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SUPERIOR COURT
YAKIMA CO WA

IN THE SUPERIOR COURT OF WASHINGTON
FOR YAKIMA COUNTY

COUGAR DEN INC., a Yakama Nation corporation,

Petitioner,

v.

DEPARTMENT OF LICENSING OF THE STATE OF WASHINGTON,

Respondent.

Case No.: 14-2-03851-7

[~~PROPOSED~~] FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came before the Court on July 10, 2015, on Petitioner Cougar Den Inc.'s Amended Petition for Judicial Review of Final Order of the Department of Licensing. The Court has reviewed the pleadings and files of record, including the following:

1. Certified Agency Record ("Agency Record") of OAH Docket No. 2014-DOL-0006, Agency No. 756M;

2. Petition for Review of Final Order of Department of Licensing;

3. Petitioner's Motion for Leave to File Amended Petition;

4. Declaration of Harry Smiskin;

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5. Respondent's Opposition to Petitioner's Motion for Leave to File Amended Petition;

6. Respondent's Motion to Strike Declaration of Harry Smiskin;

7. Petitioner's Response to Motion to Strike Declaration of Harry Smiskin;

8. Declaration of Andre M. Penalver in Response to Motion to Strike Declaration of Harry Smiskin;

9. Cougar Den's Reply in Support of Motion for Leave to File Amended Petition;

10. Declaration of Andre M. Penalver in Support of Reply for Leave to File Amended Petition;

11. Order Granting Leave to File Amended Petition and Denying Respondent's Motion to Strike Declaration of Harry Smiskin;

12. Amended Petition for Review of Final Order of Department of Licensing;

13. Cougar Den's Appeal Brief;

14. Respondent's Brief;

15. Cougar Den's Reply Brief in Support of Appeal;

16. Respondent's Citation of Supplemental Authority;

17. Cougar Den's Response to Respondent's Citation of Supplemental Authority.

On July 10, 2015, the Court heard oral argument from Andre Penalver, counsel for Cougar Den, Inc., and Fronda Woods, counsel for the Department of Licensing. Now, therefore, being fully advised, the Court hereby makes the following:

I. FINDINGS OF FACT

1. Pursuant to RCW 34.05.514 and RCW 34.05.542, Petitioner Cougar Den, Inc., timely filed a petition for judicial review of the Final Order of Director in *In re Cougar Den*, OAH Docket No. 2014-DOL-0006, Fuel Tax Assessment No. 756M.

2. On January 30, 2015, this Court granted Petitioner's Motion for Leave to File Amended Petition and denied Respondent's Motion to Strike Declaration of Harry Smiskin.

3. Pat Kohler is the Director of the Washington Department of Licensing. During 2013, the State of Washington and the Yakama Nation were parties to a lawsuit in federal court concerning fuel taxes. As Director, Pat Kohler represented the Department of Licensing in mediation sessions with the Yakama Nation Tribal Council Chairman regarding the lawsuit. Decl. Harry Smiskin. The lawsuit was settled and dismissed in November 2013. Agency Record, pp. 549-50; Decl. Andre M. Penalver Supp. Reply for Leave to File Am. Pet. As part of the settlement, the Yakama Nation and the State of Washington executed a Fuel Tax Agreement. Agency Record, pp. 160-75; Decl. Harry Smiskin Attach. B. Pat Kohler signed the Fuel Tax Agreement on behalf of the Department of Licensing. Agency Record, p. 175; Decl. Harry Smiskin Attach. B p. 16.

4. Fuel Tax Assessment No. 756M expressly referenced the Fuel Tax Agreement. Agency Record, p. 151.

5. On July 24, 2014, upon Motions for Summary Judgment by both parties, an Administrative Law Judge issued an Initial Order in Cougar Den's favor in *In re Cougar Den*, OAH Docket No. 2014-DOL-0006. Agency Record, pp. 847-60. The Initial Order struck down all taxes, interest, penalties, and licensing requirements at issue in Fuel Tax Assessment No. 756M.

6. On October 15, 2014, upon the Department's Petition for Review of Initial Order, Pat Kohler, Director of the Department of Licensing, issued a Final Order of Director in the Department's favor. Agency Record, pp. 935-46. The Final Order of Director

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reversed the Initial Order and reinstated the taxes, interest, penalties, and licensing requirements at issue in Fuel Tax Assessment No. 756M.

7. The Court incorporates by reference the Findings of Fact in the Final Order of Director. Agency Record, pp. 938-40; *see* Agency Record, pp. 47-50 (Stipulation of Facts). No party has contended that they are not supported by substantial evidence. *See* RCW 34.05.570(3)(e).

8. In reference to Conclusions of Law 2 and 3, the Court incorporates by reference the Findings of Fact of *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997). Agency Record, pp. 251-58.

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to RCW chapter 34.05, Part V. Venue is proper in the Yakima County Superior Court pursuant to RCW 34.05.514(1).

2. Article III of the Treaty codifies the Yakamas' right to travel upon all public highways ("the Right to Travel"). When travel is at issue, courts and adjudicators are required to examine the historical context of the Treaty to interpret the Right to Travel as the Yakamas of 1855 would have understood it, resolving any doubtful expressions in the Yakamas' favor. The Director's failure to examine the historical context of the Right to Travel constitutes an erroneous interpretation or application of the law and is reversible error as provided by RCW 34.05.570(3)(d).

3. To examine the historical context of the Treaty, the Director should have looked to the Findings of Fact of *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997) (Agency Record, pp. 251-58). Such Findings are preclusive in this case.

4. Based on that historical context and pursuant to RCW 34.05.574, the Court determines that the Director's decision in this matter should be set aside because it

erroneously interprets and applies the law for the reasons described in Attachment A, and that this is reversible legal error that the Court may address pursuant to RCW 34.05.570(3)(d).

5. Because Cougar Den's transport of fuel falls within its Right to Travel under the Treaty With the Yakamas, and because Assessment No. 756M places a restriction on the Right to Travel, Assessment No. 756M and its taxes, penalties, interest, and licensing requirements are preempted and barred by the Treaty. The Director's conclusion to the contrary is an erroneous interpretation or application of the law and is reversible error as provided by RCW 34.05.570(3)(d).

6. Although not necessary to reach the Conclusions provided above, Assessment No. 756M expressly referenced the Fuel Tax Agreement, which arose from mediation sessions that Director Pat Kohler attended as a party. It thus appears unfair that Ms. Kohler would review the Initial Order that struck down Assessment No. 756M. Her role in issuing the Final Order gives the Final Order an aura of partiality, impropriety, conflict of interest, or prejudgment, and thus violates Washington's Appearance of Fairness doctrine for the reasons described in Attachment A. Ms. Kohler was required to recuse herself and delegate the review of the Initial Order as permitted by RCW 34.05.425 and RCW 43.24.016(2). Because of her failure to do so, the agency engaged in unlawful procedure under RCW 34.05.570(3)(c). Pursuant to RCW 34.05.570(3)(g), Cougar Den has shown facts to support the grant of a motion for Ms. Kohler's disqualification.

7. The Court incorporates by reference its July 22, 2015 letter ruling on this matter, attached hereto as Attachment A.

8. The Final of Director in *In re Cougar Den*, OAH Docket No. 2014-DOL-0006, Fuel Tax Assessment No. 756M, shall be set aside pursuant to RCW 34.05.570(3) and RCW 34.05.574(1).

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WHEREFORE, the Court enters the following:

III. FINAL JUDGMENT AND ORDER

IT IS ORDERED that the Final Order of Director is set aside, and that Cougar Den, Inc. is exempt from the taxes, penalties, interest, and licensing requirements at issue in the adjudicative proceeding on review.

DATED this 19 day of August, 2015.

JUDGE MICHAEL G. McCARTHY

Presented by:

STOKES LAWRENCE
VELIKANJE MOORE & SHORE

By: _____ - 43073
Brendan V. Monahan (WSBA #22315)
Andre M. Penalver (WSBA #43073)
Attorneys for Cougar Den Inc.

Approved as to form;
Notice of Presentment Waived

OFFICE OF THE ATTORNEY GENERAL

By: Fronda Woods
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ATTACHMENT A

Superior Court of the State of Washington
for the County of Yakima

Judge Michael G. McCarthy
Department No. 2

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July 22, 2015

Re: Cougar Den Inc. v. Department of Licensing Yakima County Cause No. 14-2-03851-7

Dear Counsel:

This matter comes before the Court as an appeal under the Administrative Procedure Act from an assessment levied upon Cougar Den, Inc.[Appellant], by the Washington State Department of Licensing [Respondent] for unpaid fuel taxes and associated penalties.

Procedurally, this matter was heard by an Administrative Law Judge, who ruled for the Appellant. The Respondent appealed and prevailed before Pat Kohler, the Director of the Department of Licensing. The Appellant subsequently appealed to this court.

Appellant argues, pursuant to RCW 34.05.570(3)d, that the Director "erroneously interpreted or applied the law". This Court therefore considers the legal underpinnings of the decision under review de novo.

Cougar Den is a tribal corporation, doing business on the Yakama Reservation. The particular business involved in this case is the purchase of fuel in the State of Oregon, and its transport to the reservation. The transportation from the fuel terminal in Oregon to the reservation is made by a non-tribal commercial trucking firm. Cougar Den then sells the fuel, as a wholesaler, to other tribal corporations or members.

According to the Respondent, the transport of the fuel into the State of Washington creates a taxable event under RCW 82.36.020 and 82.38.030. The gravamen of the Appellant's argument is that Article III of the Treaty with the Yakamas shields Cougar Den from the assessed tax.

The Treaty provides in pertinent part as follows:

And provided, That, if necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways.

It is well settled jurisprudence that a treaty entered into between the United States and any Indian tribe must be construed as it would have been understood by the tribal members at the time of signing and any ambiguities in the document must be resolved in favor of the tribe. Tulee v. Washington, 315 US 681, 684-5, 62 S.Ct. 862, 86 L.Ed 1115 (1942).

We have the benefit of several decisions which have construed the right to travel provision of the Treaty with the Yakamas.

In Cree v. Flores, 157 F.3d 762 (9th Cir. 1998), the Court reviewed the findings of the District Court, made after an extensive evidentiary hearing focused upon the intent of the parties to the Treaty in order to interpret the scope of the right to travel provision of Article III. The trial court found, and the Court of Appeals affirmed, the Treaty secured to the Yakamas the right to travel off the reservation for fishing, hunting, gathering and trade purposes. Cree at 770. And it was improper for the State to burden such travel with monetary assessments.

In United States v. Smiskin, 487 F.3d 1260 (9th Cir. 2007), the Court recognized the inherent link between the right to travel and the right to trade. "[T]he right to travel overlaps with the right to trade under the Yakama Treaty such that excluding commercial exchanges from its purview would effectively abrogate" the decision in Cree v. Flores, supra.

This interpretation of the right to travel in Article III of the Treaty is the only view that makes any sense. An aboriginal people would not be interested in securing a right to travel unless it had some purpose, such as trade.

Respondent relies upon King Mountain Tobacco Company v. McKenna, 768 F.3d 989 (9th Cir. 2014) for the proposition the Treaty does not reserve to the Yakamas the right to trade. The Respondent is correct that a freestanding right to engage in commerce is not in the Treaty, but the King Mountain court affirmed the rulings in Cree and Smiskin, recognizing the right to travel encompassed a right to trade in conjunction with the travel.

Additionally, the taxable event in King Mountain was the sale of cigarettes, not their travel. See RCW 70.157.010 & .020 The Court correctly ruled that the Treaty did not shield the sale from taxation.

It is clear to this Court that Article III of the Treaty shields the transport of fuel, owned by Cougar Den and intended for sale to tribal members and entities on the reservation, from taxation under Title 82 of the Revised Code of Washington. The taxable event is the movement of the

fuel across the Columbia River and into the State of Washington. And, under the terms of the Treaty, this event cannot be taxed by the Respondent.

There is one factor which is troubling. The actual travel is not done by a member of the tribe or by a tribal entity. A private commercial trucking company, hired and directed by Cougar Den, actually conducts the transport. If the carriage of the fuel were done by Cougar Den or some other tribal entity, the Appellant's position would be unassailable. The question is whether the utilization of the non-Indian entity invalidates the Treaty's protection.

In Cree v. Flores, supra, the Court recognized that the right to travel can be exercised by tribal members or entities through non-Indian third parties. In Cree, logs owned by the tribe were transported on trucks owned by tribal members or entities to sawmills off the reservation. Some of the drivers were not members of the tribe. This circumstance did not invalidate the right to travel.

In the instant case, the fuel is purchased by Cougar Den, loaded onto a tanker truck owned by KAG West, a non-tribal trucking firm, driven into the State of Washington and delivered to the Appellant on the reservation and thereafter distributed to tribal members and tribal entities. The transporter, although it executes the taxable event of crossing the border and entering Washington, is not liable for any tax. Only the owner of the fuel is subject to tax. [See Final Order of Director, Conclusion of Law #13] And the owner of the fuel is a tribal entity which has a right to travel in conjunction with trade. The purchase, transportation and delivery of fuel by a tribal entity for use by tribal members and entities is clearly shielded by the Treaty. Consequently, the assessment of a fuel tax and associated penalties against Cougar Den by the Department of Licensing is null and void.

Cougar Den raises a second issue; the propriety of Pat Kohler, Director of the Department of Licensing, sitting in an adjudicatory capacity during the administrative review of this matter.

The record contains certain facts which implicate RCW 34.05.425 and the Appearance of Fairness Doctrine.

In the first instance, the parties to this proceeding are the Cougar Den, Inc., and the Department of Licensing. Incongruously, the director of the latter was an adjudicator of the issues which are now before this court.

Secondly, the assessment which is the focus of this litigation was ostensibly assessed pursuant to a Fuel Tax Agreement entered into between the Yakima Nation and the Department of Licensing in 2013. The Agreement [Attachment B to Declaration of Harry Smiskin] is referenced in the written notification given to Cougar Den [Stipulated Exhibit No. 7]. Pat Kohler negotiated the Agreement on behalf of the Department of Licensing and was a signatory to the Agreement.

The Declaration of Harry Smiskin further relates that Ms. Kohler, in the course of the negotiations, argued "the Treaty did not apply to taxes on imported fuel, even if the fuel was brought on state roads." This is precisely the issue she considered as an adjudicatory officer in the course of the administrative appeal of this matter.

"The appearance of fairness doctrine is meant to prevent a biased or potentially interested judge from ruling on a case. Sustaining a claim that the appearance of fairness was violated requires evidence of the judge's bias. Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing." Olympic Healthcare Services II LLC v. Department of Social & Health Services, 175 Wn.App. 174, 304 P.3d 491 (2013). (citations and internal quotations omitted)

Although the Appearance of Fairness Doctrine applies only to judicial officers and to certain officials involved in land use decisions, RCW 34.05.425(3) makes it applicable to the administrative process followed in the instant case. The statute provides "[a]ny person serving or designated to serve alone or with others as presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter **or for which a judge is disqualified..**" [emphasis added]

Although the Appellant did not raise the issue during the administrative adjudication, it has been raised now, primarily on the basis of Mr. Smiskin's sworn statement. Given the totality of the circumstances, a reasonably prudent and disinterested person would conclude Ms. Kohler's participation as an arbiter did not appear to be fair. Consequently, her decision should be vacated on this ground as well.

Mr. Penalver is requested to prepare appropriate Findings of Fact, Conclusions of Law and an Order.

Very truly yours,

Michael G. McCarthy
Judge

Seal of the Superior Court STATE OF WASHINGTON Of Yakima County

STATE OF WASHINGTON } ss.
COUNTY OF YAKIMA }

I, Janelle Riddle, Clerk of the above entitled court, do hereby certify that the foregoing instrument is a true and correct copy of the original now on file in my office. In witness whereof, I hereunto set my hand and the seal of said court this 18 day of AUG 15

Janelle Riddle, CLERK

By _____ Deputy