

No. 08-2262

ORAL ARGUMENT HELD ON NOVEMBER 16, 2009

---

**In The United States Court of Appeals  
for the Tenth Circuit**

---

RAMAH NAVAJO CHAPTER, *et al.*,

Plaintiffs-Appellants,

v.

KENNETH L. SALAZAR, Secretary of the Interior, *et al.*,

Defendants-Appellees.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO  
The Honorable C. LeRoy Hansen, Judge

---

**SUPPLEMENTAL BRIEF FOR THE APPELLEES**

---

TONY WEST  
*Assistant Attorney General*

GREGORY J. FOURATT  
*United States Attorney*

BARBARA C. BIDDLE  
(202) 514-2541  
JOHN S. KOPPEL  
(202) 514-2495  
*Attorneys, Appellate Staff  
Civil Division, Room 7264  
Department of Justice  
950 Pennsylvania Ave., NW  
Washington, D.C. 20530-0001*

---

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
ARGUMENT.....	2
<i>ARCTIC SLOPE</i> DEMONSTRATES THAT THE DISTRICT COURT’S JUDGMENT THAT PLAINTIFFS ARE NOT ENTITLED TO CONTRACT SUPPORT COSTS UNDER ISDA IN EXCESS OF ANNUAL STATUTORY CAPS IMPOSED BY CONGRESS SHOULD BE AFFIRMED.....	2
CONCLUSION.....	11
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF DIGITAL SUBMISSION	
CERTIFICATE OF SERVICE	

**TABLE OF AUTHORITIES**

<b>Cases:</b>	<b><u>Page</u></b>
<i>Arctic Slope Native Ass’n, Ltd. v. Sebelius</i> , No. 2010-1013, ___ F.3d ___, 2010 WL 5129708 (Fed. Cir. Dec. 15, 2010).....	passim
<i>Babbitt v. Oglala Sioux Tribal Pub. Safety Dep’t</i> , 194 F.3d 1374 (Fed. Cir. 1999), <i>cert. denied</i> 530 U.S. 1203 (2000).....	3, 7, 10
<i>Cherokee Nation of Okla. v. Leavitt</i> , 543 U.S. 631 (2005).....	2-3, 6
<i>C.H. Leavell &amp; Co. v. United States</i> , 208 Ct. Cl. 776, 530 F.2d 878 (Ct. Cl. 1976).....	1, 4-6
<i>Ferris v. United States</i> , 27 Ct. Cl. 542 (Ct. Cl. 1892).....	3, 4-6
<i>Lincoln v. Vigil</i> , 508 U.S. 182 (1993).....	7
<i>New York Airways, Inc. v. United States</i> , 369 F.2d 743 (Ct. Cl. 1966).....	9
<i>Office of Personnel Management v. Richmond</i> , 496 U.S. 414 (1990).....	10
<i>Ramah Navajo Sch. Bd. v. Babbitt</i> , 87 F.3d 1338 (D.C. Cir. 1996). ....	3, 7-8, 10
<i>S.A. Healy Co. v. United States</i> , 576 F.2d 299 (Ct. Cl. 1978). ....	3, 8
<i>Sutton v. United States</i> , 256 U.S. 575 (1921). ....	6
<i>Thompson v. Cherokee Nation of Okla.</i> , 334 F.3d 1075 (Fed. Cir. 2003), <i>aff’d sub nom. Cherokee Nation of Okla.</i> <i>v. Leavitt</i> , 543 U.S. 631 (2005).....	3
<i>Winston Bros. Co. v. United States</i> , 131 Ct. Cl. 245, 130 F. Supp. 374 (1955). ....	1, 7

**Administrative Rulings:**

*In re Newport News Shipbuilding & Dry Dock Co.*, 55 Comp. Gen. 812  
(1976). ..... 3, 6

**Constitution:**

United States Constitution:  
Appropriations Clause, art. I, § 9, cl. 7..... 9-10

**Statutes:**

Indian Self-Determination and Education Assistance Act:  
25 U.S.C. §§ 450-450bbb-2..... 1  
25 U.S.C. § 450j(c)(1). ..... 10  
25 U.S.C. § 450j-1(b). ..... 10  
25 U.S.C. § 450j-1(c). ..... 8

## INTRODUCTION

Defendants-appellees Kenneth L. Salazar, *et al.*, submit the instant supplemental brief in response to the Court's order directing the parties to "file supplemental briefs of no more than 15 pages in length addressing *Arctic Slope Native Association, Ltd. v. Sebelius*, No. 2010-1013, \_\_\_ F.3d \_\_\_ (Fed. Cir., Dec 15, 2010), and the cases cited therein, particularly *Winston Bros. Co. v. United States*, 131 Ct. Cl. 245 (1955), and *C.H. Leavell & Co. v. United States*, 208 Ct. Cl. 776 (1976)." Order, December 22, 2010.<sup>1</sup>

*Arctic Slope* and the cases cited therein militate strongly in favor of affirmance of the district court's judgment in the instant case. *Arctic Slope* involved the same issue as the present case; it is not meaningfully distinguishable in any respect, and its correct reasoning compels the conclusion that plaintiffs in this action under the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. §§ 450-450bbb-2, cannot recover contract support costs ("CSC") in excess of annual statutory caps imposed by Congress.

Like the *Arctic Slope* appellants, plaintiffs seek ISDA CSC payments in excess of the annual statutory caps, and the outcome in this action should be the same as in

---

<sup>1</sup> *Arctic Slope* is not yet published in the Federal Reporter series, but can be found at 2010 WL 5129708. All citations in this brief will be to the Westlaw version of the opinion.

*Arctic Slope*. As we have shown in our brief (“Gov’t Br.”) and at oral argument, the “subject to the availability of appropriations” language in ISDA and plaintiffs’ contracts must be respected in light of the capped appropriations, and is controlling here.

## ARGUMENT

### ***ARCTIC SLOPE* DEMONSTRATES THAT THE DISTRICT COURT’S JUDGMENT THAT PLAINTIFFS ARE NOT ENTITLED TO CONTRACT SUPPORT COSTS UNDER ISDA IN EXCESS OF ANNUAL STATUTORY CAPS IMPOSED BY CONGRESS SHOULD BE AFFIRMED.**

The legal issue in *Arctic Slope* -- whether the government is obligated to pay CSC under ISDA in excess of annual statutory caps imposed by Congress -- is identical to the issue before the Court on this appeal. The Federal Circuit has now answered this question in the negative, and we respectfully urge this Court to do the same.

A. The Federal Circuit found the contractual “availability clause,” coupled with the “not to exceed” language in annual appropriations acts, dispositive (*Arctic Slope*, 2010 WL 5129708 at \*4-5), and specifically rejected several arguments that have also been raised by plaintiffs in the instant case. The Court not only distinguished *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005) -- which concerned years in which there was no statutory cap on CSC, and other, unrestricted

funds were available to pay CSC -- but also concluded that *Cherokee* “implicitly” recognizes that “‘not to exceed’ language imposes a binding statutory cap,” and thus supports the government’s position on the issue *sub judice*.<sup>2</sup> See *Arctic Slope*, 2010 WL 5129708 at \*4-7; Gov’t Br. 16-38.

Moreover, like defendants here, the Federal Circuit relied upon *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep’t*, 194 F.3d 1374 (Fed. Cir. 1999), *cert. denied*, 520 U.S. 1203 (2000), and *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996) -- both of which concerned years with statutory caps. See *Arctic Slope*, 2010 WL 5129708 at \*4, 7; Gov’t Br. 17-18, 28-29, 33-35, 36 n.11. The Federal Circuit also rejected the *Arctic Slope* appellants’ reliance upon *Ferris v. United States*, 27 Ct. Cl. 542 (Ct. Cl. 1892), *S.A. Healy Co. v. United States*, 576 F.2d 299 (Ct. Cl. 1978), and *In re Newport News Shipbuilding & Dry Dock Co.*, 55 Comp. Gen. 812 (1976) -- all of which plaintiffs-appellants have invoked in this case, and all of which the government has already addressed in its principal brief. See *Arctic Slope*, 2010 WL 5129708, \*5-8 & n.7; Gov’t Br. 39-44, 46-49, 33 n.9.

---

<sup>2</sup> We note that the Supreme Court’s decision in *Cherokee* affirmed a judgment of the Federal Circuit (*Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003)), which the *Arctic Slope* Court also discussed at great length in its opinion. See 2010 WL 5129708 at \*1-5.

B. *Ferris* held that “where 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.” *Arctic Slope*, 2010 WL 5129708 at \*5 (citing *Ferris*, 27 Ct. Cl. at 546). In distinguishing *Ferris* (as the government has done here as well, *see* Gov’t Br. 39-44), the Federal Circuit stressed that “subsequent to *Ferris*, ‘subject to the availability of appropriations’ language was adopted to change the *Ferris* rule by providing the required notice to the contractor.” *Arctic Slope*, 2010 WL 5129708 at \*6. The Federal Circuit also cited (*ibid.*) the decision of its predecessor court, the Court of Claims, in *C.H. Leavell & Co. v. United States*, 208 Ct. Cl. 776, 530 F.2d 878 (Ct. Cl. 1976), in support of this proposition.

In *Leavell*, the Court of Claims recognized that damages for breach of contract are unavailable in the face of a “funds available” provision.” *See id.* at 892. The *Arctic Slope* Court emphasized this point, stating that “before the incorporation of ‘subject to the availability of appropriations’ language” into government contracts, “‘a failure on the part of Congress for any reason to fund an existing Government contract was held to be a breach of contract.’” *Arctic Slope*, 2010 WL 5129708 at \*6 (citing *Leavell*, 530 F.2d at 892). The Court stated that the *Leavell* court “further noted that ‘subject to the availability of appropriations’ provisions were included in contracts to overcome the *Ferris* rule by providing notice to the contractor of the

limitation on funding.” *Ibid.* The *Arctic Slope* Court thus found the analysis of the *Leavell* court squarely applicable to the controversy before it, because “[t]he present contract includes such an availability of funds provision; the contract explicitly states that CSC funding is subject to the availability of appropriations.” *Ibid.* (citation omitted). The same is true in the instant case.

The *Leavell* court held that a “funds available” provision precluded a claim for breach of contract, but not a claim for equitable adjustment based upon a suspension of work due to inadequate funding. The latter holding does not advance plaintiffs’ claim in the case at bar, however, because plaintiffs are seeking damages rather than equitable adjustment based upon a suspension of work. All that matters for present purposes, therefore, is *Leavell*’s gloss on the *Ferris* rule (which was the sole reason *Arctic Slope* discussed *Leavell*). The Federal Circuit thus concluded that “[i]n view of the statutory cap, we hold that the *Ferris* approach is inapplicable.” *Arctic Slope*, 2010 WL 5129708 at \*7.

Contrary to plaintiffs’ submission in their letter of December 21, 2010 (“Pl. Letter”) -- responding to our Fed. R. App. P. 28(j) letter of December 15, 2010 bringing *Arctic Slope* to this Court’s attention -- the Federal Circuit did not “misread[]” *Leavell* in *Arctic Slope* (see Pl. Letter 1), but instead correctly interpreted one of its predecessor court’s precedents. *Leavell* did not “concern[] a unique ‘Funds

Available for Payments' clause," as plaintiffs contend. Pl. Letter 1. Rather, as *Leavell* itself states, "in the years preceding the adoption of a funds available clause in the early 1920s, a failure on the part of Congress for any reason to fund an existing Government contract was held to be a breach of contract." 530 F.2d at 892 (citing *Ferris*). It is thus clear that *Leavell* involved a generic situation, not an isolated or unique set of facts. The generic "funds available" clause -- the precursor of the "subject to the availability of appropriations" language found in both the ISDA statute and ISDA contracts -- is precisely what the Court of Claims was referring to in *Leavell*.<sup>3</sup>

*Arctic Slope* consequently distinguished *Cherokee*, *Ferris* and *In re Newport News Shipbuilding & Dry Dock Co.*,*supra*, on the ground that in *Arctic Slope*, unlike those cases, "here there is a statutory cap and no ability to reallocate funds from non-contract uses" (*Arctic Slope*, 2012 WL 5129708 at \*6 & n.7) -- a distinction that is equally dispositive in the case at bar. The *Arctic Slope* Court held that "[i]n view of the statutory cap, . . . the *Ferris* approach is inapplicable," and that "[t]he availability

---

<sup>3</sup> *Arctic Slope*'s analysis of *Ferris* and *Leavell* is also consistent with *Sutton v. United States*, 256 U.S. 575, 581 (1921), where "the Supreme Court held that where the appropriation is for a specific project, the contractor is deemed to have notice of the limitation on appropriations and has no right to recover for work done in excess of the appropriation." *Arctic Slope*, 2010 WL 5129708 at \*5 n.5. In *Arctic Slope* and the instant case, plaintiffs unquestionably had notice of the limitation on appropriations.

of funds provision coupled with the ‘not to exceed’ language limits the Secretary’s obligation to the tribes to the appropriated amount.” *Arctic Slope*, 2012 WL 5129708 at \*7. Accordingly, the Court concluded that “[t]he Secretary is obligated to pay no more than the statute appropriates.” *Ibid.* (citing *Oglala Sioux*, 194 F.3d at 1378, and *Ramah Navajo Sch. Bd.*, 87 F.3d at 1345). The same reasoning applies here, where “the appropriated amount has been paid to the tribes,” just as in *Arctic Slope*. *Ibid.*

C. The *Arctic Slope* Court cited *Winston Bros. Co. v. United States*, 131 Ct. Cl. 245, 130 F. Supp. 374 (1955), for the proposition that “[e]ven though the Secretary is under no obligation to reallocate funds from one tribe to benefit another, the Secretary *may* have a duty to allocate funds among the tribes in a rational, non-discriminatory way.” *Arctic Slope*, 2010 WL 5129708 at \*7 n.8 (citing *Winston*, 130 F. Supp. at 380 (emphasis added)). The Court then cited *Lincoln v. Vigil*, 508 U.S. 182 (1993), for the opposing proposition that “[a]s long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives . . . the decision to allocate funds is committed to agency discretion by law.” *Arctic Slope*, 2010 WL 5129708 at \*7 n.8 (citing *Lincoln v. Vigil*, 508 U.S. at 193). The *Arctic Slope* Court held that “[w]e need not decide that issue in this case” (*ibid.*) -- just as this Court need not do so, because the Secretary’s pro rata allocation of the limited CSC funds satisfies either standard of review. *See* Gov’t Br. 6 (citing *Ramah Navajo*

*Sch. Bd.*, *supra*, 87 F.3d at 1348-49, endorsing Secretary's pro rata approach). Furthermore, in the instant case, as in *Arctic Slope*, "[t]he method of allocating funds among the various tribes is not at issue." 2010 WL 5129708 at \*7.

D. The *Arctic Slope* Court also rejected the argument that "the Secretary breached the contract by not requesting sufficient appropriations," finding this assertion to be "without merit." *Arctic Slope*, 2010 WL 5791208 at \*7. The Court found *S.A. Healy Co. v. United States*, *supra*, inapposite, because "in holding that the contractor should not bear the risk of loss, the court relied on the fact that 'the contractor was not warned of the lack of funding.'" 2010 WL 5791208 at \*7 (citing 576 F.2d at 306).

Here, in contrast -- as in *Arctic Slope* -- not only is it "not clear that the Secretary failed to request adequate funding" (*id.* at \*8), but more importantly, "[a]s required by statute, the Secretary 'prepare[d] and submit[ted] to Congress an annual report . . . includ[ing] an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted.'" *Ibid.* (footnote omitted; citing 25 U.S.C. § 450j-1(c)); *see also* Gov't Br. 48 and Appendix material cited therein. And most importantly of all, "whether or not the Secretary could take further action to request additional funding, the contractor was expressly warned of the risk that funding would be inadequate,"

and “[t]he contract explicitly specified that funding may be inadequate to fully fund the Secretary’s obligations.” 2010 WL 5129708 at \*8 (citation omitted); see Gov’t Br. 5-6 and Appendix material cited therein. In the case at bar, as in *Arctic Slope*, “[u]nder such circumstances there can be no breach resulting from an alleged failure to request adequate funding.” 2010 WL 5129708 at\*8.

E. Finally, although plaintiffs have asserted primarily that *Arctic Slope* “was wrongly decided and should not be followed” (Pl. Letter 1), based upon plaintiffs’ letter of December 21, 2010 we anticipate that plaintiffs may also attempt to distinguish *Arctic Slope*, invoking arguments that we have already refuted in our brief. See Pl. Letter 2. Any such distinction would be groundless, as *Arctic Slope* involves the very same issue presented here. Moreover, defendants have already rebutted plaintiffs’ misplaced reliance upon *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966) (see Gov’t Br. 35-36), as well as their equally mistaken assertion that the government “conceded” in *Southern Ute* the issue before the panel here (see Gov’t Br. 49-55). We respectfully direct the Court to the responses set forth in our brief to plaintiffs’ misguided arguments on these points.

\* \* \* \* \*

In closing, we reiterate the bedrock principle that under the Appropriations Clause of the Constitution, Art. I, § 9, cl. 7, “no money can be paid out of the

Treasury unless it has been appropriated by an act of Congress.” *Office of Personnel Management v. Richmond*, 496 U.S. 414, 424 (1990) (citation omitted). The plain language of both ISDA and plaintiffs’ ISDA contracts states that CSC can only be paid “subject to the availability of appropriations.” *See* 25 U.S.C. §§ 450j-1(b), 450j(c)(1); Gov’t Br. 4-6. Accordingly, we urge the Court to heed the teaching of the Federal Circuit in both *Arctic Slope, supra*, and *Oglala Sioux, supra*, and that of the D.C. Circuit in *Ramah Navajo Sch. Bd., supra*, and to affirm the correct judgment of the district court that plaintiffs may not recover CSC in excess of the annual statutory caps imposed by Congress.

## CONCLUSION

For the foregoing reasons, and for the reasons set forth in defendants' principal brief and at oral argument, the judgment of the district court should be affirmed.

Respectfully submitted,

TONY WEST  
*Assistant Attorney General*

GREGORY J. FOURATT  
*United States Attorney*

BARBARA C. BIDDLE  
[Barbara.Biddle@usdoj.gov](mailto:Barbara.Biddle@usdoj.gov)  
(202) 514-2541

s/ JOHN S. KOPPEL  
[John.Koppel@usdoj.gov](mailto:John.Koppel@usdoj.gov)  
(202) 514-2495  
*Attorneys, Appellate Staff  
Civil Division, Room 7264  
Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530-0001*

**JANUARY 2011**

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that the text of this brief complies with the typeface requirements and type style requirements of Federal Rule of Appellate Procedure 32(a)(5)(B) and 10th Circuit Rule 32(a). Pursuant to the Court's order of December 22, 2010, the text of the supplemental brief does not exceed 15 pages.

s/ John S. Koppel  
JOHN S. KOPPEL  
Attorney

## CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2011, I filed and served the foregoing “SUPPLEMENTAL BRIEF FOR THE APPELLEES” by submitting a digital copy via the ECF system and causing 7 hard copies to be dispatched to the Clerk of this Court by Federal Express overnight delivery, and by effecting service via the ECF system upon the following counsel:

Michael P. Gross, Esq.  
M.P. Gross Law Firm, P.C.  
460 St. Michael’s Drive, No. 401  
Santa Fe, New Mexico 87505  
[mpgross@cnsf.com](mailto:mpgross@cnsf.com)

Geoffrey D. Strommer, Esq.  
Hobbs, Straus, Dean & Walker, LLP  
806 SW Broadway, Suite 900  
Portland, OR 97205  
[gstrommer@hobbstrauss.com](mailto:gstrommer@hobbstrauss.com)

C. Bryant Rogers, Esq.  
Van Amberg, Rogers, Yepa, Abeita  
& Gomez, LLP  
P.O. Box 1447  
Santa Fe, New Mexico 87504  
[cbrogers@nmlawgroup.com](mailto:cbrogers@nmlawgroup.com)

Lloyd B. Miller, Esq.  
Sonosky, Chambers, Sachse,  
Miller & Munson, LLP  
900 West Fifth Avenue, Suite 700  
Anchorage, AK 99501  
[lloyd@sonosky.net](mailto:lloyd@sonosky.net)

s/ John S. Koppel  
JOHN S. KOPPEL  
Attorney

## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that:

1. all required privacy redactions have been made and, with the exception of such redactions, this document is an exact copy of the written document filed with the Clerk; and
2. the digital submission has been scanned for viruses with the most recent version of the following commercial virus scanning program, which indicates that the submission is free of viruses.

Program: Microsoft Forefront Client Security

Version: 1.97.314.0

Last Updated: January 25, 2011

s/ John S. Koppel  
JOHN S. KOPPEL  
Attorney