

# A Most Unusual Alliance: Indian Tribes and Military Contractors Vindicate First Principles in the Ramah Litigation

*By Lloyd B. Miller*

## Introduction

On June 18, 2012, the Supreme Court reaffirmed a bedrock contract law principle: when an agency over-commits itself to pay too many contracts, government contractors who have fully performed retain enforceable rights to be paid in full and can recover damages for any underpayment.<sup>1</sup> In so doing, the Court rolled back an effort by the United States to undo over a century of government contract law and rejected the notion that an overcommitted agency has unreviewable discretion to limit a contractor's payment rights to whatever sum the agency chooses.

While the case is important in its own right, it is especially intriguing that the principal advocates in the case were Indian tribes and military contractors.<sup>2</sup> This unusual alliance came about because of a little known fact: Indian Tribes routinely administer some \$3 billion annually in government contracts awarded by the Bureau of Indian Affairs (BIA) and Indian Health Service (IHS).<sup>3</sup> Under these contracts over 350 Tribes and intertribal organizations from Maine to Alaska run federal hospitals and clinics, law enforcement programs, educational and housing assistance programs, and a wide range of other federal programs established to serve Native American people on Indian reservations.

Although the law giving rise to these contracts is unique to Indian tribes,<sup>4</sup> Congress ensured the contracts are subject to the same body of law applicable to other government contracts.<sup>5</sup> Indian tribes and military contractors thus had a common interest in having the Court reaffirm bedrock principles of government contract law. This joint effort was ultimately successful, overcoming adverse precedent from the Federal Circuit and other lower courts.

## Background

The Indian Self-Determination and Education Assistance Act of 1975 (ISDA)<sup>6</sup> directs the BIA and the IHS to enter into binding contracts with Indian Tribes and tribal organizations.<sup>7</sup> Under these "self-determination contract[s]," the agencies contract with the Tribes to administer various federal programs on Indian reservations and in other areas served by the agencies. The goal of this nearly 40-year-old initiative is to promote "greater tribal self-reliance"<sup>8</sup> and reduce "Federal domination of Indian service programs [that] has served to retard ... the realization of [tribal] self-government."<sup>9</sup> Significantly, the agencies are required to award self-determination contracts to a tribe upon request, so long as there are no threshold issues warranting the agency to "decline" a contract award.<sup>10</sup> Over time, the agencies have awarded thousands of contracts to hundreds of Indian tribes and inter-tribal organizations across the country, and many have excelled in running contracted federal programs.<sup>11</sup>

Contracts awarded under the ISDA are true contracts in

every sense of the word.<sup>12</sup> Like other government contracts, they are fully enforceable under the Contract Disputes Act,<sup>13</sup> which authorizes "monetary awards" against the government on contract claims<sup>14</sup> and directs such awards "shall be paid promptly" from the Judgment Fund.<sup>15</sup> The issue, then, is what does each contract actually require the government to pay.

The ISDA commands the contract price shall be comprised of two parts. First, the price must include the amount the agency itself would spend in its direct operation of the contracted program if the agency were administering the program instead of the tribe.<sup>16</sup> Second, the price must include the additional fixed overhead and related costs (including insurance, annual audit and other "indirect costs") that the tribe will incur in operating the contract.<sup>17</sup> These additional costs are "contract support costs."<sup>18</sup>

As is typical in government contracting, payment of the contract price is conditional on Congress appropriating sufficient funds to pay the contract. Since annual ISDA contracts are put into place well before the start of the fiscal year of performance (and even before the enactment of any appropriation to cover the coming year of performance), the ISDA provides that all contract payments are "subject to the availability of appropriations."<sup>19</sup> This language is common in government contracts and related authorizing statutes, and in 2005 the Supreme Court explained this clause "makes clear" the contract "will not become binding unless and until Congress appropriates funds for that year."<sup>20</sup>

By now the reader may suspect where this is going: hundreds of ISDA contracts are awarded across the country every year, after which appropriations are enacted and performance begins. But the appropriations for overhead costs come in amounts insufficient to pay all the contracts in full, leading the agencies to underpay the overhead costs due on the contracts. Because these unreimbursed costs are fixed, contractors are forced to divert funds from the delivery of program services to cover the costs.<sup>21</sup> Indeed, this is the dilemma that has plagued the ISDA contracting regime almost since its inception.

This dilemma may be particularly acute in the tribal contracting regime, but its resolution lies in well-settled principles of federal contracting and appropriations law.

## Controlling Principles

Contract funding problems under the ISDA have arisen in two settings. Initially, each agency budgeted internal amounts to pay tribal contracts out of the agencies' larger operating appropriations. Later, Congress stepped in and limited each agency's appropriation for contract payments to a statutorily earmarked sum. Both the internally budgeted amounts and the statutorily earmarked amounts consistently proved to be insufficient to pay for all the contracts the agencies awarded. The

persistence of the underpayments, sometimes totaling millions of dollars for individual tribal contractors, produced considerable litigation and conflicting circuit court opinions,<sup>22</sup> compelling the Supreme Court to step in not once, but twice.

In 2005, the Supreme Court resolved the “internal agency budget” setting in favor of the tribal contractors. The Court ruled that when an agency has sufficient overall appropriations from Congress to pay a contract, the agency acts at its peril when it sticks to its internal budgets and prioritizes other expenditures over the contract.<sup>23</sup> Reversing the Tenth Circuit and overruling the Ninth Circuit,<sup>24</sup> the Court might have left it at that. After all, it had long been settled law that an agency facing a contract obligation payable out of a lump-sum appropriation has a duty to reprogram its internal budget to meet that contract obligation.<sup>25</sup> But the Court went further and reaffirmed the deeper principle at work. Invoking the “Ferris Rule,” the Court observed when Congress appropriates sufficient funds to pay a contractor in full, the contractor is entitled to be paid—or to pursue damages for any non-payment—“even if an agency’s total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made.”<sup>26</sup>

In June 2012, the Supreme Court confronted the second setting: a statutory cap on the total amount of funds the

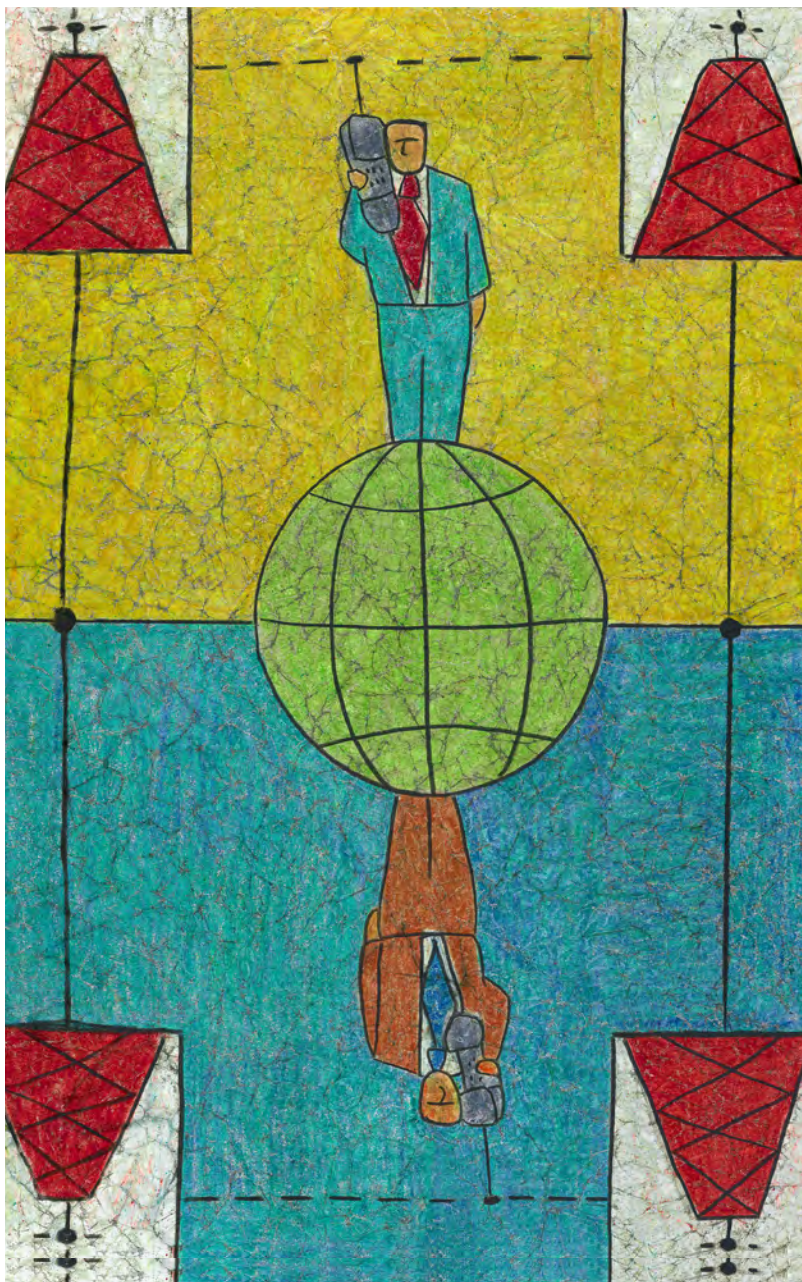
agency could spend on all tribal contracts.<sup>27</sup> This time, the agency correctly argued that it was impossible to reprogram funds from other agency priorities because a statutory earmark prohibits an agency from augmenting the earmarked amount from other sources. The agency further argued that if the government were held liable for the full amount of every tribal contract, then the government agents who signed the contracts had violated the Anti-Deficiency Act<sup>28</sup> by committing the United States to pay sums in excess of an appropriation.<sup>29</sup> In response, the tribal contractors argued the risk of such a loss must fall on the agencies, since a contractor has no way of tracking the condition of an appropriation on the agency’s books, has no way of knowing in advance the agency may run out of funds, and has no way of knowing what the agency will do if it finds funds are running short.

The Court agreed with the tribes, reiterating a bedrock principle of government contract law. When a government contractor is one of several persons to be paid out of a larger appropriation sufficient in itself to pay the contractor, it has long been the rule that the government is responsible to the contractor for the full amount due under the contract, “even if the agency exhausts the appropriation in service of other permissible ends.”<sup>30</sup> That is so “even if an agency’s total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made.”<sup>31</sup> In such cases, “[t]he United States are as much bound by their contracts as are individuals.”<sup>32</sup>

Given this rule, it was immaterial to the outcome that Congress each year appropriated hundreds of millions of dollars specifically directed to the payment of the several hundred contracts at issue in *Ramah*,<sup>33</sup> versus an appropriation of a billion dollars in *Cherokee* to pay all of the agency’s activities including the several hundred contracts.<sup>34</sup> Either way “[c]ontractors are responsible for knowing the size of the pie, [but] not how the agency elects to slice it.”<sup>35</sup> Accordingly, “so long as Congress appropriates adequate funds to cover a prospective contract, contractors need not keep track of agencies’ shifting priorities and competing obligations; rather, they may trust that the Government will honor its contractual promises.”<sup>36</sup>

This last observation was compelled by the egregious facts of *Ramah* and the companion case, *Arctic Slope*. Both IHS and BIA had, over the years, developed a raft of shifting agency systems for “slicing the pie,” including pro rata payments to all tribal contractors, payments on a first-come first-served basis, and a year-to-year “stable-base” system. None led to certain payment amounts until performance was already complete, and all led to rampant mistakes resulting in wide divergences among payment levels and even to scores of accidental overpayments.<sup>37</sup>

The Court’s conclusion that a bulk appropriation is legally available to pay a contractor in full is supported by the corollary principle that an agency has unreviewable discretion over how it spends a lump sum appropriation and thus has the choice to pay any particular contractor in full if it so chooses.<sup>38</sup> As the Court explained, so long as the agency can lawfully pay the contractor in full if it so chooses, the funds are “legally available” to pay him and the statutory condition on contract payment—the “availability of appropriations”—is satisfied.<sup>39</sup> As for the Anti-Deficiency Act, the Court noted the “Act’s requirements ‘apply to the official, but they do not



affect the rights in this court of the citizen honestly contracting with the Government.”<sup>40</sup>

The Court’s ultimate conclusion—that “the risk of over-obligation” falls on the government<sup>41</sup>—was strongly urged by the Chamber and NDIA as amici curiae. If the Court accepted the government’s position, they argued, decades of settled industry expectations would be upended, “frustrat[ing] the government’s ability to contract with private companies.”<sup>42</sup> The Chamber and NDIA further argued that the government’s position would grant it a broad right to refuse payment despite the agreed-upon price, rendering its contracts illusory. Such an approach is not only grossly unfair to contractors, but will make it difficult for the government “to find contracting partners willing to take on such risk.”<sup>43</sup> Persuaded, the Court noted “would-be contractors would bargain warily—if at all and then only at a large nonpayment premium if the government can only be trusted to pay as promised when there are no ‘more pressing fiscal needs.’” Such a result would lead to more cumbersome and expensive contracts with far fewer willing partners.<sup>44</sup> In such circumstances, indeed, a contract with the government would be illusory—a point not lost on Justice Kagan.<sup>45</sup>

## Conclusion

Some cases make strange bedfellows, and the *Ramah* case was one. It matched military contractors who expect the government to turn “square corners,”<sup>46</sup> with Indian tribes whose experiences under nearly 600 broken treaties<sup>47</sup> have led the tribes to expect considerably less of the government. In *Ramah*, this odd couple pursued common ground and helped write a more positive chapter in the nation’s dealings with the tribes. **TFL**

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*Lloyd B. Miller practices law in Washington, D.C., and Anchorage, Alaska, with Sonosky, Chambers, Sachse, Miller & Munson LLP. He specializes in appellate law, congressional affairs, and representing Indian tribes. He argued the Cherokee and Arctic cases and is co-counsel in the Ramah case. In 2012, the Alaska legislature issued a citation honoring Miller’s work. He is a graduate of Yale University and the University of Virginia School of Law.*

## Endnotes

<sup>1</sup>*Salazar v. Ramah Navajo Chapter*, 567 U.S. \_\_\_, 132 S. Ct. 2181 (2012).

<sup>2</sup>*Salazar* involved a class action comprised of all tribes contracting with the BIA. *Ramah Navajo Chapter v. Lujan*, No. CIV-90-0957, Order & Mem. Op. of Oct. 1, 1993 (D.N.M.). A companion case involved a tribal organization contracting with IHS. *Arctic Slope Native Ass’n Ltd. v. Sebelius*, 629 F.3d 1296 (Fed. Cir. 2010), *vacated*, 567 U.S. \_\_\_, 132 S. Ct. \_\_\_, 80 U.S.L.W. 3701, 2012 WL 2368663 (U.S. June 25, 2012). See also *Arctic Slope Native Ass’n v. Sebelius*, No. 2010-1013, Aug. 22, 2012, Order, slip op. (Fed. Cir.) (finding case indistinguishable from *Ramah* and remanding to the Civilian Board of Contract Appeals for damages quantification). Supporting the effort through amicus briefs in both cases was the U.S. Chamber of Commerce (Chamber) and the National Defense Industrial Association (NDIA).

<sup>3</sup>See National Congress of American Indians, [www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support](http://www.ncai.org/policy-issues/tribal-governance/budget-and-appropriations/contract-support) (last visited July 26, 2012) (posting BIA and IHS annual reports).

<sup>4</sup>See n.6, *infra*.

<sup>5</sup>*Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 639 (2005).

<sup>6</sup>25 U.S.C. § 450 *et seq.* (2006).

<sup>7</sup>*Id.* § 450f(a)(1).

<sup>8</sup>*Cherokee Nation*, 543 U.S. at 639.

<sup>9</sup>25 U.S.C. § 450(a)(1).

<sup>10</sup>*Id.* § 450f(a)(1)-(2).

<sup>11</sup>See, e.g., Editorial, *A Formula for Cutting Health Costs*, N.Y. TIMES, July 22, 2012, at SR10.

<sup>12</sup>*Cherokee Nation*, 543 U.S. at 639.

<sup>13</sup>41 U.S.C.A. §§ 7101-7109 (2012); see also 25 U.S.C. § 450m-1(d).

<sup>14</sup>41 U.S.C.A. §§ 7107-7108.

<sup>15</sup>*Id.* § 7108(a) (referencing 31 U.S.C. § 1304 (2006)).

<sup>16</sup>25 U.S.C. § 450j-1(a)(1).

<sup>17</sup>*Id.* §§ 450j-1(a)(2), (3); see also *id.* § 450b(c), (f) (defining “direct costs” and “indirect costs”). Indirect costs include fixed overhead expenses, such as utilities, rent, audits and salaries of administrative staff. See John Cibinic Jr. & Ralph C. Nash Jr., *FORMATION OF GOVERNMENT CONTRACTS* 1343 (3d ed., 1998). The reimbursement of indirect costs is a standard feature of government contracts, e.g., *Rumsfeld v. United Techs. Corp.*, 315 F.3d 1361, 1363-64 (Fed. Cir. 2003), and the Office of Management and Budget (OMB) has established uniform standards for agencies to use in determining reimbursable indirect costs under contracts performed by states, local governments, and tribes. OMB Circular A-87, 2 C.F.R. pt. 225 (2005).

<sup>18</sup>*Id.* § 450j-1(a)(2).

<sup>19</sup>*Id.* § 450j-1(b).

<sup>20</sup>*Cherokee Nation*, 543 U.S. at 643.

<sup>21</sup>U.S. Gov’t Accountability Office, *GAO/RCED-99-150, Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed* (1999).

<sup>22</sup>Compare *Shoshone-Bannock Tribes v. Sec’y, Dep’t of Health & Human Servs.*, 279 F.3d 660 (9th Cir. 2002), and *Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054 (10th Cir. 2002), with *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075, 1080 (Fed. Cir. 2003).

<sup>23</sup>*Cherokee Nation*, 543 U.S. at 637-38 (holding IHS liable for underpaying two tribes’ contracts).

<sup>24</sup>See n.22, *supra*.

<sup>25</sup>*Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 552 (Ct. Cl. 1980).

<sup>26</sup>*Cherokee Nation*, 543 U.S. at 639 (italics in original), citing *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892).

<sup>27</sup>*Ramah*, slip op. 3. *Ramah* involved tribal contracts with the Bureau of Indian Affairs. *Id.*

<sup>28</sup>31 U.S.C. § 1341(a)(1)(A).

<sup>29</sup>*Ramah*, slip op. 14.

<sup>30</sup>*Id.* at 6.

<sup>31</sup>*Id.* at 6-7 (quoting *Cherokee Nation*, 545 U.S. at 637).

<sup>32</sup>*Id.* at 7, citing *Lynch v. United States*, 292 U.S. 571, 580 (1934).

<sup>33</sup>*Id.* at 8-9 (noting annual appropriations ranging from \$91 million to \$125 million).

<sup>34</sup>*Cherokee*, 543 U.S. at 636-37.

<sup>35</sup>*Ramah*, slip op. 7.

<sup>36</sup>*Id.* at 7. *See also id.* at 16 (“it is not reasonable to expect [each] contractor to know how much of [a lump sum] appropriation remain[s] available for it at any given time.”) (quoting 2 GAO, Principles of Federal Appropriations Law, p. 6-18 (2d ed. 1992)). Dissenting Chief Justice Roberts, joined by Justices Ginsburg, Beyer, and Alito, agreed with the basic principles but read the ISDA as conferring upon the secretary special authority to allocate an insufficient appropriation among tribes. Dissenting op. at 3-4. The majority found this reading of the ISDA “improbable,” *Ramah*, slip op. at 12, adding “We are not persuaded that § 450j-1(b) was intended to enact that radical departure from ordinary government contracting principles.” *Id.* at 12-13, n.6.

<sup>37</sup>*Id.* at 9, n.4; Brief for Arctic Slope Native Assoc. as Amicus Curiae Supporting Respondents at 3-7, *Salazar v. Ramah Navajo Chapter*, 567 U.S. \_\_\_, 132 S. Ct. 2181 (2012) (No. 11-551) (detailing agency payment scenarios).

<sup>38</sup>*Ramah*, slip op. 9 (discussing *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) and *Int’l Union, United Auto., Aerospace & Agricultural Implement Workers of Am. v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (Scalia, J.)).

<sup>39</sup>*Id.*

<sup>40</sup>*Ramah*, slip op. 14, quoting *Dougherty v. United States*, 18 Ct. Cl. 496, 503 (1883). *But see id.* at n.7 (“We have some doubt whether a Government employee would violate the Anti-Deficiency Act by obeying an express statutory command to enter a contract, as was the case here. But we need not decide the question, for this case concerns only the con-

tractual rights of tribal contractors, not the consequences of entering into such contracts for agency employees.”)

<sup>41</sup>*Id.* at 8 (quoting Brief for Federal Parties in *Cherokee Nation v. Leavitt*, O. T. 2004, No. 02-1472 et al., p. 24).

<sup>42</sup>Brief for U.S. Chamber of Commerce, et al. as Amicus Curiae Supporting Respondents at 2, *Salazar v. Ramah Navajo Chapter*, 567 U.S. \_\_\_, 132 S. Ct. 2181 (2012) (No. 11-551).

<sup>43</sup>Chamber Br. at 7. The chamber explained existing contractors may have no recourse when told appropriated funds were spent elsewhere, adding that future contractors, if willing to contract at all, would need to insist on binding contractual language or demand risk premiums “assuming the government would even accept such language under its new view.” The government’s “ability to contract in advance of appropriations” will be threatened and the pricing discounts it currently enjoys due to its “reliable billpayer” reputation will be undermined. *Id.* at 23-24 (citation omitted).

<sup>44</sup>*Ramah*, slip op. 8 (citation omitted).

<sup>45</sup>Transcript of Oral Argument at 62, *Ramah*, 567 U.S. \_\_\_, 132 S. Ct. 2181 (No. 11-551) (“JUSTICE KAGAN: 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? (Laughter.)”)

<sup>46</sup>*Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387-88 (1947) (Jackson, J., dissenting) (“It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street.”)

<sup>47</sup>*See generally* II Keppeler, Indian Laws and Treaties (GPO 1904). The first treaty with an Indian tribe was the Treaty with the Delawares, 7 Stat. 13 (1778).

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privity of contract with the government may sue in tort for misappropriation that goes beyond the contours of their contractual relationship. The mere happenstance that the government obtained USMI’s trade secrets through a third party government contract hardly creates a contractual relationship between the government and USMI. USMI’s claim for wrongful disclosure of its confidential information therefore cannot reasonably be viewed as sounding in contract. Quite simply, the *USMI* majority panel got it wrong. USMI’s judgment against the government should have been upheld. **TFL**

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*Andrew E. Shipley, a partner in the Government Contracts practice group at Perkins Coie LLP, has more than 25 years of combined law firm and in-house experience managing and trying significant, high profile cases and counseling clients on contractual and regulatory matters. He has spoken and written extensively on developing successful inside-outside counsel relationships. © 2012 Andrew E. Shipley. All rights reserved.*

### Endnotes

<sup>1</sup>2012 WL 2052953 (5th Cir. May 11, 2012).

<sup>2</sup>*Id.* at \*1.

<sup>3</sup>28 U.S.C. §1491.

<sup>4</sup>*See* 28 U.S.C. § 1491(a)(1).

<sup>5</sup>324 F.2d 622 (5th Cir. 1963).

<sup>6</sup>2012 WL 2052953, at \*3.

<sup>7</sup>28 U.S.C. §1346(b).

<sup>8</sup>40 U.S.C. §270a.

<sup>9</sup>2012 WL 2052953, at \*4.

<sup>10</sup>*Id.* at \*4.

<sup>11</sup>103 Fed. Cl. 794 (Feb. 12, 2012). The government argued that as a matter of law the court lacked jurisdiction over the plaintiff’s takings claim. The court disagreed, holding that it had jurisdiction because the “taking” allegedly occurred pursuant to an “authorized act” by a government official.

<sup>12</sup>*Megapulse Inc. v. Lewis*, 672 F.2d 959 (D.C. Cir. 1982).

<sup>13</sup>915 F.2d 1242 (9th Cir. 1989).

<sup>14</sup>244 F.2d 674 (3d Cir. 1957).

<sup>15</sup>915 F.2d at 1246, quoting *Aleucto*, 244 F.2d at 678.

<sup>16</sup>915 F.2d at 1245.

<sup>17</sup>915 F.2d at 1247 (quoting *Gates v. Life of Montana Ins. Co.*, 668 P.2d 213, 214-215 (Mont. 1984)).

<sup>18</sup>*United States v. Huff*, 165 F.2d 720 (5th Cir. 1948).

<sup>19</sup>653 F.2d 726 (2d Cir. 1980).

<sup>20</sup>402 F.3d 1249 (D.C. Cir. 2005).

<sup>21</sup>*Id.* at 1256.