

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY

VIEJAS BAND OF KUMEYAAY INDIANS)
and SYCUAN BAND OF THE KUMEYAAY)
NATION; and COUNTY OF SAN DIEGO,)
CALIFORNIA,)
Appellants,)
v.)
PACIFIC REGIONAL DIRECTOR,)
BUREAU OF INDIAN AFFAIRS,)
Appellee.)

Governor's Office of Planning & Research

OCT 11 2019

STATE CLEARINGHOUSE

MOTION TO RECUSE PRINCIPAL DEPUTY ASSISTANT SECRETARY

The Ewiiapaayp Band of Kumeyaay Indians ("Ewiiapaayp") moves to recuse Principal Deputy Assistant Secretary ("PDAS") John Tahsuda from participating in this appeal, which involves a challenge by the Viejas Band of Kumeyaay Indians ("Viejas"), the Sycuan Band of the Kumeyaay Nation ("Sycuan"), and the County of San Diego ("County") to the decision of the Pacific Regional Director of the Bureau of Indian Affairs ("BIA") approving Ewiiapaayp's application to take into trust a 16.69-acre parcel of property (the "Walker Parcel") located near Alpine, California.

Since 2001, Ewiiapaayp has pursued an application for the BIA to take the Walker Parcel into trust. The process has been contentious and prolonged because it is opposed by Viejas, among others, which fears that the trust acquisition would enable Ewiiapaayp to construct and operate a casino which would compete with Viejas's nearby casino. The application has been repeatedly approved by BIA Pacific Region Office and then appealed by Viejas and others to the Interior Board of Indian Appeals ("IBIA").

Before he became PDAS, Mr. Tahsuda was employed as a lobbyist at Navigators Global, LLC. Mr. Tahsuda and Navigators Global, LLC were the registered lobbyists for Viejas during the period 2015 – 2017. On April 12, 2017, Mr. Tahsuda and Navigators Global, LLC filed a Lobbying Disclosure Report with Congress indicating their representation of Viejas was terminated effective January 31, 2017. Mr. Tahsuda was sworn into office as the PDAS on September 3, 2017.

At the time Mr. Tahsuda took office, Ewiaapaayp's trust application was pending appeal before the IBIA. On December 23, 2016 – while Mr. Tahsuda represented Viejas -- the BIA Pacific Region Office had approved the Tribe's application, and this decision was appealed to the IBIA by Viejas and certain other parties. This appeal had been fully briefed by the time Mr. Tahsuda took office as the PDAS.

By a letter dated February 14, 2018, PDAS Tahsuda directed the BIA Pacific Region's Solicitor to ask IBIA to remand the 2016 decision for re-consideration. The BIA duly filed a motion for remand, which the IBIA granted. 65 IBIA 188 (4/20/2018). After the matter was remanded, the Pacific Regional Director issued another decision, dated April 23, 2019, again in favor of the Ewiaapaayp trust acquisition of the parcel. Viejas, together with Sycuan and the County, again appealed to the IBIA. On June 6, 2019, the Assistant Secretary–Indian Affairs asserted jurisdiction over this appeal. There has been no indication that PDAS Tahsuda has recused himself from involvement in the appeal.

Executive Order 13770, issued by the President on January 28, 2017, requires every executive agency appointee to sign and be contractually committed to a pledge, which includes the obligation that "I will not for a period of 2 years from the date of my appointment participate in any particular matter involving specific parties that is directly and substantially related to my

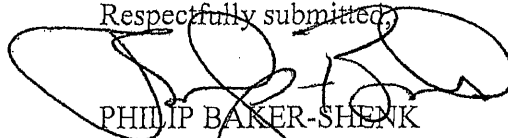
former employer or former clients, including regulations and contracts.” Mr. Tahsuda’s intervention in the IBIA appeal in February 2018 appears to violate this pledge, and another violation may have occurred if Mr. Tahsuda has played a role in the instant appeal.

In addition, 5 CFR § 2635.502 provides that, where a federal employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in a matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization from the agency designee in accordance with paragraph (d) of this section. When it promulgated this regulation, the Office of Government Ethics explained that “[e]mployees have long been required by the standards of conduct to avoid even an appearance of loss of impartiality. ... Under § 2635.502(a), it is the employee's responsibility in the first instance to consider whether a reasonable person with knowledge of the relevant facts would question his or her impartiality in a particular matter involving specific parties and, thus, to decide whether he or she has an "appearance problem." 57 Fed.Reg. 35006, 35025 (1992). “Additionally, § 2635.502 makes clear that an employee who has determined that his or her impartiality in a matter would be questioned may not authorize his or her own participation in that matter.” *Id.* at 35025-26.

A reasonable person with knowledge of the relevant facts would question Mr. Tahsuda’s impartiality in determining (or helping to determine) the disposition of the instant appeal, which involves his former client, Viejas. Accordingly, to avoid an appearance of loss of impartiality, Mr. Tahsuda should be recused from participating in the determination of this appeal.

October 9, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Recuse Principal Deputy Assistant Secretary was served on each of the following parties on this 9th day of October, 2019.

/s/ Philip Baker-Shenk
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