

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 07-2593 (MJD/SRN)

SIERRA CLUB NORTH STAR CHAPTER,)
)
) Plaintiff,) **REPLY**
) **MEMORANDUM OF LAW**
) **IN SUPPORT OF**
 v.) **MOTION TO DISMISS**
)
)
 MARY PETERS, Secretary of)
 Transportation, et al.,)
)
)
 Defendants.)

INTRODUCTION

Sierra Club seeks to be excused from the untimely filing on the basis of either equitable tolling or equitable estoppel, but failed to proffer any reason why the Court should apply them to the relieve Sierra Club here. Sierra Club also failed to explain why Court should not dismiss the claims against the NPS for lack of ripeness and/or final agency action.

ARGUMENT

I. THE SIERRA CLUB DID NOT FILE ITS COMPLAINT TIMELY.

Sierra Club did not file its complaint within 180 days of the publication of the notice of the FHWA's final agency action. 23 U.S.C. § 139(1)(1). The complaint was late.

Sierra Club contends equitable tolling or equitable estoppel should apply to relieve it from its failure to file

timely. Sierra Club offers no reason to excuse its late filing or why equitable principles should apply to its benefit other than to maintain the FHWA was to blame because its notice contained an incorrect date.

A. THE LIMITATIONS PERIOD IS JURISDICTIONAL.

The 180 day deadline is a statutorily prescribed condition of the Government's waiver of sovereign immunity and must be construed strictly in favor of the Government. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992).

The Supreme Court reaffirmed the rule that limitations periods contained in statutes implicate the subject matter jurisdiction of the court. *Bowles v. Russell*, ___ U.S. ___, 127 S. Ct. 2360, 2363-2366 (2007). The Court held Bowles's failure to file his notice of appeal in accordance with 28 U.S.C. § 2107(c) deprived the court of appeals of jurisdiction and Bowles could not rely on forfeiture or waiver to excuse his lack of compliance with the statute's time limitations. *Bowles*, 127 S. Ct. at 2366. The 180 day limitations period of section 139(l)(1) is found in a statute and provides a time bar for actions brought outside the 180 day period. The time requirement is jurisdictional and not subject to equitable modification. *Id.*

Sierra Club claims *Bowles* is inapposite, asserting that "Bowles did not involve a statute of limitations at all[,]"" did not attempt to apply its holding to statutes of limitations generally, and did not cite *Irwin*. But, *Bowles* clearly involved a statute, 28 U.S.C. § 2107(c), which was "like a statute of limitations[.]" *Bowles*, 127 S. Ct. at 2369 (Souter, J., dissenting). *Bowles* is relevant.

Sierra Club claims the availability of equitable tolling is controlled by *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 94 (1990). In *Irwin*, the Court held "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin*, 498 U.S. at 95-96. Sierra Club argues *Irwin* requires courts to presume equitable tolling is available "unless Congress specifically provided otherwise." Applying *Irwin*, Sierra Club claims that (1) it is presumed equitable tolling is available and (2) it is available under section 139(1)(1) because Congress did not specifically preclude its applicability to section 139(1)(1). Opposition Memorandum at 15. It is not that simple.

First, the *Irwin* test *did not* require specific statutory language that *specifically* precluded the availability of

equitable tolling in order for a court to decline to apply it. In *United States v. Brockamp*, 519 U.S. 347, 350 (1997), no statutory language precluded application of equitable tolling, but the Court looked not only at the specific section involved, Section 6511, but also surrounding sections of the Internal Revenue Code and the "nature of the underlying subject matter" as found in legislative history and other matters in order to determine the Congressional objective in passing the specific time bar. *Id.* at 351-354. Lack of specific preclusive language did not prevent the Court in *Brockamp* from holding equitable tolling did not apply to a time bar similar to that found in section 139(1)(1).

Second, a private analogue is an important consideration. The *Irwin* Court included it in the very phrasing of the test itself. *Irwin*, 498 U.S. at 95-96. In *Brockamp*, the Court assumed, with skepticism, a private analogue existed. *United States v. Brockamp*, 519 U.S. 347, 350 (1997). In *Scarborough*, the majority noted in dicta that "it is hardly clear that *Irwin* demands a precise private analogue." *Scarborough v. Principi*, 541 U.S. 401, 422 (2004). But, the Court found analogous private party situations. *Id.* So, *Scarborough* cannot be read to eliminate the private party analogue

component of the *Irwin* equitable tolling analysis. See *Scarborough*, 541 U.S. at 426-27 (Thomas, J. and Scalia, J., dissenting). There is no action for judicial review among private litigants. This lack of a private analogue weighs heavily against a finding that equitable tolling applies.

Third, *Sierra Club* cites *John R. Sand & Gravel Co. v. U.S.*, __ U.S. ___, 2008 WL 65445, to support its assertion that equitable modification is available in this case. But that case upheld a time bar and otherwise supports the Government. The Supreme Court recognized there are two types of statute of limitations:

Most statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims. See, e.g., *United States v. Kubrick*, 444 U.S. 111, 117, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). Thus, the law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver. See Fed. Rules Civ. Proc. 8(c)(1), 12(b), 15(a); *Day v. McDonough*, 547 U.S. 198, 202, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). Such statutes also typically permit courts to toll the limitations period in light of special equitable considerations. See, e.g., *Rotella v. Wood*, 528 U.S. 549, 560-561, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000); *Zipes, supra*, at 393, 102 S.Ct. 1127; see also *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-453 (C.A.7 1990).

Some statutes of limitations, however, seek not so much to protect a defendant's case-specific interest

in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims, see, e.g., *United States v. Brockamp*, 519 U.S. 347, 352-353, 117 S.Ct. 849, 136 L.Ed.2d 818 (1997), limiting the scope of a governmental waiver of sovereign immunity, see, e.g., *United States v. Dalm*, 494 U.S. 596, 609-610, 110 S.Ct. 1361, 108 L.Ed.2d 548 (1990), or promoting judicial efficiency, see, e.g., *Bowles v. Russell*, 551 U.S. ----, --- - ----, 127 S.Ct. 2360, 2365-66, 168 L.Ed.2d 96 (2007). The Court has often read the time limits of these statutes as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period. See, e.g., *ibid.*; see also *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). As convenient shorthand, the Court has sometimes referred to the time limits in such statutes as "jurisdictional." See, e.g., *Bowles*, *supra*, at 2364.

John R. Sand & Gravel Co., 2008 WL 65445 at *3. In this case, 23 U.S.C. §139(1)(1) is in the second category. Neither the National Environmental Policy Act ("NEPA") nor Section 4(f) of the Department of Transportation Act of 1966 provide for a private right of action; therefore, judicial review of agency action and waiver of the federal government's sovereign immunity is through the Administrative Procedure Act ("APA"). It is the APA that allows for review of "agency action," see Complaint at ¶ 44, dictating the type of agency action that is judicially reviewable, when agency action is judicially reviewable, the scope of judicial review permitted, and the

standard to be applied by a reviewing court. 5 U.S.C. §§ 701-706; see Darby v. Cisneros, 509 U.S. 137, 146 (1993). The APA does not contain a statute of limitations, so the courts must look elsewhere. Section 139(1)(1) provides that "judicial review of a permit, license, or approval issued by a Federal agency for a highway or public transportation capital project [which is otherwise reviewable only under the APA] shall be barred unless it is filed within 180 days after publication of a notice in the Federal Register announcing that the permit, license, or approval is final" Thus, since section 139(1)(1) limits the federal government's waiver of sovereign immunity in the context of final highway and transit related actions, the statute should be read as "more absolute . . . forbidding a court to consider whether certain equitable considerations warrant extending a limitations period." *John R. Sand & Gravel Co.*, 2008 WL 65445 at *3. The Court upheld the time bar and did not apply any relief therefrom. 2008 WL 65445 at *7.

The statute of limitations at issue in *Irwin* provided that "[w]ithin thirty days of receipt of notice of final action taken by . . . the Equal Employment Opportunity Commission . . . an employee...if aggrieved by the final

disposition of his complaint...may file a civil action as provided in section 2000e-5 of this title . . . " *Irwin*, 498 U.S. at 94 (quoting 42 U.S.C. 2000e-16(c)). The *Irwin* Court contrasted this language with the statutory time limits at issue in *Soriano v. U.S.*, 352 U.S. 270 (1957) ("[e]very claim . . . shall be barred"), where the Court found the time limit to be jurisdictional and the plaintiff's claim to be time-barred, and found that the difference in language was not sufficient to demonstrate Congress had intended, in enacting 42 U.S.C. 2000e-16(c), to preclude the application of the doctrine of equitable tolling. Here, Congress in 23 U.S.C. 139(1)(1) used the exact same language as the language at issue in *Soriano* (i.e., "shall be barred"). The Supreme Court has reaffirmed that *Soriano*, which interpreted the "shall be barred" language as precluding enlargement of a statutory time limit, continues to be good law. *John R. Sand & Gravel Co.*, 2008 WL 65445 at *6. Thus, this Court should also conclude that 23 U.S.C. 139(1)(1), which provides that "judicial review . . . shall be barred unless [a complaint is filed within 180 days that a notice is published in the Federal Register]," precludes application of the doctrines of equitable tolling and equitable estoppel.

Even if equitable tolling is presumed, that presumption is rebutted here. Prior to 2005, there was no specific limitations applicable to actions to review major highway projects. Consequently, the general six year time bar of 28 U.S.C. § 2401 applied. But, in 2005 Congress specifically limited the time within which a party may seek judicial review of final highway-related approvals, permits, and licenses. to 180 days from publication of the Notice of the final agency actions. 23 U.S.C. § 139(1)(1). Congress did not suggest that this 180 day limitations period would be amenable to any equitable modification and the five and one half year reduction in the filing period strongly suggests Congress did not intend to allow any equitable modification of the new 180 day period.

B. NO EQUITABLE MODIFICATION APPLIES.

Sierra Club asserts the Court should apply equitable tolling or equitable estoppel. *See Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1327 (8th Cir. 1995).

1. Applicable facts.

The facts of this case do not support equitable tolling or estoppel. Relying solely on the complaint, Sierra Club alleged the FHWA published the notice that commenced the 180

day period, the notice stated a deadline of June 6, 2007, and the complaint was timely as it was filed before June 6, 2007. Complaint, ¶¶ 47-50. Nowhere in the complaint does Sierra Club allege it actually relied on the incorrect date in the notice, that it was unable for some reason to file on or even before June 4, 2007, or that the FHWA communicated anything to it other than by way of the published notice. The notice refers several times to section 139(1)(1) and the 180 day limitations, but Sierra Club does not allege any facts as to what if any due diligence it conducted or any explanation for its not referring to a calendar to confirm independently the actual due date of June 4, 2007.

2. The facts do not support equitable tolling.

Application of equitable tolling is appropriate when the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of her claim. *Dring*, 58 F.3d at 1328. Equitable tolling is to be applied only in *exceptional* circumstances, *Id.* at 1330, or "sparingly." *Irwin*, 498 U.S. at 96. Equitable tolling applies only when the circumstances leading to the delay in filing were outside of the plaintiff's control. *Shempert v. Harwick Chem. Corp.*, 151 F.3d 793, 798 (8th Cir. 1998); *Koss*

v. YMCA, 504 F. Supp. 2d 658, 661 (D. Minn. 2007). The plaintiff must show (1) timely notice, (2) reasonable good faith conduct or diligence by plaintiff, and (3) lack of prejudice to the defendant. *Pecoraro v. The Diocese of rapid City*, 435 F.3d 870, 875 (8th Cir. 2006); *Koss*, 504 F.Supp. at 661.

Sierra Club offered no evidence supporting equitable tolling. Sierra had timely notice of the deadline. Complaint. ¶¶ 47, 48. Sierra Club proffered no allegation to support its due diligence or that the late filing was due to circumstances out of its control. Sierra Club was well aware of the existence of any claim and of the applicable statute of limitations. Complaint ¶ 49.

Sierra claims it was "lulled" into not filing the complaint by the incorrect date in the notice. Conspicuously absent from the complaint are any allegations to support any actual reliance on the incorrect date in the notice let alone that the notice actually "lulled" Sierra Club to file untimely. Sierra Club is represented by a large, sophisticated law firm.

Sierra Club claims there would be no prejudice to the FHWA because it was expecting complaints to be filed on June

6, 2007 (the incorrect date in the notice). It bears the burden to establish lack of prejudice. Sierra Club speculates at to what FHWA expected and ignores totally the multiple obvious purposes behind the 180 day time bar, including that actions for judicial review be brought promptly after the notice to avoid delaying these public projects unduly. Relief from any deadline works prejudice on any defendant, especially here where it is obvious Congress thought time was of the essence.

Sierra Club's cited cases may be distinguished readily. In *Schleuter*, the EEOC office knew of plaintiff's intent to file a charge, but they gave her the wrong form, scheduled a follow up meeting out of time, and used the incorrect date to calculate the commencement of the limitations period. *Schleuter v. Annheuser-Busch, Inc.*, 132 F.3d 455, 459 (8th Cir.1998). In *Warren*, the pro se plaintiff filed on time, but named the wrong defendant, but the court applied equitable tolling and relation to an amended pleading to save the case. *Warren v. Department of the Army*, 867 F.2d 1156, 1158-61 (8th Cir. 1989). See *Anderson v. Unisys Corp.*, 47 F.3d 302 (8th Cir. 1995) (pro se plaintiff misled by letter containing one year not 300 day deadline). The plaintiffs in these case

exercised considerable due diligence, specifically relied upon the mis-information provided, and otherwise acted reasonably. Sierra Club does not allege any due diligence or detrimental reliance. The notice contained a wrong date but the correct statute and the correct 180 day time period. Sierra Club and/or its counsel could have easily double-checked the actual filing date.

3. Equitable estoppel does not apply.

Equitable estoppel does not apply for these same reasons. Equitable estoppel applies only when the plaintiff delayed filing due to defendant's affirmative misconduct. A plaintiff must prove affirmative misconduct and the traditional elements of equitable estoppel (false representation, intent, plaintiff's lack of knowledge, and detrimental reliance). *Rutten v. United States*, 299 F.3d 993, 995-996 (8th Cir. 2002). Sierra Club has not alleged the FHWA participated in intentional affirmative misconduct. Placement of an inaccurate date in the notice simply is not enough. The failure of the FHWA to review the notice and correct the mistake is not "affirmative misconduct." The Supreme Court has rarely if ever found sufficient affirmative misconduct on the

part of the Government to justify estoppel. See *Wang v. Att'y Gen. of the United States*, 823 F.2d 1273, 1276 (8th Cir. 1987).

Sierra Club also did not allege any detrimental reliance on the wrong date, lack of knowledge of the true filing deadline, or the other elements of estoppel.

II. THE CLAIMS AGAINST THE NPS ARE NOT RIPE.

Sierra Club misconstrues the applicability of Section 7 of the WSRA in its attempt to salvage its claims against the NPS. Sierra Club repeatedly argues the NPS's draft Section 7 determination must be final in order for FHWA to have issued its Record of Decision on the Proposed Project. Opposition Memorandum at 30, 34, 36.

Any claims challenging the legality of the ROD must be directed against the FHWA and must have been timely filed, as discussed above. Furthermore, FHWA's decision to issue its ROD on the Proposed Project, pursuant to NEPA and other authorities cited in the *Federal Register* notice, has no bearing on the finality of the NPS's Section 7 determination pursuant to the WSRA. The ROD is a final agency decision of FHWA, not of the NPS.

A. COUNT III IS NOT RIPE.

Sierra Club argues Count III is ripe, because in Count III Sierra Club seeks to compel agency action "unlawfully withheld or unreasonably delayed" within the meaning of 5 U.S.C. § 706(1). This argument fails for at least two reasons.

First, section 706(1) is in the remedies section of the APA, not the substantive waiver of sovereign immunity section. To allege a cause of action based on inaction, a plaintiff must allege that the agency was presented with a matter, that it had a non-discretionary ministerial duty to act or decide the matter within a specific period of time, and that it has failed to so act. 5 U.S.C. §§ 702, 704. The APA defines "agency action" to include an agency's "failure to act." 5 U.S.C. § 551(13). In the event a plaintiff pleads and proves these elements of a cognizable "failure to act", then that plaintiff may be entitled to relief for that failure to act: "The reviewing court shall...compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Simply put, Sierra Club has not pleaded nor can it prove a substantive cause of action reviewable under the APA. Section 706(1) is of no avail.

Second, Count III is not ripe because Sierra Club failed to point to any discrete, legally required action that the NPS has "unlawfully withheld or unreasonably delayed." *Norton v. Southern Utah Wilderness Alliance (SUWA)*, 542 U.S. 55, 64 (2004); see 5 U.S.C. § 706(1). "[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *SUWA*, 542 U.S. at 64. Sierra Club has provided no authority setting forth a discrete action that the NPS was or is required to take that it has failed to take with regard to its Section 7 responsibilities.

Pursuant to Midwest Region policy, the NPS "makes section 7 determinations in our comments on public notices provided by the Corps" regarding Section 404 permit applications. Declaration of Kate Hanson, Ex. A, at 2. This approach is consistent with this Court's approval of the Secretary of the Interior's interpretation of the term "water resources project" to include "construction activity that requires a COE dredge and fill permit," which "always triggers a Section 7 determination." *Pena*, 1 F. Supp.2d at 979. On the other hand, construction that does not affect the free-flowing characteristics of a river and/or does not require a dredge

and fill permit does not trigger a Section 7 determination.
Id.

The Corps has not yet provided notice of a Section 404 permit application for the Proposed Project. Therefore, the NPS has not been presented with any matter that it has a duty to review, decide, and take action upon. Sierra Club has failed to identify any discreet, legally required duty that the NPS has failed to discharge by awaiting notice of a Section 404 application before finalizing its Section 7 evaluation for the Proposed Project. Sierra Club's claim for agency inaction under § 706(1) is neither plead properly nor ripe for review. Count III suffers from the same ripeness problem as the other claims against the NPS. The Court should dismiss Count III with the other claims against the NPS as discussed below.

B. NO FINAL ACTION BY THE NPS.

Counts I, II, IV, and V against the NPS fail to challenge any final agency action and are not ripe for judicial review.

Sierra Club's argument, Opposition Memorandum at 31-32, that the "contingencies" cited by the NPS have already occurred, rendering the draft Section 7 determination "final," is incorrect. The draft Section 7 determination specifies

that "[t]he NPS will provide comments during the review period for the public notice that application has been made for Section 10/404 permits for the preferred crossing from the U.S. Army Corps of Engineers." Draft Section 7(a) Evaluation at 51, Hanson Declaration, Ex. B. Because the Corps has not yet published public notice of a Section 10/404 permit application related to the Proposed Project, the review period during which NPS will provide final Section 7 comments and determination has not yet commenced. All contingencies referenced in the draft Section 7 determination have not yet occurred; the draft Section 7 determination is not final.

For the same reasons, the draft Section 7 determination does not represent the "consummation" of the NPS' decision-making process. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). Contrary to Sierra Club's assertions, Opposition Memorandum at 38-40, the parties and this Court will benefit from further factual development through the Section 404 permit process, with additional concrete information on the water resources project provided by the Project sponsors in the permit application and by both the Corps and the NPS during their review and comment on those specific facts. Judicial interference at this point would interfere with this

further factual development and with the agencies' exercise of their relevant expertise in the final determination. *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726, 733 (1998).

No legal consequences will flow from the NPS's Section 7 draft determination until it becomes final in the context of the Section 404 permit process. At that time, the construction altering the free-flowing natural condition of the river will be allowed legally to proceed or, in the alternative, will be halted by a "direct and adverse effect" determination, such as what occurred with the 1995 Project. See *Pena*, 1 F. Supp.2d at 975. Because a final Section 7 determination that the Proposed Project would have a "direct and adverse effect" on the river's wild and scenic values could still halt the Project, Sierra Club's assertion that "the NPS no longer has 'an opportunity to correct its own mistakes'" is incorrect. Opposition Memorandum at 39 (citing *Ohio Forestry*, 523 U.S. at 735). Once the final Section 7 decision and its legal consequences are known, Sierra Club may challenge the final Section 7 determination at that time—if it still wishes to do so.

South Carolina Wildlife Federation v. South Carolina Dept. of Transp., 485 F. Supp.2d 661, 671-72 (D.S.C. 2007) is

inapposite. That case involved review of a Final EIS, not a WWSRA Section 7 determination. An agency decision to issue either a FONSI or an EIS is typically a final agency action permitting immediate judicial review under NEPA. *Sierra Club v. Army Corps of Engineers*, 446 F.3d 808, 815 (8th Cir. 2006) (citing *Ohio Forestry*, 523 U.S. at 737). Similarly distinguishable is *National Wildlife Federation v. Harvey*, 440 F. Supp.2d 940, 947 (E.D. Ark. 2006). That case involved the Endangered Species Act's prohibition on an irreversible commitment of funds until there is a final agency determination.

CONCLUSION

This Court should dismiss the action without prejudice.

Date: January 25, 2008

FRANK J. MAGILL, JR.
Acting United States Attorney

s/ Friedrich A.P. Siekert

BY: FRIEDRICH A. P. SIEKERT
Assistant U.S. Attorney
Attorney ID No. 142013
600 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
(612) 664-5600
Attorneys for Defendants