

BENJAMIN B. WAGNER
United States Attorney
SYLVIA QUAST
Assistant United States Attorney
501 I Street, Suite 10-100
Sacramento, California 95814
Telephone: (916) 554-2740

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ALTURAS INDIAN RANCHERIA,

Plaintiff,

v.

KENNETH SALAZAR, et al.,

Defendants.

No. 2:10-CV-01997-LKK-EFB

**DEFENDANTS' REPLY TO
PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS**

Date: October 12, 2010

Time: 10:00 a.m.

Ctrm: 4, 15th Floor

Judge: Hon. Lawrence K. Karlton

INTRODUCTION

In its Opposition to the Defendants' Motion to Dismiss ("Opposition"), the Rose Faction does not dispute that the Defendants have not taken a final agency action for purposes of the Administrative Procedure Act ("APA") on the Rose Faction's February 2010 request to renew a contract under the Indian Self-Determination and Education Assistance Act ("ISDA") with the Alturas Indian Rancheria ("Tribe"). Nor does it dispute that the Bureau of Indian Affairs ("BIA") Superintendent took the action of returning its renewal request on May 25, 2010, explaining that there was a leadership dispute between the Rose Faction and the Del Rosas and that the BIA could not determine if its request was from a "tribal organization," as the ISDA requires, while an administrative appeal on the leadership issue was pending before the Interior Board of Indian Affairs ("IBIA"). Doka Declaration Exhibit 5 at 1. Nor does the Rose Faction

dispute that it filed an administrative appeal of the May 25 decision – in fact, two appeals – to the BIA Regional Director and to the IBIA. That administrative process is not yet final, as the IBIA remanded the matter to the BIA for a decision on the issue of the Rose Faction’s renewal request, and the BIA is in the midst of considering yet another Rose Faction appeal from the BIA’s August 18 decision to again return the renewal request. Accordingly, this Court lacks jurisdiction over the Rose Faction’s APA claim – the Defendants have acted three times in the past five months on the renewal request, but its actions have not become final because the Rose Faction appeals them and has not exhausted those appeals. The Court also lacks jurisdiction over the Rose Faction’s other claim based on the ISDA because the ISDA only allows plaintiffs to proceed directly to district court “in lieu of” proceeding administratively, not in addition to doing so, thus promoting efficient use of judicial and agency resources and decreasing the likelihood of conflicting determinations. Until the Rose Faction has exhausted its administrative appeals and the Defendants take final action, this Court will not have jurisdiction over the Rose Faction’s claims, and as a result, it must dismiss this action under Fed. R. Civ. P. 12(b)(1).

ARGUMENT

I. The Plain Terms Of The ISDA Bar Jurisdiction Over The Rose Faction’s Claim.

In 25 U.S.C. § 450f(b), entitled “Procedure upon refusal of request to contract,” the ISDA gives a disappointed tribal organization a clear choice: it may seek an administrative hearing on the record “under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, *in lieu of filing such appeal*, exercise the option to initiate an action in a Federal district court and proceed directly to such court. . . .” 25 U.S.C. § 450f(b)(3) (emphasis added). It is well-established that the phrase “in lieu of” means “instead of,” “in place of,” or “in substitution of.” *Blinzinger v. Lyng*, 834 F.2d 618, 622 (7th Cir. 1987); *Fed. Group, Inc. v. United States*, 67 Fed. Cl. 87, 106 (2005); Black’s Law Dictionary (8th ed. 2004); Webster’s Unabridged Dictionary 1110 (1st ed. 1996). It does not mean “in addition to.” *Blinzinger*, 834 F.2d at 622; *Fed. Group*, 67 Fed. Cl. at 106. Accordingly, assuming for purposes of argument that the Rose Faction is a “tribe” or “tribal organization,” it had a clear choice when it received word that, on May 25, 2010, the BIA Superintendent returned its request

to contract – it could either “proceed directly to” Federal district court or it could file an administrative appeal. What it could not do is file an administrative appeal from the BIA Superintendent’s May 25 action, which it acknowledges that it did, and *in addition* file this case in Federal district court.¹ See Opposition at 8 lines 13-14 (“The Rose Administration requested a hearing on the record regarding the Superintendent’s May 25, 2010 decision . . .”) and footnote 6 (“The Tribe concurrently sought [*sic*] administrative remedy regarding the May 25, 2010, decision from the Acting Regional Director.”). The Rose Faction attempts to distinguish *California Valley Miwok Tribe v. Kempthorne*, E.D. Cal. 2:08-CV-03164-FCD-EFB, Order of February 23, 2009, but its efforts are unavailing – Judge Damrell’s holding that “[o]nce it chose to proceed through the administrative process, the Tribe had to complete that process before filing suit herein” (*id.* at 10) under the ISDA is even more compelling under the facts of this case, as the Rose Faction filed multiple administrative appeals, one of which is still ongoing.²

II. The Court Lacks Jurisdiction Over The Complaint Because There Is An Ongoing Administrative Appeal And No Final Agency Action.

The Rose Faction’s argument that Defendants have failed to act or unreasonably delayed action is premised on their view that Defendants had only one of two choices in the face of its February 2010 contract request, Opposition at 11-17 and 17-20, but as *San Pasqual Band of Mission Indians v. Salazar*, D.C.D.C. Civil Action No. 09-1716 (RMC) (cited at Opposition 24-25) shows, this is incorrect. Before BIA can enter into an ISDA contract or decline an ISDA contract request, it must make a determination that the requesting entity is a “tribe” or “tribal organization.” *San Pasqual Band* Order of March 10, 2010, at 2-3 (attached as Exhibit N to Declaration of James Qaqundah). See also Opposition at 2 (acknowledging that “the ISDA

¹The Complaint in this action does not mention the Superintendent’s May 25 decision to return the contract proposals or the IBIA’s July 6, 2010, decision regarding the Rose Faction’s appeal of the May 25 decision, let alone challenge them as being invalid in any way.

²The Rose Faction asserts that it “never brought the appeal in question” at one point (Opposition at 25, emphasis omitted), but this is obviously false, and it soon clarifies that it didn’t get the administrative appellate procedures it wanted. Opposition at 25-26. If it really believes that Defendants used improper procedures in handling its appeals, it will have an opportunity to raise those issues once it has exhausted its administrative remedies.

requires the Secretary to contract only with Indian tribes and tribal organizations.”) Here, the BIA Superintendent did what *San Pasqual Band* requires and considered whether either the Rose Faction or the Del Rosas qualified as “tribal organizations.” He determined that he could not decide whether either met this threshold requirement to be an ISDA contractor and, on May 25, returned both contract proposals to the two factions, citing *San Pasqual Band* in support of its decision.³ See Doka Declaration Exhibit 5.⁴ In response to the IBIA’s July 6 remand of the May 25 decision “to allow BIA to address and decide any and all issues necessary for taking action on the [Rose Faction’s] proposal,” the BIA Superintendent reiterated this decision on August 18, and once again, the Rose Faction immediately filed an administrative appeal. Doka Declaration Exhibits 9, 10, and 11.⁵ The BIA Regional Director anticipates deciding this appeal shortly after briefing closes on October 20, but until this appeal is finally resolved and the Rose Faction has exhausted its administrative remedies, the Court will continue to lack jurisdiction over this action.

CONCLUSION

³The Rose Faction makes much of a contract that BIA entered into with the Tribe for road repair and restoration projects under the American Recovery and Reinvestment Act of 2009 (Opposition at 3, 7, 16), but this appears to be one contract proposal that the two factions could agree upon, since Darrell Rose as Vice-Chairman signed the contract for Phillip Del Rosa as Chairman of the Alturas Rancheria. See Declaration of Terry Lincoln generally and Exhibit 2 in particular.

⁴In another attempt to get around the fact that the BIA and the IBIA have both acted in response to the Rose Faction’s February ISDA contract request, the Rose Faction claims that it is the Secretary that is responsible to take action, not BIA, and the Secretary himself should take action on the Rose Faction’s contract request. See, e.g., Opposition at 2, 13. However, under the regulations that the Secretary promulgated to implement the ISDA, 25 U.S.C. § 900.1 *et seq.*, the word “Secretary” refers to both the Secretary of the Interior and his “respective delegates,” which here include BIA officials. 25 C.F.R. § 900.6 (definition of “Secretary”).

⁵The Rose Faction claims that the tribal leadership dispute, which it characterizes as a “membership dispute,” was resolved months ago (Opposition at 3, 13), but this is obviously incorrect as the two factions are still submitting competing ISDA contract proposals and fighting in two other forums in addition to the Interior administrative process. See Doka Declaration Exhibit 10 (discussing July 2010 ISDA contract proposal from Del Rosa faction); Opposition at 13, n.8. Defendants will not further address the Rose Faction’s claims regarding this dispute (Opposition at 4-9, 13-17), except to say that the Court does not have jurisdiction to address it here and the Rose Faction itself has declared it “irrelevant to the instant action.” Opposition at 4.

1 For the foregoing reasons and for those given in Defendants' opening Motion, the Court
2 should dismiss this action in its entirety.

3
4
5 Dated: October 5, 2010

Respectfully submitted,

BENJAMIN B. WAGNER
UNITED STATES ATTORNEY

6
7 By: /s/ Sylvia Quast
8 SYLVIA QUAST
Assistant United States Attorney
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BENJAMIN B. WAGNER
United States Attorney
SYLVIA QUAST
Assistant U.S. Attorney
501 I Street, Suite 10-100
Sacramento, CA 95814
Telephone: (916) 554-2740
Facsimile: (916) 554-2900

Attorneys for the United States of America

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ALTURAS INDIAN RANCHERIA,
Plaintiffs,

v.

KENNETH SALAZAR, et al.

Defendants.

CASE NO. 2:10-CV-01997-LKK-EFB

**DECLARATION OF TERRY J. LINCOLN
IN SUPPORT OF DEFENDANTS' REPLY
TO PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

Date: October 12, 2010

Time: 10:00 a.m.

Ctrm: 4 (15th Floor)

Judge: Hon. Lawrence K. Karlton

I, Terry J. Lincoln, declare as follows:

1. I am the contract Awarding Official for the Northern California Agency of the Bureau of Indian Affairs (BIA), Pacific Region, in the United States Department of the Interior. In that capacity, I oversee contract awards for tribes in Northern California, including for the Alturas Indian Rancheria ("Tribe"), and I also serve as a custodian of records for the contract award records in the Northern California Agency. I have personal knowledge of the facts set forth in this declaration.

2. Attached hereto is Exhibit 1, which is a true and correct copy of the letter I signed, dated March 26, 2010, to Phillip Del Rosa, Chairman, Alturas Rancheria, transmitting an American Recovery

1 and Reinvestment Act (ARRA) contract package for his review for contract number CTJ52T50218,
2 which was inadvertently referenced in the letter as contract number CTA52T50218.

3 3. Attached hereto is Exhibit 2, which is a true and correct copy of contract award form
4 (Standard Form 26) dated March 29, 2010, for ARRA contract CTJ5250218, signed by me and Darren
5 Rose, Vice-Chairman, on behalf of Phillip Del Rosa, Chairman, Alturas Rancheria.

6 4. Attached hereto is Exhibit 3, which is a true and correct copy of the letter I signed dated
7 March 30, 2010, to Darren Rose, Vice-Chairman, Alturas Rancheria, transmitting a fully executed copy of
8 the Alturas Rancheria Standard Form 26 Contract Award Number CTJ52T50218 for ARRA Repair and
9 Restoration funding.

10 5. Each Exhibit provided with my declaration is a true and correct copy of a document kept in
11 the ordinary course of business and located in files in the BIA's Northern California Agency offices in
12 Redding, California.

13 I declare under the penalty of perjury that the foregoing is true and correct to the best of my
14 knowledge and belief.

15 Executed at Redding, California, this 5th day of September, 2010.

16
17 By: 

18 Terry J. Lincoln
19 Awarding Official
20 Northern California Agency
21 Bureau of Indian Affairs
22 U.S. Department of the Interior
23
24
25
26
27
28



United States Department of the Interior

Bureau of Indian Affairs
Northern California Agency
1900 Churn Creek Road, Suite 300
Redding, CA 96002-0292



In Reply Refer To: Awarding Official

March 26, 2010

Phillip Del Rosa, Chairman
Alturas Rancheria
901 Country Road 56
Alturas, California 96101

Dear Mr. Del Rosa:

Enclosed for your review is a complete, ARRA Roads Repair and Restoration Program, contract package for Contract Number CTA52T50218, along with three Award/Contract forms, Standard Form 26. Also, enclosed are two Addendum to Tribal contract agreements to transfer funds pursuant to the American Recovery and Reinvestment Act of 2009, requiring signatures, which are tagged with SIGN HERE flags.

Upon review and acceptance of the terms and conditions of this ARRA Roads Repair and Restoration Program contract, sign and complete ALL copies of Award/Contract Forms, Standard Form 26, in Blocks 19A, 19B and 19C, and return them to this office. After all signatures are obtained, a fully executed copy will be sent to you for your files.

We have also enclosed an Authorized Signature Form for Payment Requests to be completed and returned with the above information.

If you should have any questions, contact Tere Salkeld, Indian Self-Determination Specialist, at (530) 246-5141, Ext. 35, or me at the above address.

Sincerely,

/s/ Terry J. Lincoln

Terry Lincoln
Awarding Official
BIAS-2009-L2-000027

Enclosures

EXHIBIT 1

AWARD/CONTRACT

THIS CONTRACT IS A RATED ORDER
UNDER DPAS (15 CFR 350)

RATING

Page 4 of 5

PAGE OF PAGE

2. CONTRACT (Proc Inst Ident) NO
CTJ521502183. EFFECTIVE DATE
03/01/2010

4. REQUISITION/PURCHASE REQUEST/PROJECT NO.

120

5. ISSUED BY

CODE

BUREAU OF INDIAN AFFAIRS
NORTHERN CALIFORNIA AGENCY
REDDING, CALIFORNIA 96002-0292
530.246.5141

6. ADMINISTERED BY (If other than item 5)

CODE

7. NAME AND ADDRESS OF CONTRACTOR (No., street, city, county, State and ZIP Code)

ALTURAS RANCHERIA
901 COUNTRY ROAD 56
A LTURAS, CALIFORNIA 96101
DUNS # 617363544
530.233.5571

8. DELIVERY

N/A

☐ FOB ORIGIN☐ OTHER (See below)

9. DISCOUNT FOR PROMPT PAYMENT

N/A: Payment

10. SUBMIT INVOICES
(4 copies unless otherwise
specified) TO THE ADDRESS
SHOWN IN:

ITEM

CODE

FACILITY CODE

11. SHIP TO/MARK FOR

CODE

12. PAYMENT WILL BE MADE BY

CODE

DOI-BUREAU OF INDIAN AFFAIRS
Branch of Finance & Accounting-Disburse. Section
Reston, VA

13. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION:

P.L. 93-638, As Amended



10 USC 2304(c) (

)



XXXXXXX

)

14. ACCOUNTING AND APPROPRIATION DATA

SEE PAGE TWO

15A. ITEM NO.

15B. SUPPLIES/SERVICES

15C. QUANTITY

15D. UNIT

15E. UNIT PRICE

15F. AMOUNT

OPERATION AND ADMINISTRATION OF THE
ARRA ROADS REPAIR AND RESTERATION
PROGRAM LISTED UNDER THE ATTACHED
SUBPART J CONTRACT.

"FIXED PRICE CONTRACT"

15G. TOTAL AMOUNT OF CONTRACT

\$ 2,793.00

16. TABLE OF CONTENTS

(X)	SEC.	DESCRIPTION	PAGE(S)	(X)	SEC.	DESCRIPTION	PAGE(S)
PART I - THE SCHEDULE				PART II - CONTRACT CLAUSES			
	A	SOLICITATION/CONTRACT FORM			I	CONTRACT CLAUSES	
	B	SUPPLIES OR SERVICES AND PRICES/COST		PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACH.			
	C	DESCRIPTION/SPECS./WORK STATEMENT			J	LIST OF ATTACHMENTS	
	D	PACKAGING AND MARKING		PART IV - REPRESENTATIONS AND INSTRUCTIONS			
	E	INSPECTION AND ACCEPTANCE			K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS	
	F	DELIVERIES OR PERFORMANCE			L	INSTRS., CONDS., AND NOTICES TO OFFERORS	
	G	CONTRACT ADMINISTRATION DATA			M	EVALUATION FACTORS FOR AWARD	
	H	SPECIAL CONTRACT REQUIREMENTS					

CONTRACTING OFFICER WILL COMPLETE ITEM 17 OR 18 AS APPLICABLE

17. ☐ CONTRACTOR'S NEGOTIATED AGREEMENT (Contractor is required
to sign this document and return _____ copies to issuing office.) Contractor
agrees to furnish and deliver all items or perform all the services set forth or otherwise
identified above and on any continuation sheets for the consideration stated herein. The
rights and obligations of the parties to this contract shall be subject to and governed by the
following documents: (a) this award/contract, (b) the solicitation, if any, and (c) such
provisions, representations, certifications, and specifications, as are attached or
incorporated by reference herein. (Attachments are listed herein.)18. ☐ AWARD (Contractor is not required to sign this document.) Your
offer on Solicitation Number _____
including the additions or changes made by you which additions or changes are set forth in
full above, is hereby accepted as to the items listed above and on any continuation sheets.
This award consummates the contract which consists of the following documents: (a) the
Government's solicitation and your offer, and (b) this award/contract. No further contractual
document is necessary.

19A. NAME AND TITLE OF SIGNER (Type or print)

Phillip Del Rosa, Chairman

20A. NAME OF _____

Awarding Official

Terry J. Lincoln, BIAS-2009-L2-0027

19B. NAME OF CONTRACTOR

19C. DATE SIGNED

20B. UNITED STATES OF AMERICA

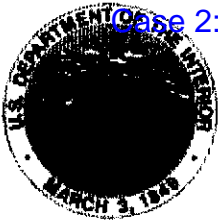
20C. DATE SIGNED

BY Phillip Del Rosa
(Signature of person authorized to sign)

3-26-10

BY Terry J. Lincoln
(Signature of Contracting Officer)

3/29/10



Bureau of Indian Affairs
Northern California Agency
1900 Churn Creek Road, Suite 300
Redding, CA 96002-0292



In Reply Refer To: Awarding Official

March 30, 2010

Darren Rose, Vice-Chairman
Alturas Rancheria
900 Running Bear Road
Yreka, California 96097

Dear Mr. Rose:

Enclosed is a fully executed copy of the Tribe's Standard Form 26, Contract Award, Number CTJ52T50218, for the Roads ARRA Repair and Restoration dollars in the amount of \$2,793.00. The Tribe's Notice to Proceed will be prepared when a Central Contractor Registration (CCR) Policy has been submitted to this Agency for entry into your contract, and you can then request a Payment Request Form.

If you have any questions, please contact Tere Salkeld, Indian Self-Determination Specialist, at (530) 246-5141, Ext. 35, or me at the above address.

Sincerely,

/s/ Terry J. Lincoln

Terry Lincoln
Awarding Official
BIAS-2009-L2-0027

Enclosure

EXHIBIT 3