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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHANNA SENATOR, Plaintiff, vs. UNITED STATES OF AMERICA; DEPARTMENT OF INTERIOR BOARD OF INDIAN APPEALS; SECRETARY DIRK KEMPTHORNE, Defendants.	NO. CV-05-3105-RHW DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendant seeks (1) a permanent injunction enjoining the U. S. Department of the Interior from removing her from her home in Brownstown, Washington; (2) to have the decision of the Board of Indian Appeals ("Board"), United States Department of the Interior, reversed; and (3) monetary damages. As the Department of Interior will take no action pending resolution of this civil action, and monetary damages have not been proved, Defendants' response and cross motion will address only the request to reverse the Board's decision finding that Plaintiff was never legally married to Phillip Kuneki Quaempts, Decedent, and therefore Plaintiff was not Decedent's surviving spouse.

Plaintiff's argument is simply that the Board failed to recognize Indian custom divorce and Indian custom marriage. Without that recognition Plaintiff's Indian custom divorce from his first wife, and his Indian custom marriage to Plaintiff, were not legal and Plaintiff is not the legal heir of Decedent's estate or real property. The problem is not that the Board failed to recognize Indian custom divorce and Indian custom marriage, the problem is that the Yakima Indian Nation, in 1977, provided code provisions for divorce and marriage with which neither Plaintiff nor Decedent complied.

II. FACTS

Ms. Bernadine Napyer married Decedent in November, 1973. They separated in May, 1980 with no intent to reunite. Although the parties may have done some of the actions which might have constituted a tribal custom divorce, they did not obtain a divorce by the Yakima Tribal Court as required by the Yakima Nation Revised Law and Order Codes (Yakima Code), Section 22.01.17.

In November, 1980, Plaintiff and Decedent participated in a tribal custom marriage ceremony and lived together as husband and wife in his house until Decedent's death in 1996. They did not attempt to sign a Marriage Register with the clerk of the court within five days of the tribal custom marriage ceremony as required by the Yakima Code, Section 22.01.05 (3).

See also Defendants' Statement of Material Facts, filed herein.

III. LEGAL ANALYSIS

A. Summary Judgment

Summary judgment is appropriate when "there is no genuine issue as to any material fact and [where] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the initial burden of showing that there is an absence of any issues of material fact. *Celotex v. Catrett*, 477 U.S. 317, 324 (1986). However, a movant who does not bear the ultimate burden of persuasion at trial need not negate the other party's

claim, rather the movant need only point to a lack of evidence to support the non-movant's claim. *Id.*, at 325.

If the moving party meets this burden, the non-moving party may not rest upon its pleadings, but must come forward with specific facts by use of affidavits, depositions, admissions, or answers to interrogatories showing there is a genuine issue for trial as to the elements essential to the non-moving party's case. Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The non-movant cannot avoid summary judgment by resting on bare assertions, general denials, conclusory allegations or mere suspicion. *See*, Fed. R. Civ. P. 56(e); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886-88 (1990) (non-moving party must offer specific facts contradicting the acts averred by the movant that indicate that there is a genuine issue for trial).

The ultimate burden of proof remains at all times with Plaintiffs. *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 143 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993). Thus, in order to proceed beyond the summary judgment phase Plaintiffs must come forward with sufficient evidence on every element of their asserted claims. As discussed below, Plaintiffs cannot meet this burden.

B. Standard of Review

The Administrative Procedures Act (APA), 5 U.S.C. §§ 500-706, authorizes courts to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" or "unsupported by substantial evidence." 5 U.S.C. § 706 (2) (A) and (E).

The "arbitrary and capricious" standard is applicable to informal agency adjudications. *Sierra Club v. Davies*, 955 F.2d 1188,1192 n. 10. The court's task is to determine whether the agency's decision is within the bounds of reasoned decision making. *Baltimore Gas & Elec. co. v. Natural Resources Defense council,* 462 U. S. 87, 105 (1983). The court must determine whether the agency

has considered the relevant factors and articulated a rational connection between the facts found and the choice made. *See Bowman Transp., Inc., v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285-86 (1974). An agency decision is arbitrary and capricious only if the agency

> has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

O'Keeffe's, Inc. v. consumer Prod. safety Comm'n, 92 F.3d 940, 942 (9th Cir. 1996) (quoting *Motor Vehicle Mfrs., Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Western Truck Manpower, Inc. v. U.S. Dept. of Labor,* 12 F.3d 151, 153 (9th Cir. 1993) (quoting *Richardson v. Perales,* 402 U.S. 389, 401 (1971).

Basically, both standards (arbitrary and capricious and substantial evidence) are based on reasonableness with the court examining the entire record to determine if the evidence supporting the agency's conclusion is credible, without substituting its own notion of what evidence is more persuasive.

C. Law of the Yakima Nation

Yakima Code, Title XXII, Domestic Relations, Section 22.01.05, provides that

> A valid marriage hereunder shall be constituted by:
>
> (1) The issuance of a marriage license by the Tribal Court or other lawful issuing agency and by execution of a written contract by both parties to the marriage and recorded with the Clerk of the Court or other proper recording agency.
>
> (2) The solemnization of the marriage by Tribal custom, by a Judge within the territorial jurisdiction of the Yakima Indian Reservation or by a recognized clergyman or by a public official authorized to do so by any state is optional.

(3) Tribal custom marriages consummated after the effective date of this Code [1977] shall be recognized as legal and binding if they are duly recorded within the records of the Tribal Court, by signing of a Marriage Register maintained by the Clerk of the Court, and each party must sign such Register within five (5) days of the Tribal custom marriage ceremony.

Section 22.01.11, provides that

Marriages which are prohibited or invalid under this Code are:

(1) Where either party is lawfully married to another living spouse unless the former marriage has been legally annulled or dissolved.

Section 22.01.17, provides that

(1) A marriage may be dissolved by divorce in the Yakima Tribal Court for incompatability [sic] of the parties for whatever reason; when either party is a resident of the Yakima Indian Reservation for ninety (90) days.

D. Argument

Plaintiff argues that "defendants' failure to recognize Indian custom divorce and Indian custom marriage" is "contrary to the customary laws of the Yakama people," and that there is no genuine issue of material fact that Plaintiff is "entitled to recognition as decedent's surviving spouse as a matter of law." (Plaintiff's Memorandum of Points and Authorities in Support of Motion for Summary Judgment, page 2 and 9, respectively).

Defendants' decision was neither arbitrary nor capricious, is supported by substantial evidence, and there is no evidence that Decedent divorced his first wife in a manner consistent with the Yakama Code, or married Plaintiff in a manner consistent with the Yakama Code. Plaintiff had to prove both that Decedent's divorce complied with the Yakima Code, and that her marriage to Decedent also complied with the Yakima Code. She proved neither as a matter of law and summary judgment in favor of defendants must be granted.

The cases relied on by plaintiff are irrelevant to Plaintiff's case. Defendant does not disagree with the holdings of the cases upon which plaintiff relies. These

cases simply have no application to the facts of the instant case.

Plaintiff cannot rely on the doctrine of impossibility, *Taylor v. Caldwell,* 3 B & S 826 (1863), as neither plaintiff nor Decedent ever made an attempt to register their Indian custom marriage, at any time, much less within five days of the ceremony. They were not aware of the procedure. Exhibit 1, attached hereto, Probate Hearing, August 21, 1998, pages 00696-00699. Had they made an attempt to register their marriage with the Yakima Tribal Court, a registry might have been prepared. But even if the doctrine of impossibility applies, their marriage was a nullity from inception as Decedent was never divorced from his first wife.

Defendant accepts that customary marriages and divorces can be legally recognized, but only if, since 1977, the parties comply with the requirements of the Yakima Code. Decedent married his first wife in 1973, and separated from her in 1980. The Yakima Code, Section 22.01.17, provides that "[a] marriage may be dissolved by divorce in the Yakima Tribal Court ...." Decedent did not apply to the Yakima Tribal Court for a divorce, and as the ALJ appropriately found, 'the Washington State cases pertaining to 'defunct' marriage addressed only the question of whether a long separation and other circumstances caused community property to become individual property and did not address the question whether a long separation constituted a divorce." Exhibit 2, attached hereto, Order Affirming Decision, September 28, 2005, page 00642.

IV. CONCLUSION

It does not matter if the question before this court is (1) whether there remains any genuine issue of material fact, or (2) whether the agency's determination was arbitrary, capricious, or otherwise not in accordance with law, or (3) whether the agency's determination was unsupported by substantial evidence, what does matter is that neither plaintiff, nor Decedent, nor Decedent's first wife, made any attempt to comply with the Yakima Code after 1977. Because

the agency's determination was not arbitrary or capricious, and was supported by substantial evidence, no issues of material fact exist, the September 28, 2005, Order Affirming Decision should be upheld and Summary Judgment granted for defendant.

RESPECTFULLY SUBMITTED this 2nd day of November, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November, 2009, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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