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BEFORE THE HEARING EXAMINER
FOR THE CITY OF OLYMPIA

In re: Eastbay Flats and Townhomes
(Westman Mill)

Appeal of Determination of Non-Significance
and Land Use Appeal

No. 17-2795

APPLICANT’S MOTION TO DISMISS
(TRIBAL TREATY RIGHTS)

COMES NOW the Applicant, 3rd Gen Investment Group, LLC (“Applicant” or “3rd Gen”), by and through its attorneys Joseph A. Rehberger and Cascadia Law Group PLLC, and moves for an Order dismissing Appellant Olympia Urban Waters League’s (“Appellant” or “OUWL”) appeal to the extent it alleges violation of tribal treaty rights. As explained below, OUWL lacks standing to assert those rights, and the Hearing Examiner lacks jurisdiction to consider them.

I. STATEMENT OF FACTS

On February 15, 2018, the City of Olympia (“City”) approved 3rd Gen’s application to construct a mixed-use development at the corner of State Avenue and Jefferson Street in downtown Olympia. The City also issued a Determination of Nonsignificance (“DNS”) under the State Environmental Policy Act with respect to the project. OUWL challenges both decisions.

1 OUWL challenges the land use approval on grounds, among others, that it “would further
2 exacerbate the ongoing treaty violation represented by the Moxlie Creek outfall culvert.”¹ See
3 Appellant’s Notice of Appeal. This culvert is located approximately 15 feet below the surface of
4 Chestnut Street. OUWL’s Appeal Brief at 5, lines 8-10. Both Moxlie Creek and Indian Creek
5 flow through this culvert before discharging into East Budd Bay. *Id.* at 5, lines 15-16.

6 In its Appeal Brief, the contents of which are incorporated by reference into its Appeal,
7 OUWL alleges that Moxlie Creek and Indian Creek “have historically supported anadromous
8 fish. Chum, sea-run cutthroat, coho, chinook, and steelhead all historically migrated to Indian
9 Creek.” *Id.* at 7, lines 14-17. Appellant further contends that the Moxlie Creek culvert
10 constitutes a barrier to fish passage. *Id.* at 14, lines 1-14.

11 The Squaxin Island Tribe has rights under the Stevens Treaties to take fish at usual and
12 accustomed places, including East Budd Bay. *Id.* at 5, lines 21-22. Appellant cites a recent Ninth
13 Circuit Court of Appeals decision for the proposition that culverts impairing fish passage violate
14 tribal fishing rights secured by the Stevens Treaties. See *U.S. v. Washington*, 853 F.3d 946 (9th
15 Cir. 2017) (amended opinion). Appellant concludes that the “proposed development and related
16 future development would further impinge upon the Squaxin Island Tribe’s treaty fishing right.”
17 OUWL’s Appeal Brief at 15, lines 1-2.

18 II. ISSUE

19 Whether Appellant Olympia Urban Waters League has standing to assert the Squaxin
20 Island Tribe’s treaty fishing rights in this appeal.

21 III. RELIEF REQUESTED

22 3rd Gen respectfully requests the Examiner issue an order adjudging that Appellant
23 Olympia Urban Waters League lacks standing to assert tribal treaty rights, and dismissing its
24 claims to the extent it relies on the same (including without limitation as set forth in its Notice of
25 Appeal at 2 and its Appeal Brief at 25-26).

26
27 ¹ It is not clear whether Appellant’s challenge to the DNS also relies on an alleged violation of tribal treaty rights, but for purposes of this motion, 3rd Gen assumes that it does.

1 IV. ARGUMENT AND AUTHORITY

2 **A. The Hearing Examiner Lacks Jurisdiction Over Appellant’s Arguments Based on**
3 **Alleged Violation of the Squaxin Island Tribe’s Treaty Fishing Rights**

4 A party may file a motion to dismiss premised on the Hearing Examiner’s lack of
5 “jurisdiction or authority over the appeal.” *See* Rules of Procedure for Proceedings Before the
6 Hearing Examiner of Olympia, Washington Chapter 4, Section Three (2). As explained below,
7 because Appellant lacks standing to challenge the land use approval and DNS based on alleged
8 violation of the Squaxin Island Tribe’s treaty rights, the Hearing Examiner lacks jurisdiction to
9 hear such challenge. This issue is purely one of law; the Hearing Examiner need not make any
10 factual determinations to rule on this motion.

11 **B. Standing Requirements**

12 The Washington Supreme Court has adopted a two-part test for standing. *E.g., Branson v.*
13 *Port of Seattle*, 152 Wn.2d 862 (2004). First, the litigant must show that its claim falls within the
14 zone of interests protected by the statute or constitutional provision at issue. *Id.* at 875. Second,
15 the litigant must show that it has suffered an injury in fact, economic or otherwise. *Id.* at 876.
16 The party seeking standing must meet both parts of the test. *Id.*

17 The standing test applies not just to claims for relief, but also to legal arguments made in
18 support of a claim. *See, e.g., State v. Johnson*, 179 Wn.2d 534, 551-52 (2014) (defendant lacked
19 standing to challenge the suspension of his driver’s license on constitutional grounds). Therefore,
20 a party may have standing to challenge a land use or SEPA decision on some grounds, but not
21 others.

22 **C. Tribal Treaty Fishing Rights**

23 In the mid-1850s, the Squaxin Island Tribe and other Native American Tribes signed
24 treaties with the United States that protected their fishing rights. The treaties stated, in relevant
25 part, that the “right of taking fish, at all usual and accustomed grounds and stations, is further
26 secured to said Indians, in common with all citizens of the Territory.” *See U.S. v. Washington*,
27 853 F.3d 946, 962 (9th Cir. 2017) (amended opinion) (the “Culvert Case”). Courts have

1 interpreted this provision as giving signatory Tribes the right to take up to fifty percent of the
2 harvestable fish. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*,
3 443 U.S. 658 (1979).

4 In the Culvert Case, the Ninth Circuit concluded that “in building and maintaining barrier
5 culverts within the Case Area, Washington has violated, and is continuing to violate, its
6 obligation to the Tribes under the Treaties.” *See U.S. v. Washington*, 853 F.3d at 966. The Ninth
7 Circuit reasoned that the treaties did not simply guarantee the right to take fish; they also
8 guaranteed that fish would be available to be taken. *Id.* at 965 (finding in the treaties “a promise
9 that the number of fish would always be sufficient to provide a ‘moderate living’ to the Tribes”).
10 Since barrier culverts block streams suitable for salmon habitat, they reduce the number of fish
11 available to the Tribes for harvest. *Id.* at 966. Thus, the Ninth Circuit concluded, culverts violate
12 the Tribes’ fishing rights under the treaties.

13 The U.S. Supreme Court has accepted review of the Ninth Circuit’s decision in the
14 Culvert Case. It will hear oral argument in the case later this month.²

15 **D. Only Tribes Have Standing to Assert Fishing Rights Guaranteed by the Treaties**

16 The treaty fishing rights that OUWL refers to in its Appeal and discusses further in its
17 Appeal Brief belong to the Tribes that signed the treaties, not to OUWL. Courts have
18 consistently found that others lack standing to base legal arguments on tribal treaty rights.

19 For example, in the Culvert Case, the State of Washington argued that the United States
20 also constructed and maintained culverts that blocked fish passage in violation of the treaties.
21 The district court determined that the State did not have standing to make this argument: “[T]he
22 State may not assert a treaty-based claim on behalf of the Tribes The decision as whether
23 when [*sic*] to assert that claim against the United States is for the Tribes alone.” *U.S. v.*
24 *Washington*, 853 F.3d at 961 (quoting district court opinion). The Ninth Circuit affirmed this
25 ruling, stating that “any violation of the Treaties by the United States violates rights held by the

26 ² *Washington v. U.S.*, __ U.S. __, 138 S. Ct. 735 (2018) (granting petition for writ of certiorari); *see also*
27 https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalApril2018.pdf (last visited
April 4, 2018).

1 Tribes rather than the State. The Tribes have not sought redress against the United States in the
2 proceeding now before us.” *Id.* at 969.³

3 In *High Tide Seafoods v. State of Washington*, 106 Wn.2d 695 (1986), plaintiffs
4 challenged the legality of Washington’s tax on “enhanced food fish.” Among other arguments,
5 plaintiffs alleged that the tax violated Indian treaty rights. Plaintiffs were a Washington
6 partnership and its two individual owners. They claimed they suffered economic and
7 constitutional injuries because they were not allowed to deduct any part of the tax paid when they
8 bought fish from treaty Indian fishermen. *Id.* at 702. However, the State Supreme Court found
9 that even if the plaintiffs could prove they suffered injury, “they will not be able to prove their
10 injury falls within the zone of the fishing rights of treaty Indians. Plaintiffs do not have standing
11 to challenge RCW 82.27 by asserting treaty rights of Indians.” *Id.*

12 OUWL’s arguments based on the Squaxin Island Tribe’s treaty fishing rights do not
13 satisfy the first element of the standing test because any injury OUWL suffers as a result of 3rd
14 Gen’s project is not within the zone of interests protected by the treaties. The fishing rights
15 guaranteed by the treaties benefit only the Tribes. They do not benefit others, even those who
16 may “view, enjoy, and study wildlife and plants in the urban environment.” OUWL’s Appeal
17 Brief at 1, lines 24-26. And because only the Tribes are within the zone of interests protected by
18 the treaties, only the Tribes may assert violations of their treaty fishing rights. OUWL does not
19 have standing to assert the Squaxin Island Tribe’s fishing rights under the treaties.

20 **E. Because OUWL Lacks Standing to Assert Tribal Treaty Rights, the Hearing**
21 **Examiner Lacks Jurisdiction to Consider Them**

22 Appellant’s lack of standing to assert tribal treaty rights deprives the Hearing Examiner of
23 jurisdiction to consider arguments based on such rights. If a plaintiff lacks standing to bring suit,
24 the courts lack jurisdiction to consider it. *See, e.g., Allen v. Wright*, 468 U.S. 737 (1984) and
25 *Grove v. Mead School District*, 753 F.2d 1528, 1531 (9th Cir. 1986). Washington courts also

26 ³ *See also U.S. v. Washington*, 827 F.3d 836, 855, 856 (9th Cir. 2016) (affirming district court decision that state did
27 not have standing to assert treaty rights belonging to the tribes).

1 adhere to this principle. *See High Tide Seafoods*, 106 Wn.2d at 702 and *Branson*, 152 Wn.2d at
2 875 (2004). Thus, because OUWL lacks standing to assert tribal treaty rights, the Hearing
3 Examiner lacks jurisdiction to consider them.

4 **V. CONCLUSION**

5 For the reasons stated above, OUWL does not have standing to challenge the City's land
6 use approval based on an alleged violation of the Squaxin Island Tribe's treaty fishing rights.
7 Consequently, the Hearing Examiner lacks jurisdiction to consider the challenge on that basis.
8 The Hearing Examiner should dismiss OUWL's appeal to the extent it relies on tribal treaty
9 fishing rights as a basis for challenging the City's land use decision and DNS.

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11 DATED this 4th day of April, 2018.

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CASCADIA LAW GROUP PLLC

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LLC*

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