

**FILED**

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

APR 8 2024

FOR THE NINTH CIRCUIT

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).

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## Information Regarding Judgment and Post-Judgment Proceedings

### Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

### Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

### Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1) Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

#### (1) Purpose

##### A. Panel Rehearing:

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

##### B. Rehearing En Banc

- A party should seek en banc rehearing only if one or more of the following grounds exist:
  - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
  - The proceeding involves a question of exceptional importance; or

- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

## **(2) Deadlines for Filing:**

- A petition for rehearing must be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

## **(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

## **(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- Attorneys must file the petition electronically via the appellate electronic filing system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-8000.

### **Petition for a Writ of Certiorari**

- The petition must be filed with the Supreme Court, not this Court. Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov).

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista, [maria.b.evangelista@tr.com](mailto:maria.b.evangelista@tr.com));
  - **and** electronically file a copy of the letter via the appellate electronic filing system by using the Correspondence filing category, or if you are an attorney exempted from electronic filing, mail the Court one copy of the letter.



**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

**Form 10. Bill of Costs**

*Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>*

**9th Cir. Case Number(s)**

**Case Name**

The Clerk is requested to award costs to *(party name(s))*:

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