The Ball is in Congress's Court: Contract Support Costs Following Ramah

James J. Linhardt

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THE BALL IS IN CONGRESS’S COURT: CONTRACT SUPPORT COSTS FOLLOWING RAMAH

James J. Linhardt*

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I. Introduction

Throughout the 1960s and 1970s, numerous changes affected the relationship between the federal government and Native Americans. Earlier in the twentieth century, Native Americans were subjected to a policy of assimilation that forced Native Americans into broader American society, often with substantial negative effects. The Reorganization Era followed the Assimilation Era, and encouraged tribes to model their governments after non-Indian organizations. Next, during the Termination Era, Native Americans gradually lost their land through a series of misguided government policies. The Termination Era eventually gave way to the Self-Determination Era for Native American tribes, which largely exists to this day.

An important piece of legislation that solidified the Self-Determination Era was the Indian Self Determination and Education Assistance Act of 1975 ("ISDA"). The ISDA gives individual tribes the opportunity to administer programs previously controlled by the Bureau of Indian Affairs ("BIA") and other administrative agencies.

In addition to funding tribal programs, the ISDA requires the government to fund Contract Support Costs ("CSCs"). CSCs are indirect tribal costs that the government normally would not incur. CSCs include special administrative costs necessary for the responsible operation of a business. However, the funding of CSCs is not without limitation. The ISDA states that funding CSCs is "subject to the availability of appropriations." In 2005, the Supreme Court ruled that government agencies must pay the full amount of CSCs regardless of the "subject to the availability of appropriations" language in the appropriation and ISDA. While the courts...

1. See generally CHARLES WILKINSON, INDIAN TRIBES AS SOVEREIGN GOVERNMENTS 16-17 (2d ed. 2001) (discussing the eras of tribal sovereignty).
2. Id. at 9-10.
4. See id. at 1188.
5. WILKINSON, supra note 1, at 16.
7. WILKINSON, supra note 1, at 17.
9. Id.
10. Id. § 450j-1(a)(3)(A).
11. Id. § 450j-1(b).
were in the process of deciding *Cherokee*, Congress inserted additional language that placed a spending cap on the total amount of the appropriations to be used to pay CSCs. The disparity between the Supreme Court ruling in *Cherokee* and the legislative changes created an issue of how to interpret CSC contracts with a spending cap when an agency’s funding ability may be limited.

Due to this conflict, in 2010 and 2011, two federal circuit courts of appeal adopted opposing interpretations of the “subject to availability of appropriations” language in situations where a spending cap is in place. *Arctic Slope Native Ass’n v. Sebelius* and the Tenth Circuit’s *Ramah Navajo Chapter v. Salazar* provided two distinct approaches to resolve the issue. The Supreme Court granted certiorari in *Ramah* and issued an opinion in favor of the tribes. Following the Supreme Court’s *Ramah* opinion, the Supreme Court granted certiorari in *Arctic Slope*, vacated the opinion, and remanded the case to the Federal Circuit to be decided in light of the *Ramah* opinion. Due to the circuit split between the Tenth and Federal Circuits, it was necessary for the Supreme Court to resolve the issue.

Successful resolution of this issue was vital. Unfunded CSCs exceed $1 billion. Furthermore, CSCs must be fully funded to ensure that mental health clinics, hospitals, and substance abuse centers established because of self-determination contracts continue to exist. Because CSCs are necessary costs, tribes that receive partial CSC funding must divert money from program funds in order to pay the remainder of their unfunded CSCs.

Non-Indian government contractors also had an interest in the swift resolution of this issue. These decisions apply to both Indian and non-Indian government contracts. Had the Supreme Court not affirmed *Ramah*, the government would not be required to fully fund any government


15. Salazar v. Ramah Navajo Chapter, 132 S. Ct. 2181 (2012). In the interest of clarity, the remainder of this comment will distinguish between the Supreme Court’s *Ramah* decision and the Tenth Circuit’s *Ramah* decision.


contract to be paid out of a capped lump-sum appropriation where the phrase “subject to the availability of appropriations” is used in the contract and the obligations are greater than the appropriation. Uncertainty created by Arctic Slope drew sharp criticism by representatives of the business community, including the U.S. Chamber of Commerce. The Chamber of Commerce believed Arctic Slope harmed both government contractors and the government itself.

This comment will discuss the ISDA, foundational cases, provide analysis of the recent Supreme Court decision in Ramah, and provide recommendations for how Congress can successfully implement the Ramah decision.

II. The Relationship Between Native Americans and the Federal Government in the Twentieth Century

It is important to know the basic history of events leading up to the ISDA to better understand its purpose. This history can be divided into four “eras,” each representing a different set of governmental policies toward Native Americans during the twentieth century. The four eras are the Allotment and Assimilation Era, the Reorganization Era, the Termination Era, and the Self-Determination Era.

A. The Allotment and Assimilation Era

The Allotment and Assimilation Era, spanning the late 1800s to the late 1920s, forced Native Americans into broader American society. The federal government furthered its assimilative goals by allocating tribal land to individual Native Americans. This created a “checkerboard” pattern of land ownership by tribes, individual Indians, and non-Indians, causing serious jurisdictional and management problems. As a result of the allotment process, Native Americans lost 65% of their land between 1887

19. Id.
20. See generally Wilkinson, supra note 1, at 1-16.
21. Id.
22. Id. at 9.
23. Id.
24. Id. at 10.
and 1934.\textsuperscript{25} The government also increased efforts to assimilate Indians into wider American culture.\textsuperscript{26} While the Assimilation Era improved education and health among Indians,\textsuperscript{27} the policy hindered cultural and religious practices within Native American communities.\textsuperscript{28}

B. The Reorganization Era

Toward the end of the Allotment and Assimilation Era, Congress made small but important changes to their relationship with Native Americans.\textsuperscript{29} One of the most important pieces of legislation during this era was the Indian Reorganization Act of 1934 ("IRA"). The primary purpose of the IRA was to encourage tribes to model their government after non-Indian organizations.\textsuperscript{30} While the IRA helped modernize tribal governments and provided an effective vehicle to communicate with the federal government, it alienated traditional Native American leaders.\textsuperscript{31} One hundred and eighty-one tribes approved the provisions of the IRA while seventy-seven did not.\textsuperscript{32} Despite this significant opposition, the legislation nevertheless affected all tribes and caused substantial changes to their organizational structure over the ensuing years.\textsuperscript{33}

C. The Termination Era

Due to discontent of Indians and non-Indians, the federal government shifted its Native American policy away from IRA-era reforms.\textsuperscript{34} The emerging era became known as the Termination Era.\textsuperscript{35} During the Termination Era, Congress passed legislation that prevented "Indians in terminated tribes from receiving any special treatment because of their status as Indians."\textsuperscript{36} Any special programs and benefits enjoyed by Indians

\textsuperscript{25} Id. (explaining how individual Native Americans were granted land through a twenty-five-year-long trust and how they often lost the land after the trust expired due to "fraudulent transactions or tax sales").

\textsuperscript{26} Id.

\textsuperscript{27} Walch, supra note 3, at 1183.

\textsuperscript{28} WILKINSON, supra note 1, at 10.

\textsuperscript{29} Walch, supra note 3, at 1183.

\textsuperscript{30} Id. ("Tribal governments were reorganized into either tripartite constitutional or corporate forms, which strengthened the tribes but gave them a form foreign to Indians.").

\textsuperscript{31} WILKINSON, supra note 1, at 12.

\textsuperscript{32} Id.

\textsuperscript{33} Id.

\textsuperscript{34} Walch, supra note 3, at 1185-86.

\textsuperscript{35} Id. at 1184-85.

\textsuperscript{36} Id. at 1188.
and tribes ceased to exist.\textsuperscript{37} More importantly, many tribes lost their status as sovereign entities.\textsuperscript{38} The negative effects of this era were quickly realized.\textsuperscript{39} Education levels, land ownership, and societal integration rapidly declined after the Termination Era began.\textsuperscript{40}

\textbf{D. The Self-Determination Era and the ISDA}

The government and Native Americans quickly realized the negative effects of Termination Era policy.\textsuperscript{41} Starting in the 1960s, another shift took place.\textsuperscript{42} President Nixon accurately summarized the new Self-Determination Era when he stated its goal was “to strengthen the Indian’s sense of autonomy without threatening his sense of community.”\textsuperscript{43}

A central piece of legislation enacted during the Self-Determination Era was the ISDA, passed in 1975.\textsuperscript{44} The Act aimed to give tribes a voice in the planning and administration of Native American policies.\textsuperscript{45} The ISDA shifted the administration of programs from the federal government to the tribes.\textsuperscript{46} The ISDA’s long-term goal was full tribal management of all BIA and Indian Health Services (“IHS”) programs.\textsuperscript{47}

There is a multi-step process required for tribes to receive full funding of their respective Indian programs. The ISDA first requires tribes to enter into self-determination contracts “for the planning, conduct, and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law . . . .”\textsuperscript{48} Tribes submit this proposed contract and it “shall, within ninety days after receipt of the proposal [be] approve[d] . . . and award[ed] . . . ” to the tribe.\textsuperscript{49} The contract can be denied for a few technical reasons; however, none of those reasons are at issue in this comment.

\begin{itemize}
  \item \textsuperscript{37} \textit{Id.}
  \item \textsuperscript{38} \textit{Id.}
  \item \textsuperscript{39} \textit{Id.} at 1189.
  \item \textsuperscript{40} \textit{Id.}
  \item \textsuperscript{41} \textit{Id.}
  \item \textsuperscript{42} \textit{See WILKINSON, supra note 1, at 16.}
  \item \textsuperscript{43} \textit{Walch, supra note 3, at 1191 (quoting Presidential Message to Congress on Indian Affairs, 6 WEEKLY COMP. PRES. DOCS. 894, 894-96 (July 8, 1970)).}
  \item \textsuperscript{44} \textit{WILKINSON, supra note 1, at 17.}
  \item \textsuperscript{45} \textit{Walch, supra note 3, at 1191.}
  \item \textsuperscript{46} Barbara J. Van Arsdale, Annotation, \textit{Validity, Construction, and Application of Indian Self-Determination and Education Assistance Act}, 190 A.L.R. FED. 249, § 2 (2003).
  \item \textsuperscript{47} \textit{WILKINSON, supra note 1, at 17.}
  \item \textsuperscript{49} \textit{Id.} § 450f(a)(2).
\end{itemize}
The funds provided under the ISDA include CSCs. The ISDA defines CSCs as the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which (A) normally are not carried on by the [agency] . . . ; or (B) are provided by the [agency] in support of the contracted program from resources other than those under contract.

The statute states that the CSCs shall be added to the other costs associated with the self-determination contract.

Every year, a tribe negotiates with the government to adjust the contract amount based on its needs. Common CSCs include: depreciation of assets, construction and mortgage costs, management studies, insurance and indemnification, and interest expenses on capital.

Following several tumultuous decades in the early twentieth century, the Self-Determination Era has been a period of relative success. The Self-Determination Era has given Indians the opportunity and ability to succeed as sovereign entities, celebrate their heritage, and exist within the larger American culture. While not perfect, the continuation of the Self-Determination Era and the ISDA are vital to the success of Native American tribes.

III. Cases Leading Up to Arctic Slope and Ramah: Ferris and Cherokee

Arctic Slope and both Ramah decisions discuss the following cases at length. As such, it is important to have an understanding of their holdings and reasoning. The two cases discussed below are Ferris v. United States and Cherokee Nation of Oklahoma v. Leavitt.

50. Id. § 450j-1(a)(2).
51. Id.
52. Id.
53. Id. § 450j-1(a)(3)(B).
54. Id. § 450j-1(k).
55. WILKINSON, supra note 1, at 16.
56. See id.
57. 27 Ct. Cl. 542 (1892).
A. Discussion of Ferris v. United States

Ferris established the basic rule regarding appropriations associated with government contracts. In Ferris, an individual contracted with the government to remove 100,000 cubic yards of earth within one year. He was under the supervision of a government employee. After removing 35,494 cubic yards of earth, the government ordered the contractor to stop work for roughly six months. The lump-sum appropriation ran out with two months left in the original one-year contract and with five months of unfinished work.

Neither side disputed that the work stoppage was the government’s fault or that the contractor went unpaid throughout the entire stoppage. The court ruled for the contractor stating, “a contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects.” The court reasoned that appropriations may be limitations on what government agents can spend, “but [their] insufficiency does not pay the Government’s debts, nor cancel its obligations, nor defeat the rights of other parties.”

Ferris protected government contractors by establishing that lump-sum appropriations will not go unpaid due to insufficient or ill-managed appropriations. Government contracts are still contracts and thus parties must fully perform, even if one of those parties is the government.

59. See generally Ferris, 27 Ct. Cl. 542.
60. Id. at 545.
61. Id.
62. Id.
63. Id. at 545-46.
64. Id. at 545.
65. Id. at 546.
66. Id.
67. Id.
68. Id. (emphasis added).
B. Discussion of Cherokee v. Leavitt

The facts of Cherokee are similar to those in Arctic Slope and Ramah and the case was vital to the Supreme Court's ultimate decision in Ramah.

Cherokee combines two separate but factually identical cases. The first case was brought by the Shoshone-Paiute and the Cherokee Nation under the Contract Disputes Act (“CDA”) of 1978 against the Department of the Interior (“DOI”). The DOI denied their claim in an administrative proceeding. The tribes then brought a breach-of-contract claim in federal district court. The district court ruled for the government and the Tenth Circuit affirmed.

The second case also involved the Cherokee Nation. The tribe again submitted claims to the DOI, which were initially denied. The Board of Contract Appeals reversed and ordered the government to pay $8.5 million. The government appealed to the Federal Circuit Court of Appeals, which affirmed the decision for the tribe.

The government’s initial argument was that self-determination contracts are “unique, government-to-government” agreements and are different than normal procurement contracts. Because tribes should know the government has entered into identical contracts with multiple tribes, tribes should bear the risk that they will not receive full payment. Using the ISDA as authority, the Court quickly rejected this argument. The ISDA’s text “suggests that Congress, in respect to the binding nature of a promise, meant to treat alike promises made under the [ISDA] and normal contractual promises.” In defining the nature of promises made under the ISDA, the act uses the word “contract” 426 times. A contract,
the Court reminded, is "a promise or a set of promises for the breach of which the law gives a remedy . . . ." 84 The Court further analyzed Congress's intent and determined there was nothing to suggest that tribes should bear the risk of underpayment. 85

Next, the Court discussed the meaning of the phrase "subject to the availability of appropriations." 86 According to the Court, the phrase traditionally meant that potential contractors could negotiate with the government before the beginning of the fiscal year, but the contract would not become binding unless Congress appropriated funds. 87 Because Congress actually appropriated sufficient funds in this case, the traditional interpretation did not assist the government's case. 88 The Court also dismissed the government's next argument: that the appropriations provision affirmatively allows agencies to adjust funding levels based on the amount of money they receive from Congress. 89

To be successful, the Court stated that the government must either show why the appropriations provision does not deserve its traditional contract-related interpretation or prove that Congress intended another meaning. 90 The government failed to persuade the Court of either possibility. 91 Although there was evidence that agency employees wanted to retain discretion to appropriate underfunded appropriations as they saw fit, the Court found no evidence that Congress acknowledged those desires within the ISDA or the appropriations themselves. 92

Ferris and Cherokee provide the backdrop to analyze both Ramah decisions and Arctic Slope. Ferris and Cherokee introduce established principles in contract law when dealing with government agencies and were vital to the Supreme Court's decision in Ramah.

IV. Discussion of the Circuit Split: Arctic Slope & the Tenth Circuit's Ramah

In late 2010 and early 2011, the Tenth and Federal Circuits of the United States Court of Appeals reached opposite conclusions on the issue of

84. Id. (quoting RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979)).
85. Cherokee, 543 U.S. at 639-40.
86. Id. at 640-41.
87. Id. at 643.
88. Id.
89. Id. at 643-44.
90. Id. at 644.
91. Id.
92. Id.
whether the government is liable for underfunding CSCs with the existence of a statutory cap.\textsuperscript{93} In \textit{Arctic Slope}, the Federal Circuit ruled that the government was not required to pay Arctic Slope Native Association ("ASNA") the difference between the contracted amount and the appropriated amount.\textsuperscript{94} The Tenth Circuit reached a different opinion in \textit{Ramah} when it ruled that tribes are entitled to unfunded CSC costs.\textsuperscript{95}

This section of the comment will discuss the analysis found in \textit{Arctic Slope} and \textit{Ramah}. These opinions are important because they created a circuit split that was recently resolved by the United States Supreme Court.\textsuperscript{96} The Supreme Court resolved the competing positions of these two cases by accepting \textit{Ramah} for certiorari and issuing an opinion.

\textbf{A. Discussion of Arctic Slope v. Sebelius}

\textit{Arctic Slope} concerned self-determination contracts made between ASNA and the Department of Health and Human Services ("DHHS").\textsuperscript{97} These contracts allowed CSCs to be used for the tribe’s health clinics.\textsuperscript{98} Similar to other cases discussed in this comment, the appropriation made by Congress was insufficient to pay the full amount of all contracts entered into by DHHS.\textsuperscript{99} The contract had the "subject to the availability of appropriations" provision\textsuperscript{100} and the appropriation passed by Congress also stated that the amount spent on CSCs was "not to exceed" the amount that Congress appropriated.\textsuperscript{101}

The “not to exceed” language distinguished this case from \textit{Cherokee}.\textsuperscript{102} The court noted that "not to exceed" is often used to show Congress intends to limit the amount of money available for a given purpose.\textsuperscript{103} This is often called a binding statutory cap.\textsuperscript{104}

\textsuperscript{94} Arctic Slope, 629 F.3d at 1304.
\textsuperscript{95} Ramah, 644 F.3d at 1073.
\textsuperscript{97} Arctic Slope, 629 F.3d at 1298.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 1299.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 1300.
\textsuperscript{102} Id. at 1301.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 1302.
ASNA did not deny that a statutory cap was created by Congress’s appropriation.\textsuperscript{105} Instead, the tribe argued that the cap only applies to a “line-item appropriation for a single contract” and because the appropriation was large enough to pay the full amount for the contract with ASNA, the tribe is entitled to full payment.\textsuperscript{106} ASNA relied on the previously discussed case, \textit{Ferris v. United States}, to support its position.\textsuperscript{107}

Unfortunately for ASNA, the Federal Circuit recognized important distinctions between the contracts at issue here and the contracts in \textit{Ferris}. The court ruled that the “subject to the availability of appropriations” provision is in the ISDA and self-determination contracts in order to overcome the \textit{Ferris} rule.\textsuperscript{108} The court believed the appropriations provision put tribes on notice of possible insufficient appropriations, and in doing so, made the tribes responsible for knowing the status of the appropriations.\textsuperscript{109}

The court conceded that \textit{Ferris} would apply in a situation where the agency had the ability to reallocate funds from another source to fulfill the contractual obligation.\textsuperscript{110} However, the court ultimately held this reallocation of funds did not apply with the statutory cap in place because the government could not reallocate funds without exceeding the amount specified by the cap.\textsuperscript{111}

The court also noted that the ISDA says a tribe’s funding should not be reduced in order to provide funding to another tribe.\textsuperscript{112} The Federal Circuit interpreted this provision to mean there would be no other permissible way for the government to allocate money among the tribes.\textsuperscript{113}

\textbf{B. Discussion of Ramah v. Salazar}

In \textit{Ramah}, the Tenth Circuit provided detailed analysis in support of its conclusion that tribes are entitled to the unfunded portion of their CSCs.\textsuperscript{114}

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\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 1303 ("[W]here the appropriation covers multiple contracts, the contractor may sue for breach if the appropriation is sufficient to cover the contract at issue, even if not sufficient for all purposes.").
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 1304.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} See generally Ramah Navajo Chapter v. Salazar, 644 F.3d 1054 (10th Cir. 2011).
In contrast with the Federal Circuit in *Arctic Slope*, the Tenth Circuit held that the rules from *Ferris* and *Cherokee* apply.\(^{115}\)

The pertinent facts in *Ramah* are identical to those in *Arctic Slope*. The contracts in question contained the "subject to the availability of appropriations" provision and funding was "not to exceed" the specified amount.\(^{116}\) The Tenth Circuit analyzed the ISDA from the light most favorable to Native Americans.\(^{117}\) According to the Tenth Circuit, when interpreting an ambiguous statute, courts should adopt the interpretation favoring Indians rather than follow the traditional rule of deferring to executive agencies.\(^{118}\) Therefore, "if the [ISDA] can reasonably be construed as the Tribe would have construed it, it must be construed that way."\(^{119}\)

The arguments made by the government and the tribes were also similar to the arguments made in *Arctic Slope*. The government argued that the provision "subject to the availability of appropriations" necessarily limits the tribe's funding to a pro rata share to be divided equally among all CSC contracts.\(^{120}\) Ramah countered that the government's ability to pay an individual CSC contract is what matters.\(^{121}\) If the appropriation is sufficient to pay an individual contract, the appellant argued, the agency should be required to fulfill the terms of that contract.\(^{122}\)

The court discussed three concepts fundamental to their opinion. First, when Congress makes a lump-sum appropriation, it is inferred that there is no restriction on how the funds should be spent.\(^{123}\) Second, the court rejected the notion that "because of mutual self-awareness among tribal contractors, tribes, not the Government, should bear the risk that an unrestricted lump-sum appropriation would prove insufficient to pay all contractors."\(^{124}\) Finally, if Congress appropriates enough money to pay a contract, the agency must pay the contractor even if they earmarked the funds for other obligations.\(^{125}\)

\(^{115}\) *Id.* at 1075-76.

\(^{116}\) *Id.* at 1057-59.

\(^{117}\) *Id.* at 1062.

\(^{118}\) *Id.*

\(^{119}\) *Id.* (quoting Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1462 (10th Cir. 1997)).

\(^{120}\) *Id.* at 1063.

\(^{121}\) *Id.*

\(^{122}\) *Id.*

\(^{123}\) *Id.*

\(^{124}\) *Id.* (quoting Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 640 (2005)).

\(^{125}\) *Id.*
Consistent with *Cherokee*, the Tenth Circuit decided that the appropriations at issue were indeed lump-sum appropriations because the appropriations were "made to cover a number of specific programs, projects, or items."\(^{126}\)

Next, the court found that the "not to exceed" provision did place a cap on the overall amount of available funding, but was not as large of a distinction as the Federal Circuit found in *Arctic Slope*.\(^{127}\) According to the court, using explicit language such as "not to exceed" is not the only way to establish a cap.\(^{128}\) For example, the *Cherokee* appropriation gave an explicit amount of money "for expenses necessary to carry out" programs and CSC contracts.\(^{129}\) The Tenth Circuit found that both provisions have the same legal effect.\(^{130}\) Since the Supreme Court, in *Cherokee*, ruled that the government was still bound to CSC contracts, the Tenth Circuit found that the "not to exceed" language should not affect the outcome of the case.

The court also upheld the rule from *Cherokee* that appellants must be paid in full regardless of whether the appropriations were used to pay other contracts legally available for that purpose.\(^{131}\)

Next, the court reviewed the following language from the ISDA: agencies are "not required to reduce funding for programs . . . serving a tribe to make funds available for another tribe . . ."\(^{132}\) The court turned the government's argument on its head. When appropriations exceed the total amount of money in CSC contracts, the agency will *necessarily* reduce funding from one tribe to another.\(^{133}\) The pro rata system is simply one method of reducing funding, and as a result, no tribe receives the total amount for which they contracted.\(^{134}\)

The Tenth Circuit's main problem with the government's case was that it characterized "over 600 tribes and tribal contractors" as a single entity.\(^{135}\) As evidence of this view, the court found that the only cases the government cited in support of its position were line-item appropriations for one obligation instead of a lump-sum appropriation for multiple

\(^{126}\) Id. at 1068 (quoting 2 U.S. GEN. ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-5 (3d ed. 2004) [hereinafter GAO REDBOOK]).

\(^{127}\) Id.

\(^{128}\) Id.; see 2 GAO REDBOOK, supra note 126, at 6-29.

\(^{129}\) Ramah, 644 F.3d at 1068.

\(^{130}\) Id.

\(^{131}\) Id. at 1069.

\(^{132}\) Id. at 1069-70 (quoting 25 U.S.C. §450j-1(b) (2006)).

\(^{133}\) Id. at 1070.

\(^{134}\) Id.

\(^{135}\) Id.
contracts. 136 Ferris does not apply to single contract appropriations and the court does not believe that these examples should supersede the rule set out in Ferris and further developed in Cherokee.

The court concluded its opinion with a discussion of remedies and the government's options for the future. The government argued that paying the tribes would violate the Appropriations Clause of the Constitution. 137 The court agreed that the shortfall could not come from the CSC appropriation, but instead must come from the Judgment Fund, through the CDA. 138 The CDA governs disputes arising out of contractual relationships with the government. 139 The CDA explicitly applies to self-determination contracts, and the money for judgments on those contracts comes from the Judgment Fund. 140 Paying the tribes out of the Judgment Fund ensures they receive the full amount of CSC funding under the contract while avoiding any constitutional issues.

V. The Supreme Court's Ramah Decision

In 2012, the Supreme Court accepted Ramah for certiorari. 141 Because of the circuit split regarding the appropriations issues discussed above, it was necessary for the Supreme Court to be the final arbiter of the matter.

In Salazar v. Ramah Navajo Chapter, 142 the Supreme Court settled the circuit split between the Tenth and Federal Circuits. In its opinion, the Court affirmed the Tenth Circuit's decision in Ramah and ruled that the government is required to pay the full amount of CSCs when Congress appropriates a sufficient amount of funds to pay one tribal contractor but not enough to pay all tribal contractors. 143

The Court discussed the impact of Cherokee and Ferris on the case and concluded that these cases "dictate the result." 144 The Court highlighted a

136. Id. at 1070-71.
137. Id. at 1076; see U.S. CONST. art. 1, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .").
138. See Ramah, 644 F.3d at 1077.
140. Ramah, 644 F.3d at 1076 (stating that this is not the most efficient system to pay the full amount for each contract, and probably not what Congress intended. The court states that they "must consider the legal effect of Congress' intentional acts, and those acts compel [this] result."); see 25 U.S.C § 450m-1(d) (2006); 31 U.S.C. § 1304 (2006); 41 U.S.C. § 612(a) (2006).
143. Id.
144. Id. at 2190.
few points. First, the government’s obligation is no different than any normal contractual obligation and “if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds.” Second, the Court emphasized the rule from Ferris, that contractors need not know the status of a lump-sum appropriation. In the case of a lump-sum appropriation, “[c]ontractors are responsible for knowing the size of the pie, not how the agency elects to slice it.”

The “not to exceed” provision was the only significant difference between the facts in Ramah and Cherokee: however, the Court agreed with the Tenth Circuit and ruled that the language did not preclude the tribes from recovery. The Court stated the “not to exceed” statutory cap is no different than the language in Ferris. This is because “[w]ords like ‘not to exceed’ are not the only way to establish a maximum limitation.” As such, the agency was able to distribute funds from the lump-sum appropriation in any manner it chose.

The statutory cap did not restrict the manner in which the agency could distribute funds. It did limit the amount of funds in the appropriation that could be used to pay the tribes’ CSCs. However, “when an agency makes competing contractual commitments with legally available funds and then fails to pay, it is the Government that must bear the fiscal consequences, not the contractor.”

By affirming the Federal Circuit, the Supreme Court resolved a complicated circuit split and provided certainty for Native Americans as well as all government contractors. The Court upheld the spirit of Ferris and Cherokee and has reinforced the contractual nature of CSC agreements under the ISDA.

145. id. at 2188 (citing Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 639 (2005)).
146. id. (quoting Cherokee, 543 U.S. at 641).
147. id. at 2189.
148. id.
149. id.
151. 2 GAO REDBOOK, supra note 126, at 6-29.
152. Ramah, 132 S. Ct. at 2192.
153. See id.
154. id. (emphasis added).
VI. Analysis of Ramah

The Supreme Court made the correct decision in Ramah for three primary reasons. First, CSC contracts are separate contracts with separate obligations. Although Congress made one large appropriation to pay the CSC contracts, hundreds of obligations remained in existence. Second, the appropriations at issue were unrestricted, lump-sum appropriations. As such, agencies had complete discretion to determine how to allocate the money. Finally, the traditional meaning of the phrase "subject to the availability of appropriations" and the reasoning from Cherokee and Ferris apply.

A. Agencies Have Individual Contractual Obligations to Each Tribe That Enters into a Self-Determination Contract

A primary factor that supports the Court’s analysis is that the agreements at issue are contracts. The ISDA leaves little room to doubt that Congress intended these agreements, “in respect to the binding nature of a promise,” to be ordinary contractual promises and not special government-to-government agreements. This is evidenced by the fact that the word “contract” is used 426 times to describe the agreement between the tribes and the government in the ISDA. Additionally, CSC agreements are specifically referred to as “self-determination contracts” within ISDA.

More importantly, because tribes enter into their own, separate CSC contracts, the government has an obligation to fully perform each contract. If any particular contract is breached, the government can be held liable under the CDA. This legislation provides a mechanism to compensate contractors for breaches by agencies if no other funds are available.

B. Legal Availability

1. Legal Obligations

Agencies were obligated to perform by paying the amount of each contract out of a lump-sum appropriation. Lump-sum appropriations are

156. Ramah, 132 S. Ct. at 2188 (citing Cherokee, 543 U.S. at 639).
159. Id.
funds used to pay for “a number of specific programs, projects, or items.”160 Absent a specific statutory provision, agencies have the discretion to determine how to allocate funds from an appropriation.161 “[C]ommittee reports and other legislative history as to how funds should or are expected to be spent do not establish any legal requirements on the agency.”162

The statutory cap imposed by Congress does not alter the fact that an agency is free to determine how to allocate the money appropriated for CSC contracts. The reasoning from In re Newport News Shipbuilding & Dry Dock Co. applies. In Newport News, Congress appropriated a statutorily capped $244 million, out of a larger $3.16 billion, to the Navy for a shipbuilding program.163 Congress’s legislative history and committee reports showed that out of the $244 million, $152 million was for the construction of one ship and $92 million for another.164 However, this intent was never explicitly included in the appropriation and as such, was not binding on the Navy. Because the appropriation did not state how the funds were to be divided, the Navy had discretion on how to allocate the funds.

As the Supreme Court correctly stated, the present cases are no different. Congress appropriated money to pay for obligations arising out of CSC contracts with Indian tribes. However, the appropriations contain no language dictating how the money should be divided among the hundreds of CSC contracts. Congress could have easily avoided this issue by simply entering a provision into the appropriation requiring a pro-rata distribution at a specified rate, or even better, by identifying a specific amount to be paid to each contract.165 But Congress did not do so. The effect is that agencies were free to determine how to fulfill their obligations without congressional restrictions.

160. 2 GAO REDBOOK, supra note 126, at 6-5; see In re Newport News Shipbuilding & Dry Dock Co., 55 Comp. Gen. 812, 1976 WL 13166 (1976) (stating that an appropriation to fund as little as two separate obligations is considered a lump-sum appropriation.).
162. Id. at 192-93 (quoting LTV Aerospace Corp., 55 Comp. Gen. 307, 319 (1975) (“Congress is well aware that agencies are not legally bound to follow what is expressed in Committee reports when those expressions are not explicitly carried over into the statutory language. . . . [A]n agency is not free simply to disregard its statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes.”).
163. 2 GAO REDBOOK, supra note 126, at 6-14 (citations omitted).
164. Id.
165. Id. at 6-15.
2. When Did Funds Become Legally Available

Funds became legally available to pay the tribes when Congress appropriated funds for the year. Three criteria must be met before funds from an appropriation are legally available:

1. the purpose of the obligation or expenditure must be authorized;

2. the obligation must occur within the time limits applicable to the appropriation; and

3. the obligation and expenditure must be within the amounts Congress has established.166

The issue here relates to the third requirement — CSC contracts are not grouped into one single government obligation. They are separate contracts. The government has an obligation to each and every tribe that has a CSC agreement. The Court correctly acknowledged that a lump-sum appropriation, not a line-item appropriation, was made to pay the contracts.167 Consequently, when looking at the issue of legal availability, the CSC contracts cannot be grouped together under the analysis of a line-item appropriation. The government’s obligation to the appellants was within the amount of the appropriation, and there was no restriction that prohibited the agency from fulfilling its obligation. There was money from the lump-sum appropriation legally available to pay the appellants.

3. “Subject to the Availability of Appropriations”

The Supreme Court correctly held that the “subject to the availability of appropriations” provision should be given its traditional interpretation. This means that contractors and agencies may negotiate the terms of the contract prior to the fiscal year but the contract will not become binding until Congress appropriates funds for that year.168 “Subject to the availability of appropriations” in the ISDA and contract only asks whether the government is able to “pay a particular tribe’s CSCs, not its ability to pay all tribes’ CSCs.”169

The phrase is a term of art common in many government contracts. In Cherokee, the Supreme Court affirmed the traditional meaning of the

166. Id. at 4-6.
169. Ramah Navajo Chapter v. Salazar, 644 F.3d 1054, 1063 (9th Cir. 2011).
phrase. The government’s interpretation, that this phrase unambiguously absolves them of any liability in excess of the appropriation, flies in the face of both settled Supreme Court jurisprudence and the ISDA’s policy of treating CSC agreements as ordinary contracts instead of “entitlements,” as the government argued.

The phrase “subject to the availability of appropriations” found in the ISDA was given its traditional interpretation by the Supreme Court in Cherokee. The special circumstances cited in C.H. Leavell v. United States and Blackhawk Heating & Plumbing Co. v. United States are not present in Ramah and Arctic Slope. The phrase simply means that tribes and agencies were free to determine the terms of the CSC contracts before the beginning of the fiscal year and those terms became binding once Congress appropriated the funds.

C. Remedies

The Supreme Court correctly held that because Cherokee and Ferris apply, and the government is legally liable, the appropriate remedy is to pay the unfunded portion of CSCs through the CDA and Judgment fund. The statutory cap does not preclude recovery of money in excess of the cap.

The government argued that the cap, along with the Appropriations Clause and the Anti-Deficiency Act, should preclude recovery in

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170. Cherokee, 543 U.S. at 643.
172. C.H. Leavell & Co. v. United States, 530 F.2d 878, 894 (1976) (stating that the agreement in C.H. Leavell contained a maximum payment of $75,000 for pile-driving work). The distinguishing factor is the provision in the contract which states that “it is distinctly understood and agreed that the amount of funds . . . is the maximum amount the government insures will be available . . . and the Government is in no case liable for payments . . . beyond this amount.” Id. The contract provision unambiguously altered the terms of the contract beyond the traditional meaning of “subject to the availability of appropriations.” Id.; Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539, 543 (Ct. Cl. 1980) (stating that the issue of the availability language was explicitly discussed throughout the negotiations). The Government’s attorney was surprised that a contractor would assent to the availability clause so easily, so he explicitly told the contractor that if Congress acted to prevent the agency from paying, they would not be held liable. In response, the contractor shrugged and the agreement was signed. Id.
173. Cherokee, 543 U.S. at 643; see 1 GAO REDBOOK, supra note 126, at 4-6.
175. U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.

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excess of the amount stipulated by the statutory cap. However, "the United States’ liability is not coterminous with the [Agency’s] ability to pay . . . [and] the Anti-Deficiency Act [does not] . . . ‘affect the rights in this court of the citizen honestly contracting with the government.”

The ISDA states that the CDA applies to self-determination contracts. The CDA is the primary method that contractors use to resolve disputes with the government. Judgments made under the CDA are paid through the Judgment Fund. The Judgment Fund allows funds to be appropriated to pay for “judgments, awards, [and] compromise settlements . . .” if the money has not already been appropriated.

The legislature intended that the CDA and Judgment Fund be used to pay tribes the money they contracted for, but have not received due to a breach by the government. The Judgment Fund should be used to make an appropriation that is the difference between the contract amount and the insufficient appropriation. An appropriation through the CDA and Judgment Fund would resolve any issues relating to the Appropriations Clause and the ADA.

VII. Recommendations to Congress: Actions Following the Ramah Decision

There are a number of methods agencies and Congress could implement to fulfill their requirements under the ISDA and the recent Supreme Court ruling in Ramah.

Congress could make line-item appropriations for each contract, continue its system of underfunding CSCs with the difference to come out of the Judgment Fund, begin to pay the full amount of CSCs in keeping with the spirit and text of the ISDA, or alter the text of the ISDA to remove language that treats CSC contracts as traditional contracts and insert language that requires full funding.

176. 31 U.S.C. § 1341(a)(1) (2006) (“An officer or employee of the United States Government . . . may not (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; (B) involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law . . . .”).
178. Id. (quoting Dougherty ex rel. Slavens v. United States, 18 Ct. Cl. 496, 503 (1883)).
183. Ramah, 644 F.3d at 1076.
A. Line-Item Appropriations

Congress is free to make line-item appropriations for individual CSC contracts. Although this solution would deprive tribes of full CSC funding, if Congress is intent on underfunding CSCs, this is probably the easiest way to do so. Line-item appropriations receive different treatment under government contract law. Unlike a lump-sum appropriation, if Congress makes a line-item appropriation, contractors are deemed to have notice of the shortfall and generally do not have any right to recovery.\(^\text{184}\) In Cherokee, the Supreme Court recognized this distinction and suggested that a line-item appropriation, also known as a statutory earmark, was a proper way to assign a specific amount of money for each contract, even if it is less than the amount specified in the contract.\(^\text{185}\) Nothing has changed since Cherokee. This approach is a legal way for Congress to underfund CSC contracts.

The government found this proposition to be "extraordinary."\(^\text{186}\) But there is nothing extraordinary about requiring Congress, when they want to underpay their contractual obligations by more than $1 billion, to list the specific amount they will appropriate for each CSC contract.\(^\text{187}\) With the vast amount of congressional resources, it would not be an extraordinary task.

B. Continue Underfunding or Alter the ISDA

Congress is free to continue underfunding CSC contracts and tribes can recover the deficiency from the Judgment Fund. Also, Congress could strip the ISDA of language that treats CSC agreements as contractual obligations. Because the Contract Disputes Act applies to disputes arising out of the ISDA, if Congress chose to make no changes to their approach,

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184. 2 GAO REDBOOK, supra note 126, at 6-44 to 6-45 ("[I]t is settled that contractors paid from a general appropriation [lump-sum appropriation] are not barred from recovering for breach of contract even though the appropriation is exhausted. However, under a specific line-item appropriation, the answer is different. The contractor in this situation is deemed to have notice of the limits on the spending power of the government official with whom he contracts. A contract under these circumstances is valid only up to the amount of the available appropriation. Exhaustion of the appropriation will generally bar any further recovery beyond that limit.").

185. Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 642 (2005) ("[T]he law normally expects the Government to avoid such situations, for example, . . . by asking Congress in advance to protect funds needed for more essential purposes with statutory earmarks . . . ").

186. Petition for a Writ of Certiorari, supra note 17, at 29.

187. Id.
tribes could recover unpaid portions of CSC costs through the Judgment Fund. This is the outcome the Supreme Court chose in Ramah.

While this is a possible outcome the courts can reach, it is far from the best outcome for future CSC dispute cases. As the Tenth Circuit stated, it is an "inefficient system of compensation..." but courts must still enforce the "legal effects of Congress'[s] intentional acts."188

If Congress is intent on paying less than the full amount of CSC costs, Congress can also alter the text of the ISDA to strip language classifying CSC agreements as contracts and make it explicit that the government is not required to fund the full amount of CSC contracts. The government recognizes that the more than $1 billion in unfunded CSCs is an important issue.189 While this would be a significant act on the part of Congress, if they decide CSC contracts are no longer worth funding in full, action equal to the importance of the issue is warranted.

While Congress certainly has the right to make fundamental changes to the ISDA, it is an action that would have dire consequences. It may effectively jeopardize the Self-Determination Era. The Self-Determination Era is widely considered to be the most successful period of relations between Native Americans and the federal government. Funding of CSC contracts is an important part of this. As discussed, CSCs are vital to the successful operation of tribal programs at the heart of the Self-Determination Era. An action that alters the effectiveness of or eliminates programs supported by CSCs threatens the future of the Self-Determination Era.

C. Full Payment of CSCs

Congress should pay the full amount of CSC requests to ensure the continued success of the ISDA and Self-Determination Era, and to uphold the spirit of the Supreme Court's Ramah decision. The best outcome would be for Congress to fulfill their contractual commitments, adhere to the spirit and text of the ISDA, and pay the full amount of their CSC obligations. This may be unrealistic given the tumultuous history of CSC disputes. However, when Congress passed the 1988 amendments to the ISDA, they recognized the importance CSC costs have to the success of the Self-Determination Era.190 The Committee on Indian Affairs went so far as to say "[f]ull funding of tribal indirect costs associated with self-determination contracts is essential if the federal policy of Indian Self-Determination is to

188. Ramah, 644 F.3d at 1077.
189. Petition for a Writ of Certiorari, supra note 17, at 29.
succeed.\textsuperscript{191} Surely Indians who depend on vital tribal programs feel the same.\textsuperscript{192}

As the Supreme Court noted in \textit{Ramah}, there is hope that Congress will fully fund CSCs.\textsuperscript{193} But given the history surrounding this issue, it is reasonable to be skeptical of this hope. Tribes and other interested parties must remain vigilant to ensure these vital costs are fully funded.

\textit{VIII. Conclusion}

The Supreme Court’s decision in \textit{Ramah} resolved a decades-long struggle of how to deal with underfunded CSCs. The decision supported the principles of the Self-Determination Era and reflected a need to maintain stability between tribes and the federal government. However, the legal principles advanced in \textit{Ramah} only represent half the battle. The $1 billion in unfunded CSCs threatens to hinder the success of the Self-Determination Era in the future.

The law requires that CSC contracts be paid in full. The existence of a statutory cap does not alter this outcome. Congress could have easily earmarked a specific amount of money to be paid to each tribe. Instead, Congress made an unrestricted lump-sum appropriation that was not sufficient to cover all of their obligations. Due to the contractual nature of the agreements, the obligations did not go away. The agencies were still free to allocate the money in any manner they felt appropriate. They could have fulfilled the government’s obligations just as easily as they made the decision to distribute the money on a pro rata basis. Of course, the agencies would never have been able to pay the full amount on all CSC contracts; however, the agencies’ “liability is not coterminous with [their] ability to pay.”\textsuperscript{194}

The statutory cap simply changes the source of recovery. Because of the cap, tribes cannot recover from the larger appropriation from which the CSC contract appropriation derived. Importantly, the ISDA intentionally

\textsuperscript{191} \textit{Id.} (emphasis added).


\textsuperscript{193} Salazar v. Ramah Navajo Chapter, 132 S. Ct. 2181, 2195 (2012) (“The Committee believes that the Bureau should pay all contract support costs for which it has contractually agreed and directs the Bureau to include the full cost of the contract support obligations in its fiscal year 2013 budget submission.”) (quoting H.R. REP. NO. 112-151, at 42 (2011)) (emphasis added).

\textsuperscript{194} Ramah Navajo Chapter v. Salazar, 644 F.3d 1054, 1076 (10th Cir. 2011).
provides another source of recovery tailor-made for the situation. It is entirely appropriate to pay the remainder of the CSCs through the CDA and Judgment Fund.

As the judiciary passes its duty on to the legislative branch, uncertainty abounds. How will Congress implement the principles of Ramah? If history is any indication, it is unlikely that Congress will fully fund CSCs. Hopefully, Congress and executive agencies will realize the importance of CSCs to Native Americans and fully fund them. CSCs are costs necessary to support vital programs in communities throughout the country. Anything less than full funding of CSCs burdens Native American communities and tribal trust in government contracting.