**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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| **BRISTOL BAY AREA HEALTH CORPORATION,** | ) | |
| **Plaintiff,** | ) | **No. 07-725C** |
| | ) | **(Judge Sweeney)** |
| **v.** | ) | |
| **UNITED STATES,** | ) | |
| **Defendant.** | ) | |

**DEFENDANT'S SUPPLEMENTAL BRIEF**

Pursuant to the Court's order of June 26, 2016, defendant, the United States, respectfully submits the following supplemental brief addressing the potential impact of the United States Supreme Court's recent decision in *Salazar v. Ramah Navaho Chapter*, No. 11-551 (U.S. June 18, 2012), upon the proceedings in this case. In this action, defendant moved to dismiss the complaint pursuant to the Rules of the United States Court of Federal Claims (RCFC) 12(b)(1) upon the ground that the Court lacks subject matter jurisdiction to entertain Bristol Bay Area Health Corporation's (Bristol Bay) claims for fiscal years (FY) 1997 and 1998 because they are barred by the six-year statute of limitations applicable under the Contract Disputes Act, 41 U.S.C. § 7101 *et seq*., (CDA). Defendant also moved to dismiss Bristol Bay's claims for FY 1995 because they are barred under the doctrine of *res judicata*. In addition, we moved to dismiss Bristol Bay's claims for FYs 1993-99, pursuant to RCFC 12(b)(6), for failure to state a claim upon which relief can be granted. As discussed, below, the Supreme Court's decision in *Ramah Navajo* has no impact upon our dispositive motion under Rule 12(b)(1) and the defense of *res judicata*, and it arguably supports our motion under Rule 12(b)(6).

## ARGUMENT

### 1. *Ramah Navajo*, Is Not Pertinent To The Government's Dispositive Motion, Which Does Not Involve The Issue Of A Statutory Appropriations Cap

The central issue decided *Ramah Navajo* concerns the Government's liability for underpaying a contract awarded under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq* (ISDEAA), where the underpayment was caused by insufficient Congressional appropriations, yet the ISDEAA limited the Government's obligation to pay contract support costs, "subject to the availability of appropriations." *See Ramah Navajo*, - - - S.Ct. - - -, 2012 WL 2196799 at *3, 4, 6. Specifically, the Supreme Court rejected the Government's argument that the "subject to the availability of appropriations language" in the ISDEAA served as an "express cap" that limited plaintiffs' right to recover contract support costs, and held that the Government was liable for the full amount of contract support costs *Id* at 3, 8.

In our motion to dismiss we did not assert the "statutory cap" defense. Rather, we argued that the Court lacks subject matter jurisdiction to entertain Bristol Bay's claims for FYs 1997 and 1998 because plaintiff failed to comply with 41 U.S.C. § 7103(a)(4), which requires, as a prerequisite to suit in this Court, that a contractor first present a claim to a government contracting officer within six-years of the accrual of the claim. *See* 41 U.S.C. § 7104(b)(3); *see also Arctic Slope Native Assoc. v. Sebelius*, 583 F.3d 785, 793 (Fed. Cir. 2009) (holding that "subject to any applicable tolling of the statutory time period, the timely submission of a claim to a contracting officer is a necessary predicate to the exercise of jurisdiction by a court . . . over a

contract dispute governed by the CDA").[1]

Furthermore, we moved to dismiss Bristol Bay's claims for FY 1995 pursuant to the doctrine of *res judicata* because, in 1995, Bristol Bay brought a lawsuit in the United States District Court for the District of Alaska to recover contract support costs, under the same FY 1995 contracts that are at issue in this case. That lawsuit, which is essentially the same claim for "all contract support costs" under the FY 1995 agreements that Bristol Bay is now making, was settled by the parties and dismissed with prejudice by the district court, and is thus barred by *res judicata*.

Thus, the Supreme Court's decision in *Ramah Navajo* clearly does not involve the issues raised in our motion to dismiss (and in our reply brief), *i.e.*, the statute of limitations, jurisdiction, and the defense of *res judicata*. Consequently, *Ramah Navajo* has no bearing upon the Government's motion to dismiss the FY 1995, 1997 and 1998 claims upon those grounds.

**2. *Ramah Navajo Supports The Government's Motion To Dismiss Claims Under RCFC 12(b)(6)***

With respect to Bristol Bay's claims for FYs 1993-99 that may survive the Government's motion to dismiss for being time-barred, or barred by *res judicata*, we argued in our dispositive motion that the remaining claims are subject to dismissal pursuant to RCFC 12(b)(6). The gist of Bristol Bay's complaint is that the Government failed "to pay the full CSC required by the

[1] Concurrent with its decision in *Ramah Navajo*, the Supreme Court vacated judgment in *Arctic Slope Native Assn., Ltd. v. Sibelius*, 629 F.3d 1296 (Fed. Cir. 2010) (holding that the Government had no liability to pay contract support costs beyond the statutory cap), and remanded the case to the United States Court of Appeals for the Federal Circuit for further consideration in light of *Ramah Navajo*. *See Arctic Slope Native Assn., Ltd. v. Sibelius*, - - - S. Ct. - --, 2012 WL 2369663 (No. 11-83, June 25 2012). *Ramah Navajo*, however, has no effect upon the Federal Circuit's *prior Arctic Slope* decision, *i.e.*, *Arctic Slope*, 583 F.3d 785, as it pertains to the six-year statute of limitations applicable in CDA cases.

ISDEAA"; in other words, that defendant failed to pay Bristol Bay an additional amount of indirect CSC required by statute, above and beyond what was specified in the contracts. *See* Compl. ¶ 3. Such an allegation, however, runs directly counter to the Supreme Court's holding in *Cherokee Nation*, which mandates that an ISDEAA contract be treated as any other procurement contract, where the parties are to rely on the terms and conditions therein. *Cherokee Nation v. Leavitt*, 543 U.S. 631, 643-45 (2005).

At the heart of our argument, therefore, is the ISDEAA which does not require the United States to pay an additional amount of support costs beyond the amounts to which the parties expressly agreed to by contract. Consequently, because Bristol Bay does not allege that the Government failed to pay the amounts promised in seven contracts for FYs 1993 through 1999, there has been no breach of contract and Bristol Bay fails to state a claim upon which the Court can grant relief.

In *Ramah Navajo*, the Supreme Court emphasized that "the Government's obligation to pay contract support costs should be treated as an ordinary contract promise, noting that the ISDA 'uses the word 'contract' 426 times to describe the nature of the Government's promise.'" *Ramah Navajo*, 2012 WL 2196799 *5 (quoting *Cherokee Nation*, 543 U.S. at 639)). The Court in *Ramah Navajo* "declin[ed] the Government's invitation to ascribe 'special, rather than ordinary' meaning to the fact that ISDA makes contracts 'subject to the availability of appropriations.'" *Ramah Navajo*, 2012 WL 2196799 *8 (quoting *Cherokee Nation*, 543 U.S. at 644).

In short, *Ramah Navajo* stands for the proposition that ISDEAA contracts are to be treated as "ordinary contracts" that constitute binding promises, even in the face of statutory caps

on appropriations that would otherwise limit funding levels for specific contracts (resulting in non-payment of the full contractual amount). *Id.* *Ramah Navajo*, therefore, arguably supports our position that the contracts into which Bristol Bay entered with the Government are to be treated as "ordinary contracts" that are binding upon *both* parties, and that Bristol Bay is not entitled to a windfall of payment beyond the amount the parties expressly agreed upon in their contract.

**CONCLUSION**

For these reasons, we respectfully submit that the Supreme Court's decision in *Ramah Navajo* has no impact upon our dispositive motion under Rule 12(b)(1) and the defense of *res judicata*, but that it arguably supports our motion under Rule 12(b)(6).

Respectfully submitted,

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July 18, 2012

**CERTIFICATE OF FILING**

I hereby certify that on the 18th day of July, 2012, a copy of the foregoing "DEFENDANT' SUPPLEMENTAL BRIEF " was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/Joseph A. Pixley