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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ALTURAS INDIAN RANCHERIA,)	Case No. 2:10-cv-01997 LKK-EFB
)	
Plaintiff,)	PLAINTIFF'S REPLY TO DEFENDANT'S
)	OPPOSITION TO MOTION TO ENFORCE
v.)	JUDGMENT
)	
KENNETH SALAZAR, et al.,)	
)	DATE: November 18, 2013
Defendant.)	TIME: 10:00 a.m.
)	CTRM.: 4, 15 th Floor
)	JUDGE: Honorable Lawrence K. Karlton
)	

INTRODUCTION

In their opposition the plaintiff's, Alturas Indian Rancheria ("Tribe"), motion to enforce this Court's judgment, dated January 12, 2012, ("Judgment"), the defendants ("Government") argue that the Government has not violated the Judgment for the following reasons: (1) the Judgment simply directs the parties to comply with the January 11, 2012, Settlement Agreement and Stipulation for Entry of Judgment and Order ("Settlement Agreement"); (2) the Settlement Agreement only required the Government to pay to the Tribe the amounts "contained in the contract award documents"; (3) the contract award documents did not specify an exact amount to be paid to the Tribe for "contract support" costs at the time the Settlement Agreement was entered into by the parties, and therefore, (4) the Government has not violated the

Judgment.

In addition, the Government argues that since its obligation to pay contract support costs arises under the Indian Self-Determination Education and Assistance Act, 25 U.S.C. § 450 et seq. (“ISDEAA”) and not the Settlement Agreement, the Tribe cannot force the Government to pay its contract support costs by an action to enforce the Judgment, but rather, must file new action in federal court to compel the Government to pay the costs.

In this brief the Tribe shall show that: (1) its 638 Contracts for 2009, 2010, 2011 and 2012 requires the Government to pay contract support costs; and (2) the fact that: (a) the amount of the costs were not quantified until after the Judgment was entered and (b) the Government does not presently have the money to pay those costs, does not relieve the Government of its contractual obligation to pay those costs.¹

I.

THE GOVERNMENT’S FAILURE TO PAY THE TRIBE’S CONTRACT SUPPORT COSTS IS A VIOLATION OF THE JUDGMENT.

A. The 2009, 2010, 2011 and 2012 638 Contracts Requires the Government to pay the Tribe’s contract support costs.

The Government’s argument that it is not obligated under the Judgment to pay contract support costs is astonishing until one remembers that it is the Bureau of Indian Affairs (“BIA”) and its officials who are making the argument. With this in mind, the Government’s tortured logic and monumental insincerity is simply par for the course.

The Government repeatedly cites to the critical language of the Judgment, but then ignores the obvious meaning of the words and the intent of the parties in entering

¹In its Opposition, the Government repeatedly makes reference to the small number of members of the Tribe and the amount of money that the Tribe has received from the Government. The implication of these statements appears to be that the Tribe does not need the funding to which it is entitled or perhaps that the members of the Tribe are just greedy. This is both offensive and irrelevant. The only issue before the Court is whether the Government has met its obligations under this Court’s Judgment.

1 into the Settlement Agreement: “The BIA has approved the Tribe’s self-determination
 2 contract requests for the fiscal years 2009, 2010, 2011, and 2012, and shall transfer the
 3 amounts provided in those requests . . . in accordance with the terms contained in the
 4 contract award documents.” The Government argues that it is not required to pay
 5 contract support costs pursuant to the Judgment because they were not included in the
 6 self-determination contract request. But, by its unambiguous terms, the Judgment
 7 requires that the Government pay the self-determination contract funds “*in*
 8 *accordance with the terms contained in the contract award documents.*” The contract
 9 award documents for 2010-2012 are the 638 contract and annual funding agreement,
 10 Contract number A12AV00538, entered into on January 5, 2012 and effective January
 11 1, 2012. On page three, the Award/Contract document lists what costs have to be paid:

CFDA Number:	15.024
CFDA Title:	Indian Self-Determination Contract Support
Federal Finance System Program Code:	T9370
BIA Program Title:	TPA/Tribal Government/Contract Support
Contract Program Category:	<u>Contract Support</u>

16 Exhibit 1 to the Declaration of Wayne Smith in Support of Motion for Order Enforcing
 17 Judgment and Finding Federal Defendants in Contempt, p. 3.

18 Thus, under the plain wording of the contract award documents, the
 19 Government is required to pay the Contract Support Costs.

20 The Government’s argument that “the Tribe fails to identify even one of its self-
 21 determination contract request from 2009 through 2012 (“638 Contract”) in which it
 22 sought contract support costs, let alone a request that it had made and the BIA had
 23 approved at the time of the Settlement Agreement,” makes the wording in the 638
 24 Contract, and the Judgment that require that the BIA pay the contract funds “*in*
 25 *accordance with the terms contained in the contract award documents*” meaningless,
 26 Opposition, pp. 5-6. Clearly, the Court recognized that the Settlement Agreement to
 27 pay the 638 Contract funds would be memorialized, as required by the ISDEAA, in the
 28 contract award documents. The unambiguous terms of those documents require
 payment of the contract support costs. If the Court did not intend that the payments

1 be made pursuant to the terms of the contract award documents, there would have
2 been no reason to include the phrase “in accordance with the terms contained in the
3 contract award documents.”

4 The Government’s argument, moreover, simply ignores the plain language of
5 the ISDEAA. 25 U.S.C. § 450j-1(a)(2) which states:

6 There shall be added to the amount required by paragraph (1) contract
7 support costs which shall consist of an amount for the reasonable costs
8 for activities which must be carried on by a tribal organization as a
contractor to ensure compliance with the terms of the contract and
prudent management, but which--

9 (A) normally are not carried on by the respective Secretary in his direct
operation of the program; or

10 (B) are provided by the Secretary in support of the contracted program
from resources other than those under contract.

11 This obligation is not and cannot be extinguished by the absence of a specific
12 instruction to the BIA to follow the law in the Judgment. The Court does not have to
13 rule that the Government is required to meet its statutory obligations in order for
14 those obligations to be applicable or enforceable.

15 Fundamentally, the Government’s interpretation of the Judgment simply
16 makes no sense. The purpose of the Settlement Agreement and the Judgment
17 implementing it was to ensure that the Tribe receive the 638 Contract funding to which
18 it was entitled for the period of 2009-2012. The payment of that funding had been
19 suspended as a result of the leadership dispute within the Tribe that erupted in 2009.
20 That funding included the contract support costs. The Government does not and
21 cannot provide any rational explanation for why the Tribe would not be entitled to the
22 contract support funding.

23 This is apparent from the events in this case. As the Government readily
24 admits, the BIA paid contract support costs under the 2009 contract on February 7,
25 2012, “after the Tribe resolved its internal leadership dispute.” Opposition, p. 2, citing
26 to page 2, paragraph 4 of the Declaration of Terry J. Lincoln in Support of Federal
27 Defendants’ Opposition to Motion to Enforce Settlement (“Lincoln Declaration”).
28 There is no basis for distinguishing between the obligation to pay contract support

costs under the 2009 contract and the 638 Contract covering 2010-2012.²

The Government further argues that the Government had no obligation to pay the contract award costs because the actual amount of the costs to be paid to the Tribe had not been established as of the date of the Judgment.

Subsequent to the Court's order ending this case, the Tribe and BIA began negotiating the cost rate for indirect contract support costs. . . . A year and a half after the Court closed this case, the Tribe and the BIA entered into an indirect cost negotiate agreement. . . . That agreement supplies a provisional rate to use for calculating indirect costs in connection with the Tribe's contracts under the ISDEAA, but the final rate must be submitted based on actual costs. . . . The agreement does not itself require the BIA to make any payments to the Tribe.

Under the ISDEAA, the Tribe cannot just specify in its request for a 638 Contract the amount of the contract support costs. The amount of the contract support costs is determined through negotiations between the BIA and an Indian tribe that enters into a 638 Contract. 25 U.S.C. § 450j-1(a)(3)(B). Through those negotiations, the parties establish the "negotiated rate" for the contract support costs. The Government's position, thus, is: (1) that the Government is not obligated to pay the statutorily mandated contract support cost because the Tribe and the Government followed the requirements of Section 25 U.S.C. § 450j-1(a)(3)(B) for establishing the amount of the costs, and, because those negotiations took eleven months to complete, the payment pursuant to the Settlement Agreement is not compelled under the Judgment; and (2) the Government is not required to make any payments pursuant to the Settlement Agreement, anyway.

Clearly, the Tribe did not lose its right to contract support funding because it complied with the statutorily established negotiation process: that process *implements*

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²Oddly, the Government asserts that the Tribe, "wants to reopen this case to seek in [sic] unspecified amount of 'contract support costs'" Opposition, p. 2. The amount has not only been specified, it was determined by negotiations between the Tribe and the BIA's, and is set forth in the "negotiated rate agreement" for 2012. Smith Declaration, pp. 2-3, ¶ 9, and Exhibit 2 thereto.

1 the Tribe's right to the funding, it does not eliminate that right.³ Second, what is the
2 point of negotiating a rate agreement if it is not an enforceable agreement establishing
3 the rate/amount of contract support costs? The Government appears to be suggesting
4 that, while the negotiations are required, compliance with the agreement is not. These
5 arguments do not pass the laugh test.

6 The Government returns to this argument a second time, with even less success:

7 Further evidence that the Tribe did not include contract support costs in
8 the 2010-2012 self-determination requests which the BIA had approved
9 at the time of the Settlement Agreement is that, by the Tribe's own
admission, it did not even begin negotiations with the BIA regarding those
costs until after the Court issued its order closing the case.

10 Opposition, p. 6.

11 The reason that the negotiations took place when they did, once again, is
12 because the Tribe was following the applicable law. The negotiated rate agreement is
13 not negotiated until after the 638 Contract is entered into. 25 U.S.C. § 450j-1(a)(3)(B)
14 ["On an annual basis, during such period as a tribe or tribal organization operates a
15 Federal program, function, service, or activity pursuant to a contract entered into
16 under this Act, the tribe or tribal organization shall have the option to negotiate with
17 the Secretary the amount of funds that the tribe or tribal organization is entitled to
18 receive under such contract pursuant to this paragraph."]. The Tribe could not have
19 established that rate before the contract was agreed upon, because the rate is based on
20 the 638 Contract.

21 The foregoing makes it clear that the Government has indeed failed to perform
22 specific acts required under the Judgment, the payment of the contract support costs.
23 On that basis, pursuant to Rule 70 of the Federal Rules of Civil Procedure ("Rule 70"),
24

25 ³It should be noted furthermore, that, to the extent that the Government is arguing
26 that the eleven month delay in finalizing the contract support cost rate negotiations,
27 somehow vitiates the Tribe's right to the contract support costs, that delay cannot be laid
28 at the feet of the Tribe. Those negotiations lasted for eleven months because the
Government was, characteristically, glacial in pursuing and completing negotiations. The
Tribe was not in control of the BIA's bureaucratic delays and should not be punished as
a result of delays over which it had no control.

the Government should be ordered to pay the contract support costs and held in contempt for its willful and ongoing failure to do so.

B. The ISDEAA requires the Government to pay the Tribe's contract support costs even though the government has not appropriated any money to pay those costs.

In its opening brief, the Tribe demonstrated that, under both the ISDEAA itself and the case law interpreting the ISDEAA, the Government is required to pay contract support costs. See the Tribe's "Memorandum of Points and Authorities in Support of Motion for Order Enforcing Judgment and Finding Defendants in Contempt," pp. 7-10., and *Salazar v. Ramah Navajo Chapter*, ___ U.S. ___, 132 S. Ct. 2181 (2012) ("*Salazar*"); *Cherokee Nation of Okla. v. Leavitt*, 543 U. S. 631, 639 (2005).

The Government's response to this analysis is remarkable: "Again, neither the Settlement Agreement nor the Court's Judgment require the BIA to comply with the ISDEAA, and thus any alleged violations of that Act cannot form the basis for a Rule 70 motion in this case." Opposition, p. 7. The Tribe is not aware of any federal case law holding that agencies of the federal government and their officials are not obligated to comply with federal law unless they are ordered to do so by a court. Ironically, immediately after relieving the Government of its obligation to comply with federal law, the Government turns around and argues that the case law, cited by the Tribe, requiring that contract support costs be paid can be distinguished, because the Tribe has to comply with the Contract Disputes Act in order to enforce their rights under the 638 Contract and the ISDEAA. Opposition, p. 8. Apparently, the Tribe does have to comply with federal law without a court order, but the Government does not. More important, this distinction is false. As discussed in the previous section, the Government is compelled under the Judgment to pay the contract support costs. Under the Government's own analysis, the Tribe is not required to file a new action pursuant to the Contract Disputes Act, because the Judgment compels the Government to pay those costs.

The Government then simply misrepresents the facts of this case: "unlike the

1 2012 contract at issue here, both *Rama* and *Cherokee Nation* involved tribes whose
 2 self-determination contract include specific provisions regarding the payment of
 3 contract support costs.” Opposition, p. 8. As the 638 Contract at issue in this case
 4 clearly reveals, contract support costs are specifically provided for under the contract.
 5 Exhibit 1 to Smith Declaration, p. 3.

6 The Government’s final point reveals the Government’s real game. The
 7 Government argues that the Tribe’s “remedy lies elsewhere, not in a motion under Rule
 8 70.” Opposition, p. 8. The Tribe, asserts the Government, must file a new lawsuit,
 9 pursuant to the Contract Disputes Act. This argument aligns perfectly with every other
 10 action that the Government has taken in this case and demonstrates perfectly why this
 11 litigation was filed and why the Court should grant the Tribe’s request for enforcement
 12 of the Judgment. The Government has, for years, found ever more creative ways to
 13 frustrate the Tribe’s attempts to receive what it is entitled to under the ISDEAA. Now,
 14 the Government, which is subject to the Court’s Judgment to pay that funding to the
 15 Tribe, based on the Settlement Agreement entered into by the Government, argues that
 16 the Tribe has to start the whole process over. Rather than meet its obligations, the
 17 Government wants to force the Tribe to waste its limited resources to get what it is
 18 entitled to. This unapologetic violation of the Government’s fiduciary obligations to
 19 the Tribe leads to a simple question: Why? What is the point of this exercise? The
 20 Government has an obligation to pay the contract support costs under the ISDEAA, the
 21 638 Contract, the applicable case law, the Settlement Agreement and the Judgment.
 22 The Government should not be rewarded for this pointless obstinance. This Court
 23 should end this matter right now and order the Government to pay the contract
 24 support costs.⁴

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26
 27 ⁴As was discussed in the Tribe’s memorandum of points and authorities in support
 28 of its motion, pp. 9-10, if the Court rules that the Government is required to pay the
 contract support costs, the money can be paid out of the Judgment Fund without affecting
 either the BIA’s budget or funding to other tribes.

CONCLUSION

The Government has presented this Court with frivolous, transparently insincere arguments. They reflect precisely the problem that led to this litigation in the first place. The Government is doing nothing more than finding ways to create obstacles to the Tribe's receipt of what the ISDEAA and the Tribe's self-determination contract require: contract support funding. The Government is trying to force the Tribe to file another lawsuit, with the only possible goal being to delay the inevitable while wasting the Tribe's limited resources. These actions violate the Government's fiduciary duty to the Tribe, the purposes of the ISDEAA, and the obvious intention of this Court's Judgment. The Tribe cannot provide any explanation for the Government's motivations. The Tribe can only ask that the Court ensure that the Tribe's statutory and contractual rights are enforced as provided for in the Judgment without further, unnecessary litigation.

Respectfully submitted,

Dated: October 28, 2013

RAPPORT AND MARSTON

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