

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF PUBLIC SAFETY

In the Matter of the Proposed
Revocation of the "The Original
Crazy Horse Malt Liquor"
Brand Label

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on April 19, 1995 at 9:30 a.m. at the Office of Administrative Hearings, Minneapolis, Minnesota. The record closed on August 28, 1995, upon receipt of the final written submission.

Jeffrey F. Lebowksi, Assistant Attorney General, Office of the Attorney General, Government Services Section, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2106, appeared on behalf of the Minnesota Liquor Control Division; Thomas J. Navin, Lawrence I. Fox, T. Raymond Williams, Attorneys at Law, McDermott, Will & Emery, 1850 K Street Northwest, Washington, DC 20006-2296, appeared on behalf of Hornell Brewing Company, Inc. and G. Heileman Brewing Company, Inc.; and Bonnie S. Hyde, Certified Student Attorney, Kenneth Tilsen, Attorney at Law, Public Interest Advocacy Clinic, Hamline University Law School, 1536 Hewitt Avenue, St. Paul, Minnesota 55104, and Robert P. Gough, Attorney at Law, PO Box 25, Rosebud, South Dakota 57570, appeared on behalf of Seth H. Big Crow, Sr., Administrator, the Estate of Tasunke Witko.

This Report is a recommendation, not a final decision. The Commissioner of Public Safety will make the final decision after a review of the record and may adopt, reject or modify the Findings of Fact, Conclusions of Law, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Michael S. Jordan, Commissioner of Public Safety, Minnesota Department of Public Safety, at 1000 NCL Tower 445 Minnesota Street, St. Paul, Minnesota 55101, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

Whether the proposed revocation of the brand label "The Original Crazy Horse Malt Liquor" is proper and consistent with Minn. Stat. § 340A.311(d) (1994).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The parties to this proceeding are the Liquor Control Division of the Minnesota Department of Public Safety (hereinafter also referred to as "Liquor Control Division" or "the Agency"), brand label applicant G. Heileman Brewing Company, Inc. (hereinafter also referred to as "Heileman"), 100 Harborview Plaza, PO Box 459, LaCrosse, Wisconsin 54602-0459; and Hornell Brewing Company, Inc. (hereinafter also referred to as "Hornell"), 4501 Glenwood Road, Brooklyn, New York 11203. The Estate of Tasunke Witko a/k/a Crazy Horse, Seth H. Big Crow, Sr., Administrator, P. O. Box 25, Rosebud, South Dakota, petitioned for and was granted full rights as a party participant in this proceeding.

2. Hornell is a Brooklyn, New York company that produces and markets alcoholic and non-alcoholic beverages. Beginning in 1987, Hornell expanded into the distribution of beverages which are bottled by others for Hornell pursuant to contract. These beverages are marketed under trademarks, brand names and labels developed and owned by Hornell. One of the brand labels owned by Hornell is "The Original Crazy Horse Malt Liquor" (hereinafter referred to as "Crazy Horse Malt Liquor").

3. G. Heileman Brewing Company of LaCrosse, Wisconsin is in the business of producing and distributing alcoholic and non-alcoholic beverages. In 1992, Heileman and Hornell entered into a contract which authorized Heileman to produce, bottle and distribute "Crazy Horse Malt Liquor".

4. Seth Henry Big Crow, Sr. is the administrator of the Estate of Tasunke Witko, a/k/a Crazy Horse, and is a member and representative of the heirs of Crazy Horse. The Estate of Tasunke Witko was allowed to intervene in this proceeding.

5. In a letter dated March 3, 1992, Heileman filed an application for brand label registration for "The Original Crazy Horse Malt Liquor" to be sold in 40-ounce non-returnable bottles. Crazy Horse Malt Liquor is a fortified malt liquor having an alcohol content by weight of 5.9%. Exhibit 1. G. Heileman also submitted a brand label registration for Crazy Horse Malt Liquor to be sold in 20-ounce non-returnable bottles on January 20, 1994. Both brand label applications were approved by the Minnesota Liquor Control Division on March 5, 1992 and January 26, 1994. Exhibits 1 and 3.

6. The Crazy Horse Malt Liquor brand label is depicted in Exhibits 1, 3 and 16. The brand label depicts the following: The front of the brand label has the words "Crazy Horse" surrounding an image of an American Indian male wearing a feather bonnet facing to the left. The words "Crazy Horse" are embossed in large bold black light-shaded letters. The words "Dakota Hills Ltd." are prominently displayed immediately beneath the name. There is Indian beadwork at the bottom of the label and a shield with two spears with feathers attached sticking through it. The letter "O" in Dakota Hills also bears a cross-hatch design typically identified by the Lakota and other Indian groups as a medicine wheel. On the reverse side of the label, a large display of Indian beadwork extends across the top and bottom. The words "Crazy Horse" are separated by additional beadwork surrounding "Dakota Hills Ltd." Beneath this, the following text appears:

The Black Hills of Dakota, steeped in the history of the American West, home of Proud Indian Nations. A land where imagination conjures up images of blue clad Pony Soldiers and magnificent Native American Warriors. A land still rutted with the wagon tracks of intrepid pioneers. A land where wailful winds whisper of Sitting Bull, Crazy Horse, and Custer. A land of character, of bravery, of tradition. A land that truly speaks of the spirit that is America.

7. After approval of the Crazy Horse brand label, marketing and distribution of Crazy Horse Malt Liquor began in liquor stores in the State of Minnesota. Public protests of the alcoholic beverage were held by individuals and American Indian organizations. Complaints were filed with various State legislators and with the Liquor Control Division in November, 1993.

8. At least two Minnesota legislators, Representative Andy Dawkins and Senator Linda Berglin, encouraged the Liquor Control Division to exercise its authority to bar the sale of Crazy Horse Malt Liquor in Minnesota. In a letter dated November 30, 1993 to Senator Berglin, the Liquor Control Division reported that it had received petitions containing over 1,000 signatures making the same request. Exhibits 6, 10, 11 and 12.

9. The Complaints and requests to bar sale of the Crazy Horse Malt Liquor were considered by Mr. Fred C. Petersen, Director of the Liquor Control Division. Mr. Petersen communicated to legislators and other complainants that he understood their concerns and was sympathetic to their views; he believed the Crazy Horse label was "undignified and in poor taste and disrespectful". However, Mr. Petersen believed that the Liquor Control Division had no authority to revoke a brand label because the label was in poor taste or offensive to some people. Exhibit 12.

10. Legislators and organizations opposed to the Crazy Horse brand label proposed rules or statutory changes to empower the Liquor Control Division to revoke the Crazy Horse brand label. A concern expressed by the proponents was a desire to avoid the pitfalls of a federal law that directly banned the use of the name "Crazy Horse" on any alcoholic beverage.^[1] As a result of these discussions, the Minnesota Legislature adopted Minn. Laws 1994, ch. 611, § 12, codified as Minn. Stat. § 340A.311(d) (1994), that empowered the Liquor Control Division to revoke a malt liquor brand label that states or implies a false connection with an actual living or dead American Indian leader. Exhibits 13, 14 and 15.

11. The name "Crazy Horse" is an approximate English translation of the Lakota name Tasunke Witko, which belonged to a now-deceased American Indian leader. Crazy Horse is recognized by the Lakota and in the history of the United States as a foremost Lakota spiritual and political leader. Crazy Horse lived in and around the Black Hills of South Dakota until he was killed on September 5, 1877 at Fort Robinson, Nebraska. Crazy Horse sought to preserve traditional Native American culture and values. He was opposed to the use of alcohol by his people. He also opposed any preservation of his image as in a photograph. Exhibit 2.

12. The administrator and heirs of the Estate of Tasunke Witko have not given Heileman or Hornell permission to use the "Crazy Horse" name on the Crazy Horse Malt Liquor and have disavowed any association, endorsement or sponsorship of the malt liquor.

13. After reviewing the brand label and reviewing the affidavit of Seth Big Crow, Sr., Mr. Petersen determined that all of the elements contained in Minn. Stat. § 340A.311(d) (1994) had been met. The brand label had been registered after January 1, 1992 and in light of the totality of the images, text and design, it appeared that a connection between the label and Tasunke Witko, a/k/a Crazy Horse, was being made. Because of Seth Big Crow, Sr.'s affidavit on behalf of the heirs of Tasunke Witko denying any association or affiliation with the brand label and denying that any consent had been given by the heirs of Crazy Horse to Hornell or Heileman, Mr. Petersen concluded that the association or connection was false and misleading.^[2]

14. In a letter dated July 26, 1994, Mr. Petersen informed Heileman that the Crazy Horse Malt Liquor brand label registration would be revoked on the date that the new legislation would become effective on August 1, 1994 unless Heileman requested a contested case hearing in this matter. Heileman requested a contested case hearing. While the matter is being contested, the proposed Agency action has been stayed pending the final outcome of the contested case proceeding.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Commissioner of Public Safety and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 340A.201.

2. The Notice of and Order for Hearing issued by the Department of Public Safety in this matter was proper and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. The burden of proof in this proceeding is upon the Liquor Control Division which must prove the facts giving rise to the proposed Agency action by a preponderance of the evidence. Minn. Rule pt. 1400.7300, subp. 5 (1993).

4. 1994 Minnesota Laws chapter 611, section 12, codified as Minn. Stat. § 340A.311(d) (1994), provides as follows:

The Commissioner shall refuse to register a malt liquor brand label, and shall revoke the registration of a malt liquor brand label already registered, if the brand label states or implies in a false or misleading manner a connection with an actual living or dead American Indian leader. This paragraph does not apply to a brand label registered for the first time in Minnesota before January 1, 1992.

5. The Crazy Horse Malt Liquor brand label was registered after January 1, 1992. The Crazy Horse brand label states or implies a connection to Tasunke Witko, a/k/a Crazy Horse, a deceased American Indian leader.

6. Because Tasunke Witko was opposed to the use of alcoholic beverages, and because the heirs of his estate have not endorsed and have specifically disavowed any connection with Crazy Horse Malt Liquor, the Crazy Horse Malt Liquor brand label states or implies in a false or misleading manner a connection to Tasunke Witko a/k/a Crazy Horse, a deceased American Indian leader.

7. As a result of Conclusions 4, 5 and 6, the Commissioner must revoke the Crazy Horse brand label.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Public Safety revoke the brand label registration of "The Original Crazy Horse Malt Liquor" pursuant to Minn. Stat. § 340A.311(d) (1994).

Dated this 28th of September, 1995.

ALLEN E. GILES
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is require to serve its final decision upon each party and the Administrative Law Judge by first-class mail.

Reported: Eight cassette tapes/not transcribed

MEMORANDUM

The Liquor Control Division has properly interpreted and applied Minn. Stat. § 340A.311(d). The Crazy Horse brand label states or implies a connection to Crazy Horse, a deceased American Indian leader. The stated or implied connection to Crazy Horse is false because Crazy Horse was opposed to the use of alcoholic beverages and because the administrator and heirs of Crazy Horse's estate have not endorsed or supported the product. Because the Crazy Horse label states or implies a false or misleading connection to Crazy Horse, the Liquor Control Division is required to revoke the brand label. The Judge is persuaded that the Liquor Control Division has acted properly and exercised its authority consistent with the law.

Hornell and Heileman (collectively referred to as “Claimants”) assert that revocation of the Crazy Horse brand label is improper for several reasons. Claimants argue that to violate Minn. Stat. § 340A.311(d) a brand label must state or imply that Crazy Horse’s family was connected to the manufacture, sale and distribution of the Crazy Horse Malt Liquor. As a part of this argument, Claimants argue that the Liquor Control Division has failed to meet its burden of proof because the Division has not established that a meaningful number of the public would be misled into believing that Crazy Horse’s actual family is involved in the sale, manufacture and distribution of Crazy Horse Malt Liquor. The Judge rejects the narrow interpretation of section 340A.311(d) proposed by Claimants. The plain language of the statute states that there only needs to be a “connection” and the Judge believes that the “connection” can be achieved by any implied association or relationship.

Claimants assert that the Liquor Control Division has failed to meet its burden of proof because the Liquor Control Division did not solicit testimony from the potential consuming public as to whether they would be misled by the Crazy Horse brand label. The Judge also rejects this argument. The Liquor Control Division met its burden of proof in this case by the testimony of Mr. Petersen who testified that as Director of the Liquor Control Division it was his decision whether or not to revoke the Crazy Horse brand label. He testified that he made his decision based upon the totality of the graphics on the label and the references to Crazy Horse, and concluded that the brand label stated or implied a connection to Crazy Horse, an actual deceased American Indian leader. He also testified that he reviewed the Affidavit of Seth H. Big Crow, Exhibit 2, the Administrator of the Crazy Horse estate. Mr. Big Crow disavowed any endorsement of the Crazy Horse brand label. Mr. Petersen, therefore, concluded that the implied connection with Crazy Horse was false. The Judge believes that the Liquor Control Division has met its burden of proof in this proceeding.

Claimants also assert that the Director of the Liquor Control Division was biased against the Crazy Horse brand label and, therefore, was predisposed to revoke the brand label before he was empowered to do so by Minn. Stat. § 340A.311(d). Mr. Petersen testified that the “offensiveness” or poor taste of the Crazy Horse Brand label played no part in his decision. He believed it was inappropriate to reject a brand label based on its offensiveness to some people or because others believed it was in poor taste. Rejection of a brand label for these reasons was a form of censorship that he thought was unconstitutional. He testified that he did not want to become a censor and that he discouraged any proposals that gave him censorship authority. In making his decision in this case, Mr. Petersen applied the elements of section 340A.311(d). The Judge does not believe that Mr. Petersen showed any bias in his application of section 340A.311(d).

Finally, the Claimants have informed the Judge that they intend to challenge the constitutionality of Minn. Stat. § 340A.311(d) when this matter is appealed to the Court of Appeals. The Judge has no jurisdiction to determine the facial constitutionality of Minn. Stat. § 340A.311(d). Neeland v. Clearwater Memorial Hospital, 257 N.W.2d 366, 268 (Minn. 1977).

^[1] Prior to filing the brand label registration with the Liquor Control Division, Hornell obtained a certificate of label approval from the U.S. Department of Treasury--Bureau of Alcohol, Tobacco & Firearms to use the Crazy Horse brand label. Federal legislation was enacted that prohibited the use of the name Crazy Horse "on any distilled spirit, wine or malt beverage product". Public Law 102-393, section 633. Hornell sought an injunction in U.S. District Court prohibiting the enforcement of the law. In the District Court for the Eastern District of New York, Hornell claimed, *inter alia*, that the legislation was an unconstitutional restraint on commercial speech. The Court granted Hornell's motion and prohibited enforcement of the law. Hornell Brewing Company, Inc. v. Brady, 819 F. Supp. 1227 (E.D.N.Y. 1993).

^[2] A similar brand label bearing the name of the Menominee American Indian leader, Chief Oshkosh, was also determined to be false and misleading. The Chief Oshkosh brand label was also revoked.