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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ALTURAS INDIAN RANCHERIA,	)	Case No. 2:10-cv-01997 LKK-EFB
	)	
Plaintiff,	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN SUPPORT OF MOTION
v.	)	FOR ORDER ENFORCING JUDGMENT
	)	AND FINDING DEFENDANTS IN
KENNETH SALAZAR, et al.,	)	CONTEMPT
	)	
Defendant.	)	DATE: November 4, 2013
	)	TIME: 10:00 a.m.
	)	CTRM.: 4, 15 <sup>th</sup> Floor
	)	JUDGE: Honorable Lawrence K. Karlton

Plaintiff, the Alturas Indian Rancheria ("Tribe"), moves the Court for an order enforcing the "Settlement Agreement and Stipulation for Entry of Judgment and Order," entered by this Court on January 12, 2012 ("Judgment") and holding the defendant federal officials, Secretary of the Interior Kenneth Salazar<sup>1</sup> et al. ("Federal Defendants"), in contempt for their willful and persistent failure to comply with the Judgment. The Judgment states:

The BIA has approved the Tribe's self-determination contract requests for the fiscal years 2009, 2010, 2011, and 2012, and shall transfer the amounts provided in those requests to the Tribe's bank account maintained with the Plumas Bank . . . in accordance with the terms contained in the contract award documents.

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<sup>1</sup>Former Secretary of the Interior Kenneth Salazar, who was a defendant in this matter at the time that the Judgment was rendered, has since left office. Sally Jewel is the current Secretary of the Interior.

Judgment, p. 2.

In clear violation of the Court's Judgment, the Federal Defendants refuse to pay the contract support costs that they are required to pay to the Tribe under the terms of the self-determination contract for government operations entered into between the Tribe and the Bureau of Indian Affairs ("BIA") pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 et seq. ("ISDEAA"), and the ISDEAA's implementing regulations.

Pursuant to Rule 70 of the Federal Rules of Civil Procedure ("Rule 70"), the Tribe requests that the Court issue an order directing the Federal Defendants to pay the contract support costs the United States is obligated to pay pursuant to the Tribe's self-determination contract; holding the Federal Defendants in contempt for failing to comply with this Court's Judgment and, on that basis, impose sanctions in the form of the Tribe's attorneys' fees incurred in preparing this motion.

#### **FACTUAL BACKGROUND**

The following are the only facts necessary to address the Tribe's present motion:

1. The Tribe entered into a self-determination contract for 2009 with the BIA for government operations, pursuant to the provisions of the ISDEAA. In that contract, the Tribe agreed to provide government operations services that the BIA would have been required to provide to the Tribe. In return, the BIA agreed to provide both base funding and funding for the contract support costs arising from the contract. Declaration of Wayne Smith in Support of Motion for Order Finding Federal Defendants in Contempt ("Smith Declaration"), p. 1, ¶ 2, and Exhibit 1 thereto.

2. In January, 2010, in response to an internal tribal dispute about who constituted the members of the Tribe and who constituted the members of the Tribe's Tribal Council, the BIA, Northern California Agency, refused to renew the Tribe's self-determination contract. Smith Declaration, p. 2, ¶ 3.

3. As a result of the BIA's actions, the Tribe was not permitted to enter into

1 self-determination contracts for 2010 or 2011. Smith Declaration, p. 2, ¶ 4.

2 4. In July, 2010, the Tribe filed the above-entitled action seeking an order  
3 directing the relevant federal officials to enter into a self-determination contract for  
4 2010-2012 and provide the Tribe with the ISDEAA funding to which the Tribe was  
5 entitled under the Contract.<sup>2</sup> Smith Declaration, p. 2, ¶ 5.

6 5. On January 11, 2012, the Tribe and the BIA, Northern California Agency,  
7 entered into a stipulation in which the parties settled the Tribe's claims against the  
8 Federal Defendants. Pursuant to that stipulation, the Court issued the Stipulation for  
9 Entry of Judgment and Order dated January 12, 2012.

10 6. Subsequent to the issuance of the Judgment, the BIA entered into a self-  
11 determination contract with the Tribe ("Contract") for 2012-2014. The contract  
12 included in the 2012 funding the grant funding for 2010 and 2011 as well as the  
13 funding for 2012. Smith Declaration, p. 2, ¶ 7, and Exhibit 1 thereto.

14 7. Pursuant to the Judgment, the BIA paid to the Tribe the base funding  
15 that the federal government was obligated to pay to the Tribe for the years 2009-2012.  
16 The BIA did not pay the contract support costs for those contract years. Smith  
17 Declaration, p. 2, ¶ 8.

18 8. Shortly after the Court issued the Judgment, the Tribe and the Federal  
19 Defendants began negotiating the cost rate for indirect contract support costs for the  
20 Contract for 2012 and 2013 ("Negotiated Rate Agreement"). The rate for 2012  
21 included the contract support costs for 2010-2012. Those negotiations were not  
22 completed until June 25, 2013, when the Negotiated Rate Agreement was executed.  
23 Smith Declaration, p. 2, ¶ 9 and Exhibit 2 thereto.

24 9. The Negotiated Rate Agreement states that the rate for the period 1/1/12-  
25 12/31/12 was 68.99%, and the rate for the period 1/1/13-12/31/13 was 150%. The  
26 Negotiated Rate Agreement also set forth the basis for the establishment of the  
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28 <sup>2</sup>The complaint included claims against a number of officials of the State of California. The claims relating to those defendants are not relevant to the current motion.

1 negotiated rate and the obligations of the parties in carrying out the negotiated rate  
2 agreement. Exhibit 2 to the Smith Declaration, p. 2.

3 10. Since the Negotiated Rate Agreement was entered into, the BIA has not  
4 provided the Tribe with any funding pursuant to the that agreement. Smith  
5 Declaration, p. 3, ¶ 10.

6 11. Beginning on or about June, 2013, representatives of the Tribe contacted  
7 representatives of the BIA seeking payment of the contract support costs from the BIA  
8 that the Tribe was entitled to under the Contract. Smith Declaration, p. 3, ¶ 11.

9 12. In June, 2013, Wayne Smith, the Tribe's Tribal Administrator, contacted  
10 Tere Salkeld of the BIA's Northern California Agency seeking an explanation as to why  
11 the Tribe had not received the contract support costs that the Tribe was entitled to  
12 under the Contract. Smith Declaration, p. 3, ¶ 12.

13 13. Salkeld informed Smith that she could provide no explanation or  
14 assistance with regard to the BIA's failure to pay the Tribe's 2010-2012 contract  
15 support costs funding, as it was a matter over which the Northern California Agency  
16 had no authority, because it related to previous years. Smith Declaration, p. 3, ¶ 13.

17 14 With regard to 2013 contract support costs funding, Salkeld provided  
18 Smith with a copy of an email exchange between herself and Sunshine Jordan, Senior  
19 Awarding Official, Pacific Regional Office, BIA. Smith Declaration, p. 3, ¶ 14, and  
20 Exhibit 3 thereto.

21 15. In the email, Jordan stated to Salkeld,  
22 The attached PR [payment request] is being returned. Alturas Rancheria  
23 is not identified on the attached FY 13 CSC distribution list, therefore, I  
24 am unsure as to why NCA [Northern California Agency] is attempting to  
award the tribe CSC funding? [sic]

25 Please revise the PR and resubmit.

26 Exhibit 3 to Smith Declaration.

27 16. Salkeld responded to Jordan by stating: "Alturas has a CSC Rate for  
28 FY-13, and yes they weren't on last years list, so what is the process to get them their

1 CSC for FY-13. [sic].” Exhibit 3 to Smith Declaration.

2 17. Jordan responded: “They can be considered for the bottoms [sic] up  
3 distribution at the end of the year, if funds are available.” Exhibit 3 to Smith  
4 Declaration.

5 18. Subsequently, Smith and the Tribe’s legal counsel sought an explanation  
6 from BIA officials of what contract support costs distribution list Ms. Jordan was  
7 referring to, how and under what authority the list is created, and why the Tribe is not  
8 on that list, given that it has an approved contract for contract support costs for 2012  
9 and 2013. Neither Mr. Smith, nor the Tribe’s legal counsel has received an explanation  
10 from anyone at the Northern California Agency or the Pacific Regional Office of the  
11 BIA as to how the “distribution list” was established, how a tribe qualifies for the  
12 distribution list or what factors would disqualify a tribe that has entered into a  
13 negotiated rate agreement from placement on the list. Smith Declaration, pp. 3-4, ¶ 18.

14 19. On July 31, 2013, Salkeld provided Smith with a copy of the BIA’s  
15 “Contract Support Policy” (“Policy”). Smith Declaration, p.4, ¶ 19, and Exhibit 4  
16 thereto.

17 20. The Policy describes the “bottoms up” distribution as funding “paid out  
18 to those tribes with the most severe shortfalls (a ‘bottom up [sic] approach), so that the  
19 gap between the best and worst funded tribes is narrowed by as much as Pool 3  
20 funding permits.” Exhibit 4 to Smith Declaration, p. 13.

21 21. The Policy defines “Pool 3” funding as, “amounts, if any, appropriated for  
22 increases on the prior year ‘CSC base’ to pay additional CSC requirements (‘CSC  
23 increase’).” Exhibit 4 to Smith Declaration, p. 13.

24 22. As of the filing of this motion, the BIA has not paid any contract support  
25 cost funds to the Tribe for fiscal years 2010 through 2012, as required by the Court’s  
26 Judgment.

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## I.

**THE TRIBE IS ENTITLED TO AN ORDER FINDING  
THE FEDERAL DEFENDANTS IN CONTEMPT.**

Rule 70(e) permits a court to direct a party to litigation to perform a specific act as directed by a judgment of the court and to hold a party in contempt where the party has failed to comply with the terms of a judgment issued by the Court. In the present case, the Federal Defendants have failed and refused to comply with the Judgment by failing to pay to the Tribe the contract support costs to which it is entitled under the Contract.

The Judgment requires that the Federal Defendants pay the contract support costs: “The BIA has approved the Tribe’s self-determination contract requests for the fiscal years 2009, 2010, 2011, and 2012, and *shall transfer the amounts provided in those requests to the Tribe’s bank account . . . in accordance with the terms contained in the contract award documents.*” (Emphasis added.)

The Contract provides that the BIA shall pay to the Tribe the contract support costs incurred by the Tribe in carrying out its obligations under the Contract. Smith Declaration, Exhibit 1, p. 8.

The ISDEAA also provides that the federal government shall pay to Indian tribes the contract support costs incurred by a tribe in carrying out its obligations under a self-determination contract, 25 U.S.C. § § 450j-1(a)(2), (g).

The BIA’s failure to pay the indirect contract support costs arising from the administration of the Tribe’s Self-Determination contract is, thus, a violation of the terms of the Judgment. Federal courts have concluded that a motion filed pursuant to Rule 70 is an appropriate means for enforcing a judgment against an agency of the federal government, even where the judgment requires the federal government to pay money to the plaintiff. *Gilbert v. Johnson*, 490 F.2d 827, 829 (5th Cir. 1974); *Lufkin v. United States*, 168 F. Supp. 451, 455 (D.N.H. 1958). An order of contempt is also appropriate, even where the defendants are public officials. *Gilbert*, 490 F.2d at 830;

1 *Sawyer v. Dollar*, 190 F.2d 623, 634 (D.C. Cir. 1951). See, also, *Spangler v. Pasadena*  
2 *City Board of Education*, 384 F. Supp. 846 (C.D. Cal. 1974).

3 Thus, the filing of the Tribe's notice, pursuant to FRCP Rule 70, is the  
4 appropriate means for enforcing the Judgment against the Federal Defendants in this  
5 case.

6 **II.**

7 **DEFENDANTS POLICY OF REFUSING TO PAY CONTRACT**  
8 **SUPPORT COSTS AS A RESULT OF INSUFFICIENT**  
9 **APPROPRIATIONS IS A VIOLATION OF THE ISDEAA.**

10 The BIA's response to the Tribe's repeated requests for the contract support  
11 costs to which it is entitled under the Contract is that the BIA is not obligated to pay  
12 those costs, because: (1) the Tribe was not on a "distribution list" that entitles tribes to  
13 contract support costs ("Alturas Rancheria is not identified on the attached FY 13 CSC  
14 distribution list, therefore, I am unsure as to why NCA is attempting to award the tribe  
15 CSC funding?"), and (2) there is no money available to pay the contract support costs  
16 funds to the Tribe, so the only funding that might be available would be from new  
17 appropriations ("They can be considered for the bottoms [sic] up distribution at the  
18 end of the year, if funds are available.").

19 The question of whether the federal government is required to provide contract  
20 support costs to Indian tribes that have entered into self-determination contracts, even  
21 where Congress has failed to appropriate sufficient funds to pay for all of the contract  
22 support costs for all of the tribes with which the BIA has entered into self-  
23 determination contracts was definitively resolved by the United States Supreme Court  
24 in *Salazar v. Ramah Navajo Chapter*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2181 (2012) ("*Salazar*").

25 In both *Cherokee Nation of Okla. v. Leavitt*, 543 U. S. 631, 639 (2005), and  
26 *Salazar*, the Court addressed the contention put forward by the federal officials that its  
27 obligation to pay contract support costs for ISDEAA self-determination contracts was  
28 "subject to the availability of appropriations." 25 U.S.C. §450j-1(b). "The Government  
contended . . . that Congress had appropriated inadequate funds to enable the [agency]



1 to pay the Tribes' contract support costs in full, while meeting all of the agency's  
2 competing fiscal priorities.” *Salazar*, 132 S. Ct. at 2188.

3 In *Salazar*, the Ramah Navajo School Board challenged the BIA’s decision to  
4 grant indirect contract support costs to Indian tribes that had entered into self-  
5 determination contracts on a “uniform, pro rata basis,” *Salazar*, 132 S. Ct. at 2187,  
6 because Congress failed to appropriate sufficient funds to pay the full amount of the  
7 contract support costs for all of the self-determination contracts. The school board  
8 sought all of the indirect contract support costs to which it was entitled under the  
9 terms of the contract.

10 The Supreme Court ruled that the school board was indeed entitled to all of the  
11 indirect contract support costs provided for in the contract and the ISDEAA, despite  
12 the fact that Congress had not allocated sufficient funding to pay for all of the contract  
13 support costs required under all of the self-determination contracts entered into with  
14 tribes throughout the country:

15 When a Government contractor is one of several persons to be paid out of  
16 a larger appropriation sufficient in itself to pay the contractor, it has long  
17 been the rule that the Government is responsible to the contractor for the  
18 full amount due under the contract, even if the agency exhausts the  
19 appropriation in service of other permissible ends. See *Ferris v. United*  
20 *States*, 27 Ct. Cl. 542, 546 (1892); *Dougherty v. United States*, 18 Ct. Cl.  
21 496, 503 (1883); see also 2 GAO, Principles of Federal Appropriations  
22 Law, p. 6-17 (2d ed. 1992) (hereinafter GAO Redbook). That is so “even if  
23 an agency's total lump-sum appropriation is insufficient to pay *all* the  
24 contracts the agency has made.” *Cherokee Nation*, 543 U. S., at 637, 125  
25 S. Ct. 1172, 161 L. Ed. 2d 66. In such cases, “[t]he United States are as  
26 much bound by their contracts as are individuals.” *Lynch v. United*  
27 *States*, 292 U. S. 571, 580, 54 S. Ct. 840, 78 L. Ed. 1434 (1934) . . . .  
28 Although the agency itself cannot disburse funds beyond those  
appropriated to it, the Government's “valid obligations will remain  
enforceable in the courts.” GAO Redbook, p. 6-17.

*Salazar*, 132 S. Ct. 2181.

The Court went on to explain the basis of its holding:

[S]o 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. *Dougherty*, 18 Ct. Cl., at 503. In such cases, if an agency overcommits its funds such that it cannot fulfill its contractual commitments, even the Government has acknowledged that “[t]he risk of over-obligation may be found to fall on the agency,” not the



contractor.

*Salazar*, 132 S. Ct. at 2189.

The Supreme Court further explained that:

The principles underlying *Cherokee Nation* and *Ferris* dictate the result in this case. Once “Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of ‘insufficient appropriations,’ even if the contract uses language such as ‘subject to the availability of appropriations,’ and even if an agency’s total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made.”

*Salazar*, 132 S. Ct. 2190, quoting *Cherokee Nation*, 543 U. S., at 637.<sup>3</sup>

In reaching this conclusion, the *Salazar* Court specifically rejected the argument that its ruling:

could cause the Secretary to violate the Anti-Deficiency Act, which prevents federal officers from “mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation.” 31 U. S. C. §1341(a)(1)(A). But a predecessor version of that Act was in place when *Ferris* and *Dougherty* were decided, see GAO Redbook, pp. 6-9 to 6-10, and the Government did not prevail there. As *Dougherty* explained, the Anti-Deficiency 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.” 18 Ct. Cl., at 503; see also *Ferris*, 27 Ct. Cl., at 546 (“An appropriation *per se* merely imposes limitations upon the Government’s own agents; . . . but its insufficiency does not pay the Government’s debts, nor cancel its obligations”).

*Salazar*, 132 S. Ct. at 2193.

The *Salazar* Court found that, where necessary, the shortfall in funding for self-

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<sup>3</sup>In *Cherokee Nation*, the Court found that:

. . . the Government’s provision of funds under the Act is “subject to the availability of appropriations.” 25 U.S.C. § 450j-1(b). This language does not help the Government . . . . Language of this kind is often used with respect to Government contracts. See, e.g., 22 U.S.C. § 2716(a)(1) [22 USCS § 2716(a)(1)]; 42 U.S.C. §§ 6249(b)(4) [42 USCS § 6249(b)(4)], 12206(d)(1). This kind of language normally makes clear that an agency and a contracting party can negotiate a contract prior to the beginning of a fiscal year but that the contract will not become binding unless and until Congress appropriates funds for that year.

*Cherokee Nation*, 543 U.S. at 643.

determination contracts can be made up from the judgment fund<sup>4</sup> established under 31 U.S.C. § 1304:

Congress expressly provided in ISDA that tribal contractors were entitled to sue for ‘money damages’ under the Contract Disputes Act upon the Government’s failure to pay, 25 U. S. C. §§450m-1(a), (d), and judgments against the Government under that Act are payable from the Judgment Fund, 41 U. S. C. §7108(a).

*Salazar*, 132 S. Ct. at 2193.

The *Salazar* and *Cherokee Nation* decisions leave no doubt that the BIA is obligated to pay to the Tribe the contract support costs for all of the years the Contract was in force. To the extent that the appropriations by Congress were, or are, insufficient to pay all of the contract support costs to which the BIA is obligated under the Contract, the federal government must pay the costs from the Judgment Fund. *Id.*

Finally, there is nothing in the *Salazar* and *Cherokee Nation* cases that could be interpreted to allow the BIA to evade its obligation to pay contract support costs through the failure of BIA officials to place the Tribe on an internal BIA “distribution list.”

## CONCLUSION

The Federal Defendants are compelled to pay all of the contract support costs to which it has obligated itself under the Tribe’s self-determination contract, because this Court has ordered the Federal Defendants to do so. The Federal Defendants are also compelled to pay all of the contract support costs to which it has obligated itself under the Contract, because the Supreme Court does not permit the federal government to avoid its obligation to pay contract support costs for self-determination contracts on the grounds that Congress failed to appropriate sufficient funding to cover all of the contracts that federal agencies have entered into: “[W]hen an agency makes competing contractual commitments with legally available funds and then fails to pay,

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<sup>4</sup>When payment from the Judgment Fund (31 U.S.C. 1304) is required, guidance to agencies is provided by the Treasury Department’s Financial Management Service at <http://www.fms.treas.gov/judgefund/index.html>.

1 it is the Government that must bear the fiscal consequences, not the contractor.”

2 *Salazar*, 132 S. Ct. at 2192.

3 In this case, the Federal Defendants do not dispute that they have failed to pay  
4 the contract support costs due to the Tribe under the Contract. Instead, they maintain  
5 that they cannot pay the contract support costs because Congress has not allocated  
6 sufficient funding for all of the contract support costs to which the BIA has obligated  
7 itself. It is not the Tribe’s responsibility to bear the consequences of the federal  
8 government’s failure to appropriate sufficient funds.

9 The Tribe therefore respectfully requests that the Court order the Federal  
10 Defendants to pay all of the contract support costs to which it is obligated under the  
11 Tribe’s self-determination contract for 2010-2012. By doing so, the Court will ensure  
12 that the Tribe receives the funds that it is entitled to under its self-determination  
13 contracts from the Judgment Fund. The Tribe also respectfully requests that the Court  
14 find the Federal Defendants in contempt for their refusal to pay those contract support  
15 costs in violation of the Judgment and award the Tribe its costs and attorneys’ fees  
16 incurred in bringing this motion as a sanction for their behavior.

17 Respectfully submitted,

18 Dated: September 27, 2013

RAPPORT AND MARSTON

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20 By: /s/Lester J. Marston  
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