

**NOT FOR PUBLICATION**

**FILED**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

APR 8 2024

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

SAMUEL JAMES KENT,

Petitioner,

v.

DARRYL LACOUNTE, Director of the  
United States Bureau of Indian Affairs;  
DEB HAALAND, Secretary of the United  
States Department of the Interior; BUREAU  
OF INDIAN AFFAIRS; U.S.  
DEPARTMENT OF THE INTERIOR,

Respondents.

No. 22-70013

DOI No. OI-PI-21-0685-I

MEMORANDUM\*

On Petition for Review of an Order of the  
Department of Interior

Argued and Submitted March 11, 2024  
San Francisco, California

Before: S. R. THOMAS, McKEOWN, and CHRISTEN, Circuit Judges.

Samuel Kent petitions for review of the Bureau of Indian Affairs' (BIA) order denying his whistleblower retaliation complaint filed pursuant to 41 U.S.C. § 4712(c). The BIA's order concluded that, “[u]pon legal review, it is clear that 41

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

U.S.C. § 4712 does not apply to Indian Self-Determination and Education Assistance Act agreements made under Public Law 93-638, including the HIP and TTP administered by [the Pit River Tribal Council] in this case.” Because the parties are familiar with the facts, we do not recount them here. We have jurisdiction pursuant to 41 U.S.C. § 4712(c)(5), and we review an agency’s order issued pursuant to § 4712(c) under the Administrative Procedure Act’s arbitrary and capricious standard. *See* 41 U.S.C. § 4712(c)(5). We grant the petition in part, deny in part, and remand.

The Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA), Public Law 93-638, provides that “the contracts and cooperative agreements entered into with tribal organizations pursuant to section 5321 of this title shall not be subject to Federal contracting or cooperative agreement laws (including any regulations), except to the extent that such laws expressly apply to Indian tribes.” 25 U.S.C. § 5324(a)(1). Section 5321 pertains to “self-determination contracts.” 25 U.S.C. § 5321. ISDEAA defines a “self-determination contract” as a contract:

entered into under subchapter I [§§ 5321–32] (or a grant or cooperative agreement used under section 5308 of this title) between a Tribal organization and the appropriate Secretary for the planning, conduct, and administration of programs or services that are otherwise provided to Indian Tribes and members of Indian Tribes pursuant to Federal law, subject to the condition that . . . no [such] contract . . . shall be[,] . . . except as provided in section 5328(a)(1) of this title, subject to any Federal procurement law (including regulations)[.]

25 U.S.C. § 5304(j).

The laws that govern federal contracting and procurement are found in Title 41 of the U.S. Code (titled “Public Contracts”). Section 4712 of that title provides that an employee of a contractor or grantee “may not be discharged, demoted, or otherwise discriminated against as a reprisal” for making certain disclosures about a federal contract or federal funds, 41 U.S.C. § 4712(a)(1), subject to an exception for employees and contractors of the intelligence community, *id.* § 4712(f).

Kent argues that, because he was not one of the individuals excepted in section 4712(f), he is protected by section 4127(a)(1). This argument is without merit. ISDEAA creates a presumption that a federal contracting law does not apply to self-determination contracts unless that law expressly applies to Indian tribes. 25 U.S.C. § 5324(a)(1). Because section 4712 does not expressly apply to Indian tribes, ISDEAA self-determination contracts are exempt from its protection. That section 4712—the enactment of which postdates the current version of section 5324(a)(1)—does not specifically except employees of an Indian tribe is thus immaterial. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (“We assume that Congress is aware of existing law when it passes legislation.”). Accordingly, because the Housing Improvement Program (HIP) contract was clearly a self-determination contract under ISDEAA, the BIA correctly concluded that section 4712 does not apply to the portion of Kent’s complaint alleging

retaliation related to his disclosures about the HIP funds.

The Tribal Transportation Program (TTP) agreement here, however, was entered into pursuant to 23 U.S.C. § 202, not ISDEAA. Accordingly, the BIA’s conclusion that “41 U.S.C. § 4712 does not apply to Indian Self-Determination and Education Assistance Act agreements *made under Public Law 93-638, including the. . . TTP*” assumes a premise that is not supported by the record before us (emphasis added).

In its appellate brief, the BIA argues that ISDEAA nevertheless applies to the TTP agreement by virtue of 23 U.S.C. § 202(b)(6)(A). That provision states that “all funds made available through the Secretary of the Interior under this chapter . . . shall be made available, upon request of the Indian tribal government, to the Indian tribal government for contracts and agreements . . . in accordance with [the] Indian Self-Determination and Education Assistance Act (25 U.S.C. 5301 et seq.).” 23 U.S.C. § 202(b)(6)(A). At oral argument, the BIA conceded that the record does not indicate that the Pit River Tribe ever requested that the TTP funds in this case be delivered pursuant to an ISDEAA contract or agreement. In addition, the agency has not explained the basis for its conclusion that the phrase “in accordance with” confers ISDEAA’s protections—including the exemption from federal contracting laws—upon all contracts and agreements concerning TTP funds, such as the TTP agreement here. Because the BIA’s order contained only

its conclusion and not its analysis, we grant Kent's petition related to the TTP funds and remand for a reviewable explanation as to why the BIA concludes that the TTP agreement is exempt from section 4712.

**GRANTED IN PART, DENIED IN PART, AND REMANDED.<sup>1</sup>**

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<sup>1</sup> Each party shall bear its own costs. *See* Fed. R. App. P. 39(a)(4).



APPENDIX 6 of 10  
**United States Department of the Interior**  
BUREAU OF INDIAN AFFAIRS  
Washington, DC 20240

January 5, 2022

Samuel James Kent  
13426 SW 61st Avenue  
Portland, Oregon 97219-8123

Frank Lawrence, Esq.  
Tribal Attorney  
578 Sutton Way, No. 246  
Grass Valley, California 95945

Re:                   Samuel James Kent Whistleblower Claim Against Pit River Tribal Council  
Case No. OI-PI-21-0685-I

Dear Mr. Kent and Mr. Lawrence:

On December 6, 2021, the Office of the Inspector General (OIG) issued a Report of Investigation (ROI) in Case No. OI-PI-21-0685-I in which it substantiated Mr. Kent's whistleblower reprisal complaint brought under the National Defense Authorization Act's (NDAA) whistleblower provision, 41 U.S.C. § 4712, against the Pit River Tribal Council (PRTC) arising from PRTC's administration of the Housing Improvement Program (HIP) and the Tribal Transportation Program (TTP). On that date, the OIG transmitted the ROI to the Secretary of the Interior for "any action deemed appropriate," while informing the Secretary that, in making its determination, the OIG had "assumed without deciding that 41 U.S.C. § 4712 applied to any and all Federal grants received by the Tribe, regardless of whether those grants were made pursuant to or under the authority of Public Law 93-638." (ROI at page 1). As the head of the cognizant U.S. Department of the Interior bureau, I am issuing the following order.

Upon legal review, it is clear that 41 U.S.C. § 4712 does not apply to Indian Self-Determination and Education Assistance Act agreements made under Public Law 93-638, including the HIP and TTP administered by PRTC in this case. Accordingly, I am denying the complainant's request for relief under 41 U.S.C. § 4712(c).

**Darryl  
LaCounte**

Digital signature by Darryl  
LaCounte  
Date: 2022.01.05 19:10:50  
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Darryl LaCounte  
Director, Bureau of Indian Affairs



APPENDIX 7 of 10  
United States Department of the Interior

BUREAU OF INDIAN AFFAIRS  
Washington, DC 20240

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Memorandum

To: Matthew Elliot  
Assistant Inspector General for Investigations  
Office of Inspector General

From: Director, Bureau of Indian Affairs *Daryl L. Lant*

Subject: DOI-OIG Case File Number: OI-HQ-19-19-0707-R  
Mismanagement of Federal Funds and Improper Termination

This memorandum is in response to your email dated September 11, 2019 concerning a complaint filed by Samuel Kent alleging that the Pit River Tribe: 1) mismanaged federal funding from 2013-2019; and 2) terminated Mr. Kent's employment with the Pit River Tribe as a direct result of unauthorized disclosures to federal agencies and allegations of tribal property theft. Specifically, the complainant alleges that the Pit River Tribe commingles Housing Improvement Program (HIP) funds, and that Tribal Transportation Program are not in compliance with the referenced funding agreement. In consultation with the BIA Pacific Region, the BIA provides the following:

***Allegation 1: Comingling A17AV01014 Funds by Pit River Tribe***

*The allegation states, in part, that "On March 13, 2019 I notified the Tribe's CFO Jake Suppah and the accounting supervisor Alex Urena that funds advanced to the Tribe under the BIA Housing Improvement Program (HIP) agreement A17AV01014 needed to be segregated out from the rest of the grant funds aggregated in the Tribe's bank account".*

Ms. Victoria May, Indian Self-Determination Officer, BIA Pacific Regional Office was interviewed to affirm potential abnormalities or area(s) of concern related to the management and accounting of federal funding awarded to the Pit River Tribe by the BIA. Ms. May confirmed that the Pacific Region issued notice to Pit River Tribe advising the Tribe to cease commingling of federal funds. The Pacific Region acknowledges that commingling of federal funds occurs at the Pit River Tribe. However, contract A17AV01014 closed in good standing

with Pacific Region. Therefore, BIA recommends no further action be taken regarding this allegation.

***Allegation 2: Comingling A16AP00252 and A13AP00123 Funds by Pit River Tribe***

*The allegation states that "On July 10, 2019, A notice of non-compliance with the provisions of the Pit River Tribe's Tribal Transportation Agreement A16AP00252 and A13AP00123 was submitted to CFO Suppah, Tribal Administrator, Charles White and Tribal Chairperson Agnes Gonzales. The notice was in regards to non-compliance with provisions of the tribe's referenced funding agreement requiring TPP funds to be segregated from other federal funds and accounted for separately".*

BIA interviewed Ms. Scarlett Carmona, Transportation Specialist, BIA Pacific Region Division of Transportation to determine potential abnormalities or area(s) of concern related to the contract management of A16AP00252 and A13AP00123. Ms. Carmona stated that she was unaware of any non-compliance notice issued to the Pit River Tribe by the Tribal Transportation Division, BIA or Federal Highway Administration and believes that the referenced notice is an internal communications within the Pit River Tribe. Ms. Carmona stated that to the best of her knowledge, the Tribal Transportation Program Funds awarded to Pit River Tribe are monitored, tracked and expended consistent with their contract awards. Therefore, BIA recommends no further action regarding this allegation

***Allegation 3: Indirect Cost Reimbursement Rates***

*The allegation states that "On June 28, 2019 an email was sent to CFO Jake Suppah and accounting supervisor Alex Urena notifying them that the \$1,019,882.84 of the indirect cost that was booked in the Tribe's accounting system had been calculated incorrectly. This email was in response to recently discovering the supporting documents for the IDC charge. Prior to this, several discussions were held between the three of us in which I expressed my objection to the booking of indirect cost charges against the Tribe's Tribal Transportation Program for periods which could not be substantiated. It is my understanding that these charges were recorded to reduce the amount of unearned revenue on the Tribe's balance sheet, which had been the cause of audit findings for the past several years".*

BIA interviewed Ms. Carmona regarding the potential of indirect cost (IDC) and/or contract support cost (CSC) allocation concerns. Ms. Carmona stated that to the best of her knowledge the Pit River Tribe maintains compliance for IDC reimbursement rates as negotiated with the Tribe's cognizant agency. BIA believes that the statement made by the complainant may be an internal matter between the complainant and the tribe. It is BIA's policy not to interfere with the governance of tribes allowing them to utilize their own processes, including administrative decisions. BIA recommends no further action regarding this allegation.

***Allegation 4: Lease/Rental Cost Recovery***

*The allegation states that "On July 09, 2019 an email was sent to CFO Jake Suppah outlining my concerns for the amount of rental expenses the Tribe's economic development arm (the Kwahn Corporation) had been charging the Tribe's Roads Department for use of a vacant lot and metal building. My concern was due to rent expenses being collected for a 12 month period without an active lease and the amounts being charge is higher than the allowable regulatory amounts. The Pit River Tribe's Roads Department is funded by the Tribal Transportation Program.*

The BIA determined that this allegation is an internal leasing matter between a tribal enterprise and the tribe. It is the BIA's policy not to interfere with the governance of tribes allowing them to utilize their own processes, including operational decisions. Therefore, BIA recommends no further action regarding this allegation.

***Allegation 5: Restricted Federal Agency Communications***

*The allegation states, in part, that "On July 11, 2019 I was informed that my employment with the Tribe was terminated. I was informed that the termination was in response to 1. Being in contact with federal agencies after being instructed not to be. This directive was given after the Tribe was notified that \$113,000 would need to be repaid for the BIA HIP Program and a notice to cease the co-mingling of federal funds would follow".*

The BIA determined that this allegation is an internal matter between the complainant and the tribe. It is the BIA's policy not to interfere with the governance of tribes allowing them to utilize their own processes, including staffing decisions. Therefore, BIA recommends no further action regarding this allegation.

***Allegation 6: Repayment of A17AV01014 Contract Funds***

*The allegation states that "I was informed that the personnel action taken against me were a result of a senior awarding official at the BIA named Victoria May being made of the fact the Tribe was comingling HIP funds and also the notification the Tribe was overfunded under HIP agreement A17AV01014 by \$113,000, which would have to be repaid.*

Ms. Victoria May, Indian Self-Determination Officer, BIA Pacific Regional Office was interviewed regarding the award of A17AV01014 by the BIA. Ms. May verified that \$113,000 was over-awarded to the tribe's HIP. As a result, the BIA and the tribe negotiated an amendment to their existing self-determination agreement to allow an individual or families deemed eligible for HIP services. The Pit River Tribe has identified a qualified HIP applicant and intends to

disburse the remainder of the \$113,000 to the Pit River Housing Authority for renovation costs. BIA concludes that the over-award was unintentional and has been corrected. BIA recommends no further action to be taken on this issue.

**Conclusion:**

As a result of our administrative investigation, the BIA concludes that no further actions are required. The BIA maintains a relationship with the Pit River Tribe and continues to provide technical assistance when requested by the tribe.

If you have any questions or need additional information regarding this matter, please do not hesitate to contact Amy Dutschke, Regional Director, Pacific Region at (916) 978-6000.