

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STUART KOZAL, d/b/a JUMPING EAGLE
INN; ARROWHEAD INN, INC., d/b/a
ARROWHEAD INN; CLAY BREHMER and
DANIEL BREHMER, d/b/a STATE LINE
LIQUOR and SANFORD HOLDING, LLC,
d/b/a D & S PIONNER SERVICE

Petitioners,

v.

NEBRASKA LIQUOR CONTROL
COMMISSION,

Respondent.

CASE NO. CI _____

PETITION ON APPEAL

Petitioners, by and through their attorney and pursuant to the Nebraska Administrative Procedures Act for their appeal to this Court from the final decision and order of the Nebraska Liquor Control Commission dated April 24, 2017 state and allege as follows:

1. Petitioner Stuart Kozal, is a resident of Sheridan County, Nebraska and operates a business known as Jumping Eagle Inn located at 7873 State Highway 97, Whiteclay, Nebraska 69365. Stuart Kozal was issued a liquor license by the Nebraska Liquor Control Commission on or about February 16, 1982. The license has been automatically renewed each year since its issuance.

2. Petitioner Arrowhead Inn, Inc. is a corporation organized and existing pursuant to the laws of the State of Nebraska with a principle place of business located at North Highway 87, Whiteclay, Nebraska 69365. Arrowhead Inn, Inc. was issued a liquor license by the Nebraska Liquor Control Commission on or about May 15, 2006. The license has been automatically renewed each year since its issuance.

3. Petitioners Clay & Daniel Brehmer are residents of Sheridan County, Nebraska. They own and operate a business known as State Line Liquor located at 7880 State Highway 87, Whiteclay, Nebraska 69365. Clay & Daniel Brehmer were issued a liquor

license by the Nebraska Liquor Control Commission on or about January 16, 2002. The license has been automatically renewed each year since its issuance.

4. Petitioner Sanford Holdings, LLC is a limited liability company organized and existing pursuant to the laws of the State of Nebraska with a principle place of business located at 7874 West Highway 97, Whiteclay, Nebraska 69365. Sanford Holdings, LLC was issued a liquor license by the Nebraska Liquor Control Commission on or about August 5, 2008. The license has been automatically renewed each year since its issuance.

5. The Respondent Nebraska Liquor Control Commission (hereinafter the "Commission"), whose address is 301 Centennial Mall South, PO Box 95046, Lincoln, Nebraska 68509 is an agency of the State of Nebraska charged with the renewal of liquor licenses.

6. On or about November 1, 2016 the Commission held a hearing at which evidence was received. At the conclusion of receipt of evidence Commissioner Bailey made a motion to require Petitioners to file a "long form" application for renewal of their liquor licenses. The motion was sustained. Thereafter an order requiring each Petitioner to submit a long form application was entered by the Commission.

7. Petitioners were not notified of the date, time or nature of the hearing of November 1, 2016. Petitioners were not provided an opportunity to present evidence on their behalf or defend against the evidence presented to the Commission on November 1, 2016.

8. Under protest the Petitioners filed long form applications with the Commission.

9. On or about February 6, 2017 the Petitioners filed requests for the application of rules of evidence at any hearing held before the Commission.

10. On or about March 14, 2017 Petitioners filed an amended motion to strike, two motions in limine and a motion to dismiss with regard to the proceedings pending before the Commission. The Commission entered an order regarding these motions on or about March 31, 2017.

11. On April 6, 2017 a hearing was held before the Commission. On the 24th day of April, 2017 the Commission entered an order (hereinafter the "final decision") in the

contested case denying Petitioners the opportunity to renew each of their liquor licenses. A true and accurate copy of the final decision is attached hereto and marked as Exhibit "A".

12. Venue is proper in the District Court of Lancaster County, Nebraska pursuant to Neb. Rev. Stat. §84-917(2)(a)(i) as the Commission's action was taken in Lancaster County.

13. The contested case was a "contested case" as that term is defined by Neb. Rev. Stat. §84-917 involving the parties named herein.

14. The final decision denying the application should be reversed by this Court for the following reasons:

- a. The final decision was arbitrary and capricious;
- b. The final decision was unsupported by the evidence;
- c. The final decision exceeds the Commission's statutory authority;
- d. The final decision is contrary to Nebraska statutes and prior rulings of the Nebraska Supreme Court;
- e. The Petitioners were denied due process by the Commission's failure to notify Petitioners that issues regarding their licenses were to be heard and determinations made and orders issued on November 1, 2016.
- f. The final decision took into account evidence which should not have been admitted at the time of the hearing and evidence which was not admitted at the time of the hearing.
- g. The final decision is unsupported by competent, material and substantial evidence in view of the entire record as made on review.
- h. The Commission erred in overruling Petitioners' motion to dismiss and overruling portions of Petitioners' motions in limine.

WHEREFORE, Petitioners pray for an order of the Court reversing the final decision of the Nebraska Liquor Control Commission denying Petitioners the ability to renew each of their liquor licenses and for such other relief as the Court deems just and proper.

DATED: April 24, 2017.

**STUART KOZAL, d/b/a JUMPING EAGLE INN;
ARROWHEAD INN, INC., d/b/a ARROWHEAD INN;
CLAY BREHMER and DANIEL BREHMER, d/b/a
STATE LINE LIQUOR and SANFORD HOLDING, LLC,
d/b/a D & S PIONEER SERVICE, Petitioners**

By: 

Andrew W. Snyder, NSBA #20611
CHALOUPKA, HOLYOKE, SNYDER,
CHALOUPKA & LONGORIA, PC, LLO
1714 Second Avenue
Post Office Box 2424
Scottsbluff, NE 69361
Telephone: (308) 635-5000
Facsimile: (308) 635-8000
E-mail: aws@chhsclaw.net

BEFORE THE NEBRASKA LIQUOR CONTROL COMMISSION

In Re:	B-121088)	
	Stuart Kozal)	
	"Jumping Eagle Inn")	ORDER
	7873 State Highway 87)	
	Whiteclay NE 69365)	
)	
	B-121085)	
	Arrowhead Inn Inc.)	
	"Arrowhead Inn")	
	North Hwy 87)	
	Whiteclay NE 69365)	
)	
	B-121089)	
	Clay Brehmer & Daniel Brehmer)	
	"State Line Liquor")	
	7880 State Highway 87)	
	Whiteclay NE 69365)	
)	
	B-121087)	
	Sanford Holding LLC)	
	"D & S Pioneer Service")	
	7874 W Highway 87)	
	Whiteclay NE 69365)	

Now on the 6th day of April, 2017, this matter came on for a show cause hearing before the Nebraska Liquor Control Commission, upon the "long form" applications of Stuart Kozal, dba "Jumping Eagle Inn"; Arrowhead Inn Inc., dba "Arrowhead Inn"; Clay Brehmer & Daniel Brehmer, dba "State Line Liquor"; and Sanford Holding LLC, dba "D & S Pioneer Service" for Class B Liquor Licenses, in Whiteclay, Nebraska. The show cause hearing was held due to the existence of citizen protests to issuance of such licenses, and further to determine whether there is adequate law enforcement in Whiteclay.

The applicants were present and represented by Attorney Andrew Snyder. The Citizen Protesters were present, Barb Vancil, David Vancil, Bonita Bush, and Lori Hankinson and were represented by Attorney Dave Dominia. Citizen Protesters Bruce BonFleur, Marsha BonFleur, and Abram Neumann were also present. The Commission was represented by Milissa Johnson-Wiles, Assistant Attorney General.

The Commission makes the following findings of fact and conclusions of law.



PROCEDURAL HISTORY:

This matter came before the Commission on November 1st 2016 (Order dated November 2nd 2016) as an Agenda Item to determine if a "Long Form Application" should be ordered in lieu of the normal renewal process. See Neb. Rev. Stat. 53-135. The purpose of the agenda item was to determine whether, based on information presented to the Commission regarding allegations of lack of adequate law enforcement in Whiteclay, Nebraska, a more thorough examination of the licensees by use of the full application process was warranted. At that meeting, the Commission reviewed certain comments made by Sheridan County Commissioner Jack Anderson before the Nebraska Legislature's General Affairs Committee, that Sheridan County "absolutely [did] not" have adequate law enforcement for Whiteclay (Transcript of testimony before General Affairs Committee October 25, 2016). The Commission also considered information from the Nebraska State Patrol regarding Nebraska State Patrol enforcement hours in and around Whiteclay for 2016 (E-mail from Captain Jahnke to Hobert Rupe).

The Commission found that there was a sufficient showing that there may not be adequate law enforcement in the area, see Neb Rev. Stat 53-132 (3)(g) and that a long form application should be filed by all four of the licensees within 30 days of the date of the order pursuant to Neb. Rev. Stat. Sec. 53-135. (Commission Order dated November 2, 2016).

The four license holders complied and filed the long form applications and the standard process was followed. The Sheridan County Board recommended approval on January 10th 2017. The Commission received 13 (later reduced to 12) protests from citizens of Sheridan County under Neb Rev. Stat. Sec 53-133(b). A Show Cause hearing was scheduled based on the existence of a citizen protest as well as to determine adequacy of existing law enforcement in Whiteclay, Nebraska. The licensees were notified of the hearing by notice dated January 25th 2017. The four applications were consolidated for hearing and the evidentiary hearing was held April 6.

The license holders/long-form applicants requested the formal rules of evidence and the hearing proceeded under the Rules of Evidence applicable to the district court. Neb. Rev. Stat. Sec. 84-914.

The following witnesses testified on behalf of the citizens protesting the license:

Tatewin Means, Attorney General of the Ogallala Sioux Tribe

Abram Neumann, resident of Whiteclay

Bruce BonFleur, resident of Whiteclay

Marsha BonFluer, resident of Whiteclay

Barbara Vancil, resident of Hay Springs

James Jones, National Liquor Law Enforcement Association

John Maisch, former Assistant Attorney General, Oklahoma Attorney General's Office

Judi M. gaiashkibos, Executive Director, Nebraska Indian Affairs Commission

The following witnesses were called on behalf of the licensees/long-form applicants:

Terry Robbins, Sheridan County Sheriff

Inv. Rob Jackson, Nebraska State Patrol

Major Kyle Otte, Nebraska State Patrol

Commissioner James Krotz, Sheridan County Commissioner

Jason Schwarting, owner of Arrowhead Inn

Clay Brehmer, owner of State Line Liquor

Steve Sanford, owner of D & S Pioneer Service

Stuart Kozal, owner of Jumping Eagle Inn

The following exhibits were received into evidence:

Exhibit No. 1 File/Application: Arrowhead Inn Inc., "Arrowhead Inn"

Exhibit No. 2 File/Application: Sanford Holding LLC, "D&S Pioneer Service"

Exhibit No. 3 File/Application: Stuart J. Kozal, "Jumping Eagle Inn"

Exhibit No. 4 File/Application: Clay Brehmer & Daniel Brehmer, "State Line Liquor"

Exhibit Nos. 6, 32, 38 Photos of Black Chevrolet Suburban in Whiteclay parked in front of State Line Liquor, alcohol purchased and leaving Whiteclay heading North out of town

Exhibit No. 42 Photo of maroon Chevrolet 4-door auto outside Arrowhead Inn, man with brown sack entering car, car leaving Whiteclay heading North on Hwy 87

Exhibit No. 71 Photo looking North on Highway 87

Exhibit Nos. 101, 102, 108 Series eighteen (18) photos white Dodge 4x4 in front of D&S Pioneer store, beer purchased, vehicle leaving Whiteclay

Exhibit No. 139 US Census Bureau Quickfacts Sheridan County, NE

Exhibit No. 140 Whiteclay Census Data Sheridan, County, Nebraska

Exhibit No. 141 Whiteclay Geography Dec 2016

Exhibit No. 142 Whiteclay Map Why routes to SD Dec 2016

Exhibit No. 143 Gallonage Comparisons Maisch Beer Wine Spirits Sheridan Dawes Cherry 07.01.15 to 06.30.16

Exhibit No. 144 NDOR Traffic Study

Exhibit No. 147 Sheridan County Sheriff's Dispatch Logs to Whiteclay

Exhibit No. 148 Sheridan County Sheriff's Office April 2014 Dispatch Log

Exhibit No. 149 Sheridan County Sheriff's Office August 2014 Dispatch Log

Exhibit No. 150 Sheridan County Sheriff's Office April 2015 Dispatch Log

Exhibit No. 151 Sheridan County Sheriff's Office August 2015 Dispatch Log

Exhibit No. 152 Sheridan County Sheriff's Office April 2016 Dispatch Log

Exhibit No. 153 Sheridan County Sheriff's Office August 2016 Dispatch Log

Exhibit No. 155 Sheridan County correspondence- law enforcement

Exhibit No. 168 Affidavit of Stuart Kozal

Exhibit No. 169 Affidavit of Jason Schwarting

Exhibit No. 170 Affidavit of Daniel Brehmer
Exhibit No. 171 Affidavit of Clay Brehmer
Exhibit No. 172 Affidavit of Steve Sanford
Exhibit No. 173 Affidavit of Doug Sanford
Exhibit No. 174 Affidavit of Andrew Snyder
Exhibit No. 175 NLCC Public Meeting Agenda
Exhibit No. 176 Transcript General Affairs Committee
Exhibit No. 177 Email correspondence between Hobert Rupe and Mike Jahnke
Exhibit No. 179 Lakota Hope Ministry documents
Exhibit No. 180 Packet of information submitted by Bruce BonFleur
Exhibit No. 182 Investigation Review of Clay M. Brehmer and Daniel J. Brehmer
Exhibit No. 183 Investigation Review of Stuart Kozal
Exhibit No. 184 Investigation Review Douglas Sanford
Exhibit No. 185 Order re: Liquor License Retail Class B-081631-Sanford Holding LLC
Exhibit No. 186 Order re: Liquor License Retail Class B-053988-Clay & Daniel Brehmer
Exhibit No. 187 Order re: Liquor License Retail Class B-009454-Stuart Kozal
Exhibit No. 188 Order re: Liquor License Retail Class B-062357-Jason Schwarting
Exhibit No. 189 NLCC letter to Sanford Holdings dated January 25, 2017
Exhibit No. 190 NLCC letter to Clay Brehmer & Daniel Brehmer dated January 25, 2017
Exhibit No. 191 NLCC letter to Stuart Kozal dated January 25, 2017
Exhibit No. 192 NLCC letter to Arrowhead Inn Inc. dated January 25, 2017
Exhibit No. 193 NLCC letter to Clerk of Sheridan County Clerk dated December 5, 2016-re:
Liquor Exhibit License Class B – 121088 for Jumping Eagle Inn
Exhibit No. 194 NLCC letter to Clerk of Sheridan County Clerk dated December 2, 2016-re:
Exhibit Liquor License Class B-121089 for State Line Liquor
No. 195 NLCC letter to Clerk of Sheridan County dated December 14, 2016- re: Liquor License
Class B - for Arrowhead Inn
Exhibit No. 196 NLCC letter to Clerk of Sheridan County dated December 2, 2016 – re:
Liquor License Class B – for D&S Pioneer Service
Exhibit No. 197 Resolution re: Jump Eagle Inn dated: January 10, 2017
Exhibit No. 198 Resolution re: Arrowhead Inn dated: January 10, 2017
Exhibit No. 199 Resolution re: State Line Liquor dated: January 10, 2017
Exhibit No. 200 Resolution re: D&S Pioneer Service dated: January 10, 2017

The Commission took the matter under advisement with written closing arguments to be supplied by close of business on April 14th 2017. The Commission scheduled a special meeting on April 19, 2017 to announce its decision. This Order follows.

IMPRESSIONS-CREDIBILITY AND DEMEANOR

In making its decision, the Commission considered the credibility and demeanor of the witnesses. The Commission found compelling the testimony of the citizen protesters, in particular Bruce and Marsha BonFleur and Abram Neumann, regarding their personal observations and experiences in Whiteclay, over an extensive period of time. Also taking

demeanor into account, the Commission accords no weight to the recommendation of the Sheridan County Board with respect to the issuance of these licenses and adequacy of law enforcement in Whiteclay, Nebraska. Finally, the Commission finds that the testimony of Jason Schwarting, Clay Brehmer, Steve Sanford, and Stuart Kozal was self-serving and failed in any way to show that law enforcement in Whiteclay was adequate and consistent with the public interest. On the contrary, the licensees did no more than question this Commission's authority to inquire into the issue of adequacy of law enforcement and its effects on the citizens of Whiteclay, as well as those who consume alcohol on its streets on a daily basis.

FINDINGS OF FACT:

1. The unincorporated village of Whiteclay is located in northern Sheridan County NE. There are nine residents and as an unincorporated village, it is subject to regulation by Sheridan County and Law enforcement is provided by the Sheridan Counties Sheriff's office.
2. There are four Class B (off-sale) licenses: Arrowhead Inn, State Line Liquor, D & S Pioneer Service, and Jumping Eagle Inn. The four licensees sold over 330,000 gallons of beer in one year (Exhibit 143). That amount is over three times the total alcohol sold in Chadron NE pop. 5,821 and over twice the amount sold in Gordon NE pop. 1,612 during the same time period. (Exhibit 143)
3. The unincorporated village of Whiteclay is located 300 yards from the town of Pine Ridge. Pine Ridge is the largest town on the Pine Ridge Indian Reservation. The population of Pine Ridge is 4,000 and the population of the Reservation is app. 40,000. Alcohol is not allowed on the reservation and it is considered 'dry'. (Testimony of Attorney General Tatewin Means)
4. The Pine Ridge Tribal Police force has an authorized strength of 52 but currently only had 25 positions filled. (Testimony of Attorney General Means)
5. The Sheriff's Office of Sheridan County has one elected Sheriff and 4 Deputy Sheriffs. It is headquarter in Rushville which is app. 25 miles from Whiteclay. (Testimony of Sheriff Robbins)
6. There is zero cooperation and communication from the Sheridan County Sheriff's Office when requests have been made by the Pine Ridge Tribal Police (Testimony of AG Means).
7. The Nebraska State Patrol has one investigator assigned for liquor law enforcement in the troop area that includes the Panhandle, encompassing Sheridan County. His primary responsibility is to conduct yearly premise inspections of 276 liquor licenses. His primary responsibility does not include patrolling areas where liquor licenses are located. (Testimony of Inv. Rob Jackson)
8. Crimes have taken place on the streets of Whiteclay including, but not limited to, assaults, weapons related offenses, sexual assaults, consumption of alcohol on public

- property, illegal sale of alcohol without a license and sale of alcohol for resale. (Testimony of Abram Neumann, Bruce BonFleur, Marsha BonFleur and applicants.)
9. Intoxicated individuals have loitered on the public streets of Whiteclay and trespassed on private property, consuming alcohol. Urination and defecation in public is a regular occurrence (Testimony of Abram Neumann, Bruce BonFleur, Marsha BonFleur.)
 10. When Sheridan County law enforcement is called, response times to Whiteclay are delayed (Dispatch logs, Exhibits 147, 148, 149, 150, 152, and 153). Local residents have stopped calling local law enforcement to help with issues they are having related to the consumption of alcohol by occupants of the streets of Whiteclay, because they believe nothing will be done. (Testimony of Abram Neumann, Marsha BonFleur)
 11. An individual named Sherry Wounded Foot was assaulted in Whiteclay in 2016. She later died of her injuries (Testimony of Abram Neumann)
 12. There has not been an arrest in Whiteclay for an alcohol related offense other than DUI made by the Sheridan County Sheriff's Office in 2014, 2015 or 2016. If an individual is found in possession of alcohol on a public street or trespassing on private property, local law enforcement, if present, will make the individual pour out the alcohol and move. If an individual is found "passed out" from the consumption of alcohol in Whiteclay, local law enforcement may rouse the individual and tell them to move along. (Testimony of Sheriff Robbins).
 13. The nature and violence of criminal activity increases later in the day as many of the people consuming alcohol become more intoxicated. (Testimony of Neumann)
 14. The increase in law enforcement hours spent in Whiteclay, Nebraska by Nebraska State Patrol in 2016 did not solve or diminish the daily occurrences described by the BonFleurs and Abram Neumann. Further, it was shown that the increase in law enforcement hours was funded by a temporary grant. (Exhibit 177, Testimony of Major Otte). The Commission heard no evidence that there is an expectation of future resources to dedicate to enforcement and/or patrol in Whiteclay, Nebraska.
 15. Based on the evidence presented, the Commission finds that the residents and daily occupants of the streets of Whiteclay have been ignored by the local governing body, local law enforcement, and the licensees for a substantial period of time, and this inquiry was long overdue.

CONCLUSIONS OF LAW:

1. The Commission properly exercised its authority to require long form applications be filed under Neb. Rev. Stat. 53-135.
2. The Nebraska Liquor Control Act shall be liberally construed to the end that the health, safety and welfare of the people of the State of Nebraska is protected. Neb. Rev Stat. 53-101.05.
3. There is no vested right to the renewal of a license issued by the Nebraska Liquor Control Commission. Neb Rev. Stat Sec. 53-135, 53-135-02.

4. The licensees/long-form applicants failed to show that with the inadequacy of existing law enforcement, they can properly provide the services proposed in the county where the premises are located, consistent with the public interest. They have also failed to show that they can conform to all provisions of the Nebraska Liquor Control Act or that the license is or will be required by the present or future public convenience and necessity. Neb. Rev. Stat. 53-132 (2).
5. In making this decision the Commission considered, foremost, the existence of citizen protest, and the adequacy of existing law enforcement. The Commission also considered, the existing population of the unincorporated village of Whiteclay, the nature of the neighborhood or community, the existing pedestrian traffic, and the sanitary conditions on or about the premises. Neb. Rev. Stat. 53-132 (3).
6. The fact that there is not adequate law enforcement is the root issue and it has caused a "cascade" effect to occur. The public health, safety and welfare concerns are inexorably linked to the near complete absence of meaningful law enforcement in Whiteclay, Nebraska.
7. The long form applications are hereby denied.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED THAT the "long-form" applications for Retail Class B liquor licenses of Stuart Kozal, dba "Jumping Eagle Inn"; Arrowhead Inn Inc., dba "Arrowhead Inn"; Clay Brehmer & Daniel Brehmer, dba "State Line Liquor"; and Sanford Holding LLC, dba "D & S Pioneer Service" in Whiteclay, Nebraska, should be and the same hereby are, denied effective at the closing hour of business on April 30, 2017 (12:00 A.M. May 1).

IT IS FURTHER ORDERED that the licensee/long form applicants shall abide by all provisions of the Liquor Control Act and Rules and Regulations of the Liquor Control Commission regarding the transfer of all alcohol inventory remaining on the licensed premises at the closing hour of business on April 30, 2017. No inventory shall be transferred or removed from the premises without prior approval of the Nebraska Liquor Control Commission pursuant to 237 NAC 6-016.

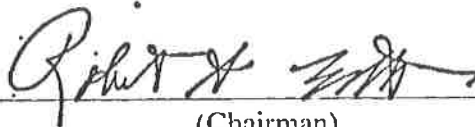
IT IS FURTHER ORDERED that due to the immediate public health and safety concerns raised by the evidence in this matter, the Commission will not stay enforcement of its decision.

IT IS FURTHER ORDERED that the licensees shall collectively pay costs of this action, assessed in the amount of \$688.89, as well as any additional subpoena service charges that may be forthcoming.

Dated this 24th day of April, 2017.

NEBRASKA LIQUOR CONTROL COMMISSION

BY



(Chairman)

I hereby certify this to be a true and correct copy of the original order entered herein, and further certify, that a copy was delivered via electronic delivery to Attorney Dave Dominia, and Attorney Andrew Snyder and via First Class Mail postage prepaid, to: Arrowhead Inn, State Line Liquor, D& S Pioneer Service, Jumping Eagle Inn, Bruce BonFleur, Marsha BonFleur, and Abram Neumann, on this 21st day of April, 2017.



(Executive Director)