




United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

August 14, 2007

Memorandum

To: Director, Office of Hearings and Appeals

From: Chief Administrative Judge, Board of Indian Appeals 

Subject: Request from Tribe for Recusal in *California Valley Miwok Tribe v. Pacific Regional Director*, Docket No. IBIA 07-100-A

The California Valley Miwok Tribe (Tribe), through Silvia Burley, and represented by Phillip E. Thompson, Esq., has an appeal pending before the Board of Indian Appeals, referenced above, which seeks review of an April 2, 2007, decision of the Pacific Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director upheld a decision of the Central California Agency Superintendent (Superintendent), BIA, to assist the Tribe in organizing a tribal government.¹ The Board received the Tribe's appeal on April 20, 2007.

The Board also has another appeal pending before it that involves this Tribe: an appeal filed by Ms. Burley's opponents, in *Chadd Everone and Velma Whitebear v. Pacific Regional Director*, Docket No. IBIA 06-70-A. That appeal challenges a decision by the Regional Director regarding a Public Law 93-638 contract with the Tribe through Ms. Burley. Appellants in that case contend that Ms. Burley should not be recognized by BIA as an authority for or as representing the Tribe. That appeal has been pending before the Board since June 1, 2006.

¹ Burley claims to be Chairperson of the Tribe. BIA apparently recognizes her as the representative of the Tribe for government-to-government purposes, but does not recognize the Tribe as having an organized, governmental structure.

By letter dated July 25, 2007 (copy attached), Mr. Thompson wrote to me and requested that I issue a show cause order regarding an alleged ex parte communication between Judge Debora Luther and Jane Smith, who is counsel for BIA in the Tribe's appeal. Mr. Thompson also suggested that Judge Luther be disqualified from participating in any action involving the Tribe, based on her prior involvement in matters and cases involving the Tribe.

Judge Luther was already recused from participating in either the Tribe's appeal or the *Everone* appeal, and therefore I declined to issue a show cause order or to inquire further into Mr. Thompson's allegations. I also noted that in discussing and deciding upon her recusal, Judge Luther and I had no discussions concerning the merits of any issues involving the Tribe or issues raised in these appeals. A copy of my response, dated July 30, 2007, is attached.

On August 10, 2007, I received another letter from Mr. Thompson, dated August 8, 2007. In that letter (copy attached), the Tribe takes issue with my response, characterizing it as failing "to determine the impact of the ex parte communication." Mr. Thompson states that I made an "assumption that the conversation did not impact [the Tribe's] case," which "brings into question" whether my "discussions with [Judge] Luther have involved her past activities regarding this tribe." Based on "these questions" and my action in not investigating the Tribe's earlier request further, the Tribe now requests that I recuse myself from hearing the pending appeals.

Section 4.317(b) of 43 C.F.R. contains the rules for the Board of Indian Appeals for disqualification of an administrative judge:

Disqualification. An administrative judge may withdraw from a case in accordance with standards found in the recognized canons of judicial ethics if the judge deems such action appropriate. If, prior to a decision of the Board, a party files an affidavit of personal bias or disqualification with substantiating facts, and the administrative judge concerned does not withdraw, the Director of the Office of Hearings and Appeals will determine the matter of disqualification.

The ABA Code of Judicial Conduct provides in relevant part that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." ABA Code of Judicial Conduct, Canon 3E.

I have considered the Tribe's request, and the grounds stated therein. For the following reasons, I am declining to recuse myself from hearing these appeals.

First, the Tribe's concern about the alleged conversation between Judge Luther and Ms. Smith is premised on the understanding, which I believe is mistaken, that the conversation may have constituted an "ex parte communication." An "ex parte communication" is defined, in relevant part, to include a "communication concerning the merits of a proceeding between . . . any representative of a party [to a proceeding] and any Office [of Hearings and Appeals] personnel *involved or who may reasonably be expected to become involved in the decisionmaking process* on that proceeding." 43 C.F.R. § 4.27(b) (emphasis added). Because Judge Luther was already recused from any involvement in either of the pending appeals involving the Tribe, she fell outside the scope of the personnel covered by the definition. Based on this threshold determination, I decided not to inquire into the substance of any alleged conversations that may have occurred between Judge Luther and Ms. Smith. I did inform Judge Luther of Mr. Thompson's request that she be recused, but I did not inquire into the substance of any alleged conversation between her and Ms. Smith. Because Judge Luther was already recused, I considered it advisable not to inquire into the details of any such alleged conversation.

Second, as I noted in my response to Mr. Thompson's July 25, 2007, letter, I have had no discussions with Judge Luther regarding the merits of any issues involving the Tribe or issues raised in these appeals. When Judge Luther first learned of the *Everone* appeal (which was pending when she arrived at the Board), she informed me that she had advised BIA in her previous position as an Assistant United States Attorney, on several matters involving the dispute concerning the Tribe's government, including the Public Law 93-638 contract between BIA and the Tribe. Based on that conversation, we decided that it would be advisable for her to be recused from appeals in which the dispute regarding the Tribe's government is implicated. At no time, however, did we discuss the merits of any issues in which Judge Luther was involved or the merits of any issues pending before the Board. When the Tribe filed its subsequent appeal, I had it assigned to me, and Judge Luther has had no involvement in that case.

I do not believe that my conversations with Judge Luther, which were limited to identifying the fact of her prior involvement in matters involving the Tribe's government (including the '638 contract), and identifying pending appeals that apparently implicate the same underlying dispute, provide any basis on which my impartiality in these proceedings can reasonably be questioned. In addition, I am not aware that any other grounds exist that warrant my recusal, and I believe that I can impartially, without bias or prejudice,

participate in the adjudication of these appeals.² Therefore, I am declining to withdraw from this case.

Because I have not withdrawn from these proceedings, I am referring the matter of disqualification to you, pursuant to 43 C.F.R. § 4.317(b).³

Attachments (3)

cc: Distribution List in Docket Nos. IBIA 06-70-A and 07-100-A (w/ attachments)

² Of course, in light of the two-judge membership of the Board, it will be necessary for an Acting Administrative Judge to be appointed or assigned to these cases when they come under active consideration for a decision.

³ Counsel's letter was not in the form of an "affidavit," as required by section 4.317(b) for a referral to the Director. However, because counsel indicates that he would file a motion with the Director if I do not recuse myself, I have treated Appellant's submission as sufficient to trigger the regulatory provision requiring the Director to make a final determination on this matter.

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OFFICE OF HEARINGS AND APPEALS
BOARD OF INDIAN APPEALS

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- 06-70-A also

July 25, 2007

Steven K. Linscheid
Chief Administrative Judge
Interior Board of Indian Appeals
801 North Quincy Street
Arlington, VA 22203

Re: California Valley Miwok Tribe v. Pacific Regional Director.
(Docket No. IBIA 07-100-A)

Dear Judge Linscheid:

I am writing in on behalf of my client, the California Valley Miwok Tribe, regarding the above-mentioned action. On or about July 24, 2007, I had a conversation with Ms. Jane Smith an attorney with the U.S. Department of the Interior, Office of the Solicitor, Division of Indian Affairs. From my understanding, Ms. Smith is the government's lead counsel for the above referred case and in the case Chadd Everone v. Pacific Regional Director, Docket No. IBIA 06-70-A which the Tribe is also a party.

During the conversation which was initiated by Ms. Smith as part of a consultation requirement for filing a Motion in another matter, she stated that she had a conversation with Ms. Debroa Luther an Administrative Judge at the IBIA regarding our case. We believe this communication may have violated 43 C.F.R. Sec. 4.27(b)(1)'s prohibition against ex parte communications.

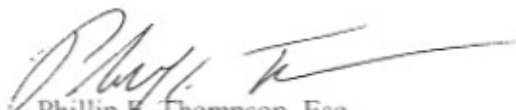
As you can understand, my client is concerned about the nature and extent of any communication the attorneys at the Department may or have had with any Administrative Judge at the Interior Board of Indian Appeals. Pursuant to Section 4.27(b)(2), we understand that as Chief Administrative Judge, you can issue a show cause order to the Department of the Interior to "show cause why its claim, motion, or interest should not be dismissed, denied, or otherwise adversely affected; disciplining offending Office personnel pursuant to the Department's standards of conduct (43 CFR part 20); and invoking such sanctions against other offending persons as may be appropriate under the circumstances."

We request that a show cause order be issued in this case. In addition, we believe that based on her prior involvement in matters and cases involving the California Valley Miwok Tribe, Judge Luther should be disqualified under Section 4.27(c) for hearing any action involving the Tribe.

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We appreciate your prompt action on this matter. If you have any questions or require any additional information, please do not hesitate to contact us.

Sincerely,



Phillip E. Thompson, Esq.
General Counsel
California Valley Miwok Tribe

Cc: Ms. Jane Smith
California Valley Miwok Tribe
File



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
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ARLINGTON, VA 22203

July 30, 2007

Phillip E. Thompson, Esq.
Native American Law and Economic
Development Center
601 Pennsylvania Ave.
Suite 900, South Building
Washington, D.C. 20005

Re: *Chadd Everone and Velma Whitebear v. Pacific Regional Director*,
Docket No. IBIA 06-70-A
California Valley Miwok Tribe v. Pacific Regional Director,
Docket No. IBIA 07-100-A

Dear Mr. Thompson:

This letter is in response to your letter to me dated July 25, 2007, in which you suggest that an ex parte communication may have occurred between Ms. Jane Smith, of the Solicitor's office, and Judge Debora Luther, concerning the Tribe's above-referenced appeal. You request that I issue a "show cause" order pursuant to 43 C.F.R. 4.27(b)(2). You also suggest that, based on her prior involvement in matters and cases involving the Tribe, Judge Luther be disqualified from participating in any action involving the Tribe.

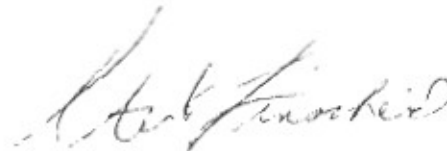
Please be advised that Judge Luther is already recused from participating in these two appeals and she has had no involvement in either appeal during her tenure on the Board. Regardless of whether such recusal would have been required pursuant to the judicial canons of ethics, Judge Luther and I agreed upon her arrival to the Board that it would be prudent for her to be recused from participating in the *Everone* appeal, given her previous involvement, as an Assistant U.S. Attorney, in various matters involving the Bureau of Indian Affairs and the Tribe. Similarly, she has been recused from the subsequent appeal filed by the Tribe. In discussing and deciding upon her recusal, Judge Luther and I have had no discussions concerning the merits of any issues involving the Tribe or issues raised in these appeals.

Obviously, any determination regarding Judge Luther's involvement in future appeals that involve the Tribe would be premature.

Because Judge Luther is and has been recused from participating in these appeals, I find no reason to inquire further into your allegations, although I note that you provide no details of the alleged substance of the alleged conversation regarding the Tribe's case.

Similarly, I find no grounds for issuing a show cause order.

Sincerely,

A handwritten signature in cursive script, appearing to read "Steven K. Linscheid".

Steven K. Linscheid
Chief Administrative Judge

cc: Distribution lists for Docket Nos. IBIA 06-70-A and 07-100-A

Distribution: IBIA Nos. 06-70-A and
07-100-A

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OFFICE OF HEARINGS AND APPEALS
BOARD OF INDIAN APPEALS

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August 8, 2007

Steven K. Linscheid
Chief Administrative Judge
Interior Board of Indian Appeals
801 North Quincy Street
Arlington, VA 22203

Re: California Valley Miwok Tribe v. Pacific Regional Director.
(Docket No. IBIA 07-100-A)

Dear Judge Linscheid:

The Tribe is in receipt of your letter dated July 30, 2007 regarding my client's request, pursuant to 43 C.F.R. Sec. 4.27(b)(1), relating to the prohibition against ex parte communications. The rule relating to the prohibition takes into account that parties not subject to an ex parte communications generally do not know the details of the conversation and its impact on the case. The rules provide a remedy which you have chosen not to use to determine the impact of the ex parte communication.

Your assumption that the conversation did not impact this case brings into question whether your discussions with Ms. Luther have involved her past activities regarding this tribe. Based on these questions and your actions in not investigating this matter, the California Valley Miwok Tribe requests that you recuse yourself from hearing the pending appeals.

Please let us know as soon as you can whether you will recuse yourself from this matter so that appropriate Motions can be filed within the Office of Hearing and Appeals. We hope that the appearance of a fair and impartial proceeding outweighs any other concerns..

Sincerely,



Phillip E. Thompson, Esq.
General Counsel
California Valley Miwok Tribe

Distribution: IBIA Nos. 06-70-A and
07-100-A

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