

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

NATIVE AMERICAN COUNCIL OF TRIBES;	)	
BLAINE BRINGS PLENTY;	)	Civ. 09-4182-KES
SHAWN GARNETT;	)	
NEPHI ANTELOPE;	)	
BRIAN DUBRAY;	)	
CLAYTON CREEK;	)	
DAVID DELORIA; and	)	
All other persons who are similarly situated,	)	
	)	PLAINTIFFS' UNOPPOSED
Plaintiffs,	)	SECOND
	)	AMENDED COMPLAINT
vs.	)	
	)	
DOUGLAS WEBER, in his official capacity as	)	
Warden of the South Dakota State Penitentiary;	)	
TIMOTHY REISCH, in his official capacity as	)	
Secretary of the South Dakota Department of	)	
Corrections; and	)	
MARTY J. JACKLEY, in his official capacity as	)	
Attorney General for the State of South Dakota,	)	
	)	
Defendants.	)	

COMES NOW the Plaintiffs and, by way of their Unopposed Second Amended
Complaint against the Defendants, say:

1. Plaintiffs bring this civil rights action under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc et seq., seeking declaratory and injunctive relief (1) declaring the actions, decisions, policies, and/or regulations of Defendants, insofar as they prohibit the plaintiff Native American inmates and other similarly situated Native American inmates of the South Dakota State Penitentiary from using tobacco

products in Native American religious rituals and ceremonies, violate (a) RLUIPA; (b) the plaintiffs' First Amendment right to the free exercise of religion and their due process and equal protection rights under the Fourteenth Amendment; (c) the American Indian Religious Freedom Act, 42 U.S.C. § 1996; (d) the right of freedom of religion under customary international law and the United Nations Charter; (e) the right to protection against genocide as provided under international law and the Geneva Convention; and (f) plaintiffs' rights as a "self-governing people" under Article 73 of the United Nations Charter, and (2) temporarily and permanently enjoining Defendants from continuing to undertake, implement and enforce such illegal and unconstitutional actions, decisions, policies, and/or regulations.

PARTIES

2. Plaintiff Native American Council of Tribes (NACT) is a South Dakota non-for-profit 501(c)(3) corporation that was formed within the South Dakota State Penitentiary, with offices at 2601 S. Minnesota Ave., Ste. 105, Sioux Falls, SD 57105. NACT is governed by a general council, whose membership is composed of the named individual Plaintiffs in this case, all of who are members of the Great Sioux Nation.
3. Plaintiff Blaine Brings Plenty is currently an inmate at the South Dakota State Penitentiary.
4. Plaintiff Shaun Garnette is a resident of Rapid City, South Dakota, who formerly was an inmate at the South Dakota State Penitentiary.
5. Plaintiff Nephi Antelope is currently an inmate at the South Dakota State Penitentiary.
6. Plaintiff Brian Dubray is currently an inmate at the South Dakota State Penitentiary.
7. Plaintiff Clayton Creek is currently an inmate at the South Dakota State Penitentiary.

8. Plaintiff David Deloria is currently an inmate at the South Dakota State Penitentiary.
9. Defendant Douglas Weber is the Warden of the South Dakota State Penitentiary.
10. Defendant Timothy Reisch is the Secretary of the South Dakota Department of Corrections.
11. Defendant Marty J. Jackley is the Attorney General for the State of South Dakota.

JURISDICTION AND VENUE

12. The Court has jurisdiction of this matter under 28 U.S.C. § 1331.
13. Venue is properly laid in the District of South Dakota under 28 U.S.C. § 1391(b).

FACTUAL BACKGROUND

14. Defendants, through their actions, policies and/or regulations, have prohibited the use of tobacco in Native American religious ceremonies conducted at the South Dakota State Penitentiary.
15. NACT and its individual members have instituted this action, pursuant to RLUIPA, to invalidate and reverse these actions, policies and/or regulations, and to enjoin Defendants to cease to prohibit, and to compel Defendants to allow, the use of tobacco in Native American religious rituals and ceremonies conducted at the South Dakota State Penitentiary.

COUNT I - RLUIPA

16. Plaintiffs hereby reallege the allegations of Paragraphs 1 through 15 of their Second Amended Complaint as if fully set forth herein at length.
17. RLUIPA forbids any government, including the State of South Dakota, from “impos[ing] a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general

applicability, unless the government demonstrates that imposition of the burden on that person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000cc-1(a).

18. The individual Plaintiffs and similarly situated Native American inmates are “persons residing in or confined to an institution,” namely the South Dakota State Penitentiary, who have engaged in and who desire to continue to engage in religious exercises protected by RLUIPA, specifically Native American religious ceremonies that require or involve the use of tobacco.

19. Defendants, by their actions, decisions policies and/or regulations, have imposed a substantial burden on the religious exercises of Plaintiffs and similarly situated inmates of the South Dakota State Penitentiary by prohibiting all use of tobacco by inmates, including such use in Native American religious ceremonies.

20. The imposition of this substantial burden on the religious exercises of Plaintiffs and similarly situated Native American inmates of the South Dakota State Penitentiary does not further any compelling governmental interest nor is it the least restrictive means of furthering a compelling governmental interest, if any.

WHEREFORE Plaintiffs respectfully demand the entry of judgment against Defendants:

(a) Declaring that the actions, decisions, policies, and/or regulations of Defendants, insofar as they prohibit the Plaintiffs and other similarly situated Native American inmates of the South Dakota State Penitentiary from using tobacco products in Native American religious rituals and ceremonies, violate RLUIPA;

- (b) Temporarily and permanently enjoining Defendants from continuing to undertake, implement and enforce such illegal actions, decisions, policies, and/or regulations;
- (c) For costs and attorney's fees; and
- (d) For such other relief as the Court may deem just or equitable.

COUNT II - FIRST AMENDMENT

- 21. Plaintiffs hereby reallege the allegations of Paragraphs 1 through 20 of their Second Amended Complaint as if fully set forth herein at length.
- 22. Defendants, by their actions, decisions, policies and/or regulations, have imposed a substantial burden on the sincerely held religious beliefs of Plaintiffs and other similarly situated Native American inmates by prohibiting all use of tobacco by inmates, including such use in Native American religious ceremonies, in violation of the Free Exercise Clause of the First Amendment.
- 23. No rational connection exists between the actions, decisions, policies and/or regulations of Defendants prohibiting all use of tobacco by inmates, including such use in Native American religious ceremonies and any legitimate governmental interest.
- 24. No alternative means of exercising the rights of Plaintiffs and other Native American inmates to use tobacco in Native American religious ceremonies currently exists.
- 25. Reasonably accommodating the exercise of the rights of Plaintiffs and other Native American inmates to use tobacco in Native American religious ceremonies would have no adverse impact on guards, other prisoners, or on prison resources generally.
- 26. Ready, easy-to-implement alternatives to a total ban on the use of tobacco exist that would accommodate the rights of Plaintiffs and other Native American inmates to use tobacco in Native American religious ceremonies.

WHEREFORE Plaintiffs respectfully demand the entry of judgment against Defendants:

- (a) Declaring that the actions, decisions, policies, and/or regulations of Defendants, insofar as they prohibit the Plaintiffs and other similarly situated Native American inmates of the South Dakota State Penitentiary from using tobacco products in Native American religious rituals and ceremonies, violate the Free Exercise Clause of the First Amendment;
- (b) Temporarily and permanently enjoining Defendants from continuing to undertake, implement and enforce such unconstitutional actions, decisions, policies, and/or regulations;
- (c) For costs and attorney's fees; and
- (d) For such other relief as the Court may deem just or equitable.

COUNT III - FOURTEENTH AMENDMENT

27. Plaintiffs hereby reallege the allegations of Paragraphs 1 through 26 of their Second Amended Complaint as if fully set forth herein at length.

28. Defendants, by their actions, decisions, policies and/or regulations, have deprived Plaintiffs and other similarly situated Native American inmates of their legally protected liberty and property interests without procedural and substantive due process and have unconstitutionally discriminated against Plaintiffs and other similarly situated Native American inmates in violation of their rights to equal protection of the laws by prohibiting them from using tobacco in Native American religious ceremonies.

WHEREFORE Plaintiffs respectfully demand the entry of judgment against Defendants:

- (a) Declaring that the actions, decisions, policies, and/or regulations of Defendants, insofar as they prohibit the Plaintiffs and other similarly situated Native American

inmates of the South Dakota State Penitentiary from using tobacco products in Native American religious rituals and ceremonies, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment;

- (b) Temporarily and permanently enjoining Defendants from continuing to undertake, implement and enforce such unconstitutional actions, decisions, policies, and/or regulations;
- (c) For costs and attorney's fees; and
- (d) For such other relief as the Court may deem just or equitable.

COUNT IV – AMERICAN INDIAN RELIGIOUS FREEDOM ACT

29. Plaintiffs hereby reallege the allegations of Paragraphs 1 through 28 of their Second Amended Complaint as if fully set forth herein at length.

30. Defendants, by their actions, decisions, policies and/or regulations prohibiting the Plaintiffs and other similarly situated Native American inmates of the South Dakota State Penitentiary from using tobacco products in Native American religious rituals and ceremonies, have violated the American Indian Religious Freedom Act, 42 U.S.C. § 1996.

WHEREFORE Plaintiffs respectfully demand the entry of judgment against Defendants:

- (a) Declaring that the actions, decisions, policies, and/or regulations of Defendants, insofar as they prohibit the Plaintiffs and other similarly situated Native American inmates of the South Dakota State Penitentiary from using tobacco products in Native American religious rituals and ceremonies, violate the American Religious Freedom Act, 42 U.S.C. § 1996;

- (b) Temporarily and permanently enjoining Defendants from continuing to undertake, implement and enforce such illegal actions, decisions, policies, and/or regulations;
- (c) For costs and attorney's fees; and
- (d) For such other relief as the Court may deem just or equitable.

COUNT V – INTERNATIONAL LAW

31. Plaintiffs hereby reallege the allegations of Paragraphs 1 through 30 of their Second Amended Complaint as if fully set forth herein at length.

32. Defendants, by their actions, decisions, policies and/or regulations prohibiting the Plaintiffs and other similarly situated Native American inmates of the South Dakota State Penitentiary from using tobacco products in Native American religious rituals and ceremonies, have violated their right of freedom of religion under customary international law and the United Nations Charter, their right to protection against genocide as provided under international law and the Geneva Convention, and their rights as a “self-governing people” under Article 73 of the United Nations Charter.

WHEREFORE Plaintiffs respectfully demand the entry of judgment against Defendants:

- (a) Declaring that the actions, decisions, policies, and/or regulations of Defendants, insofar as they prohibit the Plaintiffs and other similarly situated Native American inmates of the South Dakota State Penitentiary from using tobacco products in Native American religious rituals and ceremonies, violate customary international law, the Geneva Convention, and the United Nations Charter;
- (b) Temporarily and permanently enjoining Defendants from continuing to undertake, implement and enforce such illegal actions, decisions, policies, and/or regulations;
- (c) For costs and attorney's fees; and

(d) For such other relief as the Court may deem just or equitable.

Dated this 15th day of June, 2010

Respectfully submitted,
GONZALEZ LAW FIRM

/s/ Mario Gonzalez

Mario Gonzalez
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Attorney General for the State of South Dakota,	)	
	)	
Defendants.	)	

CERTIFICATE OF SERVICE

I hereby certify that a on this 15th day of June, 2010, I serve a true and correct copy of the UNOPPOSED SECOND AMENDED COMPLAINT via United States District Court ECF filing system to the following:

Scott Hendricks Leuning
Attorney for Defendants
300 South Phillips Ave., Suite 300
PO Box 5027
Sioux Falls, SD 57117-5027

Respectfully submitted,
GONZALEZ LAW FIRM

/s/ Mario Gonzalez
Mario Gonzalez
Attorney for Plaintiffs