA.

ASNA, like other tribes and tribal organizations which provide similar services, receives two varieties of financial support from the Department of Health and Human Services – a "secretarial amount" (funds which the Secretary of the Department would have provided for operation of the program, absent the contract) and "contract support costs" (CSC), funds that the tribe or tribal organization reasonably must incur to manage the contract, such as those for "federally mandated annual single-agency audits, liability insurance, financial management systems, personnel systems, property management and procurement systems and other administrative requirements." S. Rep. No. 100-274, at 8, *reprinted in* 1987 U.S.C.C.A.N. at 2627. If the Government does not reimburse a tribe for its CSC, tribal resources, "which are needed for community and economic development must instead be diverted to pay for the indirect costs associated with programs that are a federal responsibility." *Id.* at 9, *reprinted in* 1988 U.S.C.C.A.N. at 2628. For the years at issue here, ASNA alleges it has not received all the CSC funds to which it was entitled.

In 1990 (as the majority notes, pre-FASA), tribal ISDA contractors filed a class action against the Secretary of the Interior for underpayment of contract support costs due under ISDA contracts with the Department of the Interior, Bureau of Indian Affairs (BIA). *Ramah Navajo Chapter v. Kempthorne*, 50 F. Supp. 2d 1091 (D.N.M. 1999) (*Ramah I*). On October 1, 1993, United States District Judge LeRoy Hansen certified a nationwide class of all tribal contractors who had contracted with the BIA. Judge Hansen ruled that for a tribal contractor to be a member of the class, it was not necessary to exhaust its administrative remedies under the CDA, because the exhaustion could be excused when "[a]dministrative remedies are

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Court refers in the quote in footnote 8, *supra*, was simply the plaintiff's position that the court's interpretation was unjust, forcing the plaintiffs to choose between partial remedies available in different courts, as could be argued by any other plaintiff, Indian or not, in similar circumstances. It is interesting to note, however, that in the instant case the tribal organization is being penalized for trying to <u>avoid</u> filing in two forums.

generally inadequate or futile" as a result of "structural or systemic failure." *Id*. ASNA participated as a full member of the *Ramah I* class, and it received payments from two subsequent class partial settlements with the BIA. ASNA remains a member of that class.

Also faced with very significant deficits in the funds it expected to receive from Congress to provide medical care to its members, medical care previously provided by IHS, ASNA closely followed activity in the courts on the CSC issue throughout the country, and determined that it was appropriate to pursue its remedies as a member of a class rather than to bear the expense of litigation on its own.

From 1994 to 2007, through its president, ASNA continued to keep a close watch on the litigation against the BIA and IHS over contract support cost shortfalls, because during that period, ASNA asserts, it never received full funding for its contract support cost requirements from either agency. ASNA's president kept track of the litigation not only through its attorney, but also by attending several statewide as well as annual national meetings of organizations such as the National Congress of American Indians, the National Indian Heath Board, and the Lummi Self-Governance Education Project, where contract support costs and related class action litigation were the subject of extensive discussions. He also learned that the Government was taking the position in *Cherokee Nation of Oklahoma v. United States,* 190 F. Supp. 2d 1248 (E.D. Okla. 2001), that if a tribe or tribal organization filed its own claim, that contractor would be excluded from the Cherokee class. He additionally conferred with ASNA's counsel to discuss the information he had received. He consistently provided updates to the ASNA board of directors.

In September 2001, when at least a year remained on the ASNA presentment deadlines, ASNA's own counsel filed a class action lawsuit against IHS seeking damages for under- and mis-calculated CSC payments, *Pueblo of Zuni v. United States,* 467 F. Supp. 2d 1101, 1113 (D.N.M. 2006). This case was also assigned to Judge Hansen, who presided over *Ramah I.* The complaint described the class as consisting of "all tribes and tribal organizations contracting with IHS under the [ISDA] between fiscal years 1993 and the present." ASNA assumed it was included in the *Zuni* putative class seeking recovery of CSC for ISDA health service contracts, and it reasonably believed that as a putative class member, it was in the proper forum where its CSC claims would be addressed.

In December 2001, Judge Hansen entered a stay of all proceedings in the *Zuni* case. After the Supreme Court decision in *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005), the stay was lifted and class certification was sought. The Government filed a motion to dismiss in *Zuni*, making the new argument that, even if a class were certified, only

contractors who had timely presented their claims to the IHS contracting officer (CO)[4] could be members of the class.

Thus, once ASNA learned through its counsel-in-common that IHS was now insisting that contractors must individually present their claims to the CO to be members of the class, it prepared a good faith estimate of the amount it had been underpaid. On September 30, 2005,[5] ASNA submitted and the CO received claims for each of the fiscal years 1996 through 1998 for additional direct and indirect administrative CSC, as confirmed in IHS' annual CSC shortfall and related queues.

In October 2006, Judge William Johnson, to whom the case had been transferred in 2005, ruled in *Zuni* that the *Ramah I* holding excusing administrative presentment was "not binding" and dismissed claims which had not been administratively presented within the six-year period. *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1101, 1113 (D.N.M. 2006). He later denied class certification. *Pueblo of Zuni v. United States*, 243 F.R.D. 436 (D.N.M. 2007). Thus, as of 2006, ASNA was no longer a putative or actual member of the Zuni class, and its only option for resolving its grievances was to prosecute its claims filed on September 30, 2005. The CO did not issue decisions on these claims.[6] They were therefore deemed denied, *see* 41 U.S.C. § 605(c)(5) (2006), and these appeals followed.

Appellant argues that it is entitled to equitable tolling because it became a putative class member seeking relief in *Zuni* before the presentment limitation period had run, even though that class was not ultimately certified. But the Board majority here states that since the Federal Circuit found that class action tolling was inappropriate in this case, *ASNA II*, ASNA's reliance on the *Zuni* class action is also unavailing to support equitable tolling. I disagree. The same facts which preclude class action tolling relief can support appellant's argument that it is entitled to equitable tolling. This is not inconsistent, as the Federal Circuit

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[4] Under the ISDA scheme, the governmental authority is often referred to as the awarding official rather than contracting officer. In the interest of consistency with this opinion and Federal Circuit practice, I refer to this authority as the CO.

[5] Variously three, two, and one year beyond the CDA presentment time limit. ASNA mistakenly argues in its motion that the claim letters were filed on September 1, 2005. The claim letters indicate that they were filed on September 30, 2005. The day in September 2005 on which the claims were filed is not significant to the determination of this motion.

[6] IHS also did not issue decisions in most, if not all, other claims filed by similarly situated tribes.

stated in a recent decision, since class action statutory tolling does not modify a statutory time limit or extend equitable relief. Rather, it suspends the running of the limitations period for all purported members of a class consistent with the proper function of a statute of limitations. Equitable tolling, on the other hand, permits courts to modify a statutory time limit and extend equitable relief when appropriate. *Bright v. United States*, 603 F.3d 1273, 1278-88 (Fed. Cir. 2010).

Irwin v. Department of Veterans Affairs, 498 U.S. 89, 96 (1990), tells us that a class complaint that is "defective," as in *Zuni*, because it fails to meet the requirements of Federal Rules of Civil Procedure 23, is no different than a complaint that is defective because it is filed in a court without jurisdiction, *Herb v. Pitcairn*, 325 U.S. 77 (1945), or in the wrong venue, *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965). In fact, the Supreme Court discussed in *Irwin* a "defective class action" as a third kind of defective pleading that justifies equitable tolling. *Irwin*, 498 U.S. at 100 n.3.

It does not matter that class action tolling was ultimately unavailable because administrative presentment had not been perfected as a matter of law; the question is whether, when a party can show good-faith reliance on the filing of a defective class action, equitable tolling may apply even where class action tolling does not. For example, where the plaintiff acted in a good faith belief that a six-year statute of limitations was tolled during the pendency of a putative class action filed in New Jersey, upon the state court dismissal, when the case was later refiled out of time in federal court, the statute of limitations was tolled as a matter of equity. *Hatfield v. Halifax PLC*, 564 F.3d 1177 (9th Cir. 2009); *see also Burnett*; *Herb*; *Stone Container Corp. v. United States*, 229 F.3d 1345, 1354 (Fed. Cir. 2000).

The very fact that the *Zuni* class action pleading was defective is what gives rise to the possibility that appellant is entitled to equitable tolling. Equitable tolling has been applied where a plaintiff timely filed suit in the wrong court. But the timeliness of the filing of a defective class action tolls the limitations period as to the individual claims of purported class members. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974); *Hatfield.* Significantly, the Federal Circuit has stated that the diligence requirement is more relaxed for cases where the claimant filed a pleading in the wrong place as opposed to filing it after a statutory deadline. *Jaquay v. Principi*, 304 F.3d 1276, 1287 (Fed. Cir. 2002) (en banc), *overruled on other grounds by Henderson v. Shinseki,* 589 F.3d 1201 (Fed. Cir. 2009) (en banc), *reversed*, 131 S. Ct. 1197 (2011).

As noted earlier, the Federal Circuit has also stated that "equitable tolling is available in a variety of circumstances." *Barrett*, 363 F.3d at 1318. I believe under all the circumstances of this case and the long history of the CSC litigation, it is appropriate to

determine whether the appellant has acted in good faith in pursuing its judicial remedies, and perhaps whether it was induced into allowing the administrative presentment deadline to pass. *Pace*; *Irwin*, 498 U.S. at 96; *see also Holland v. Florida*, 130 S. Ct. 2549 (2010).

On September 10, 2001, the date the *Zuni* class action lawsuit was filed, ASNA still had a year left before the six-year period for official claim presentment expired, even for the oldest fiscal year, 1996. At the time, ASNA understood that the Government was taking the position that if putative class members wanted to participate in a class action, they must not present their claims administratively, for presenting a claim to a CO would act as a bar to participation in any class. ASNA's president and board relied upon this representation by the Government. Furthermore, their reliance was bolstered by Judge Hansen's earlier ruling in *Ramah I* that administrative presentment was not required, and they believed that Judge Hansen would hold consistent with that ruling in *Zuni*.

Believing that the state of the law was consistent with the position of the Government, ASNA at that time intentionally did not file administratively with the CO, and instead chose to resolve its CSC dispute with IHS through the mechanism of the *Zuni* class action litigation. *Zuni* was stayed for many years pending the outcome of the *Cherokee* CSC cases as they made their way through the Tenth and Federal Circuits to the Supreme Court, which in 2005 issued its decision in *Cherokee Nation*.

Yet four years later, the Government changed its litigating position, arguing that a class could include only presenters. The appellant argues this switch certainly explains the trap that was set for a diligent tribal contractor monitoring all these events. After being first told that presentment would bar participation in a class, ASNA withheld presentment, only then to be told that presentment was required for it to participate in a class – but by then, it was too late to present, either for purposes of participating in a class or for purposes of litigating individual claims before the Board, unless the time limitation is equitably tolled.

The majority states that ASNA cannot rely on litigation positions taken by its adversary. However, ASNA should be permitted to rely in good faith on representations made by its own counsel, counsel who in fact represented *Zuni* in the class action, as well as holdings by Judge Hansen in *Ramah* and *Zuni.* The law was not as clear in 2001 as it is following *ASNA II* that presentment is an essential requirement for participation in a CDA class action lawsuit. *See York v. Galetka*, 314 F.3d 522 (10th Cir. 2003) (equitable tolling of limitations period for habeas petition where petitioner relied on "unsettled" circuit precedent about whether filing deadline was tolled); *Clymore v. United States*, 217 F.3d 370, 375 (5th Cir. 2000) (equitable tolling permitted, given unsettled state of the law where "even an experienced and able attorney would have had to guess as to the proper venue in which to

bring the claim"); *see also Townsend v. Knowles*, 562 F.3d 1200 (9th Cir. 2009); *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170 (9th Cir. 1986).

Finally, the Government was aware of the participation of the putative members of the class, not only because of the *Zuni* and *Cherokee* class actions, but also for other reasons. Government representatives attended a number of the same meetings referred to by ASNA's president at which CSC issues and litigation were extensively discussed. At issue was a national policy about the amount and distribution of CSC funds to all beneficiaries under the ISDA. There had been several CSC cases filed with the Department of the Interior Board of Contract Appeals, involving both the BIA and IHS, as well as in several district courts throughout the country. Moreover, IHS had been including ASNA on its queue lists of the contractors awaiting CSC payment, as well as on its shortfall reports for Congress. Ultimately, the delay in providing formal notice did not prejudice the Government.

Thus, I would put my thumb on the scale, as the Supreme Court did in *Henderson*, and find that the equities lie in favor of appellant, at least for the purpose of allowing it to present its case on the merits. It acted reasonably in believing that its claims would be adjudicated via the *Zuni* class action, and relied on its counsel's advice, Judge Hansen's rulings, and the Government's representation that administrative presentment would exclude it from participation in the class action. I would deny the respondent's motion to dismiss and equitably toll the six-year presentment provision in 41 U.S.C. § 7103(a)(4)(A).

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CANDIDA S. STEEL
Board Judge