No. 2011-1485

United States Court of Appeals for the Federal Circuit

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,

Appellant,

v.

Kathleen Sebelius, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellee.

Appeal from the Civilian Board of Contract Appeals in
case nos. 190-ISDA, 289-ISDA, 290-ISDA, 291-ISDA, 292-ISDA, and 293-ISDA,
Administrative Judge Jeri Kaylene Somers.

REPLY BRIEF OF APPELLANT ARCTIC SLOPE NATIVE ASSOCIATION, LTD.

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CERTIFICATE OF INTEREST

Counsel for the Appellant Arctic Slope Native Association, Ltd. certifies the following:

1. The full name of every party or amicus represented by me is:

   Arctic Slope Native Association, Ltd.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   N/A

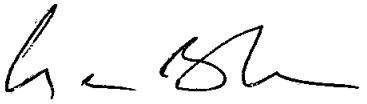
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   N/A

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or agency or are expected to appear in this court are:

   Sonosky, Chambers, Sachse, Miller & Munson, LLP; Lloyd B. Miller; Donald J. Simon; Arthur Lazarus, Jr., of counsel; Sidley Austin, LLP; Carter G. Phillips; Jonathan F. Cohn.

March 7, 2012



Lloyd B. Miller

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This case presents an uncommonly strong basis for equitable tolling, which is the exercise of a court's equity powers made "on a case-by-case basis," *Holland* v. *Florida*, 130 S. Ct. 2549, 2553 (2010) (quoting *Baggett* v. *Bullitt*, 377 U.S. 360, 375 (1964)), when warranted by the specific facts of a case. The specific facts in this case are unusual and compelling.

In *Ramah Navajo Chapter* v. *Lujan*, No. 1:90-cv-00957 (D.N.M. filed Oct. 4, 1990), the district court in New Mexico expressly ruled that tribal contractors (including Appellant Arctic Slope Native Association (ASNA)) which had not individually "presented" their contract claims to an agency contracting officer under the Contract Disputes Act, 41 U.S.C. §§ 7101-7109 (CDA), could nonetheless participate in a class action seeking damages for breach of contract by the Bureau of Indian Affairs, so long as the class representative had itself presented its claims. J.A. 315 (Order of Oct. 1, 1993). That issue had been contested by the Government, which lost the point. *Id.*

When a subsequent class action—different only in that it was brought against another agency, but otherwise indistinguishable in its scope and legal claims—was filed by the Pueblo of Zuni against the Indian Health Service (IHS) in the same district court in New Mexico and assigned to the same judge, there was every reason for ASNA to rely on that judge's earlier ruling on class certification

in *Ramah*, and no reason to believe that the same judge would decide the same presentment question differently. *Pueblo of Zuni* v. *United States*, No. 1:01-cv-01046 (D.N.M. filed Sept. 10, 2001).

So ASNA in good faith relied on the 1993 *Ramah* ruling to conclude that it was unnecessary to separately present its claims in order to participate in the *Zuni* class action, just as it had been unnecessary for ASNA to separately present its claims in order to participate in the *Ramah* class action (which is ongoing even today and in which ASNA remains a class member). ASNA relied on the filing of the *Zuni* class complaint as the appropriate vehicle to vindicate its contract claims against the IHS, just as it had successfully relied on the *Ramah* class complaint, and its status as a class member in *Ramah*, to vindicate its identical claims against the BIA. In having its claims against the IHS asserted through the timely filing of the *Zuni* class complaint, ASNA thus acted not only timely, but diligently—it did everything it could reasonably have thought it needed to do in order to sue IHS for contract damages.

Years later, because of an unexpected change in the law (made in the *Zuni* case by a different judge of the same court, to whom the case had been transferred after a stay lasting four years), ASNA's efforts were frustrated when its failure to have presented its claims was deemed to be a defect that retroactively disqualified

it from participating in any *Zuni* class. By then, the statute of limitations on presentment had run, and it was too late to cure the presentment problem.

This unforeseeable change in the governing law was an extraordinary development that created an incurable defect in ASNA's participation in the class, and in ASNA's ability to assert its claims against IHS. ASNA was thus caught in a trap occasioned by a change in the law that caused a retroactive defect in its good faith efforts to vindicate its legal rights. It is precisely for such situations that this Court can and should provide equitable tolling relief.

In response, the Government makes three principal arguments. First, it argues that nothing "extraordinary" occurred here; that is, even if it was "reasonable" for ASNA to have relied on the presentment ruling in *Ramah*, the Government insists there were no "extraordinary circumstances" that prevented ASNA from presenting its claims. Gov't Br. at 26. As we show below, this argument misapprehends the test for equitable tolling and, in any event, the Catch-22 position in which ASNA found itself due to an unforeseeable change in the law was indeed "extraordinary."

Second, the Government argues that it was unreasonable for ASNA to have relied on the presentment ruling in *Ramah* because that case was different than *Zuni*. *Id.* We show below that the Government's claim of material differences between the two cases does not withstand scrutiny.

Finally, the Government contends that equitable tolling is available only to those who "actively pursue" a claim and ASNA, by contrast, "did nothing at all." *Id.* That argument is no more than a word game. In the special context of class actions, putative class members—or those who reasonably believe that they are putative class members—are expected not to "act," in the sense of filing their own pleadings. The class representative is designated to act for them.

ASNA's failure to separately present its claims or to file a separate court complaint does not bespeak a negligent inattention to the assertion of its legal rights. The record shows that ASNA was actively engaged in a national effort by Tribes across the country to vindicate their right to receive full payment of contract support costs. ASNA's active participation in the *Ramah* class case through the class claims process, its close and diligent attention to the filing of the *Zuni* class complaint, and its demonstrable reliance on the presentment ruling made by the judge in *Ramah* constitute, in this special context of class litigation, all the "action" that the governing law at the time demanded, and all that equity now requires.

I. THE *IRWIN* STANDARD FOR EQUITABLE TOLLING WAS NOT DISPLACED BY AN "EXTRAORDINARY CIRCUMSTANCES" TEST.

The Government relies heavily on the Supreme Court's statement in *Holland* v. *Florida*, 130 S. Ct. at 2562, that equitable tolling applies only where a plaintiff establishes that "some extraordinary circumstance stood in his way and prevented

timely filing." Gov't Br. at 22-23. But *Holland* does not purport to establish a new standard for equitable tolling that displaces the familiar test set forth in *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). Indeed, *Holland* rests firmly on *Irwin*. In its statement of the "extraordinary circumstances" standard, the Court in *Holland* cites only to a single, prior case, *Pace* v. *DiGuglielmo*, 544 U.S. 408 (2005). *See Holland*, 130 S. Ct. at 2562 (citing *Pace*, 544 U.S. at 418). And the Court's invocation of the "extraordinary circumstances" standard in *Pace*, in turn, cites back only to *Irwin*, 498 U.S. at 96, where the Court states that "[w]e have allowed equitable tolling 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." *Pace*, 544 U.S. at 418 (citing *Irwin*, 498 U.S. at 96) (emphasis added).

Thus, the "extraordinary circumstances" standard in *Holland* arises directly from *Irwin* and encompasses *Irwin*'s "defective pleading" prong, including the "timely filing of a defective class action." *Irwin*, 498 U.S. at 96 n.3 (citing *Am. Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538 (1974)). Indeed, in a post-*Holland* case last year, this Circuit sitting en banc cited the "extraordinary circumstance" standard and then, citing *Irwin*, noted that equitable tolling includes cases involving "the timely filing of a procedurally defective pleading." *Cloer* v. *Sec'y*

of Health & Human Serv., 654 F.3d 1322, 1344-45 (Fed. Cir. 2011) (en banc). That is the situation here. Accordingly, the facts at issue in this case expressly fall within the category of "extraordinary circumstances" that warrant equitable tolling.

II. THE UNFORESEEABLE CHANGE IN THE LAW ON CLASS ACTION PRESENTMENT WAS AN "EXTRAORDINARY CIRCUMSTANCE" THAT CREATED A PROCEDURAL DEFECT IN THE TIMELY-FILED *ZUNI* CLASS ACTION.

If ASNA had simply relied on the filing of the *Zuni* class action in 2001—and if no more were involved—that reliance might not by itself give rise to equitable tolling.

But far more is involved here. ASNA relied on the filing of the *Zuni* class action in light of a specific and express court ruling that it was not necessary for ASNA or other tribal contractors to individually present claims in order to be a class member. In *Ramah*, the court said:

> In light of the above, it is not necessary that each member of the proposed class exhaust its administrative remedies under the Contract Disputes Act. The Court will therefore certify the class to include all Indian tribes and organizations who have contracted with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act.

J.A. 319-20 (Order of Oct. 1, 1993) (emphasis added). This ruling in *Ramah* was not just directly on point on the issue of whether presentment was necessary to participate in a class; it was a ruling by the same judge who was assigned to hear the *Zuni* case. When the *Zuni* class complaint was filed in 2001, there was no

reason to think the judge who decided this issue in *Ramah* would decide the same issue differently in *Zuni*.

The Government attempts to distinguish the ruling in *Ramah* by arguing that it was made before the six-year statute of limitations was added to the CDA. Gov't Br. at 46. But, as we have previously noted, ASNA Br. at 32, the addition of a limitations period to the existing presentment requirement did not matter if, as *Ramah* held, presentment by class members was not required at all. Thus, there was no reason to think the intervening change to the CDA would alter the square holding of *Ramah* that "it is not necessary that each member of the proposed class exhaust its administrative remedies under the Contract Disputes Act." J.A. 319.

When, ultimately and unforeseeably, the same issue was decided differently (by a different judge) years after the *Zuni* case was filed, it was at that point too late for ASNA to timely present its claims. Having relied on the law as it was, ASNA was out of time to preserve its rights once the law unexpectedly changed.[1]

The doctrine of class action tolling is designed to shield putative class members who are ultimately excluded from a class (or where a class is denied altogether) from the harsh effects of having a limitations period expire during the period between the filing of the class complaint and the decision on class

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[1] This is not, as the Government contends, a situation where a party made "reasonable mistakes of law." Gov't Br. at 26, citing *Williams* v. *Sims*, 390 F.3d 958 (7th Cir. 2004). This is a situation where ASNA relied on Judge Hansen's directly applicable ruling in the *Ramah* case, and then the law changed.

certification. But this Court decided in *ASNA I* that class action tolling cannot be invoked to toll the six-year period for presenting a claim to a contracting officer by any putative class member who had not presented a claim within the six-year period. *Arctic Slope Native Assoc., Ltd.* v. *Sebelius*, 583 F.3d 785, 795 (Fed. Cir. 2009) (*ASNA I*). As a practical matter, this means that class action tolling does not apply to the presentment period set forth in section 605(a) of the CDA.

This combination of rulings has presented ASNA with extraordinary barriers to vindicating its contract rights. On the one hand, ASNA's good faith reliance on the presentment ruling in *Ramah* was frustrated by a sharp and unforeseeable change in law that created an incurable defect in its effort to participate in the *Zuni* class action. This defect was exposed only after the expiration of the limitations period, placing ASNA in a Catch-22. On the other hand, the class action tolling doctrine that is designed to ameliorate the limitations impact of an unforeseen defect in a proposed class certification—such as the one suffered by ASNA—has been found to be inapplicable to toll this particular limitations period.

The application of equitable tolling is the only way out of the conundrum presented by this unusual confluence of unforeseeable rulings, and it is a doctrine that this Court has expressly held does apply to section 605(a). *ASNA I*, 583 F.3d at 798 ("[E]quitable tolling applies to the six-year time limitation set forth in section 605(a)").

The Government misapprehends ASNA's argument for equitable tolling as a renewed request for class action tolling. Gov't Br. at 28-29. It is not. To be sure, the basis for equitable tolling here shares facts in common with ASNA's earlier argument for class action tolling—both involve the timely filing of the *Zuni* class complaint. But tolling under *American Pipe* applies even to putative class members "who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings . . . ." *Am. Pipe*, 414 U.S. at 552. By contrast, the argument for equitable tolling here depends not just on the filing of the *Zuni* class action, but also on the additional facts that (1) ASNA was aware of the filing of the class proceedings brought in its interest and (2) ASNA demonstrably did "rely on the institution of those proceedings." *Id.* The basis for equitable tolling is thus different from that for class action tolling.[2]

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[2] For similar reasons, the Government confuses the issue of whether *American Pipe* tolling is legal or equitable in nature. As this Court has decided, such tolling is legal, or "statutory," tolling. *Stone Container Corp.* v. *United States*, 229 F.3d 1345, 1354 (Fed. Cir. 2000). Nonetheless, *Irwin* cited the filing of a "defective class action," *Irwin*, 498 U.S. at 96, n.3, as an example of where a claimant "has actively pursued his judicial remedies by filing a defective pleading during the statutory period," which is one of the two *Irwin* prongs for equitable tolling. *Id.* at 96. Thus, in the Supreme Court's view, reliance on the filing of a "defective class action" can give rise to equitable tolling under appropriate circumstances, even if similar facts can also support statutory tolling under *American Pipe* (*e.g.*, where knowledge and reliance are not present). This does not "create a new category of plaintiffs entitled to equitable tolling[,]" Gov't Br. at 31, but reinforces the conclusion that traditional equitable tolling principles apply to the filing of a defective class complaint, as well as to other kinds of defective pleadings.

In one of the rare instances in which similarly unusual facts have occurred, the Ninth Circuit held that, in a situation where class action tolling did not apply as a matter of law, equitable tolling should nonetheless be applied to extend the statute of limitations for putative class members who relied on the filing of a class action that proved defective. *Hatfield* v. *Halifax PLC*, 564 F.3d 1177, 1186, 1190 (9th Cir. 2009); *see* ASNA Br. at 41-43. In response to this plainly applicable precedent, the Government notes only that the equitable tolling in *Hatfield* arose under California, not federal, law. Gov't Br. at 31. That distinction misses the point of the case, which is that the equities underlying a party's good faith reliance on a defective class action can support a finding of equitable tolling in situations where class action tolling does not apply as a matter of law. *Hatfield*, 564 F.3d 1190.

To be sure, the applicable standard for equitable tolling, whether state or federal, must still be satisfied. Indeed, the equities here are even stronger than those presented in *Hatfield*. There, the putative New Jersey class members arguably could have known that California law did not recognize cross-jurisdictional class tolling (and therefore could have known that they should not rely on the filing of the New Jersey class action to delay filing suit in California). Here, by contrast, there was no way for ASNA to know that the then-existing class presentment law of *Ramah* would unexpectedly change in *Zuni* after the limitations

period expired. For the reasons discussed above, this unusual set of circumstances satisfies the *Irwin* standard.

III. ASNA DID NOT SLEEP ON ITS RIGHTS.

The Government argues that ASNA is not entitled to equitable tolling because it "did nothing at all to pursue its claim," and therefore failed to show the diligence that is necessary for such tolling. Gov't Br. at 26.

None of the cases cited by the Government, *id.* at 22-27, addresses the diligence requirement in the factual situation presented here—where a party had a good faith (and judicially sanctioned) belief that it was a putative member of a class action. In the class action context, the usual presumption that a party must affirmatively act to protect its rights is reversed: those who believe they are members of a putative class "are expected and encouraged to remain passive during the early stages of the class action and to 'rely on the named plaintiffs to press their claims.'" *Cullen* v. *Margiotta*, 811 F.2d 698, 719 (2d. Cir. 1987) (quoting *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 352-53 (1983)) *overruled on other grounds*, *Agency Holding Corp.* v. *Malley-Duff Assocs., Inc.*, 483 U.S. 143 (1987); *In re IndyMac Mortgage-Backed Sec. Litig.*, 793 F. Supp. 2d 637, 647 (S.D.N.Y. 2011). Indeed, in *Irwin*, the Supreme Court cited the filing of a defective class action as an example of litigants—namely the "purported class members"—"actively pursu[ing]" their "judicial remedies." *Irwin*, 498 U.S. at 96

and n.3 (emphasis added). The Court did not view those purported class members as if they "did nothing."

So the fact that ASNA failed to take more affirmative action to present its claims once it learned the *Zuni* class complaint had been filed on its behalf, was in accord with the legal obligations placed on those who believe they are members of a putative class and, more importantly, was in accord with ASNA's own experience as a successful member of the *Ramah* class.

In *Ramah*, the filing of the class complaint by the class representative had sufficed as the basis for ASNA to recover its contract damages, even though ASNA had not separately presented its claims. In that sense, the filing of the class complaint was the equivalent of a "pleading" filed by ASNA. In *Zuni*, the filing of the class complaint by the class representative proved to be the equivalent of a "defective pleading" filed by ASNA when, unlike in *Ramah*, the court excluded ASNA from the class because it had failed to present its claims.[3]

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[3] The Government conflates the requirement for a class representative to present its claims with the different issue of whether each putative class member must separately present its claims as well. In *Ramah*, the court found that Ramah Navajo could serve as class representative because it had presented its claims. J.A. 317 ("Plaintiff has exhausted its administrative remedies and is therefore properly before this Court . . . ."). The Government argues that if ASNA had filed the *Zuni* complaint as a class representative, the case would have been dismissed because ASNA had not presented its claims. Gov't Br. at 32. That may be true, but it is irrelevant. ASNA is not arguing that it could have served as a class representative without presenting its claims, but rather that, under *Ramah*, it could be a member of the class.

ASNA's informed decision not to separately present its claims does not, however, mean that it was passive about vindicating its contract rights. Indeed, ASNA's diligence here is shown by the uncontested facts of what it did do. As its President testified by affidavit in this case, ASNA "kept a close watch" on litigation over contract support cost underpayments, J.A. 435 (Hopson Aff.); it was an active participant in national meetings, such as those convened by the National Congress of American Indians, attended by both tribal and Government officials, at which contract support cost matters were discussed, *id.*; and it closely monitored national tribal activity about how best to pursue its contract rights, including the status of contract support cost litigation. *Id.* According to President Hopson, "I was kept informed of general litigation activities concerning contract support costs, including activities in ongoing class action lawsuits." J.A. 436. Further:

> Throughout my tenure with ASNA, ASNA was a member of the contract support cost class action that was certified in 1993 in [*Ramah*]. . . . From time to time over the years I would receive notices from class counsel or from the court concerning major activities in the case . . . . In February 2001 ASNA received its first distribution from the funds that had been recovered by the class in the *Ramah* case.

Id. ASNA also twice submitted claims to receive distributions of settlement amounts in *Ramah*, *see* 65 Fed. Reg. 4989 (Feb. 2, 2000); 68 Fed. Reg. 26329 (May 15, 2003), hardly the actions of a merely passive observer. With regard to the filing of the *Zuni* case, Hopson testified:

> In the Fall of 2001 I learned . . . that a new class action lawsuit had been filed by the Zuni Tribe in New Mexico against IHS, that the lawsuit covered ASNA's FY 1996-1998 claims, and that the lawsuit was pending before the same federal judge who had been handling the *Ramah* class action against the BIA. Since the *Zuni* case covered all of ASNA's claims, I concluded that the most efficient course of action was to remain in the *Zuni* case, just as ASNA had remained in the *Ramah* case, because ASNA's claims had already succeeded in *Ramah* without ASNA filing its own claims . . . .

J.A. 437.

ASNA's diligence is best illustrated by the fact that as soon as it was put on notice even that the law might change, it acted as promptly as possible to preserve its claims. Once the stay in the *Zuni* case was lifted in 2005 (following the Supreme Court's decision in *Cherokee Nation of Oklahoma* v. *Leavitt*, 543 U.S. 631 (2005)), the Government indicated that it would challenge the *Ramah* holding and contend presentment was necessary to participate in the class. J.A. 438. Without even waiting for a ruling by the court, ASNA promptly and protectively presented its claims to a contracting officer by August 2005. *Id.* ("I decided that the most prudent course of action was to file the CSC claims swiftly."). Of course, by that time, ASNA's claims for 1996 through 1998 were beyond the six-year limitations period.

In short, it is a mischaracterization to say that ASNA slept on its rights or failed to act diligently in pursuit of those rights. Given Judge Hansen's presentment ruling in *Ramah*, given ASNA's experience in *Ramah*, and given the

filing of the *Zuni* class case before Judge Hansen, ASNA did all that diligence would require. In this context, the doctrine of equitable tolling demands no more.[4]

IV. THE *ZUNI* CASE WAS MATERIALLY INDISTINGUISHABLE FROM THE *RAMAH* CASE IN WHICH THE COURT RULED THAT PRESENTMENT WAS NOT NECESSARY.

Central to the Government's argument is the proposition that it was unreasonable for ASNA to have relied on the presentment ruling in *Ramah* to conclude it could be a member of the *Zuni* class without presenting its claims to IHS. The Government contends that the claims asserted in *Zuni* were different from those litigated in *Ramah* and, because of those differences, the court's decision in *Ramah* to include non-presenters in the certified class could not prudently have served as precedent for the similar issue to be decided in *Zuni*. Gov't Br. at 42-43.

These arguments are simply wrong. When the *Zuni* complaint was filed in 2001, it was a carbon copy of the ongoing *Ramah* class litigation—identical in all respects, save for the fact that the former was a class case against the IHS while the

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[4] The Government contends that ASNA's 2005 presentation of a "good faith estimate" of its damages now creates a "risk" of prejudice to the Government, if equitable tolling is granted. Gov't Br. at 37-38 (citing J.A. 439 (Hopson Aff.)). But the Government does not explain how it might be prejudiced, why presentment in 2002 (within the six-year period for ASNA's earliest claims) as opposed to 2005 (when the claims actually were presented) would have made a difference, or what issues relating to the merits of the Government's defense would rely on anything other than the contract documents set forth in the Administrative Record. *See* ASNA Br. at 36.

latter was a class case against the BIA. Both the legal claims and the proposed class in the two cases were indistinguishable.

A. The *Ramah* Claims and the *Zuni* Claims Were Identical.

The Government contends that "[i]n *Zuni*, unlike in *Ramah*, the plaintiff sought payment of each tribe's full contract support costs need based upon each tribe's individual contract." Gov't Br. at 34. Although this statement is true as to the claims asserted in the initial 1990 complaint in *Ramah*, the Government ignores the claims added to *Ramah* between 1990 and 2001 (when *Zuni* was filed) that were also resolved (or continue to be litigated) on a class-wide basis. Taking into account these added claims, there is in all respects an identity between the claims litigated in *Ramah* and those brought in *Zuni*:

- The original *Ramah* complaint raised a class-wide challenge to how the BIA calculated the indirect cost rate used to determine contract support costs. *See Ramah Navajo Chapter* v. *Babbitt*, 50 F. Supp. 2d 1091, 1094 (D.N.M. 1999) (*Ramah I*) (describing the allegation "that the formula the Bureau of Indian Affairs used to calculate these indirect costs resulted in serious underpayments . . . ."). And so did *Zuni*. J.A. 393 (*Zuni* Complaint at 29) (stating that the First Cause of Action includes "the failure of the defendants to properly calculate indirect contract support costs as determined in *Ramah Navajo Chapter v. Lujan* . . . .).

This so-called "miscalculated rate claim" in *Ramah* was set forth in the complaint and settled on a class-wide basis in 1999, for approximately $76 million covering FY 1989 through FY 1993. *Ramah I*, 50 F. Supp. 2d at 1100-1102, 1107. ASNA applied for and received payments as part of the settlement. J.A. 437 (Hopson Aff.).

- *Ramah* raised a class-wide challenge to the underpayment of so-called "direct contract support costs," a claim added to *Ramah* in 2000, prior to the filing of the *Zuni* complaint. *See Ramah Navajo Chapter* v. *Norton*, 250 F. Supp. 2d 1303, 1305, 1307 (D.N.M. 2002) (*Ramah II*) (describing the "DCSC claim" as a claim for "unpaid direct contract support costs"). And so did *Zuni*. J.A. 375 (*Zuni* Complaint at 11) (describing "direct contract support costs" as an element of contract support costs); J.A. 393-394 (*Zuni* Complaint at 29-30) (asserting causes of action for "failure of defendants to pay . . . full contract support costs associated with all IHS programs . . . .").

This "direct cost claim" in *Ramah* was incorporated into the ongoing *Ramah* class proceedings, *Ramah II*, 250 F. Supp. 2d at 1312, and was partially resolved on a class-wide basis in 2002, for a $29 million settlement covering FY 1993 and 1994 (this amount also included settlement of a portion of the "shortfall claim"). *Id.* at 1306. ASNA applied for and received payments as part of the settlement. *Supra* 14.

- *Ramah* raised a claim challenging the failure of the Government to pay in full the calculated amounts of contract support costs owed to each Tribe, due to allegedly insufficient appropriations. *See Ramah II*, 250 F. Supp. 2d at 1305 (describing the "shortfall claim" as a "claim for the difference between the indirect cost rate multiplied by the BIA direct base for all class members . . . and what was actually paid."). And so did *Zuni*. J.A. 375-385 (*Zuni* Complaint at 11-21) (describing underpayments of contract support costs).

The "shortfall claim" was added as a class claim to *Ramah* in 1999, prior to the filing of the *Zuni* complaint, after the Government consented to amendment of the class complaint. *Ramah II*, 250 F. Supp. 2d at 1307. It was partially settled by the class in 2002 for a payment of $29 million (including the settlement of the "direct cost claim") covering FY 1992 and 1993. *Id.* at 1306. ASNA applied for and received payments as part of the settlement. J.A. 437 (Hopson Aff.).[5]

In other words, although the Government argues that in *Zuni*, "unlike in *Ramah*," there was a claim for payment of "each tribe's full contract support costs," Gov't Br. at 34, an identical "shortfall claim" was in fact asserted and

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[5] Both the "shortfall claim" and the "direct cost claim" continue to be litigated on a class-wide basis for fiscal years after 1993 (the so-called "cap year" appropriations), and are pending before the Supreme Court. *Ramah Navajo Chapter* v. *Salazar*, 644 F.3d 1054 (10th Cir. 2011), *cert. granted*, 132 S. Ct. 995 (2012).

certified in *Ramah* as a class claim, with the consent of the Government, well before the filing of the complaint in *Zuni*.

Indeed, the Government itself previously recognized the identity of the claims in *Ramah* and in *Zuni*. In a brief filed in 2005 in opposition to class certification in *Zuni*, the Government directed the court's attention to the similarity between *Ramah* and *Zuni*, stating, "It is also notable that in the Ramah case, as here [*i.e.*, in *Zuni*], the plaintiff sought not only to challenge an agency policy, but to obtain monetary relief on its specific claims of breach of contract." J.A. 416 (*Zuni* Gov't Br. at 17 n.8).

Thus, at the time the *Zuni* class complaint was filed against the IHS in 2001, all of the claims asserted in *Zuni*—the miscalculated rate claim, the direct cost claim and the shortfall claim—were being actively litigated on a class-wide basis in *Ramah*.

B. The *Ramah* Class and Proposed *Zuni* Class Were Identical.

The class actually certified in *Ramah* and the class that sought certification in *Zuni* were also identical.

In *Ramah*, the court approved certification of a class "to include all Indian tribes and organizations who have contracted with the Secretary of the Interior under the Indian Self-Determination and Education Assistance Act." J.A. 320 (*Ramah*, Order of Oct. 1, 1993) (granting class certification).

In *Zuni*, the complaint sought certification of a class that consisted of "all tribes and tribal organizations contracting with IHS under the ISDA program between the years 1993 to the present." J.A. 388 (*Zuni* Complaint at 24).

The Government argues that ASNA should not have expected the *Zuni* class to be certified when the identically-framed *Ramah* class already had been. It contends that the 1993 presentment decision by the *Ramah* court extended only to the "miscalculated rate claim" asserted in the initial *Ramah* complaint, and thus could not reasonably be relied on by ASNA to cover the "direct cost claim," and the "shortfall claim" asserted in *Zuni*. Gov't Br. at 33-34. But the *Zuni* complaint also included a miscalculated rate claim that was identical to the claim before the *Ramah* court when it certified the class in 1993. The *Ramah* court's conclusion that it would be futile to require presentment of that claim by all class members applied identically to the miscalculated rate claim at issue in *Zuni*.

More broadly, the *Ramah* court—with the Government's concurrence—treated all of the claims before it as proper class claims. The "shortfall claim" was added in 1999, and although the Government initially objected to amendment of the class complaint in order to add the claim, it later withdrew the objection and consented. *Ramah II*, 250 F. Supp. 2d at 1307. The Government subsequently consented to the class-wide settlement of this claim. *Id.* at 1306.

So, too, the "direct cost claim" was brought in 2000 and then added "as a new class claim in *Ramah*" as part of the settlement. *Id.* at 1309; *see also id.* at 1312 ("the DCSC claim was certified as a class claim for settlement purposes"). This was also done with the Government's consent. *Id.* at 1312.

Thus, while it is true that the 1993 *Ramah* certification decision dealt only with the miscalculated rate claim initially brought in *Ramah*, the claims later added to the case were litigated as, and settled as, class claims. The Government did not oppose class treatment of the additional claims, notwithstanding the lack of presentment by individual class members. Nor did it ever move to de-certify a class in *Ramah*. Indeed, the "shortfall" and "direct cost" claims currently pending before the Supreme Court are still class claims. And the Government just recently argued to the Supreme Court that it should grant the petition for *certiorari* in *Ramah* (and not another petition raising the same issues) precisely because *Ramah* is a class action. *See* Pet. for Cert. at 29-30, *Salazar* v. *Ramah Navajo Chapter*, No. 11-551, 2011 WL 5145757 (U.S. Oct. 31, 2011).

It is, of course, true that the Government, at any time, could have moved for decertification of the *Ramah* class and, if it had done so, the motion might have been granted. Gov't Br. at 45. But that reasoning is nothing more than idle speculation that if the Government had sought decertification (which it did not), the court might have decertified the class (which it has not).

To be sure, in approving the two settlements of the three class claims in *Ramah*, the court noted in passing that there was some "risk of . . . decertification of the Class . . . ." *Ramah I*, 50 F. Supp. 2d at 1100; *see also Ramah II*, 250 F. Supp. 2d at 1308 (decertification is "a possibility"). But the court's statements came in the context of discharging its duty to assess the adequacy of a proposed settlement of class claims as measured against the risks to the class of continued litigation, a context in which a court canvasses all possible risks, no matter how remote or speculative, to support the court's conclusion that a proposed settlement is fair and adequate to absent class members. *E.g.*, *Ehrheart* v. *Verizon Wireless*, 609 F.3d 590, 592-93 (3rd Cir. 2010) (in reviewing class settlements, a district court "acts as a fiduciary [for] absent class members").

In this context, the court's passing reference to the "possibility" or "risk" of decertification does not change the facts: (1) that in certifying a class in *Ramah*, the court held that presentment by class members was not necessary, (2) that the claims subsequently added to *Ramah* were both litigated and settled (with the Government's consent) on a class-wide basis, (3) that the Government has never sought, nor has the court granted, decertification of the class in *Ramah*, and (4) that the claims set forth in the *Zuni* class complaint were identical to the claims litigated and settled on a class-wide basis in *Ramah*.

Indeed, when the Government argued against class certification in *Zuni* in 2005, it did not contend then (as it does now) that the claims in *Ramah* were different; instead it said of the *Ramah* presentment ruling: "Defendants submit that this ruling (which was not appealed) was error . . . ." J.A. 414. If the Government in *Zuni* had no basis to distinguish the *Ramah* precedent—other than simply to say that *Ramah* was wrong—then there was no basis for ASNA to think anything other than that *Ramah* was valid precedent.[6]

In sum, ASNA knew that it was a member of the *Ramah* class and knew that it had applied for and received payments as a class member from both settlement funds in *Ramah*. ASNA's reliance on its experience as a class member in *Ramah*

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[6] The Government also contends that ASNA should have been on notice that class certification might be denied in *Zuni* because of a decision by a different district court that denied class certification in a similar case. *Cherokee Nation of Oklahoma* v. *United States*, 199 F.R.D. 357, 366 (E.D. Okla. 2001). In its argument to the *Cherokee* court in opposition to the motion for class certification, the Government restated its position that the *Ramah* presentment ruling was "clearly erroneous" but also said that "[i]n any event, that decision is not binding on this Court." J.A. 360. The opposite is also true. The contrary decision on certification by the district court in *Cherokee* was not binding on the New Mexico district court in *Zuni*.

In addition, there were strong grounds for ASNA to believe that the New Mexico district court in *Zuni* would follow the precedent that had been set in *Ramah* by the same district court. *See, e.g.*, *Igartua* v. *United States*, 626 F.3d 592, 603 (1st Cir. 2010) (stating a principle of *stare decisis* that "a court is bound by its own prior legal decisions unless there are substantial reasons to abandon a decision"). This was particularly true at the time of the *Cherokee* decision in 2001 when the judge assigned to the *Zuni* case was the same judge who had made the presentment and certification decision in *Ramah*.

surely outweighs the speculation that the Government and the court might behave differently in *Zuni*.

V. THE INDIAN SELF-DETERMINATION ACT MANDATES LIBERAL CONSTRUCTION OF ITS PROCEDURAL REQUIREMENTS FOR THE BENEFIT OF A TRIBAL CONTRACTOR.

The Government cites several cases for the proposition that statutes of limitations apply to Indian Tribes the same as they do to other litigants. Gov't Br. at 39-40. However, none of these cases arises in the special context of the Indian Self-Determination Act, where Congress expressly created a rule of statutory construction to mandate that "each provision" of the statute (and of each ISDA contract) "shall be liberally construed for the benefit of the Contractor . . . ." 25 U.S.C. §450*l*(c). Because the ISDA incorporates by cross-reference the CDA (including the section 605(a) presentment requirement), *id.* at § 450m-1(d), the same rule of liberal construction should apply to the provisions of the CDA when invoked in this special ISDA context.

The Government's only response misapprehends the argument. The Government states that Congress' "incorporation of [CDA] procedures into the resolution process for ISDA claims makes those procedures equally mandatory for tribal contractors" and, therefore, it would be "illogical" for tribal contractors to benefit from equitable tolling "when other contractors would not." Gov't Br. at 41. But this Court already decided in *ASNA I* that the presentment requirement in

section 605(a) is subject to equitable tolling, so the Government's contention that presentment is "mandatory" begs the question of whether equitable tolling is warranted. And Congress clearly decided that tribal contractors under the ISDA are not the same as "other contractors" when it wrote a special rule of statutory construction "for the benefit" of tribal ISDA contractors. 25 U.S.C. § 450*l*(c). This special rule of construction would have little meaning if it does not inform a court's assessment of the equities in deciding whether to toll the limitations period for presentment. At least to that extent, Congress clearly does want tribal ISDA contractors to be treated differently—more "liberally"—than "other contractors."

In the context of statutes of limitations relating to veterans' rights, this Court has repeatedly recognized that such liberal and sympathetic review of the equities is warranted in deciding whether to invoke equitable tolling. *See, e.g., Kirkendall* v. *Dep't of the Army*, 479 F.3d 830 (Fed. Cir. 2007) (en banc). As Judge Steel noted in her dissent below, "When the underlying issue involves a government program beneficiary for which Congress has shown solicitude . . . the courts have been more lenient in granting equitable relief." J.A. 15. She added, "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." *Id.* at 17.

The veterans' cases arise in a context where there is no explicit congressional directive on the matter. Here, where Congress has spoken and has directed the courts to "liberally construe" a statute for the benefit of tribal contractors, it is particularly appropriate for the Court to apply the doctrine of equitable tolling in order to ensure, under these unusual circumstances, that a tribal contractor at least can have its day in court.[7]

CONCLUSION

The opinion below should be reversed and the case remanded to the Board.

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[7] In a Rule 28(j) letter to the Clerk after the filing of its brief, the Government brought to the attention of the Court a ruling by the district court for the District of Columbia that rejected a claim for equitable tolling. *Menominee Indian Tribe of Wisconsin* v. *United States*, ___ F. Supp. 2d ___, 2012 WL 192815 (D.D.C. 2012). Contrary to ASNA's argument here, the Menominee Tribe relied on the filing of the *Cherokee* class action as the basis for equitable tolling, an argument rejected by the court. *Id.* at *5-6. The *Cherokee* case, unlike the *Zuni* case, was filed in a different district and was before a different judge than *Ramah*. We respectfully submit that the filing of the *Zuni* case before the same judge who certified the class and made the presentment ruling in *Ramah* is a significant difference in the nature of the reliance asserted by ASNA. In the weighing of equities that must be made on a "case-by-case basis," *Holland*, 130 S. Ct. at 2563, that difference materially distinguishes this case from the district court's decision in *Menominee*. Thus, even if *Menominee* were correctly decided (and it was not), that case provides no basis for affirming the decision below.

Respectfully submitted this 7th day of March 2012.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION AND TYPEFACE AND TYPE STYLE REQUIREMENTS

I, Lloyd B. Miller, hereby certify and attest that:

1. I am counsel of record for Appellant in the above-captioned matter.

2. Appellant's Reply Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) or FRAP 28.1(e). Appellant's Reply Brief contains 6,900 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

3. Appellant's Reply Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or FRAP 28.1(e) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). Appellant's Reply Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point, Times New Roman font.

Dated this 7th day of March 2012.

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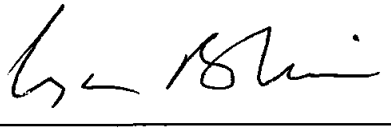
By: 
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CERTIFICATE OF SERVICE

I, Lloyd B. Miller, hereby certify and attest that:

1. I am counsel of record for Appellant Arctic Slope Native Association, Ltd. in the above-captioned matter.

2. That on the 7th day of March 2012 I caused to be delivered by Federal Express the original and eleven (11) true and correct copies of Reply Brief of Appellant Arctic Slope Native Association, Ltd. to the following for filing:

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3. That on the 7th day of March 2012 I caused to be served by e-mail one (1) true and correct copy of Reply Brief of Appellant Arctic Slope Native Association, Ltd. and by Federal Express two (2) true and correct copies of Reply Brief of Appellant Arctic Slope Native Association, Ltd. upon the following:

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