

1 **Final agency action regarding decision below:**

2
3 **ALJCERT ALJ decision certified as final**

4
5 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

6
7 In the Matter of the Beer & Wine Store
8 Spirituous Liquor License No. 10033118
9 Issued to:

10 Mickey J. Irizarry
11 Wauneta Trading Post
12 Hwy. 89, 32 Miles North of
13 Flagstaff, AZ 86001

No. 05A-0039-LIQ

**ADMINISTRATIVE
LAW JUDGE DECISION**

14 **HEARING:** March 1, 2006 at 1:30 p.m.

15 **APPEARANCES:** The Arizona Department of Liquor Licenses and Control
16 appeared through Keely Lynn Verstegen, Esq., Assistant Attorney General; Respondent
17 Mickey J. Irizarry, the owner of Wauneta Trading Post, appeared through Peter H.
18 Schelstraete, Esq.

19 **ADMINISTRATIVE LAW JUDGE:** Diane Mihalsky

20
21 The parties presented evidence on the issue of whether Mr. Irizarry, the owner of
22 Wauneta Trading Post, a licensee of the Arizona Department of Liquor Licenses and
23 Control ("the Department"), violated A.R.S. § 4-210(A)(2) by failing to maintain the
24 capability, qualifications, and reliability requirements for a license, as prescribed by
25 A.R.S. § 4-202 and 4-203, by selling alcohol to a person who said he planned to resell
26 the alcohol on the Navajo Reservation. Based on this evidence, the Administrative Law
27 Judge recommends the following Findings of Facts, Conclusions of Law, and
28 Recommended Order to the Director of the Department.

29 **FINDINGS OF FACT**

30 **BACKGROUND AND PROCEDURE**

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007
(602) 542-9826

1 1. The Department issued Beer & Wine Store Spirituous Liquor License No.
2 10033118 to Mr. Irizarry, as owner of Wauneta Trading Post.

3 2. On August 5, 2005, the Department issued the Complaint and Notice of
4 Hearing in this matter, which charged Mr. Irizarry with commission of the following
5 statutory violation:¹

6 Count 1 The licensee has failed to satisfactorily maintain the
7 capability, qualifications, and reliability
8 requirements for a license as prescribed by A.R.S.
9 Section 4-202 and 4-203, in that Mickey Irizarry
10 knowingly sold alcohol with the knowledge that the
11 purchased alcohol would be taken to the
12 reservation and resold to Native Americans, in
13 violation of A.R.S. Section 4-210(A)(2).

14 3. Mr. Irizarry answered the complaint, denying that he had committed any
15 statutory violation.

16 4. After several continuances to allow the parties to obtain and analyze the
17 evidence, a hearing was held, at which both parties were represented by counsel. The
18 Department offered into evidence five exhibits and the testimony of two witnesses.

19 **EVIDENCE AT THE HEARING**

20 5. On May 18, 2004, the Department accepted an application from Mr. Irizarry
21 for Wauneta Trading Post, which he had purchased from former owners Charlene and
22 Cordell ("Corky") Morris. While the application was pending, Mr. Irizarry operated
23 Wauneta Trading Post under an interim license.

24 6. Wauneta Trading Post is located on Highway 89, 32 miles north of Flagstaff
25 and 6 miles south of the Navajo Reservation. When Mr. Irizarry purchased Wauneta
26 Trading Post, it was one of two locations under a joint investigation by the Department,
27 the FBI, and the Navajo Department of Law for facilitating bootlegging of alcohol onto
28 the Reservation for resale. The Department had taken action against the previous
29 owners, Mr. and Mrs. Morris, for openly selling alcohol to Navajo bootleggers to take
30 back to the Reservation for resale.

 7. The Department's Senior Investigator Danny R. Thomas testified that
bootlegging alcohol onto the Reservation was a concern because it led to underage

1 drinking, alcoholism on the reservation, and motor vehicle accidents. Mr. Thomas first
2 became aware of the problem in 2000. In conversations with Coconino Sheriff Richards
3 and Navajo Nation authorities, he performed a volume study to identify the Department
4 licensees near the Reservation that sold a high volume of liquor popular on the
5 reservation, such as Thunderbird wine, Mogen David 20/20 wine, Steel Reserve beer,
6 and High Gravity 800 malt liquor. Wauneta Trading Post was one of the primary
7 locations identified.

8 8. On June 28, 2004 and June 29, 2004, undercover "sting" operations were
9 conducted at Wauneta Trading Post. FBI Special Agent Mac Rominger, Department
10 Investigators Danny Thomas and Wally Hopson, and Navajo Nation Law Department
11 Officers Randy Sherlock and Lucy Lane participated in the June 28, 2004 "sting"
12 operation. The same officers and investigators, except for Special Agent Rominger,
13 participated in the June 29, 2004 operation.

14 9. On June 28, 2004, Special Agent Rominger gave Officers Lane and Sherlock
15 \$225 in assorted currency to purchase liquor. At approximately 7:19 p.m., Officer
16 Sherlock entered Wauneta Trading Post. Mr. Irizarry came out from the back and
17 identified himself as the new owner of the Wauneta Trading Post. Officer Sherlock told
18 Mr. Irizarry that he used to do business with "Corky," buying beer at the Wauneta
19 Trading Post and taking it back to the reservation to sell and that the profit was good.
20 He wanted to purchase beer to sell at a squaw dance. Mr. Irizarry said he was a
21 legitimate businessman and had come out from New York about one and one-half
22 months earlier. Later, Mr. Irizarry told Officer Sherlock that "whatever you do with the
23 beer you buy is your business."

24 10. On June 28, 2004, Officer Sherlock selected cases of malt liquor, wine, and
25 beer to purchase. Because the cost of Officer Sherlock's initial selections exceeded the
26 amount of money had had, he had to put back a case of wine and a 30-pack of beer
27 and go outside to get another \$5. Officer Sherlock then purchased 1 12-bottle case of
28 40-ounce High Gravity 800, a high alcohol malt liquor, four 24-bottle cases of
29 Thunderbird wine, and two 18-packs of Budweiser beer cans. Officer Sherlock said that
30 "Corky" used to let him drive to the back to load up, but Mr. Irizarry told him that it was

¹ Two other counts were dismissed at the time of the hearing in this matter.

1 not necessary. Officer Sherlock then started loading his purchases through the front
2 door of the Wauneta Trading Post, with Officer Lane's help.

3 11. After Officer Sherlock loaded his vehicle with liquor, he went back into the
4 store and told Mr. Irizarry that, if he sold most of the liquor, he might be back the next
5 day because the squaw dance would probably be busy and the first of the month, when
6 most people got paid, was coming up. Mr. Irizarry told him that "Corky" had some
7 suspicions because the police were always around and to be careful. Officer Sherlock
8 told Mr. Irizarry that he would take a dirt road back to Tuba City.

9 12. On June 29, 2004, Investigator Thomas gave Officer Sherlock \$250 in
10 assorted currency to purchase liquor at the Wauneta Trading Post. When he entered
11 the Wauneta Trading Post, Mr. Irizarry was behind the counter talking to two women.
12 Officer Sherlock went back to the cooler and brought out a 12-pack of 12-ounce
13 Budweiser beer bottles and an 18-pack of 12-ounce Busch beer cans, which he put on
14 the counter. He told Mr. Irizarry that he was getting some beer for his friend in Tuba
15 City and asked for 3 boxes of unopened 40-ounce Steel Reserve, another high alcohol
16 malt liquor that is popular in bootlegging operations.

17 13. When Officer Sherlock was loading the liquor into his undercover vehicle on
18 June 29, 2004, he told Mr. Irizarry that his friend was going to sell it during the 4th of July
19 and that the beginning of the month was here, when everyone got paid. Officer
20 Sherlock told Mr. Irizarry that he had "sold good last night" at the squaw dance and he
21 needed some more Thunderbird to sell at a rodeo in Kayenta. Mr. Irizarry told Officer
22 Sherlock that he "didn't hear a thing I said to him." Officer Sherlock testified at the
23 hearing that he believes that Mr. Irizarry heard everything.

24 14. On June 29, 2004, Officer Sherlock purchased a total of 3 cases of Steel
25 Reserve (each consisting of 12 40-ounce bottles), an 18-pack of 12-ounce Busch beer,
26 a six-pack of 12-ounce Budweiser beer long-neck bottles, and 3 24-bottle cases of 375
27 ml. Thunderbird wine.

28 15. After Officer Sherlock loaded his truck, he went back into the Wauneta
29 Trading Post. Mr. Irizarry placed three unopened 375 ml. bottles of Thunderbird wine
30 on the counter. Officer Sherlock told him to put the bottles into a sack. Mr. Irizarry also
gave Officer Sherlock a free Play Boy poster because, according to Officer Sherlock, "I

1 was considered a friend." Officer Sherlock told Mr. Irizarry that he probably would be
2 doing more business with him and left the store.

3 16. The liquor that Officer Sherlock purchased at the Wauneta Trading Post on
4 June 28 and 29, 2004 was not taken to the reservation but was impounded as evidence
5 and placed into an FBI warehouse for safekeeping.

6 17. Special Agent Rominger had provided recording devices for Officer Sherlock
7 to wear into the Wauneta Trading Post on June 28 and 29, 2004. The resulting
8 recordings were inaudible. Officer Sherlock testified at the hearing that there was no
9 way to test the equipment. The tape from the June 28, 2004 operation was taken away
10 immediately afterwards and participants in the "sting" operation did not have an
11 opportunity to listen to the recording or identify potential problems with the equipment.

12 18. The Department subsequently issued Beer & Wine Store Spirituous Liquor
13 License No. 10033118 to Mr. Irizarry and Wauneta Trading Post. The Department's
14 attorney explained at the hearing that it did not want to jeopardize an undercover "sting"
15 operation by publicly objecting to the license application while the operation was
16 ongoing.

17 19. On January 14, 2005, Investigator Thomas interviewed Mr. Irizarry at the
18 Wauneta Trading Post. Mr. Irizarry told Investigator Thomas that he did not sell much
19 liquor and did not sell "5-6 cases of anything" to any single customer. But Mr. Irizarry
20 also said that he sold 100 to 150 cases of Thunderbird a month. If a customer told Mr.
21 Irizarry that the customer was purchasing liquor to resell on the reservation, Mr. Irizarry
22 said "I don't want to know anything about it" because "it's none of my business and I
23 don't want to know." Mr. Irizarry told Investigator Thomas that "[y]ou're making me a co-
24 facilitator, a co-conspirator whatever" and "involving me in something that I do not want
25 to be involved in."

26 20. On January 14, 2005, Mr. Irizarry told Investigator Thomas that he gives
27 customers who purchase a case of Thunderbird one extra bottle. "Corky" used to give
28 them two, but Mr. Irizarry could not afford to give any more than one bottle.

29 21. Investigator Thomas then asked Mr. Irizarry about his feelings about
30 individuals telling him that they are purchasing liquor to bootleg onto the reservation.
According to Investigator Thomas' supplemental report,

1 He stated, "I don't know about it! I don't condone anybody
2 breaking the law period!" I told him there wasn't a specific
3 law against bootlegging under the State [statutes]. Irizarry
4 told me, ["It doesn't matter! . . . That's even worse, I was a
5 'Fed' for seven years!"

6 22. Investigator Thomas testified that, when he told Mr. Irizarry about undercover
7 operations at Wauneta Trading Post, he did not respond. Mr. Irizarry told him that, if
8 bootleggers did not get alcohol to sell on the reservation at Wauneta Trading Post, they
9 would get it elsewhere.

10 CONCLUSIONS OF LAW

11 1. The Department has jurisdiction to determine whether Mr. Irizarry violated
12 A.R.S. § 4-210(A)(2).²

13 2. The Department bears the burden of proof and must establish that Mr. Irizarry
14 violated applicable statutes by a preponderance of the evidence.³ "A preponderance of
15 the evidence is such proof as convinces the trier of fact that the contention is more
16 probably true than not."⁴ A preponderance of the evidence is "evidence which is of
17 greater weight or more convincing than evidence which is offered in opposition to it; that
18 is, evidence which as a whole shows that the fact sought to be proved is more probable
19 than not."⁵

20 3. A.R.S. § 4-210(A)(2) includes among the grounds for the Department to
21 revoke, suspend, or refuse to renew a liquor license that "[t]he licensee fails to
22 satisfactorily maintain the capability, qualifications and reliability requirements of an
23 applicant for license prescribed in § 4-202 or § 4-203." A.R.S. § 4-203 requires that "[a]
24 spirituous liquor license shall be issued only after satisfactory showing of the capability,
25 qualifications and reliability of the applicant and, with the exception of club licensees,
26 that the public convenience requires that the best interest of the community will be
27 substantially served by the issuance."

28 ² See A.R.S. § 4-210(E) and (F).

29 ³ See A.A.C. R2-19-119; see also *Vazanno v. Superior Court*, 74 Ariz. 369, 372, 249 P.2d 837 (1952).

30 ⁴ Morris K. Udall, ARIZONA LAW OF EVIDENCE § 5 (1960).

⁵ BLACK'S LAW DICTIONARY at page 1064 (6th ed. 1990).

1 4. The Department argued at the hearing that the flow of liquor to the
2 reservation is a substantial concern for the Department and local law enforcement.
3 Although the Department is not prosecuting this licensing proceeding under federal or
4 local law, one who facilitates a crime has shown that he lacks the capability,
5 qualifications and reliability for licensure. Although Mr. Irizarry's sale of alcohol to
6 Officer Sherlock was legal, his knowledge that Officer Sherlock meant to resell the
7 alcohol on the reservation made him culpable under state licensing law. The
8 Department was not looking to revoke Mr. Irizarry's license, but asked that it be
9 suspended for three days and that a \$1,000 civil penalty be imposed.

10 5. Mr. Irizarry's attorney argued that the legislature enacted A.R.S. § 4-244(43)⁶
11 to address the problem at which the undercover "sting" operation was directed. But this
12 statute was passed more than a year after the undercover operation and did not
13 become effective until August 2005. Due process requires an agency's action to
14 comply with known standards. Although 18 U.S.C. §§ 1154,⁷ 1156,⁸ and 1161⁹ do

15 ⁶ This statute includes among unlawful acts "[f]or a retail licensee or an employee of a retail licensee to
16 sell spirituous liquor to a person if the retail licensee or employee knows the person intends to resell the
17 spirituous liquor" and was added by Laws 2005, Ch. 284, § 11.

18 ⁷ 18 U.S.C. § 1154(a) addresses "Intoxicants dispensed in Indian Country" and provides as follows:

19 Whoever sells, gives away, disposes of, exchanges, or barter any malt,
20 spirituous, or vinous liquor, including beer, ale, and wine, or any ardent
21 or other intoxicating liquor of any kind whatsoever, except for scientific,
22 sacramental, medicinal or mechanical purposes, or any essence, extract,
23 bitters, preparation, compound, composition, or any article whatsoever,
24 under any name, label, or brand, which produces intoxication, to any
25 Indian to whom an allotment of land has been made while the title to the
26 same shall be held in trust by the Government, or to any Indian who is a
27 ward of the Government under charge of any Indian superintendent, or
28 to any Indian, including mixed bloods, over whom the Government
29 through its departments, exercises guardianship, and whoever
30 introduces or attempts to introduce any malt, spirituous, or vinous liquor,
 including beer, ale, and wine, or any ardent or intoxicating liquor of any
 kind whatsoever into the Indian country, shall, for the first offense, be
 fined under this title or imprisoned not more than one year, or both; and,
 for each subsequent offense, be fined under this title or imprisoned not
 more than five years, or both.

⁸ This federal statute provides in relevant part as follows:

 Whoever, except for scientific, sacramental, medicinal or mechanical
 purposes, possesses intoxicating liquors in the Indian country or where

1 address the sale of liquor to Native Americans in Indian Country, the Department did not
2 charge any violation of these statutes or cite legal authorities that an off-reservation sale
3 of alcohol, which never actually reached the reservation, could ever constitute a criminal
4 conspiracy or facilitation to violate federal statutes. Liquor is sold in casinos that are
5 located on Native American reservations in Arizona. At the time of the "sting" operation,
6 Mr. Irizarry had been in Arizona only a month and a half; he should not be charged with
7 violating federal statutes that are not incorporated by reference into Arizona laws
8 governing liquor licensees or charged in the complaint.

9 **DUE PROCESS REQUIREMENTS**

10 6. "Procedural due process requires notice and an opportunity to be heard in a
11 meaningful manner and at a meaningful time."¹⁰ The Administrative Procedure Act
12 requires the Department to include in its notice "[a] reference to the particular sections
13 of the statutes and rules involved."¹¹

14 7. The Department alleged that Mr. Irizarry allegedly facilitated Officer
15 Sherlock's commission of some crime, which impugns Mr. Irizarry's capability,
16 qualifications and reliability under A.R.S. § 4-210(A)(2). But due process and the
17 Administrative Procedure Act require the Department to refer, not just to A.R.S. §§ 4-
18 210(A)(2), -202, and -203, but to the predicate criminal offense by statutory citation or,

19 the introduction is prohibited by treaty or an Act of Congress, shall, for
20 the first offense, be fined under this title or imprisoned not more than one
21 year, or both; and, for each subsequent offense, be fined under this title
22 or imprisoned not more than five years, or both.

23 ⁹ This federal statute provides in relevant part as follows:

24 The provisions of sections 1154, 1156, 3113, 3488, and 3669, of this title
25 shall not apply within any area that is not Indian country, nor to any act or
26 transaction within any area of Indian country provided such act or
27 transaction is in conformity both with the laws of the State in which such
28 act or transaction occurs and with an ordinance duly adopted by the tribe
29 having jurisdiction over such area of Indian country, certified by the
30 Secretary of the Interior, and published by the Federal Register.

¹⁰ *Webb v. Arizona Board of Medical Examiners*, 202 Ariz. 555, 558 ¶ 9, 48 P.3d 505, 508 (App. 2002)
(citing *Comeau v. Arizona State Board of Dental Examiners*, 196 Ariz. 102, 106 ¶ 18, 993 P.2d 1066,
1070 (App. 1999)).

¹¹ A.R.S. § 41-1061(B)(3).

1 at least, by name.¹² Mr. Irizarry did not receive actual or constructive notice of the
2 specific criminal offenses that the Department was charging as a predicate for cause to
3 sanction his license under A.R.S. § 4-210(A)(2).

4 8. The Administrative Procedure Act also required the Department to furnish “a
5 more definite and detailed statement” upon Mr. Irizarry’s application.¹³ Although his
6 failure to request a more definite and detailed statement might constitute a waiver of
7 deficiencies in the Department’s notice, the record in the Office of Administrative
8 Hearings shows that the hearing in this matter was continued at least twice to allow the
9 parties to analyze the evidence. Based on this record, Mr. Irizarry’s attorney’s
10 statements at hearing, and the Department’s failure to allege even at the hearing any
11 criminal statutes whose violation Mr. Irizarry allegedly facilitated, the Administrative Law
12 Judge finds that Mr. Irizarry did not waive his due process right to notice.¹⁴

13 9. Mr. Irizarry’s sale of alcohol off-reservation was legal. The record does not
14 show that the Department ever gave Mr. Irizarry notice of the statutes he violated or the
15 statutes he facilitated another’s violation of by selling alcohol to a person who said he
16 planned to resell the alcohol on the reservation. The Administrative Law Judge

17 ¹² No Arizona cases address this precise issue. However, cases from other jurisdictions decided under
18 similar regulations or statutes reach this result and are persuasive. See, e.g., *Goodloe v. Parratt*, 605
19 F.2d 1041, 1045-46 (8th Cir. 1979) (“Once prior violation of a specific state statute became an element of
20 the offense . . . , Goodloe was entitled not only to notice of that general fact, but also to notice of what
21 law he was alleged to have violated.”); *Escalera v. New York City Housing Authority*, 425 F.2d 853, 862
22 (2d Cir. 1970) (Notice that alleged that tenants committed “anti-social activities” and “criminal acts” were
23 inadequate (citing *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 105 (1963)); *Edgecomb v.*
24 *Housing Authority*, 824 F. Supp. 312, 315 (D. Ct. 1993) (where regulations permitted authority to
25 terminate assistance “if any family member has engaged in drug-related or violent criminal activity,” “[a]
26 proper notice . . . would state the particular felony and the person who allegedly committed it, and would
27 give a brief factual statement concerning the incident.” (Citing *inter alia Goldberg v. Kelly*, 397 U.S. 254,
28 267 (1970))); cf. *Bills v. Weaver*, 25 Ariz. App. 473, 544 P.2d 699 (1976) (Where notice for administrative
29 hearing contained erroneous nonexistent statute number for predicate crime but “clearly stated that the
30 matter which would be at issue was appellee’s conviction for attempted income tax evasion,” notice
requirements of Administrative Procedure Act were met); *Brown v. Saranac Lake Central School District*,
273 A.D.2d 785, 786, 709 N.Y.S.2d 706, 708-09 (2000) (“Even in an administrative proceeding, ‘no
person may lose substantial rights because of wrongdoing shown by the evidence, but not charged’”
(citation omitted)).

¹³ A.R.S. § 41-1061(B)(4).

¹⁴ No Arizona authorities construe this statute. A Connecticut court’s construction of a similar statute is
persuasive. See *Greater Bridgeport Transit District v. State Board of Labor Relations*, 43 Conn. Supp.
340, 355, 653 A.2d 229, 238 (Sup. Ct. 1993) (“A plaintiff’s failure to request a more definite and detailed
statement constitutes a waiver of its right to question the sufficiency of the notice of relief requested.”).

1 therefore cannot conclude that his actions in the undercover sting impugn his capacity,
2 qualifications, and reliability or provide cause to penalize his liquor license.

3 **ATTORNEYS' FEES APPLICATION**

4 10. To "ensure fair and open regulation by state agencies, a person. . . is eligible
5 for reimbursement of the person's costs and fees if the person prevails against any
6 agency in an administrative hearing as provided in section 41-1007."¹⁵

7 11. Mr. Irizarry's attorney at the hearing requested an award of the attorney's
8 fees he incurred in defending this action under A.R.S. § 41-1007.

9 12. The Administrative Law Judge has the authority to determine the merits of an
10 application for attorney's fees.¹⁶

11 13. Mr. Irizarry is entitled to his fees if he both prevailed as to the most significant
12 issue or set of issues and the Department's position was "not substantially justified."¹⁷ Both
13 requisites must be present before an application for attorney's fees and costs can be
14 approved in an administrative proceeding.¹⁸

15 14. No Arizona cases address the meaning of the phrase "not substantially justified"
16 in A.R.S. § 41-1007(A)(1). The federal Equal Access to Justice Act¹⁹ requires courts to
17 award fees and costs to parties prevailing against federal agencies "unless the court finds
18 that the position of the United States was substantially justified"

19 15. The leading United States Supreme Court opinion on that statute is the 1988
20 case of *Pierce, Secretary of Housing and Urban Development v. Underwood*.²⁰ There
21 the Supreme Court discussed at length the meaning of "substantially justified":

22 Before proceeding to consider whether the trial court abused its discretion in
23 this case, we have one more abstract legal issue to resolve: the meaning of
24 the phrase 'substantially justified' in 28 U. S. C. § 2412(d)(1)(A). The Court of

25 ¹⁵ A.R.S. § 41-1001(A)(2).

26 ¹⁶ A.R.S. § 41-1007(A).

27 ¹⁷ A.R.S. § 41-1007(A).

28 ¹⁸ Administrative proceedings differ from civil actions in the recovery of attorneys' fees and costs.
29 Compare A.R.S. § 41-1007 with A.R.S. §§ 12-341, 12-341.01, and 12-349.

30 ¹⁹ 28 U. S. C. § 2412; see 28 U. S. C. § 2412(d)(1)(A).

²⁰ 487 U.S. 552, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988) (Scalia, J.).

1 Appeals, following Ninth Circuit precedent, held that the Government's
2 position was 'substantially justified' if it 'had a reasonable basis both in law
3 and in fact.' [Citation omitted.] The source of that formulation is a Committee
4 Report prepared at the time of the original enactment of the [Equal Access to
5 Justice Act], which commented that '[t]he test of whether the Government
6 position is substantially justified is essentially one of reasonableness in law
7 and fact.' [Citation omitted.] In this petition, the Government urges us to hold
8 that 'substantially justified' means that its litigating position must have had
9 'some substance and a fair possibility of success.' [Citation omitted.]
10 Respondents, on the other hand, contend that the phrase imports something
11 more than 'a simple reasonableness standard,' [citation omitted] - though
12 they are somewhat vague as to precisely *what* more, other than 'a high
13 standard,' and 'a strong showing,' [citation omitted].

14 In addressing this issue, we make clear at the outset that we do not
15 think it appropriate to substitute for the formula that Congress has adopted
16 any judicially crafted revision of it - whether that be 'reasonable basis in both
17 law and fact' or anything else. 'Substantially justified' is the test the statute
18 prescribes, and the issue should be framed in those terms. That being said,
19 there is nevertheless an obvious need to elaborate upon the meaning of the
20 phrase. The broad range of interpretations described above is attributable to
21 the fact that the word 'substantial' can have two quite different - indeed,
22 almost contrary - connotations. On the one hand, it can mean '[c]onsiderable
23 in amount, value, or the like; large,' Webster's New International Dictionary
24 2514 (2d ed. 1945) - as, for example, in the statement, 'He won the election
25 by a substantial majority.' On the other hand, it can mean '[t]hat is such in
26 substance or in the main,' *ibid.* - as, for example, in the statement, 'What he
27 said was substantially true.' Depending upon which connotation one selects,
28 'substantially justified' is susceptible of interpretations ranging from the
29 Government's to the respondents'.

30 We are not, however, dealing with a field of law that provides no
guidance in this matter. Judicial review of agency action... regularly proceeds
under the rubric of 'substantial evidence' set forth in the Administrative
Procedure Act, 5 U. S. C. § 706(2)(E). That phrase does not mean a large or
considerable amount of evidence, but rather 'such relevant evidence as a
reasonable mind might accept as adequate to support a conclusion.' [Citation
omitted.] In an area related to the present case in another way, the test for
avoiding the imposition of attorney's fees for resisting discovery in district
court is whether the resistance was 'substantially justified,' Fed. Rules Civ.
Proc. 37(a)(4) and (b)(2)(E). To our knowledge, that has never been
described as meaning 'justified to a high degree,' but rather has been said to
be satisfied if there is a 'genuine dispute,' [citations omitted], or 'if reasonable
people could differ as to [the appropriateness of the contested action],'
[citations omitted].

1 We are of the view, therefore, that as between the two commonly
2 used connotations of the word 'substantially,' the one most naturally
3 conveyed by the phrase before us here is not 'justified to a high degree,' but
4 rather 'justified in substance or in the main' - that is, justified to a degree that
5 could satisfy a reasonable person. That is no different from the 'reasonable
6 basis both in law and fact' formulation adopted by the Ninth Circuit and the
7 vast majority of other Courts of Appeals that have addressed this issue.
8 [Citations omitted.]²¹

9 16. The Administrative Law Judge's recommendation that the administrative
10 action against Mr. Irizarry be dismissed because the Department did not meet due
11 process notice requirements does not require a concomitant legal conclusion that the
12 Department's position was not substantially justified. The United States Supreme Court
13 has expressly held that the government's position, although ultimately rejected, can
14 have a reasonable basis in law and fact and, therefore, be substantially justified.²² The
15 question of substantial justification at the attorneys' fees application stage of a
16 proceeding is distinct from the question of whether an agency's decision is supported by
17 substantial evidence at the merits stage of a proceeding.²³

18 17. In this case, all the Department's witnesses credibly testified that access to
19 alcohol on the Navajo Reservation was legally restricted to prevent the potential harms
20 that Investigator Thomas identified. Mr. Irizarry's attorney did not dispute the existence
21 of these restrictions. The Administrative Law Judge believes, based on the
22 Department's evidence, that Mr. Irizarry knew that he was probably facilitating Officer
23 Sherlock's commission of a criminal act when Mr. Irizarry sold Officer Sherlock liquor
24 that he was told was for resale on the reservation. The Department's position was not
25 without substantial justification, it simply lacked the statutory citations and analysis to
26 sustain it. The Department's position was "justified in substance or in the main."²⁴

27 ²¹ *Pierce*, 487 U.S. at 563-565 (Brennan, Marshall and Blackmun, JJ., concurred separately in this part of
28 the opinion). See also BLACK'S LAW DICTIONARY at 1429 ("substantially justified") (6th ed. 1990).

29 ²² *Pierce*, 487 U.S. at 565.

30 ²³ See *Cummings v. Sullivan*, 950 F.2d 492, 498 (7th Cir. 2000).

²⁴ *Pierce*, 487 U.S. at 565.

1 18. Since Mr. Irizarry's attorney's request can be determined based on the
2 Department's position having been "substantially justified," it is not necessary to address
3 A.R.S. § 41-1007(A)'s second requirement ("prevailing on the most significant issue or set
4 of issues").

5 19. Due to her determination that the Department's position was substantially
6 justified, the Administrative Law Judge also does not request a fees application or address
7 the reasonableness of Mr. Irizarry's claimed attorneys' fees. She notes that Mr. Irizarry's
8 attorney showed a high level of legal and professional competence, was ably prepared,
9 and was a gentleman in his dealings with the Administrative Law Judge and the
10 Department's witnesses and counsel. These attributes were greatly appreciated.²⁵

11 **RECOMMENDED ORDER**

12 For the foregoing reasons, the Administrative Law Judge recommends that the
13 Department dismiss Case No. 05A-0039-LIQ against Beer & Wine Store Spirituous
14 Liquor License No. 10033118 that had been issued to Mickey J. Irizarry, Wauneta
15 Trading Post.

16 It is further ordered that Mr. Irizarry's request for attorney's fees is denied.

17 Done this day, March 7, 2006.

18 _____
19 Diane Mihalsky
20 Administrative Law Judge

21 Original transmitted by mail this
22 ____ day of March, 2006, to:

23 Arizona Department of Liquor Licenses and Control
24 Leesa Berens Morrison, Director
25 800 W. Washington St., 5th Floor
26 Phoenix, AZ 85007

27 By _____

28 ²⁵ The administrative law judge notes that A.R.S. § 41-1007(E) provides that a decision of an administrative
29 law judge "is subject to judicial review. If fees and other costs were denied by the . . . administrative law judge
30 because the party was not the prevailing party but the party prevails on appeal, the court may award fees and
other costs for the proceedings before the . . . administrative law judge if the court finds that fees and other
costs should have been awarded under" A.R.S. § 41-1007(A).