IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

STATE OF ALABAMA	*	
	*	
Plaintiff,	*	
	*	**CASE NO: C.A. 08-0182-WS-C**
vs.	*	
	*	
UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF THE INTERIOR, and DIRK KEMPTHRONE, in his official capacity as Secretary of the Department of Interior	*	
	*	
Defendants,	*	
	*	
vs.	*	
	*	
POARCH BAND OF CREEK INDIANS	*	
	*	
Defendant – Intervenor	*	

PLAINTIFF'S SUPPLEMENTAL BRIEF REGARDING EQUITABLE TOLLING AND JUDICIAL ESTOPPEL

The Plaintiff, State of Alabama ("State"), files this supplemental brief on the limited issues of equitable tolling and judicial estoppel in response to the Court's Order entered August 26, 2008, requesting additional documents and briefing of these topics. If the Court finds that the statute of limitations applies in this case, and the State argues it does not, the Defendants should be estopped from asserting the affirmative defense of the statute of limitations, and the limitations period should be tolled for the duration of the previous action in which all parties were waiting on the Secretary of the United States Department of Interior to act.

I. FACTUAL BACKGROUND

In September 2007, the State, in response to the Fifth Circuit Court of Appeals' decision in *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007), striking down 25 C.F.R. Part 291 ("Regulations"), the regulations at issue in the current litigation, requested the Defendant, United States Department of Interior ("Department"), to either dismiss a petition filed by the Poarch Band of Creek Indians ("Tribe") seeking Class III gaming in accordance with the Regulations, or if the Department had plans to seek certiorari in the *Texas* case, then to hold the petition in abeyance. Not only did the Department not seek certiorari, the Department filed a brief in opposition to certiorari. *Kickapoo Traditional Tribe of Texas v. State of Texas, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*, Brief for the Federal Respondents in Opposition, attached as Exhibit A. The Department, rejecting the State's request, issued a letter to the State in March of 2008 stating that the informal conference would be resumed. Letter to Alabama Attorney General, March 4, 2008, attached as Exhibit B. The State filed suit on April 7, 2008, in response to the Department's continued persistence to compel the State to participate in negotiations in accordance with the invalid Regulations.

The current action is not the first time the State, the Department, and the Tribe have found themselves in litigation regarding the Regulations. On April 12, 1999, the day the Regulations were published, the State of Alabama and the State of Florida filed an action seeking to have the Regulations declared invalid. *State of Florida and State of Alabama v. United States of America*, Case No:4:99-CV137-RH/WCS, Complaint, attached as Exhibit C. The Department filed a motion to dismiss claiming that the States of Alabama and Florida did not have standing to sue because the case was not ripe for adjudication. *State of Florida and State of Alabama v. United States of America*, Federal Defendant's Motion to Dismiss or, In the Alternative, For a Stay of Proceedings,

p.1, attached as Exhibit D. The Department also argued in the alternative for a stay of the proceedings to allow the Department time to issue procedures and to allow the ripeness defense to become moot. Id. at p.2. The Court granted the stay and entered a Joint Scheduling Report which provided that the parties would submit cross motions for summary judgment forty-five days after the Secretary presented the proposed Class III procedures. *State of Florida and State of Alabama v. United States of America*, Joint Scheduling Report, p. 3., attached as Exhibit E. The States of Florida and Alabama, as well as the Court, believed the proposed gaming procedures were imminent. In the Order for Dismissal, the Court stated, "The parties expected that presentation to occur without substantial delay." *State of Florida and State of Alabama v. United States*, Case No. 4:99CV137-RH/WCS, Order for Dismissal, p. 3, attached as Exhibit F. The States believed that the proposed procedures would be issued and the ripeness argument would therefore become moot, relying on the Department's representations to the court, stating, "The federal defendants are eager for a judicial resolution of its legal authority to issue procedures under the regulations." *State of Florida and State of Alabama v. United States*, Case No. 4:99CV137-RH/WCS, Federal Defendants' Motion to Dismiss or, in the Alternative, for a Stay of Proceedings, p. 1, attached as Exhibit D. The Department failed to issue the promised procedures for more than 8 years, moving the State outside the six-year window from the date of publication of the Regulations. Now the Department attempts to use its own actions that led to the delay and dismissal of the Florida District Court action that was filed within the statute of limitations period to its advantage and argues that the State is now barred by the statute of limitations. Defendant United States' Motion to Dismiss, p. 8.

In the current litigation, the Department argues that the State of Alabama is barred from challenging the validity of the Regulations by the six-year statute of limitations. Defendant United

States' Motion to Dismiss, p.8. Despite the fact that the Department argued that the Plaintiffs' action was not ripe for adjudication in 1999, the same defendant now argues that the State's cause of action accrued in 1999. Id. These two positions are diametrically opposed to one another.

II. ARGUMENT

The actions of the Department in the *State of Florida and State of Alabama v. United States* action should preclude the Department from asserting the affirmative defense of the statute of limitations, and the extraordinary actions taken by the Department provide a clear basis for this Court to toll the applicable statute of limitations for the entire period in which the State relied upon the representations of the Department regarding the issuance of proposed procedures.

A. JUDICIAL ESTOPPEL

As defined by the United States Supreme Court, "judicial estoppel 'is an equitable doctrine invoked by a court at its discretion.'" *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)(citations omitted). The doctrine precludes a party from asserting a position or claim in a legal proceeding that is inconsistent with a position or claim taken by that party in a previous proceeding. *Id*. at 749. The U.S. Supreme Court has identified several factors that should inform this Court's analysis of the issue: (1) whether a party's later position is clearly inconsistent with its earlier position, (2) whether the party succeeded in persuading the prior court to accept the earlier position so that acceptance of an inconsistent position in a later proceeding creates the perception that either the first or the second court was misled, and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 750-51 (internal citations and quotation marks omitted); *see also Stephens v. Tolbert*, 471 F. 3d 1173, 1177 (11th Cir. 2006) (court can prevent a party from making inconsistent claims in subsequent

proceedings).

The Department maintained in the Florida district court litigation that the State's challenge to the Procedures was not ripe, and that the State could not therefore maintain its action against the Department. The Department's position led the Florida district court to stay the case pending promised further action from the Department that would, according to the Department, moot its ripeness argument. Here, however, the Department argues that the statute of limitations has run on the State's ability to challenge the Procedures, which necessarily admits that the State's Florida district court action was ripe. This is so because "a cause of action against an administrative agency first accrues within the meaning of § 2401(a) as soon as 'the person challenging the agency action can institute and maintain a suit in court.'" *Trafalgar Capital Associates, Inc. v. Cuomo*, 159 F. 3d 21, 35 (1st Cir. 1998) (quoting *Spannaus v. DOJ*, 824 F. 2d 52, 56 (D.C. Cir. 1987)).

The Department cannot now take the position in the present action that the statute of limitations bars the State's lawsuit because it was able to "institute and maintain a suit" in 1999, yet have taken the position in the Florida district court that the 1999 action was unable to be instituted and maintained because it was not ripe. The Department is asserting inconsistent positions to the unfair prejudice and detriment to the State. In such a situation, this Court has the authority to invoke judicial estoppel to prevent such an inequity. *See New Hampshire v. Maine*, 532 U.S. at 1814-15; *Stephens*, *supra* at 1177.[1]

[1] Questions remain regarding the nature of the ability of the federal government to waive the statute of limitations found in 28 U.S.C. § 2401(a). The Eleventh Circuit Court of Appeals stated that 28 U.S.C. § 2401(a) is jurisdictional in a case regarding the "continuing violation doctrine". *Center For Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006). Both the Fifth Circuit and the Ninth Circuit have found that equitable remedies are available for extending the statute of limitations found in 28 U.S.C. § 2401(a). *Clymore v. United States*, 217 F.3d 370, 374 (5th Cir. 2000) (section 2401(a) is a "garden variety" limitations provision not a specific, technical provision and therefore equitable tolling is available); *See also, Cedars-Sinai Medical Center v. Shalala*, 125 F.3d 765, 770 (9th Cir. 1997) (section 2401(a) creates only a procedural bar and therefore is subject to waiver).

B. EQUITABLE TOLLING

"Equitable tolling is the doctrine under which plaintiffs may sue after the statutory period has expired if they have been prevented from doing so due to inequitable circumstances." *Ellis v. General Motors Acceptance Corporation*, 160 F.3d 703, 707 (11th Cir. 1998) (quoting *Bailey v. Glover*, 88 U.S. 342, 347 (1874)). "The basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one of legislative intent whether the right shall be enforceable after the prescribed time." (internal quotation marks omitted) *Arce v. Garcia*, 434 F.3d 1254, 1261 (11th Cir. 2006); *quoting Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 426 (1965). This sets up a two tiered approach to equitable tolling of statutes of limitations concerning actions against the Federal government, (1) is the statute subject to equitable tolling, and, if yes, (2) do the facts of the specific case warrant tolling of the statute.

The doctrine of equitable tolling is one that is to be used sparingly. *Jackson v. Astrue*, 506 F.3d 1349, 1353 (11th Cir. 2007). "The doctrine of equitable tolling permits courts to deem filings timely where a litigant can show that he has been pursuing his rights diligently and that some extraordinary circumstance stood in his way." *Id.* Equitable tolling has been allowed "in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). The Supreme Court has noted that the doctrine may be appropriate in other cases as well. *See Young v. United States*, 535 U.S. 43, 50 (2002) (three-year lookback period for IRS can be tolled during pendency of debtor's Chapter 13 proceeding); *see also Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (other reasons for tolling are inadequate notice,

motion for appointed counsel pending, actions of the court that led plaintiff to believe that everything required to properly file had been completed, and misconduct on the part of the defendant that lulled the plaintiff into inaction). The Eleventh Circuit has stated that:

> [T]raditional equitable tolling principles require a claimant to justify her untimely filing by a showing of extraordinary circumstances. The extraordinary circumstances standard, we explained, may be met "where the defendant misleads the plaintiff, allowing the statutory period to lapse; or when the plaintiff has no reasonable way of discovering the wrong perpetrated against her."

Jackson v. Astrue, 506 F.3d 1349, 1353 (11th Cir. 2007); *quoting Waller v. Comm'r*, 168 Fed.Appx. 919, 922 (11th Cir. 2006). The doctrine does not require misconduct on the part of the defendant. *See Browing v. AT&T Paradyne*, 120 F.3d 222, 226 (11th Cir. 1997) (Title VII action was tolled where agency provide inaccurate notice). A plaintiff must, however, show due diligence in pursuing his or her claims. *Irwin v. Department of Veterans Affairs*, 498 U.S. at 96. Also, "absence of prejudice to the defendant is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified. … However, it is not an independent basis for invoking the doctrine and sanctioning deviations from establishing procedures." *S.R. v. United States*, 555 F.Supp.2d 1350, 1358 (S.D. Fla. 2008); *quoting Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152 (1984).

To determine if a statute of limitations is one which may be tolled, the United States Supreme Court stated that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin v. Department of Veterans Affairs*, 498 U.S. at 95-96. The *Irwin* case created a negative question that must be answered to determine if the statute can be tolled, "Is there good reason to believe that Congress did *not* want the equitable tolling doctrine to apply?" *United States v. Brockamp*, 519 U.S. 347, 350

(1997). In *Brockamp*, the Court found that the I.R.C. § 6511 was not subject to tolling based on two factors. *Id*. First, the limitations period in § 6511 was found to be set forth "in a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions." *Id*. Second, the Court focused on the impact that tolling could have on the administration of the applicable agency. The Court found that the "nature and potential magnitude of the administrative problem" from the large number of tax returns suggests that "Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so wherever a court concludes that equity requires." *Id*. at 352.

The statute of limitations at issue in the present case is 28 U.S.C. § 2401(a), the general statute of limitations applicable to all actions against the federal government. Section 2401(a) states, in pertinent part, "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." This statute is part of the Federal government's waiver of sovereign immunity. *Center for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006). While neither the Eleventh Circuit Court of Appeals, nor the United States Supreme Court, has address the specific question of whether 28 U.S.C. § 2401(a) is a statue that may be tolled, both the Fifth Circuit Court of Appeals and the Ninth Circuit Court of Appeals have found that this statute is subject equitable doctrines.[2] *See, Clymore v. United States*, 217 F.3d 370, 374 (5th Cir. 2000) (section 2401(a) is a "garden variety" limitations provision not a specific, technical provision and therefore equitable tolling is available); *See also, Cedars-Sinai*

[2] The Eleventh Circuit recently recognized § 2401 as being "jurisdictional" in *Rease v. Harvey*, barring claims brought outside the statutory period. This case did not discuss whether § 2401(a) could be subject to equitable tolling, and stated in footnote 9 that even assuming it could, the plaintiff failed to establish a factual basis for tolling. *Rease v. Harvey*, 238 Fed. Appx. 492, 496-97 (11th Cir. 2007).

Medical Center v. Shalala, 125 F.3d 765, 770 (9th Cir. 1997) (section 2401(a) creates only a procedural bar and therefore is subject to waiver).

In *Clymore v. United States*, the Fifth Circuit Court of Appeals determined that 28 U.S.C. § 2401(a), like 28 U.S.C. § 2401(b) is subject to tolling. *Clymore v. United States*, 217 F.3d 370, 374 (5th Cir. 2000). Relying on the analysis of 28 U.S.C. § 2401(b) in *Perez v. United States*, the court in *Clymore* agreed subsection (a) should be subject to tolling for two reasons stating:

> The two reasons cited in Perze in support of the conclusion that § 2401(b) is subject to equitable tolling – (1) § 2401(b) is a "garden variety" limitations statute, not a highly-technical one like that found in I.R.C. § 6511, and (2) allowing equitable tolling would not create an administrative nightmare- apply with equal force to § 2401(a).

Clymore v. United States, 217 F.3d 370, 374 (5th Cir. 2000); *citing Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999). While *Clymore* concerned the tolling § 2401(a) for purposes of providing the plaintiff the opportunity to maintain an action to seek the return of seized property, the statutory analysis is still applicable to the current action seeking redress under the Administrative Procedures Act ("APA") and the Indian Gaming Regulatory Act.

The Ninth Circuit Court of Appeals has also found that § 2401(a) is subject to equitable doctrines stating that:

> [W]here the language of a statute of limitations does not speak of jurisdiction, but erects only a procedural bar, the Supreme Court has stated that recognition of traditional exceptions such as equitable tolling, waiver, and estoppel does little to broaden the congressional waiver of sovereign immunity, and "is likely to be a realistic assessment of legislative intent as well as a practically useful principal of interpretation."

Cedars-Sinai Medical Center v. Shalala, 125 F.3d 765, 770 (9th Cir. 1997); quoting *Irwin*, 498 U.S. at 95. According to the court, the six-year statute of limitations in § 2401(a) is subject to waiver

because it "erects only a procedural bar." *Id*. This case did concern an action under the APA, but was decided on the issue of waiver of the statute of limitations, not tolling. Again, this distinction is of no merit, as the important element concerns whether the statue is subject to the equitable doctrine of tolling. *See Felter v. Norton*, 412 F.Supp.2d 118, 124 (D. D.C. 2006) (section 2401(a) is subject to tolling because it is a statute of general application and "not entwined in a detailed administrative scheme").

Based upon the reasoning in *Clymore* and *Cedars-Sinai Medical Center*, this Court should find that § 2401(a) is subject to the equitable doctrine of tolling. Section 2401(a) does not contain the type of highly technical and precise language as the *Brockamp* decision found in § 6511. Also, finding that § 2401(a) is subject to tolling will not create the type of "administrative nightmare" contemplated in *Brockamp*. Section 2401(a) is a garden variety statute of limitations, and any potential difficultly resulting from allowing the statute to be tolled is sufficiently safeguarded by the factual requirements of obtaining the relief of the equitable doctrine. It would prove a difficult task to find another factual example in which the Department, in litigation with a State or other party, has made an affirmative statement to conduct a certain action, failed to conduct that action within the statute of limitations, and then is subsequently in litigation of the same issue, with the same parties. So, to answer the question: "Is there good reason to believe that Congress did *not* want the equitable tolling doctrine to apply?" for purposes of § 2401(a), the answer should be no. *Irwin*, 498 U.S. at 95-96.

Finding that § 2401(a) is a statute of limitations to which the doctrine of equitable tolling should apply, the Court then turns the question to whether the factual situation in the present case is one in which the Court should apply equity to toll the statue. The pertinent facts stated above

include several key reasons which would provide this Court support for finding that, if the statute of limitations applies, the statute should be tolled for the length of the prior action between the Department and the State. Most importantly, the State relied upon the representations by the Department that proposed Class III gaming procedures would be released quickly and that the Department was eager to have its authority to issue the Regulations clarified. *See State of Florida and State of Alabama v. United States*, Case No. 4:99CV137-RH/WCS, Order for Dismissal, p. 3, attached as Exhibit F; *see also State of Florida and State of Alabama v. United States*, Case No. 4:99CV137-RH/WCS, Federal Defendants' Motion to Dismiss or, in the Alternative, for a Stay of Proceedings, p. 1, attached as Exhibit G.

Equitable tolling has been provided for in actions where a party relied upon the representations of the government or the courts. The Eleventh Circuit has found that where a plaintiff relies upon the misleading instructions of a court, the doctrine of equitable tolling applies to extend the time limits. *Spottsville v. Terry*, 476 F.3d 1241, 1245-46 (11th Cir. 2007). In *Spottsville*, the *pro se* plaintiff attempted to file a writ for *habeus corpus* in the trial court, which the court denied and returned a letter with misleading instructions. *Id*. at 1243. The Eleventh Circuit found that the plaintiff's actions of following the misleading instructions were extraordinary circumstances that provide for the application of equitable tolling of the statute of limitations. *Id*. at 1246; see *also, Goldsmith v. City of Atmore*, 996 F.2d 1155 (11th Cir. 1993) (plaintiff's action was equitable tolled where timely but defective filing was filed with district court and plaintiff was led to believe the filing was effective). The Sixth Circuit has also recognized that misleading actions on the part of the government can be a basis for equitably tolling a statute of limitations. In *Glarner v. United States*, the Sixth Circuit equitably tolled a statute of limitations where the Disabled American Veterans

office failed to provide a specific form to the plaintiff that was required to file a claim against the Department of Veterans Administration. *Glarner v. United States*, 30 F.3d 697 (6th Cir. 1994); *see also Perez v. United States*, 167 F.3d 913 (5th Cir. 1999) (government's failure to provide form required to file action against department provided basis for equitable tolling of statute of limitations). In all of the cases cited, the government or the courts took some action or failed to take some action that caused the plaintiff to not act and miss the statutory deadline.

For purposes of the current action, the State previously filed a timely action. Relying on the representations of the Department, the court stayed the proceedings. The Department failed to comply with its representations, and as a result the case was ultimately dismissed without prejudice. The Department now seeks to take advantage of its own actions that misled the State and the court. These actions appear to be similar to those cited above in that the court or the government took misled the plaintiff and the statute of limitations ran. Therefore, actions of the Department of the nature the courts have found to be extraordinary circumstances. Based on the actions of the Department, the court should toll the statute of limitations for the period in which the Department mislead the parties, from April 1999 to September 7, 2007.

III. CONCLUSION

Based on the foregoing, the court should apply the doctrine of judicial estoppel and prevent the Department from asserting the affirmative defense of the statute of limitations provided in 28 U.S.C. § 2401(a). The court should also find that § 2401(a) is subject to equitable doctrines and, if the court finds the statute of limitations applies and the Department is not estopped from asserting the statute of limitations defense, the court should find that the facts of this case present extraordinary circumstances that allow for the application of equitable tolling and toll the statute for

the period of the prior litigation.

Respectfully submitted,

TROY KING
ATTORNEY GENERAL OF ALABAMA

CHEAIRS PORTER
SPECIAL ASSISTANT ATTORNEY GENERAL
11 South Union Street
Montgomery, Alabama 36130

s/Kenneth S. Steely
KENNETH S. STEELY (STEEK4183)
Deputy Attorney General
KIRKLAND E. REID (REIDK9451)
Deputy Attorney General

OF COUNSEL:

JONES, WALKER, WAECHTER, POITEVENT
CARRERE & DENEGRE, L.L.P.
P.O. Box 46
Mobile, Alabama 36601
(251) 439-7535 - Phone
(251) 433-1001 - Fax
ksteely@joneswalker.com
kreid@joneswalker.com

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 10th day of September, 2008, electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and request the Court to serve the same electronically on the following:

Maureen E. Rudolph
U.S. Department of Justice
Environmental and Natural Resources Division
Natural Resources Section

P.O. Box 663
Washington D.C. 20044-0663
maureen.rudolph@usdoj.gov

Edward J. Passarelli
U.S. Department of Justice
Environmental and Natural Resources Division
Natural Resources Section
P.O. Box 663
Washington D.C. 20044-0663
edward.passarelli@usdoj.gov

Eugene A. Seidel
U.S. Attorney's Office
63 S. Royal St., Rm. 600
Mobile, Alabama 36602
eugene.seidel@usdoj.gov

Caroline T. Pryor
6251 Monroe Street, Suite 200
Daphne, Alabama 36526
cpryor@carrallison.com

William H. Sisson
6251 Monroe Street, Suite 200
Daphne, Alabama 36526
wsisson@carrallison.com

Judson Wells
6251 Monroe Street, Suite 200
Daphne, Alabama 36526
jwells@carrallison.com

William R. Perry
1425 K Street, N.W.
Suite 600
Washington, D.C. 20005
wperry@sonosky.com

Anne D. Notto
1425 K Street, N.W.
Suite 600

Washington, D.C. 20005
anoto@sonosky.com

s/Kenneth S. Steely
Kenneth S. Steely