2011-1485

IN THE 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

BRIEF FOR APPELLEE

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director

KIRK T. MANHARDT
Assistant Director

JACOB A. SCHUNK
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
Attn: Classification Unit
8th Floor
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Tele: (202) 616-0320
Fax: (202) 307-0972

Attorneys for the Secretary

OF COUNSEL:

Melissa Jamison
Sean Dooley
Senior Attorneys
U.S. Department of Health
and Human Services
Office of the General Counsel
Public Health Division
200 Independence Ave., S.W.
Washington, D.C. 20420

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5 of the Rules of the United States Court of Appeals for the Federal Circuit, appellee's counsel states that this Court has decided two earlier appeals in this case: *Arctic Slope Native Association, Ltd. v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009) (Mayer, Lourie, and Bryson), which was decided September 29, 2009, and *Arctic Slope Native Association, Ltd. v. Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), which was decided December 15, 2010. Counsel is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title.

Appellee's counsel is also aware that the resolution of the issues in this case may affect *Menominee Indian Tribe of Wisconsin v. United States*, No. 1:07-cv-00812-RMC (D.D.C.), and *Bristol Bay Area Health Corporation v. United States*, No. 07-725 (Fed. Cl.), as well as several cases currently pending before the Civilian Board of Contract Appeals.

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STATEMENT OF JURISDICTION

The Civilian Board of Contract Appeals ("board") entertained this case pursuant to 41 U.S.C. § 7105(e)(1)(B). This Court possesses jurisdiction to entertain an appeal from the decision dismissing the case for lack of jurisdiction pursuant to 41 U.S.C. § 7107(a)(1)(A) and 28 U.S.C. § 1295(a)(10).

STATEMENT OF THE ISSUES

1. Whether equitable tolling can excuse a plaintiff's failure to exhaust administrative remedies within the requisite period when the plaintiff simply elected not to follow statutory exhaustion procedures in the hope that a future court decision in a class action brought by a third party would make the plaintiff's exhaustion unnecessary?

2. Even if a plaintiff can simply elect not to exhaust administrative remedies and reap the benefits of equitable tolling, whether a plaintiff pursued its rights with the requisite diligence when (a) nothing prohibited the plaintiff from exhausting its administrative remedies, (b) there was no binding precedent holding that exhaustion was unnecessary, and (c) the Government never agreed to waive the statutory exhaustion requirements.

STATEMENT OF THE CASE

I. Nature Of The Case

Plaintiff, Arctic Slope Native Association, Ltd. ("ASNA"), seeks damages for amounts it claims it is owed as part of contracts entered into with the Department of Health and Human Services ("HHS") in 1996, 1997, 1998, 1999, and 2000. The board dismissed the claims for the years 1996, 1997, and 1998, which are at issue here, because ASNA failed to file a claim with a contracting officer within six years of each claim's accrual and because neither equitable tolling nor class action tolling were available to toll claims brought under the Contract Disputes Act ("CDA"). *See Arctic Slope Native Ass'n, Ltd. v. Sebelius*, 583 F.3d 785, 788 (Fed. Cir. 2009) (*"ASNA I"*).

In its first review of this case, the Court affirmed in part and reversed in part. Because ASNA had not timely presented its claims to a contracting officer, the Court affirmed the board's decision that class action tolling did not apply to ASNA's claims. *See id.* The Court reversed the board's decision concerning equitable tolling, finding that equitable tolling could be available depending upon the specific facts of this case. The Court, thus, remanded for a consideration of whether equitable tolling applied. *Id.*

Upon remand, the board again dismissed ASNA's claims for 1996, 1997, and 1998, finding that, based upon the facts present here, equitable tolling did not preserve ASNA's untimely claims. JA 1-25.[1] This appeal followed.

In another decision, for reasons not directly applicable here, the board denied the claims for 1999 and 2000, and this Court also affirmed that decision. *See Arctic Slope Native Ass'n, Ltd v. Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010) ("*Arctic Slope II*"). The United States Court of Appeals for the Tenth Circuit reached a different result concerning similar claims brought in a different proceeding. *See Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1071 (10th Cir. 2011). The Supreme Court granted a writ of certiorari in that case on January 5, 2012. -- S. Ct. ----, 2012 WL 28948 (mem.).

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS BELOW

I. Factual Background

ASNA is a tribal organization authorized and organized by several recognized Indian tribes in Alaska. Pursuant to the Indian Self Determination and Education Assistance Act ("ISDA"), which, in part, provides funding for tribes and tribal organizations to administer programs that would otherwise be provided to tribes by the Federal Government, *see* 25 U.S.C. § 450b(j), ASNA has assumed

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[1] "JA __" refers to the joint appendix to be submitted in this case.

responsibility to operate the Barrow Public Health Service Hospital in Barrow, Alaska. *See* JA 171-279.

ASNA proposed to the Indian Health Service ("IHS"), an agency of the Department of Health and Human Services ("HHS"), that control over the hospital services in Barrow be transferred to ASNA beginning in January 1996. *See* JA 55. For fiscal years 1996 - 2000, the years at issue in ASNA's complaint, ASNA entered into annual funding agreements with IHS that identified the amount IHS would provide to ASNA for the hospital's operation. The annual funding agreements differentiated between the amount IHS would provide for the Secretarial amount, which is the amount that the Federal Government would have incurred had it continued to operate the program, and for "contract support costs," which are the "reasonable costs" for activities a tribal organization must carry on in its operation of a program that either (1) would not be "carried on by the respective Secretary in his direct operation," or (2) are funded with resources other than those transferred under the contract. *See ASNA II*, 629 F.3d at 1301; *see also* 25 U.S.C. §§ 450j-1(a)(1)-(2).

ASNA's contracts, like all ISDA contracts, were governed by the Contract Disputes Act ("CDA"), *see* 25 U.S.C. § 450m-1(d), which required ASNA, like

any other contractor, to present a claim to a contracting officer within six years of a claim's accrual before bringing suit, *see* 41 U.S.C. § 7103(a).

ASNA did not file claims with a contracting officer concerning any purported underpayment in contract support costs for any of the fiscal years identified in the complaint until September 2005. JA 440-41. The close of each fiscal year occurred on September 30 of each year, JA 440, and there is no dispute that ASNA's claims for the three years currently at issue – 1996, 1997, and 1998 – were not filed within six years of the close of any of the three years. JA 440-41.

II. Contract Support Costs And Related Litigation

Although Congress enacted ISDA in 1975, Congress did not provide for funding of contract support costs until 1988. *See* ISDA Amendments of 1988, Pub. L. No. 100-472, § 205, 102 Stat. 2293 (25 U.S.C. § 450j-1(a)(2)). Contract support costs are defined as other "reasonable costs" for activities that the tribal contractor "must carry on to ensure compliance with the terms of the contract and prudent management," but that either (1) would not be incurred if a Federal agency continued operating the program or (2) are provided from resources other than those under the contract. 25 U.S.C. § 450j–1(a)(2). Contract support costs can include indirect costs, which can be calculated in part by "applying an 'indirect cost rate' to the amount of funds otherwise payable to the Tribe."

Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 635 (2005). However, any indirect costs already funded through the Secretarial amount cannot also be funded as indirect contract support costs. *See* 25 U.S.C. § 450j-1(a)(3). Contract support costs can also include direct costs, such as workers' compensation insurance, but only for activities not funded through the Secretarial amount. *See* 25 U.S.C. § 450j–1(a)(2).

When Congress initially allowed for payment of contract support costs in 1988, it did not enact any statutory caps upon the amounts agencies could allocate for contract support costs. Beginning with fiscal year 1994 for the Department of the Interior ("Interior"), *Ramah*, 644 F.3d at 1059, and with fiscal year 1998 for HHS, *see ASNA II*, 629 F.3d at 1300, Congress began capping the amount of funds available to pay for contract support costs. Congress's fiscal year 1999 appropriation for IHS, for example, provided that, "notwithstanding any other provision of law . . . not to exceed $203,781,000 shall be for payments . . . for contract or grant support costs." *See ASNA II*, 629 F.3d at 1300.

Both before Congress began enacting statutory caps and after Congress enacted caps, tribes filed claims alleging that, for various reasons, they were not receiving all of the contract support costs to which they were entitled. Three of those lawsuits are relevant here.

A. ***Ramah***

One of the things tribes challenged was the method for how contract support costs were calculated. Interior calculated certain indirect contract support costs allotments based upon indirect cost rates negotiated by Interior's inspector general and calculated with a general formula that Interior applied to all tribes. In *Ramah Navajo Chapter v. Norton*, No. 90-0957 (D.N.M.) ("*Ramah*"), a plaintiff tribe challenged the appropriateness of the formula through a class action raising what the court called a "calculation claim." *See Ramah*, 250 F. Supp. 2d 1303, 1305 (D.N.M. 2002); JA 316. The tribe challenged the indirect cost rate formula, and it sought to have a class certified of "all Indian tribes and organizations contracting under the [ISDA] with the Bureau of Indian Affairs [of the Department of the Interior]. . . who receive or are entitled to receive contract support funding based on indirect cost rates negotiated through the office of the inspector general." JA 316.

The district court in 1993, over the Government's objection, granted the plaintiff's class certification motion. The Government argued that class certification was inappropriate because, although the named plaintiff had filed a claim with a contracting officer and therefore "exhausted its administrative

remedies . . . there is no showing that the members of the class to be certified have exhausted their administrative remedies." JA 317.

The court agreed with the Government that some of the class members may not have filed claims and that filing a claim is a jurisdictional requirement for CDA claims. JA 318-19. The court also noted that it was aware of no "case decided under the CDA where exhaustion of remedies was waived as being futile." JA 318. The court held, however, that filing a claim was unnecessary for certification in that particular case because the "action does not concern a typical contract dispute." JA 319. The court held that, because the plaintiff was challenging "policies and practices" and seeking "systemwide" reforms, it was not necessary that all class members exhaust administrative remedies. JA 319.

In 1999, the parties entered into a settlement of the "calculation claim" through 1993, the year before Congress began capping the amount Interior could allocate for contract support costs. *See Ramah*, 250 F. Supp. 2d at 1305. The district court approved the partial settlement in May 1999, *see Ramah*, 50 F. Supp. 2d 1091, 1094 (D.N.M. 1999), and ASNA, which also had a contract with Interior, shared in the settlement's proceeds, *see* JA 437.

After approval of that settlement, the plaintiffs added additional claims. The plaintiffs added (1) a "shortfall claim," which the district court described as "a

claim for the difference between the indirect cost rate multiplied by the BIA . . . and what was actually paid," and (2) a "direct contract support costs or DCSC claim," for purported underpayments in direct contract support costs. *Ramah*, 250 F. Supp. 2d at 1305.

In September 2002, the parties filed a joint motion for approval of a second partial settlement to resolve the "shortfall" claims for fiscal years 1992-93 and the DCSC claims for fiscal years 1993-94. *Ramah*, 250 F. Supp. 2d at 1306. When the court approved the settlement in December 2002, the court noted that the lawyers had negotiated the claim in formal negotiations that took place in the spring of 2000 through June 2001, when the settlement was initially agreed upon. *Id.* at 1308. The court also made specific findings concerning the suitability of a class action to pursue both the shortfall claims and the DCSC claims. The court specifically found that, in regard to the DCSC claims, "class certification . . . would be resisted by the government." *Id.* In regard to the shortfall claim, the court found that "[d]ecertification of the shortfall claim is a possibility." *Id.* The court also recognized that "there now exists a significant body of case law adverse to the position of the Class on these claims." *Id.* ASNA also shared in the proceeds from the December 2002 settlement. *See* JA 437.

B. *Cherokee*

After the December 2002 order approving the settlement, the court in *Ramah* stayed further proceeding pending conclusion of the appellate proceedings in *Cherokee Nation of Oklahoma v. United States*, No. 99-92-S (E.D. Okla.) ("*Cherokee*"). *See Ramah*, 644 F.3d at 1062.

The tribe in *Cherokee* filed its complaint as a class action against HHS in 1999, nine years after *Ramah* was filed against Interior, and ASNA was also aware of this litigation. JA 437. Unlike the initial complaint in *Ramah*, which only challenged the method used to calculate indirect cost rates, the tribe in *Cherokee* challenged HHS's refusal to pay tribes their "full" contract support costs because of an "alleged lack of available appropriations." *Cherokee*, 199 F.R.D. 357, 364 (E.D. Okla. 2001). The tribe in *Cherokee* sought to have a class certified of "[a]ll Indian tribes and tribal organizations operating [Indian Health Service] programs . . . authorized by the [ISDA] . . . that were not fully paid their contract support costs needs, as determined by [the Indian Health Service], at any time between 1988 and the present." *Id.* at 360.

In February 2001, the court issued an order denying class certification. The plaintiff was seeking full payment upon each individual contract for each tribe, but the contracts were "not the same for every tribe" and "there was not even standard

language on contract support costs." *Id.* at 363. Because a "detailed examination into the contracts of each plaintiff for each year with the defendant would be required," the court held that "the questions peculiar to individual members of the class predominate[] over questions of law or fact that are common." *Id.* Thus, the court denied the motion to certify the class.

The Government had also argued that certification was not appropriate because the proposed class "fail[ed] to exclude putative class members whose claims in this case are barred by the six-year general statute of limitations." *Id.* at 362. Although the court did not certify the class, the court disagreed with this basis for denying certification, holding that "an inquiry into a claimed affirmative defense impermissibly allows an issue going to the merits of the litigation to intrude upon the class certification analysis." *Id.* (internal citation and quotation omitted).

In *Cherokee*, after the court denied the motion for certification, the plaintiff pursued the action upon its own behalf. The Supreme Court ultimately heard the case and held that, because the "appropriations statutes [for the years at issue] unambiguously provided unrestricted lump-sum appropriations," *Cherokee*, 543 U.S. 631, 646-7 (2005), and because there were "unrestricted appropriated funds" with which the agency could have paid all tribes' contract support costs, *id.* at 642,

there was no basis for excusing the Government from its admitted "promise[] [in the specific contracts at issue] to pay the relevant contract support costs," *id.* at 636.

C. *Zuni*

In September 2001, after Cherokee filed its class action complaint and after the February 2001 order denying class certification, a different tribe, the Pueblo of Zuni ("Zuni"), brought a new class action against HHS, the same defendant as in *Cherokee*, but this time in the same district as *Ramah*. *Pueblo of Zuni v. United States*, D.N.M. No. CIV 01-1046 ("*Zuni*"). In this case, similar to *Cherokee*, the tribe sought to have a class certified of "all tribes and tribal organizations contracting with IHS under the ISDA between fiscal years 1993 to the present." *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1105 (D.N.M. 2006). The complaint in *Zuni*, similar to the complaint in *Cherokee*, claimed not only that HHS was relying upon improperly calculated indirect cost rates but also that each tribe was entitled to its full contract support costs need. JA 365-66.

In December 2001, before the tribe filed a motion for class certification, the proceedings in *Zuni*, as in *Ramah*, were stayed pending the conclusion of the appellate proceedings in *Cherokee*. JA 398. After the proceedings were no longer stayed, the Government moved to dismiss a portion of Zuni's claims because the

tribe had not first submitted all of its claims to a contracting officer. *See Zuni*, 467 F. Supp. 2d at 1112. The court granted the motion, holding that exhaustion is jurisdictional and that, even if it were futile for Zuni to have submitted the claims, "futility is simply not available as an excuse for nonexhaustion." *Id.* (citing *Thoen v. United States*, 765 F.2d 1110, 1116 (Fed. Cir. 1985)). The court also rejected Zuni's purported reliance upon the 1993 certification order in *Ramah* as justifying its failure to exhaust administrative remedies, noting that "Plaintiff can hardly be said to rely on the oblique argument that a class certification order in a *separate* case allows Plaintiff to forego exhaustion of their claims in *this* case." *Id.* at 1114.

Subsequent to that decision dismissing some of Zuni's individual claims, the court also denied Zuni's motion for class certification. The court held that "exhaustion under the CDA is mandatory and jurisdictional" and "the existence of unexhausted claims within the claims of the putative class remains a jurisdictional defect, precluding class certification." *Zuni*, 243 F.R.D. 436, 442-42 (D.N.M. 2007). The court also found that "[t]he terms and conditions of the tribal contracts were sufficiently individualized so that the question of whether all tribal contractors were underpaid becomes one of the disputed issues," *id.* at 448, and that "[t]he nature of this kind of case with individualized contracts does not lend itself to class litigation," *id.* at 446.

D. Current Status of *Ramah*

After the Supreme Court decision in *Cherokee*, the district court in *Ramah* lifted the stay and the parties litigated, among other things, the Government's exposure during fiscal years in which Congress had enacted a cap upon the agency's appropriation for contract support costs. In 2011, the United States Court of Appeals for the Tenth Circuit held that the statutory cap was not a defense to the plaintiffs' claims against Interior because "the insufficiency of a multi-contract appropriation to pay all contracts does not relieve the government of liability if the appropriation is sufficient to cover an individual contract." *Ramah*, 644 F.3d at 1071.

In a decision from this Court involving ASNA's claims against IHS for fiscal years 1999 and 2000, the Court held that "[t]he availability of funds provision coupled with the 'not to exceed' language [in the statute and contracts] limits the Secretary's obligation to the tribes to the appropriated amount." *Arctic Slope II*, 629 F.3d at 1304. The Supreme Court granted a writ of certiorari in *Ramah* on January 5, 2012. -- S. Ct. ----, 2012 WL 28948 (mem.).

III. Course Of Proceedings Below

This appeal involves ASNA's claims for additional contract support costs funding for fiscal years 1996, 1997, and 1998. The board initially dismissed these

claims, finding that ASNA failed to present a claim to a contracting officer within the requisite statutory period and that neither equitable tolling nor class action tolling could toll the period for presenting a claim to a contracting officer. *ASNA I*, 583 F.3d at 788.

This Court reversed in part and affirmed in part. Concerning class action tolling, the Court found that ASNA's claims are "not subject to statutory class action tolling in this case." *Id.* at 791. The Court recognized the rule in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), that the filing of a class action stops the running of the statute of limitations for "all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 583 F.3d at 791. The Court held that *American Pipe* did not apply here because "both the Supreme Court and the lower courts have held that a party that has not exhausted administrative remedies is not eligible to be a class member." *Id.* at 794. Thus, the Court found that the proceedings in *Zuni* did not result in class action tolling of ASNA's claims because class action tolling "does not apply to parties over whom the court has no authority to exercise jurisdiction," *id.* at 795, and ASNA failed to comply with the "requirement to present its claims to a contracting officer," *id.* at 796.

The Court also dismissed ASNA's reliance upon the 1993 order certifying a class in *Ramah*. The Court noted that the *Ramah* court "did not adopt the general principle that asserted class members need not exhaust their administrative remedies in an ISDA contract case" but instead found "that exhaustion of administrative remedies was not required under the circumstances of that case because it would have been futile." 583 F.3d at 796 n.3. The Court found ASNA's reliance upon that case unavailing, noting, among other things, that ASNA has "not argued that any 'futility' exception excuses [its] failure to make timely presentments of the disputed claims to the contracting officers." *Id.*

The Court also noted the peculiar result of permitting ASNA's claims to be tolled by the proceedings in *Zuni*. Had the complaint in *Zuni* or *Cherokee* been brought by ASNA, ASNA would not have been entitled to any recovery because its "claims would have been subject to dismissal for failure to comply with the presentment requirement." *Id.* at 796. Thus, allowing ASNA's claims to be tolled by class action tolling would mean that its "status as asserted class members would put [it] in a better position than [it] would have been in if [it] had actually been named parties in the *Zuni* and *Cherokee Nation* actions." *Id.* at 796.

As to equitable tolling, the Court held that the board erred because the time limit for submitting a claim to a contracting officer is subject to equitable tolling.

Id. at 799. The Court remanded to the board for a "determination as to whether, under the circumstances of these cases, the limitation period should be tolled." *Id.* at 800.

Upon remand, the board considered the facts of this case and determined that equitable tolling was inapplicable. Upon cross motions, without receiving testimony other than a declaration submitted by ASNA's executive director, the board found that equitable tolling did not apply to ASNA's claims because "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." JA 6.

The board found, among other things, that ASNA could not rely upon the class certification in *Ramah* as somehow equitably tolling its claims. The board noted that *Ramah* (where a class was certified) and *Zuni* (where certification was denied) were different in part because, when the court decided *Zuni*, unlike in *Ramah*, Congress had enacted a six year limit for presenting claims to a contracting officer; thus, the *Ramah* court "had no need to determine whether members had filed their claims on a timely basis." JA 5. The board also noted, as this Court had already identified, that the *Ramah* court found that presentment to a contracting officer was unnecessary because the action challenged "systemwide reforms not limited to reimbursement of contract support costs." JA 5.

The board also rejected ASNA's reliance upon the purported "defective class action" in *Zuni*. JA 6. The court noted that the complaint in *Zuni* was not defective because the named plaintiffs were permitted to proceed and, in any event, that ASNA, which had not submitted a claim to a contracting officer, "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." JA 7.

This appeal followed.

SUMMARY OF ARGUMENT

Equitable tolling does not excuse ASNA's election not to exhaust its administrative remedies within the statutory period.

Absent extraordinary circumstances not present here – such as an individual's mental incapacity or misleading conduct by an adversary – a plaintiff is not entitled to equitable tolling where (1) nothing prohibits a plaintiff from pursuing a claim and (2) the plaintiff fails to take any timely action to pursue its rights. ASNA could have pursued its rights by submitting a claim to a contracting officer. Instead of complying with that statutory requirement, ASNA elected to do nothing and to hope instead that a class action filed by a third party would make it unnecessary for ASNA to comply with the statute. Equitable tolling does not

apply because the doctrine is inapplicable where a plaintiff elects to do nothing to pursue its claim.

Even if equitable tolling could apply where a plaintiff elects not to pursue a timely claim, the doctrine only saves untimely claims where a plaintiff exercises reasonable diligence. ASNA purportedly chose not to exhaust its administrative remedies because of the *Zuni* complaint, asserting that, had the district court certified the class, exhaustion would have been unnecessary. Even if that proposition were correct, which it is not, the only other court to consider whether a similar class should be certified, the district court in *Cherokee*, held that certification was improper. Accordingly, under any standard, ASNA's election not to do anything was unreasonable.

ARGUMENT

I. Standard Of Review

The Court reviews the board's legal determinations de novo. *See Lear Siegler Servs., Inc. v. Rumsfeld*, 457 F.3d 1262, 1266 (Fed. Cir. 2006). The board's factual findings "may not be set aside unless the decision is (A) fraudulent, arbitrary, or capricious; (B) so grossly erroneous as to necessarily imply bad faith; or (C) not supported by substantial evidence." 41 U.S.C.

§ 7107(b)(2); *see, e.g., Cities of Burbank, Glendale and Pasadena, Cal. v. Bodman*, 464 F.3d 1280, 1284 (Fed. Cir. 2006). Where facts are undisputed and the question is whether a plaintiff "meets the diligence standard for equitable tolling . . . [the] case presents a question of law that [the Court] review[s] de novo." *Fmr. Employees of Sonoco Prods Co. v. Chao*, 372 F.3d 1291, 1295 (Fed. Cir. 2004).

II. Equitable Tolling Does Not Save ASNA's Untimely Claims

There is no dispute that ASNA failed to submit claims to a contracting officer (or to take any actions whatsoever to preserve its claims) for fiscal years 1996, 1997, and 1998, the only years at issue, within six years of the claims accruing. There is also no dispute that the six year period for filing a claim is a jurisdictional prerequisite to the board's jurisdiction. *See ASNA I*, 583 F.3d at 793 ("[T]he timely submission of a claim to a contracting officer is a necessary predicate to the exercise of jurisdiction by a court or a board of contract appeals over a contract dispute governed by the CDA."). The only question raised by ASNA in this appeal is whether, because of the class action filed in *Zuni*, its time period for submitting a claim was equitably tolled. That case is of no moment to these proceedings, and ASNA's claims should, thus, be dismissed.

ASNA's brief largely ignores the legal requirements for equitable tolling, asserting instead that its claims were tolled because, although it elected to do nothing to preserve its claims, it exercised reasonable diligence. ASNA's argument is fundamentally flawed in at least two major respects: (1) absent extraordinary circumstances not present here, plaintiffs who elect to do nothing to pursue their claims are not entitled to equitable tolling and (2) even if a party could elect not to pursue its claims and reap the benefits of equitable tolling, ASNA's election is inexcusable.

A. ASNA's Claims Are Not Equitably Tolled Because It Did Nothing To Preserve Its Claims

When, as in this case, there is no dispute that a plaintiff knows all of the facts necessary to bring a claim, *see, e.g.*, *Taylor v. Meirick*, 712 F.2d 1112, 1118 (7th Cir. 1983), a plaintiff must affirmatively pursue its claim for equitable tolling to extend a limitations period. When a plaintiff – like ASNA – elects to do nothing, equitable tolling is not available.

"Equitable tolling is extended 'only sparingly,'" *Fmr. Employees of Sonoco Prods. Co. v. Chao*, 372 F.3d 1291, 1299 (Fed. Cir. 2004) (quoting *Irwin v. DVA*, 498 U.S. 89, 96 (1990)), and only where a plaintiff establishes "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance

stood in his way and prevented timely filing." *Holland v. Florida*, -- U.S. ----, 130 S. Ct. 2549, 2553 (2010) (internal quotation omitted); *see also Martinez v. United States*, 333 F.3d 1295, 1318 (Fed. Cir. 2003) ("[E]quitable tolling against the federal government is a narrow doctrine . . . mere excusable neglect is not enough . . . there must be a compelling justification for delay."). ASNA, as the party seeking to bring an untimely claim, has the burden of demonstrating its entitlement to equitable tolling. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

The fundamental requirement of equitable tolling is that, if nothing stands in the plaintiff's way, it must timely and actively pursue its rights. *See Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999) ("Equitable tolling is appropriate . . . because of extraordinary circumstances that are both beyond [a plaintiff's] control and unavoidable even with diligence."). Thus, where a plaintiff affirmatively pursues a claim, even if the plaintiff's actions are legally flawed, the plaintiff's actions may result in equitable tolling.[2] Where, however, a plaintiff is able to pursue its claim but simply elects to do nothing – unless the plaintiff's failure to act is due to an extraordinary circumstance such as severe attorney

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[2] *See Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 30 (U.S. 1965); *Gillig v. Nike, Inc.*, 602 F.3d 1354, 1359 (Fed. Cir. 2010); *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1161 (11th Cir. 1993).

misconduct,[3] mental incapacity,[4] or misleading behavior by an opposing party[5] – equitable tolling does not apply.[6]

Even if legally flawed, a plaintiff's affirmative steps to initiate proceedings can equitably toll a statute of limitations. Where, for example, a plaintiff files an action in an improper venue, the improperly filed complaint can toll the plaintiff's statute of limitations. *See, e.g.*, *Burnett*, 380 U.S. 430 ("Both federal and state jurisdictions have recognized the unfairness of barring a plaintiff's action solely because a prior timely action is dismissed for improper venue after the applicable statute of limitations has run."). Similarly, a complaint that fails to comply with all of the applicable local rules can equitably toll a limitations period so long as the plaintiff "actively pursued judicial remedies by filing [the] defective pleading within the statutory period." *Goldsmith*, 996 F.2d at 1161; *see also Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466-67 (1962) ("When a lawsuit is filed, that filing

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[3] *See Holland v. Florida*, 130 S.Ct. 2549, 2564 (2010).

[4] *See Barrett v. Principi*, 363 F.3d 1316, 1318 (Fed. Cir. 2004).

[5] *See DuMarce v. Scarlett*, 446 F.3d 1294, 1304-05 (Fed. Cir. 2006).

[6] *See Irwin*, 498 U.S. 89; *Nelson v. Nicholson*, 489 F.3d 1380, 1385 (Fed. Cir. 2007); *Jaquay v. Principi*, 304 F.3d 1276, 1286 (Fed. Cir. 2002) (en banc), *overruled on other grounds by Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009 (en banc), *rev'd* 131 S. Ct. 1197 (2011); *Frazer v. United States*, 288 F.3d 1347 (Fed. Cir. 2002); *Boling v. United States*, 220 F.3d 1365, 1374 (Fed. Cir. 2000); *Gilbert v. HHS*, 51 F.3d 254, 257 (Fed. Cir. 1995).

shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply."); *Gillig*, 602 F.3d at 1359 (recognizing that equitable tolling could apply where "proper defendant is named in the complaint but the plaintiff is misidentified").

Where, on the other hand, a plaintiff has not affirmatively pursed a claim and nothing has prevented the plaintiff from doing so, equitable tolling is not available. *See Jaquay*, 304 F.3d at 1287 (noting the "typical late-filing cases" that are denied because "the limitations period expires before the would-be claimants perform any action to preserve their legal rights"). As the Supreme Court held in *Irwin*, when it rejected a plaintiff's reliance upon equitable tolling when the plaintiff's lawyer was out of the country when notice of a decision arrived, equitable tolling is only available where a plaintiff "actively pursue[s] his judicial remedies[.]" 498 U.S. at 96. A plaintiff's failure to act – whether it be due to "garden variety excusable neglect," *see Nelson*, 489 F.3d at 1385, an attorney's negligence, *see Gilbert*, 51 F.3d at 257, or a well-reasoned belief under then-existing law a claim would be unsuccessful, *see Frazer*, 288 F.3d at 1347; *Boling*, 220 F.3d at 1374 – renders baseless any subsequent reliance upon equitable tolling as extending a limitations period. *See also, e.g.*, *Covey v. Ark. River Co.*, 865 F.2d

660, 662 (5th Cir. 1989) ("It is a common maxim that equity is not intended for those who sleep on their rights.").

Not only did ASNA not "actively pursue" a claim; ASNA did nothing at all to pursue its claim. As ASNA explains in its brief, "[t]here is no dispute that ASNA expressly relied on the September 2001 filing of the *Zuni* class action in deciding not to pursue its claims on an individual basis." Br. 13[7] (emphasis added). The explicit and implicit underpinning for ASNA's entire appeal is that its decision not to pursue its claim was reasonable, but a party's mere expectation that it may not need to act, even if reasonable (and ASNA's expectation was not), does not excuse the party's failure to act when it is able to do so. *See, e.g.*, *Williams v. Sims*, 390 F.3d 958, 963 (7th Cir. 2004) (noting the "general rule" that "even reasonable mistakes of law are not a basis for equitable tolling"); *Citicorp Person-to-Person Fin. Corp. v. Brazell*, 658 F.2d 232, 235 (4th Cir. 1981) (finding "no basis for the application of an equitable tolling doctrine" even where "there may be some reasonable explanation [for a litigant's] legal mistake"). Courts do not, and cannot, toll statutes of limitations "for every procedural or strategic mistake made by a litigant (or his attorney)," – like that made by ASNA in this case – because doing so "would render such statutes no value at all[.]" *Arrieta v.*

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[7] "Br. __" refers to ASNA's opening brief filed on October 21, 2011.

Battaglia, 461 F.3d 861, 867 (7th Cir. 2006) (quotation and citation omitted). For this reason alone, the board's decision should be affirmed.

All of the other specific points raised in ASNA's brief in support of the idea that a party can elect not to pursue administrative remedies but still benefit from equitable tolling are equally unpersuasive. ASNA erroneously contends that (1) the complaint in *Zuni* constitutes a "defective pleading" sufficient to toll ASNA's limitations period, Br. 22-32; (2) there was a change in the controlling law that excused its failure to take any action, Br. 33; (3) equitable tolling should be allowed because the Government will not be prejudiced, Br. 35-37; and (4) equitable tolling should apply regardless of whether ASNA pursued its claim within the statutory period because tribal contractors are entitled to special statutory protections, Br. 46-49. None of these arguments is meritorious.

1. The *Zuni* Complaint Does Not Save ASNA's Untimely Claims

ASNA erroneously contends that equitable tolling should excuse its decision not to submit its claims to a contracting officer because the class action complaint filed by a different party in *Zuni* is a defective pleading sufficient to toll ASNA's limitations period. Br. 22-32. Although class action tolling, unlike equitable tolling, can apply even where a plaintiff does nothing to pursue its

rights, that principle does not apply to equitable tolling and this Court has already determined that class action tolling is inapplicable to this case.

Neither class action principles nor the proceedings in *Zuni* can save ASNA's untimely claims. The Supreme Court established the doctrine of class action tolling in *American Pipe,* which provided that, under Rule 23 to the Federal Rules of Civil Procedure, which governs class action procedures, "the filing of the class action complaint ends the running of the statute of limitations as to all putative class members." *ASNA I*, 583 F.3d at 795. Unlike in equitable tolling where a party's actions during the relevant limitations period matter, the Supreme Court found it immaterial whether the putative class members were aware of the complaint or whether they did anything to preserve their rights, holding that class action tolling applies to "asserted class members who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings." *American Pipe*, 414 U.S. at 552.

This Court already decided that the *Zuni* litigation, class action tolling, and the decision in *American Pipe* do not excuse ASNA's failures to exhaust its administrative remedies. *See ASNA* I, 583 F.3d at 791-94. The Court explained that ASNA, unlike Zuni and other tribes, failed to exhaust administrative remedies by filing a claim with a contracting officer. *Id.* at 794. Thus, the *Zuni* litigation

could not save ASNA's untimely claims because, even had a class been certified, ASNA would not have been a member. *Id.* at 795-96. As the Court explained, ASNA did not "satisf[y] the requirement, set forth in *American Pipe*, making class action tolling available [only] 'to all asserted members of the class who would have been parties.'" *Id.* at 796 (internal quotation omitted).

Notwithstanding this Court's previous decision, ASNA asserts entitlement to equitable tolling based upon the complaint in *Zuni* because *American Pipe* "is the situation here." Br. 25. ASNA claims that *American Pipe* involves equitable tolling as well as class action tolling and that it is entitled to equitable tolling under *American Pipe*. As an initial matter, this Court already held that *American Pipe* is not the situation here because *ASNA* does not meet the "requirement, set forth in *American Pipe*," that a party claiming tolling under *American Pipe* be eligible for class certification. For this reason alone, regardless of the title ASNA gives to the tolling applicable in *American Pipe*, the Court should reject ASNA's reliance upon that decision.

Second, ASNA is incorrect that *American Pipe* involves equitable tolling. This Court held in *Stone Container Corp. v. United States*, 229 F.3d 1345, 1354 (Fed. Cir. 2000), that the tolling established in *American Pipe* was not based upon "equitable tolling, but rather on the Court's interpretation of Rule 23." 229 F.3d at

1354. The Court has also recognized more recently, in *Bright v. United States*, 603 F.3d 1273, 1278 (Fed. Cir. 2010), that "this Court described the tolling in *American Pipe* . . . as statutory tolling." 603 F.3d at 1278. Equitable tolling, unlike class action tolling, applies only where a plaintiff actively pursued its rights, and ASNA failed to do so.

For purported support of its position that *American Pipe* involves equitable tolling, ASNA cites the Supreme Court's decision in *Irwin*, which, when discussing the possibility of equitable tolling for claims where a claimant has filed a defective pleading, cited in a footnote to *American Pipe*. *See Irwin*, 498 U.S. at 96 n.3. That footnote alone does not create an entire new category of equitable tolling for plaintiffs, like ASNA, who elect to do nothing to pursue their claims but instead hope to be included in a class action for which they were always ineligible. *See Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 535 (9th Cir. 2011) ("The majority of the lower federal courts that have addressed the issue have held that *American Pipe* tolling is not equitable, but legal.").

ASNA also erroneously relies upon the decision in *Land Grantors in Henderson, Union & Webster Cntys., Ky. v. United States*, 64 Fed. Cl. 661 (2005), but the court in that case found only that "under the unique and *sui generis* circumstances of th[at] case . . . Plaintiffs' ignorance of the underlying facts

concerning their cause of action . . . was excusable." 64 Fed. Cl. at 707, 716. That case has no application where, as in this case, ASNA knew all the facts of its cause of action but elected to do nothing. Moreover, although the court in that case does reference equitable tolling in the context of *American Pipe*, that reference alone does not demonstrate that the court has any other understanding (nor could it) than what this Court established in *Stone Container* – that *American Pipe* does not create a new category of plaintiffs entitled to equitable tolling. *See Albano*, 634 F.3d at 537 ("[I]n circumstances where the distinction between legal and equitable tolling was not dispositive, courts regularly have referred to *American Pipe* tolling as 'equitable.'").

Similarly, ASNA incorrectly relies upon the decision of the United States Court of Appeals for the Ninth Circuit in *Hatfield v. Halifax PLC*, 564 F.3d 1177 (9th Cir. 2009). In that case, as ASNA correctly identifies, Br. 41-44, the court applied class action tolling principles to establish equitable tolling, but ASNA ignores that the court did so in the context of equitable tolling under California law, which permits tolling where there is (1) "timely notice" to the defendant; (2) "a lack of prejudice to the defendant" by an untimely claim proceeding; and (3) "good faith and reasonable conduct by the plaintiff." *Hatfield*, 564 F.3d at 1185. That case has no application here, where ASNA must show the stricter

requirements that (1) it pursued its rights "diligently" and (2) "some extraordinary circumstance . . . prevented timely filing." *See Holland*, 130 S. Ct. at 2563.

ASNA also miscomprehends the nature of equitable tolling. Even if the complaint in *Zuni* were a deficient pleading that was somehow sufficient to toll the limitations period for ASNA to file a complaint, nothing about the *Zuni* complaint could toll ASNA's statutory period for exhausting administrative remedies. Zuni, unlike ASNA, complied with the statute and, for the majority of its claims, exhausted administrative remedies prior to bringing suit. ASNA should have done the same.

ASNA instead elected not to exhaust administrative remedies and now incorrectly claims that "the filing of the 2001 class complaint [in *Zuni*] . . . was for all practical purposes the equivalent of a 2001 pleading timely filed by ASNA to litigate those claims." Br. 27. ASNA is incorrect because, had ASNA rather than *Zuni* filed the class action complaint, the court would have dismissed the entire complaint for lack of jurisdiction. That is exactly what the Court did to that portion of Zuni's claims that Zuni failed to present to a contracting officer, *Zuni*, 467 F. Supp. 2d at 1114, and ASNA, unlike Zuni, did not present any of its claims. Moreover, there is also no reasonable argument that ASNA could have successfully relied upon the *Ramah* proceedings as somehow excusing the

exhaustion requirement, as the district court held when it dismissed a portion of Zuni's claims: "Plaintiff can hardly be said to rely on the oblique argument that a class certification order in a *separate* case (*Ramah*) allows Plaintiff to forego exhaustion of their claims in *this* case." *Zuni*, 467 F. Supp. 2d at 1114 (parenthetical added).

2. A Change In The Law Does Not Save ASNA's Untimely Claims

ASNA also erroneously contends that "a change in the controlling law" can make equitable tolling available where a plaintiff elects not to pursue its claim. Br. 33. ASNA asserts that, because it was able to participate in the class proceedings in *Ramah* without filing a claim, its failure to submit a timely claim should be excused by equitable tolling because "in far more ambiguous contexts involving a change in controlling law, equitable tolling has nonetheless been allowed." Br. 33.

This argument fails because there was no change in the law. The district court order certifying the class in *Ramah* indicated that, because the plaintiff was challenging the overall indirect cost rate methodology relied upon by Interior to calculate all tribes' contract support costs and was therefore challenging Interior's overall "policies and practices," the case did "not concern a typical contract

dispute" and a class could be certified. JX 319. In *Zuni*, unlike in *Ramah*, the plaintiff sought payment of each tribe's full contract support costs need based upon each tribe's individual contract. JX 365-66. Based upon these claims, the court held, similar to the *Cherokee* decision in 2001, *see Cherokee*, 199 F.R.D. at 364, that "[t]he nature of this kind of case with individualized contracts does not lend itself to class litigation," *Zuni*, 243 F.R.D. at 442-43. Although the court also noted that "the existence of unexhausted claims within the claims of the putative class remains a jurisdictional defect," *id.* at 443, *Zuni* did not change any law because the case-specific holding in *Ramah* was neither controlling nor applicable to the case-specific decision in *Zuni*.

Further, even if *Ramah* were the "controlling law" and ASNA's reliance upon that decision were somehow justified, the cases cited by ASNA for the proposition that it could do nothing pending the outcome in *Zuni* actually undermine ASNA's argument. As these cases reinforce, for a plaintiff to be entitled to equitable tolling, a plaintiff must, unlike ASNA in this case, actively pursue its rights if it is able to do so.

ASNA first erroneously cites *Townsend v. Knowles*, 562 F.3d 1200 (9th Cir. 2000), *Harris v. Carter*, 515 F.3d 1051 (9th Cir. 2008), and *York v. Galetka*, 314 F.3d 522 (10th Cir. 2003). In each of these cases, all of which involve habeas

petitions, the prisoners filed the relevant petitions within the time period established by the respective circuits but subsequent Supreme Court decisions rendered the already-filed petitions untimely. Those cases defeat ASNA's claim because those plaintiffs, unlike ASNA, made a "diligent effort" to pursue their claims, *see, e.g.*, *York*, 314 F.3d at 527, but subsequent changes in the law made their efforts ineffective. Here, ASNA did nothing to protect its claim, hoping a future court decision would excuse its failure to comply with statutory exhaustion requirements.

Similarly, ASNA mistakenly relies upon *Clymore v. United States*, 217 F.3d 370 (5th Cir. 2000), and *Valenzuela v. Kraft, Inc.*, 801 F.2d 1170, 1174-75 (9th Cir. 1986), *amended by denial of reh'g* 815 F.2d 570 (1987). In *Clymore*, following a criminal proceeding, the plaintiff filed a timely motion for return of his property but filed the motion in the "wrong venue." The United States Court of Appeals for the Fifth Circuit, recognizing the "unsettled state of the law" concerning the proper venue for such motions and the plaintiff's timely motion in the wrong venue, held that equitable tolling applied. *Clymore*, 217 F.3d at 377. Likewise, in *Valenzuela*, a plaintiff filed a timely state court proceeding, but the proceeding should have been brought in federal court. Because the law at the time of the plaintiff's complaint was "unclear whether federal courts had exclusive

jurisdiction over [the plaintiff's" claim[]," and because of the "diligence demonstrated by the plaintiff," the court found that the relevant statutory period was equitably tolled. 801 F.2d at 1175

In all of these cases the plaintiffs, unlike ASNA, took steps during the perceived statutory period to pursue their claims but, due to changes in the law, their claims were rendered untimely. The decisions show the fallacy in ASNA's argument because ASNA, unlike these plaintiffs, did nothing during the relevant period to pursue its claims. ASNA's mere speculation that the *Zuni* court or even the board would sustain its decision to do nothing does not warrant equitable tolling. *See, e.g.*, *Lawrence v. Florida*, 549 U.S. 327, 336 (2007) ("Attorney miscalculation is simply not sufficient to warrant equitable tolling[.]"); *Holland*, 130 S. Ct. at 2567 ("[T]he principal rationale for disallowing equitable tolling based on ordinary attorney miscalculation is that the error of the attorney is constructively attributable to the client and thus is not a circumstance beyond the litigant's control."); *Nelson* 489 F.3d at 1384 ("We have always followed the guidance of [the Supreme Court] that equitable tolling does not apply to what is at best a garden variety claim of excusable neglect.") (internal quotation omitted).

3. ASNA Incorrectly Asserts That The Government Will Not Be Prejudiced By Application Of Equitable Tolling

ASNA also incorrectly asserts that equitable tolling is appropriate in this case because the Government will not be prejudiced if ASNA is permitted to pursue its claims. Br. 35-37. This argument, like ASNA's other arguments, is unavailing.

As an initial matter, statutes of limitations are to be enforced even where there is no showing of prejudice by the filing of an untimely claim. The Supreme Court reached this express result in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), where the Court held that, "[a]lthough absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply . . . it is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." 466 U.S. at 152; *see also Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990) (explaining that courts "should not trivialize the statute of limitations by promiscuous application of tolling doctrines," because statutes of limitations "protect important social interests in certainty, accuracy, and repose").

Moreover, there is no factual basis to disregard the risk of factual prejudice to the Government in this case. ASNA's executive director, in an affidavit dated

October 14, 2010, more than five years after ASNA submitted its already-late claims, represented that the claims were prepared in "a bit of a rush" and are only a "good faith estimate" of ASNA's "damages" based upon "limited information." JA 439. It is, thus, impossible to know whether the Government could be prejudiced by having to defend against ASNA's late claims because, as of October 2010, ASNA had not amended its claims to inform the Government of its potential liability but instead represented that the claims were only estimates based upon limited information. As a further example, ASNA's claim for 1996 is $2,301,631, JA 284, but ASNA indicated at the time of contracting that its entire contract support costs need for that year would be $500,000, JA 238. Because ASNA has not explained how that difference was calculated, it is impossible to know if the Government would be prejudiced by having to defend a claim for the total of $2,301,631.

ASNA's cited cases do not support its position. ASNA cites *Council of Athabascan Tribal Governments v. United States*, 693 F. Supp. 2d 116, 123 (D.D.C. 2010) ("*Athabascan*"), and *Menominee Indian Tribe of Wisconsin v. United States*, 614 F.3d 519 (D.C. Cir. 2010) ("*Menominee*"), but both of those cases involve a laches defense, which is only applicable where a defendant proves prejudice. *See Menominee*, 614 F.3d at 123. Further, the Government in

Athabascan admitted that "the contract documents themselves should dispose of this case," *Athabascan*, 693 F. Supp. 2d at 123, and the circuit court in *Menominee* only remanded because it found the district court's "terse" prejudice explanation – that "funding has long since expired" – inconclusive, *Menominee*, 614 F.3d at 532. Neither of those cases speak to the situation where, as in this case, a plaintiff incongruously contends (1) that its claims are only "estimates" but (2) that the Government will not be prejudiced by having to defend against them.

4. ASNA's Status As A Tribal Organization Does Not Excuse Its Failure To Pursue Its Claim

ASNA also incorrectly asserts that the Court should find its claims equitably tolled even if they would not be tolled if brought by a different Government contractor because equitable tolling is "particularly appropriate for the benefit of a specially protected group." Br. 44.

ASNA's position is without merit because it again contradicts established precedent from this Court. In *Hopland Band of Promo Indians v. United States*, 855 F.2d 1573, 1576 (Fed. Cir. 1988), the Court specifically held that "statutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking redress or relief from the Government." *See also Irwin*, 498 U.S. at 96 ("Because the time limits imposed by Congress in a suit

against the Government involve a waiver of sovereign immunity, it is evident that no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants.").

Nonetheless, ASNA attempts to gain special protection and obtain the benefits of equitable tolling even where it would not apply for other contractors, arguing that tribes and the Government have a special "trust relationship." Br. 44-49. Nothing about that relationship renders the statute of limitations inapplicable. *See Menominee Tribe of Indians v. United States*, 726 F.2d 718, 722 (Fed. Cir. 1984). Moreover, this Court has recognized that Congressional statements indicating that a trust relationship exists, *see* Br. 46-48, do not "create the necessary trust relation triggering a damage remedy[.]" *Samish Indian Nation v. United States*, 419 F.3d 1355, 1364 (Fed. Cir. 2005). If those statements do not create a separate damages remedy then they also do not allow ASNA to bring special claims against the Government if those claims would otherwise be barred by the statute of limitations.

Similarly, ASNA erroneously asserts that it should be treated like veterans or other specially protected groups who are entitled to additional protections because, quoting the board's dissenting opinion, the relationship between the Government and a tribal contractor "is not, or at least should not be adversarial."

Br. 48. ASNA ignores the statutory scheme. To the extent the Court has identified special rules for veterans cases, the Court has done so because it is in the "context of the non-adversarial, paternalistic, uniquely pro-claimant veterans' compensation system." *Jaquay*, 304 F.3d at 1286; *see also Capoeman v. United States*, 440 F.2d 1002, 1007 (Ct. Cl. 1971).

ASNA also contends that incorporation of the CDA into the ISDA was meant to expand upon tribal rights rather than to infringe upon them, Br. 46 n.5, but ASNA fails to recognize the import of the CDA. That statute details mandatory, jurisdictional steps to the claims resolution process, *see ASNA I*, 583 F.3d at 793, and Congress's incorporation of those procedures into the resolution process for ISDA claims makes those procedures equally mandatory for tribal contractors. It is, thus, illogical to suggest that, as a result of Congress's incorporation of the CDA into the ISDA, tribal contractors should be entitled to equitable tolling when other contractors would not. *See Baldwin County Welcome Center*, 466 U.S. at 152 ("Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants."); *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) ("[I]n the long run, experience teaches that strict adherence to the

procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.").

B. Even If Equitable Tolling Could Apply Where A Plaintiff Did Not Pursue Its Rights, ASNA's Failure To Act Was Unreasonable

ASNA is also not entitled to equitable tolling because, even if it were possible for a claim to be equitably tolled when a party (1) does nothing to pursue its rights and (2) does not allege that anything stopped it from pursuing its statutorily-required administrative exhaustion procedures, ASNA's election not to do anything was unjustified and unreasonable. To be entitled to equitable tolling, a party must exercise "reasonable diligence." *Holland*, 130 S. Ct. at 2565.

ASNA's election not to exhaust its administrative remedies within the statutory period for its claims was not reasonable. ASNA concedes that the claim for each fiscal year accrued, at the latest, on September 30 of each year, so the claim for fiscal year 1996 accrued on September 30, 1996, and the six year period for presenting a claim to a contracting officer ended on September 30, 2002. JA 440-41. Similarly, ASNA concedes that the statutory period for presenting a claim for the 1997 fiscal year ended on September 30, 2003, and the period for presenting a claim for the 1998 fiscal year ended on September 30, 2004. *Id.*

Because nothing stopped ASNA from presenting a claim prior to those periods expiring, equitable tolling does not apply.

The only reason given for ASNA's election not to exhaust its administrative remedies is the district court proceedings in *Zuni*, but that purported reliance was neither justified nor reasonable. *See United States v. Marcellow*, 212 F.3d 1005, 1010 (7th Cir. 2010) (requiring plaintiff, to benefit from equitable tolling, file "by the earliest possible deadline, not the latest"); *see also Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991) ("[I]t is well-settled that ignorance of the law alone is not sufficient to warrant equitable tolling."). In *Zuni*, the complaint alleged that HHS failed (1) to rely upon a properly calculated rate to negotiate each tribe's indirect contract support costs need, (2) to pay the full amount of contract support costs for each tribe, and (3) to pay in full even the amount improperly calculated. JA 365-66. Zuni recognized that, prior to filing suit, it was necessary to exhaust administrative remedies, because Zuni asserted in its complaint that, prior to filing suit, it "submitted timely claims with IHS for damages . . . pursuant to the Contract Disputes Act." JA 387.

ASNA, unlike Zuni, did not submit timely claims, and the complaint in *Zuni* does not somehow excuse that failure. ASNA asserts its decision to do nothing was reasonable because it expected the court in *Zuni*, like in *Ramah*, to certify a

class regardless of whether each member had exhausted administrative remedies, but the order in *Ramah*, which was issued in 1993, only held that exhaustion of administrative remedies was not necessary in that case because, at that juncture, the plaintiff was challenging only the "structural" and "systemic" method used to calculate all tribes' indirect cost rates. JA 319. The complaint in *Zuni*, filed in September 2001, sought damages not only for how IHS calculated rates but also for each tribe's full contract support costs need. JA 365-66. The only class certification motion alleging similar claims to those in *Zuni* was filed in *Cherokee*, and the district court denied that motion in February 2001, prior to the complaint in *Zuni* being filed. *Cherokee*, 199 F.R.D. at 363. ASNA was aware of the order in *Cherokee*, JA 438, and upon that basis alone, ASNA's election not to exhaust administrative remedies based upon the hope that *Zuni* would turn out differently than *Cherokee* was unreasonable.

Moreover, the proceedings in *Ramah* undermine ASNA's reliance upon the 1993 class certification order. Prior to Zuni's complaint in 2001, but after the initial order certifying the class in *Ramah*, the plaintiff in *Ramah* amended its complaint to include two additional claims for contract support costs that were similar to those asserted in *Cherokee* and *Zuni*. *See Ramah*, 250 F. Supp. 2d at 1305. In June 2001, the parties entered into a partial settlement agreement

concerning some of the class claims, and the December 2002 order approving the settlement noted that "class certification of [one of the new] claims would be resisted by the government," and that "decertification of the [other new claim] is a possibility." *Id.* at 1308. For this reason also, ASNA was on notice that any class in *Zuni* may not be certified, and its election to do nothing and instead wait to see what would happen was neither justified nor reasonable.

ASNA's statements in alleged support of its argument are baseless. ASNA asserts that, when the Government resisted class certification in *Zuni* in 2005, "[t]he undisputed evidence is that ASNA was 'surprised' to learn that the government was insisting that every tribal contractor had to have individually presented its own claims." Br. 15. The Government's position in *Zuni* was no different than the Government's position in *Ramah*. Moreover, the *Cherokee* court in 2001, prior to Zuni even filing its complaint, issued an order denying certification for similar claims, and the court in *Ramah* also noted the Government's objection to certification for claims like that brought in *Zuni*.

Similarly, ASNA erroneously asserts (1) that "there was every reason for ASNA to believe that the same judge who certified a class in *Ramah* that included non-presenters like ASNA, would decide the same issue the same way in *Zuni*," and (2) that "[a]t the time the *Zuni* complaint was filed . . the 1993 class

certification precedent from *Ramah* was unquestioned and stood squarely for the proposition that a tribal contractor was not required to individually present its claims or exhaust administrative remedies in order to participate in a class recovery." Br. 31. Along with ignoring the *Cherokee* decision in 2001, ASNA also ignores multiple other reasons why ASNA's purported belief was unwarranted and unreasonable: (1) the *Zuni* complaint sought additional categories of damages than those sought by the initial complaint in *Ramah*, *compare Ramah*, 250 F. Supp. 2d at 1305, *with* JA 365-66; (2) the *Ramah* court's order approving the second partial settlement indicated that certification in that case was questionable after the complaint was amended to add claims similar to those sought in *Zuni*, *see Ramah*, 250 F. Supp. 2d at 1305; and (3) the governing law changed in the CDA which, after certification in *Ramah*, not only required the submission of claims to contracting officers but also that the claims be submitted within six years of accrual, *see* JA 5 (citing the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 2351(a), 108 Stat. 3243, 3322 (1994)).

Without citing any authority, ASNA also contends in a footnote that "[p]resentment" of its claims to a contracting officer in this case "would have been–and proved to be–equally futile." Br. 32 n.4. It is unclear what import ASNA applies to this proposition, but it is irrelevant and incorrect because this

Court has recognized at least as early as 1985 that futility does not excuse a contractor's failure to submit a claim to a contracting officer. *See Thoen v. United States*, 765 F.2d 1110, 1116 (Fed. Cir. 1985). Moreover, although the court in *Ramah* certified a class of tribal contractors even where not all of the contractors had presented claims, the court also recognized that neither it nor the plaintiff tribe could "locate any case decided under the Contract Disputes Act where exhaustion of remedies was waived as having been futile." JA 318.

ASNA also incorrectly asserts that it does not even need to demonstrate that it exercised reasonable diligence because "the test is actually more relaxed when the circumstances involve timely action–here, the 2001 class complaint in *Zuni*." Br. 30. ASNA contends that "the New Mexico district court where the *Zuni* class complaint was filed may have turned out to be the 'wrong place' for ASNA to file its claims, but the filing certainly was before the CDA's statutory deadline." Br. 30. ASNA ignores (1) that it was another tribe, Zuni, that filed the district court complaint and (2) that the right place for ASNA to present its claims was not to a court at all but to a contracting officer. Nothing excuses ASNA's failure to exhaust its administrative remedies. Moreover, the cases cited by ASNA in purported support of this proposition, Br. 30, again undermine ASNA's argument because, unlike in this case, it was the plaintiffs those cases, not some unrelated

third party, that affirmatively pursed the claims. *See Jaquay*, 304 F.3d at 1287 (veteran submitted notice of appeal to incorrect entity); *Goldlawr*, 369 U.S. at 467 (plaintiff filed complaint in improper district).

CONCLUSION

For the foregoing reasons, we respectfully request that the Court affirm the board's decision dismissing for lack of jurisdiction all of the claims raised in this proceeding.

Respectfully submitted,

TONY WEST
Assistant Attorney General

JEANNE E. DAVIDSON
Director

KIRK T. MANHARDT
Assistant Director

JACOB A. SCHUNK
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
PO Box 480
Ben Franklin Station
Washington, D.C. 20530
Tele: (202) 616-0320
Fax: (202) 307-0972
Attorneys for the Secretary

Of Counsel:

Melissa Jamison
Sean Dooley
Senior Attorneys
U.S. Department of Health
and Human Services
Office of the General Counsel
Public Health Division
200 Independence Ave., S.W.
Washington, D.C. 20420

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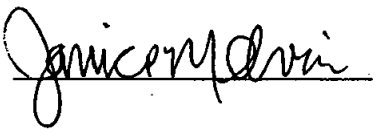
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 23rd day of January, 2012, I caused to be sent, via First-Class United States mail, two copies of the foregoing "BRIEF FOR APPELLEE" addressed as follows:

Carter G. Phillips
Jonathan F. Cohn
Sidley Austin, LLP
1501 K Street, N.W.
Washington, D.C. 20005

Lloyd B. Miller
Donald J. Simon
Sonosky, Chambers, Sachse,
Miller & Munson, LLP
900 West Fifth Avenue, Suite 700
Anchorage, AK 99501-2029



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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 10,658 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Jacob A. Schunk
Attorney for Respondent
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