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April 20, 2012

VIA ELECTRONIC MAIL

PRIVILEGED AND CONFIDENTIAL

MEMORANDUM NO. 13A-2012

TO: **National Tribal Contract Support Cost Coalition**

FROM: **Sonosky, Chambers, Sachse, Miller & Munson, LLP**

SUBJECT: **Discussion Regarding April 18, 2012 Oral Argument in *Salazar v. Ramah* Case before U.S. Supreme Court**

Earlier this week we forwarded to you a copy of the Wednesday Supreme Court oral argument transcript in the *Ramah* contract support cost class action case against the BIA. Today we offer a few thoughts about the argument.

Overall, the Justices' questions revealed a very wide range of potential views. That is, unlike a majority of cases, there did not appear to be a consensus across at least five of the nine Justices about how to resolve the case.

At one end of the spectrum, Justice Kagan and Justice Sotomayor appeared deeply troubled by the government's position that a tribal contractor has no contractual right to full payment when an appropriation is large enough to pay the contractor in full. While each Justice came at the issue from somewhat different angles, Justice Kagan's concluding remarks summed things up well: "This is a very -- this is a very strange kind of contractual right. The -- the contracting tribe has a right to have the Secretary to use discretion to decide how much the contracting tribe gets. What kind of contract is that?"

Earlier in the argument Justice Sotomayor expressed a similar sentiment. ("[W]hat you're saying is you make two promises on the ISDA. We're going to pay you your support

costs, your administrative costs, in full, and we're going to retain the right to break that promise. That's really what you're saying the ISDA says.") At a more technical level, Justice Sotomayor and Justice Kagan argued strongly that the so-called Ferris Doctrine (which has long protected contractors who are paid out of an appropriation that is insufficient in aggregate to pay all contractors covered by it) applies squarely to the situation presented here, and they each used hypotheticals involving multiple contractors to prove their points. But their questions were not always consistent, and Justice Sotomayor suggested at one point that perhaps the Ferris Doctrine should be modified where, as is the case here—and unlike the usual contracting situation—the Secretary is forced to award contracts without regard to the condition of his appropriation.

At the other end of the spectrum appeared to be Justice Breyer and Justice Kennedy. Justice Breyer was particularly aggressive in insisting that this case was different from the classic Ferris Doctrine situation. Justice Breyer based this position on the fact that the "availability of appropriations" point was not just a general background principle, but was a statement actually included in every self-determination contract. Justice Breyer argued that this had apparently not been the situation in the original case which gave rise to the Ferris Doctrine.

Justice Kennedy also seemed generally skeptical of the tribal position, repeatedly charging that the tribal argument meant that Congress's appropriations cap was meaningless, because the Tribes that chose to litigate would end up getting paid through the Judgment Fund. He appeared dismissive of the response that the purpose of the limited CSC appropriation was to protect the rest of the BIA's appropriation from being invaded to pay contract support costs, and he seemed equally dismissive of the point that a litigating Tribe would not be suing to secure more contract payments, but instead would be seeking money damages caused by the government's underpayment.

The other Justices were somewhat harder to categorize.

Justice Ginsburg appeared to agree with Justice Kennedy's skepticism, saying the Tribes' position meant that the Tribes which sued would end up getting paid in full, while the contracting Tribes that did not sue would end up short, something she found Congress unlikely to have intended. At the same time, however, she questioned whether the BIA might have been responsible for proposing the insufficient CSC appropriations.

Justice Scalia appeared more accepting of the Tribes' position, arguing that the basic Ferris Doctrine question had already been resolved in the *Cherokee* case, and he spent time discussing with counsel the various ways that Congress could address the issue in the future if the Court were to accept the tribal position. He saw little relevance in the fact that there was a cap on total contract support cost appropriations, essentially asking at one point why the overall cap on the CSC appropriation should even matter. Later Justice Scalia added that a tribal contractor cannot be expected to know how the agency is spending its appropriation. But, Justice Scalia also asked whether knowledge of the appropriations' insufficiency could be "imputed" to the Tribes nonetheless.

Chief Justice Roberts asked a few questions and seemed skeptical of both sides' arguments. He suggested that the BIA's pro rata system would encourage Tribes to 'game' the system by demanding a contract for more than was actually needed, figuring the true need, after a pro rata reduction, would then be fully funded. And, he pressed the government attorney on the breadth of the discretion the agency was claiming to set the contract price for each Tribe. But, in discussing what Congress might do differently, Chief Justice Roberts also seemed to suggest that it made more sense for the agency to set the contract dollar amounts, rather for Congress to do so.

Justice Thomas asked no questions, and Justice Alito asked only one (addressed to the timing of when contracts are awarded).

In short, one could say that, as a group, the Justices were 'all over the map' and lacked any clear consensus about how to resolve the case. Our best guess is that Justices Sotomayor, Kagan and Scalia were favorable to the Tribes' position, Justices Breyer, Kennedy and Ginsburg were skeptical, and Justices Thomas and Alito, along with Chief Justice Roberts, did not clearly indicate their view. Keep in mind, however, that under their internal procedures none of the nine Justices had conferred with one another before the argument. As a result, the Justices were hearing one another's views for the very first time. Thus, while the Justices may have come into the courtroom somewhat divided 3 to 3, with the three remaining Justices undecided (one possible reading of yesterday's proceedings), it is quite possible that, by the time the Justices confer privately and take their first vote on the case today, their views will have shifted again.

Given the tenor of Wednesday's argument, we cannot offer even a general prediction of how the case seems likely to be resolved. Indeed, we note that this uncertainty is shared by the other courtroom observers who have written in the blogosphere. What we can say, however, is that the five pro-tribal briefs that were presented to the Court collectively set forth a very powerful case in favor of the tribal position, and we are heartened that at least two of the Justices understand very clearly the full range of the arguments that are presented in those briefs. Our hope is that, in their private conference and subsequent deliberations, those two Justices will lead the way and persuade at least three of their colleagues to join them.

The Court's current 2011 Term ends at the end of June. A decision in the *Ramah* case can therefore be expected anytime from mid-May until the Term ends, with an Order in the *Arctic Slope* case to follow shortly afterward.

Sincerely,

SONOSKY, CHAMBERS, SACHSE,
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By: Lloyd B. Miller