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CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

STATE OF SOUTH DAKOTA and)
WILLIAM J. JANKLOW, GOVERNOR,)
)
Plaintiffs,)
)
v.)
)
NORMAN Y. MINETA, Secretary,)
United States Department)
of Transportation,)
)
Defendant.)

CIV. 02-3034

COMPLAINT

1. This is a civil action for declaratory relief. South Dakota and its Governor, William J. Janklow, ask this Court to declare the United States Department of Transportation (US DOT) lacks the authority to threaten the State of South Dakota with the loss of federal highway funds or to withhold federal highway funds for the reason that the South Dakota Department of Transportation (SD DOT) refuses to compel its contractors to pay an illegal tax to the Rosebud Sioux Tribe or refuses to subject, or assist in subjecting, a SD DOT contractor to the illegal jurisdiction of the Rosebud Sioux Tribe.

2. This action arises under the Declaratory Judgment Act, 28 U.S.C. § 2201 and this Court has jurisdiction pursuant to 28 U.S.C. § 1331.

3. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)(e).

4. Plaintiff State of South Dakota is a body politic and a sovereign entity and brings this action on its own behalf and on behalf of all its citizens and visitors who use its highways.

5. Plaintiff Governor William J. Janklow is responsible for the faithful execution of the laws of the State of South Dakota, including those laws which provide for the building and maintenance of the roads of the state.

6. Defendant Norman Y. Mineta is Secretary of the United States Department of Transportation.

FACTS

7. The external boundaries of the Rosebud Reservation are coterminous with the boundaries of Todd County.

8. South Dakota constructs and maintains three roads within the Rosebud Reservation. These include:

U.S. 18-road miles 176.08 to 234.14

U.S. 83-road miles 0.0 to 31.19

S.D. 63-road miles 26.71 to 36.13

9. The State of South Dakota is entitled to funds to build and maintain roads in South Dakota, including those identified in paragraph 8, by virtue of 23 U.S.C. § 101 et seq., which authorizes federal aid to highways and pursuant to other legislation, including acts of Congress appropriating funds for such maintenance and construction.

10. Funding for roads in South Dakota, including the roads identified in paragraph 8, is based upon whether the project is a maintenance project or a construction project. Maintenance projects are 100% funded from state taxes; construction projects on non-Interstate roads are funded 80% from federal funds and 20% from state funds. These ratios are the same both in reservation counties and in non-reservation counties.

11. In 1986, the Rosebud Sioux Tribe enacted a "Tribal Employment and Contracting Rights Ordinance." (TECRO) (Ordinance No. 86-3 as amended.) The Ordinance purports to "apply to all areas within the exterior boundaries of the Rosebud Sioux Reservation. . . ." Section 103.

12. With exceptions for key, regular and permanent employees, any covered employer or contractor, in hiring, and promotion, is required to give qualified Indians preference. The preference is first, to members of the Rosebud Tribe, second, to local Indians not members of the Rosebud Sioux Tribe and third, to other Indians. Sections 201-205, 207.

13. Covered employers are required by the Tribal Ordinance to participate in training programs; employers engaged in construction are required to participate in the tribe's BAT certified training program. Section 209.

14. The Ordinance provides that covered employees may not use job qualification criteria as barriers to the employment of Indians, when such criteria are not required by "business necessity;" the Ordinance puts the burden on the employer to demonstrate that a criteria is required by "business necessity." Section 210.

15. The Tribe in its Ordinance grants its Commission the authority to "impose hiring goals and timetables to specify the minimum number of Indians a covered employer must hire." Section 108(3).

16. The Tribal Ordinance provides that within a particular craft or position, "non-Indians shall be terminated first, then

non-local Indians who are not members of the Rosebud Sioux Tribe, then local Indians" Section 207.

17. The Ordinance seeks to control the "hiring, promotion, training, layoff, and all other aspects, of employment." Section 201.

18. The Tribal Commission, in addition, is given the power to make "an examination or investigation of the place of business of any employer or other entity during normal business hours" without necessity for obtaining a warrant. Section 108(15). The Ordinance specifies that the Tribe has the "right to inspect and copy all relevant records of an entity, of the entity's signatory unions or subcontracts, to speak with workers on the job site, and to engage in similar investigatory activities." Section 113.

19. The Ordinance imposes a two percent fee with respect to each construction contract of \$5,000 or more to be paid by the primary contractor. Section 111.

20. The Ordinance allows extraordinary sanctions against a person or entity which does not comply. According to Section 125 of the Ordinance, the Commission:

may impose any or all of the following sanctions and any other sanctions authorized by this Ordinance:

- (1) deny such party the right to commence business on the Rosebud Reservation;
- (2) suspended such party's operation with the Rosebud Reservation;
- (3) terminate such party's operation with the Rosebud Reservation;
- (4) deny the right of such party to conduct any further business within the Rosebud Reservation;

- (5) impose a monetary civil penalty on such party;
- (6) order such party to make payment of back pay or other damages to any aggrieved Indian or aggrieved Indian-preference certified firm;
- (7) order such party to dismiss any employees hired in violation of the Tribe's employment rights requirements;
- (8) order such party to take such other action as is necessary to ensure compliance with this Ordinance or to remedy any harm caused by a violation of this Ordinance, consistent with the requirements of 25 U.S.C. Sec. 1301 et seq.

The maximum monetary civil penalty which may be imposed is \$500.00 for each violation. Each day during which a violation exists shall constitute a separate violation.

21. The State of South Dakota regularly performs, and will continue to perform, maintenance contracts funded with 100% state funds on the roads identified in paragraph 8. Likewise, the state regularly performs and will continue to perform, construction contracts on the roads identified in paragraph 8.

22. The State of South Dakota owns the right-of-way for all the roads identified in paragraph 8.

23. In the years 1991-1997, contractors with the State of South Dakota for highways on roads identified in paragraph 8 have paid in excess of \$335,000 in TECRO taxes.

24. A significant portion of the \$335,000 paid to the Rosebud Sioux Tribe constituted state generated funds. Because this money was paid to Rosebud Sioux Tribe, it was not available to the State for the maintenance and construction of highways either in Todd County or at other locations.

25. On September 13, 1999, SD DOT Secretary Wheeler sent a letter to the Rosebud Sioux Tribe in which he noted that the State had been unable to find a legal basis on which to continue to charge a TECRO fee. The letter also recognized that SD DOT was unable to justify the expenditure of taxpayer funds in ways which were not "legally supportable." The letter asked the tribe for legal justification. No satisfactory response has ever been received to this letter from the Tribe; nor has the United States been able to satisfactorily answer this question.

26. On January 6, 2000, the Division Administrator Don Kamikar, formally notified the Secretary of SD DOT, Ron Wheeler, that the Federal Highway Administration's (FHWA) "policy on the TERO tax and Indian preference in employment is well established." (FHWA is part of US DOT). The letter continued that it was the federal position that "the formal Tribes in South Dakota do have the jurisdictional authority to impose and collect a TERO Tax." (The federal references to TERO clearly include both the TERO and TECRO).

27. The January 6, 2000, letter, relied upon a Notice N 4720.7 dated March 15, 1993, and a 1994 Presidential document, both of which it enclosed.

28. Notice N 4720.7, dated March 15, 1993, provides that "Tribes may impose this [TERO] tax on reservations" It further provides that if the TERO tax on highway contracts is the same as the tribal tax on other contracts, such cost are eligible for federal-aid reimbursement. The Notice did not distinguish

between roads as to which the state held a right of way and other roads; rather, the Notice applied to all roads.

29. No maintenance contract is eligible for federal aid reimbursement and no tribal tax on maintenance is eligible for federal aid reimbursement.

30. Notice N 4720.7, dated March 15, 1993, provides that when an "Indian employment goal has been inserted in a contract, the "state will follow normal contract compliance or contract administration oversight procedures to effect compliance."

31. In the January 6, 2000, letter, the United States stated that complaints against the State DOT constituted a "situation that we, as an Agency, cannot ignore. If the matter cannot be resolved in the very near future" the agency would be "forced to initiate an investigation."

32. In March 2000 the Rosebud Sioux tribe filed a complaint with the FHWA alleging, inter alia, that the SD DOT had "refused to acknowledge the validity of the TERO fee imposed by the tribe on highway/maintenance projects. . . ."

33. A July 2000 letter from the SD DOT to the US DOT pointed out that intervening federal court precedent had put into question the whole matter of TERO compliance.

34. After a drawn out investigation which required the SD DOT to respond to various demands of US DOT, the US DOT concluded on August 20, 2002 that "SD DOT is in non-compliance regarding the Tribal Employment and Contracting Rights Ordinance (TECRO) fee."

35. The August 20, 2002, US DOT Investigative Report, likewise concluded that

The evidence shows that the Respondent refused to acknowledge the validity of the 2 percent TECRO fee collected by the tribe and failed to sign a new TERO agreement with Complainant because of the 2 percent TECRO fee. Evidence shows that the Respondent was informed by the FHWA Division Office that formal Tribes in South Dakota do have the jurisdictional authority to impose and collect a TERO tax.

The Respondent's actions are not consistent with FHWA's long-standing guidance, Notice N 4720.7, Indian Preference in Employment on Federal-Aid Highway Projects on and near Indian Reservations.

36. On September 3, 2002, the US DOT informed the SD DOT that the August 20, 2002, letter had been issued without a full "internal review process," and that after the process was complete the state would be notified of the disposition of the complaint.

37. The September 3, 2002, US DOT letter did not call into question its prior reliance on the 1993 Notice, or its interpretation of the 1993 Notice, nor did it retreat from its stance that SD DOT and its contractors were required to comply with the Rosebud TECRO.

38. Because the US DOT maintains the position set out in its 1993 Notice, and because the position of the State of South Dakota is directly to the contrary with regard to the roads identified in paragraph 8, there is an immediate controversy between US DOT and the State of South Dakota and its Governor.

39. SD DOT cannot adequately maintain and construct roads within Todd County if the issue raised by US DOT regarding the applicability of the Rosebud TECRO to the lands in question is

not resolved. South Dakota cannot adequately inform its prospective contractors of the law which will be applicable to them and cannot provide adequately for the cost estimates of prospective projects.

40. US DOT has no special expertise in the resolution of Indian jurisdictional problems, as indicated, inter alia, by its continued unreasonable reliance on a 1993 US DOT notice in preference to reliance on recent Supreme Court and other federal court precedent regarding tribal jurisdiction.

41. No statute provides that South Dakota must await the resolution of the current RST complaint against SD DOT as a request to the bringing of a federal court action regarding South Dakota's complaint against US DOT.

42. As to SD DOT contracts carried out on the roads identified in paragraph 8, the Tribe lacks the authority, as a matter of federal law, to subject state contractors to tribal civil jurisdiction, including any civil jurisdiction the Tribe may otherwise have to tax, and the United States lacks the authority, as a matter of federal law, to withhold funds or to threaten to withhold funds from the Plaintiffs for the reason that they refuse to pay an illegal tax to the Tribe, refuse to fund the payment of an illegal tax to the Tribe through state contractors, or refuse to subject, or aid in subjecting, SD DOT contractors to the illegal jurisdiction of the tribe.

CLAIM FOR DECLARATORY RELIEF

43. Plaintiffs incorporate by reference and re-allege the paragraphs above.

44. Plaintiffs and the citizens they represent have suffered legal wrong and have been adversely affected by the official actions taken by Defendant and his officers and employees.

45. Plaintiffs are entitled to a declaratory judgment to the effect that

(a) The Defendant's continued reliance on a 1993 Notice entitled "Indian Preference and Employment On Federal-Aid Highway Projects on a Near Indian Reservations" is without basis, in light of current Supreme Court precedent binding upon the United States Department of Transportation.


(b) With regard to roads in Todd County as to which the State owns the right of way, the US DOT lacks the authority to threaten the State with the loss of federal highway funds or to withhold federal highway funds for the reason that South Dakota refuses to pay the RST TECRO tax, refuses to compel its contractors to pay the RST TECRO tax, or refuses to subject, or assist in subjecting, a SD DOT highway contractor to the jurisdiction of the Rosebud Sioux Tribe.

46. Plaintiffs also request that the Court grant such other and further relief be just in the premises.

Dated this 6th day of October, 2002.

Respectfully submitted,

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