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CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

NORTHERN CHEYENNE TRIBE,
ROSEBUD SIOUX TRIBE, YANKTON
SIOUX TRIBE, CROW CREEK SIOUX
TRIBE, and DEFENDERS OF THE
BLACK HILLS,

CIV03-5019

**DEFENDANT MEL MARTINEZ'
REPLY BRIEF**

Plaintiff,

STANDING ROCK SIOUX TRIBE,

Plaintiff – Intervenor,

v.

MEL MARTINEZ, in his official capacity
as United States Secretary of Housing and
Urban Development, BLACK HILLS
COUNCIL OF LOCAL
GOVERNMENTS, STURGIS
INDUSTRIAL EXPANSION
CORPORATION, CITY OF STURGIS,
and BLACK HILLS SPORTSMAN'S
COMPLEX, INCORPORATED,

Defendants.

COUNTS I AND II

The Plaintiffs' Memorandum Opposing Defendant Martinez's Motion to Dismiss ("Plaintiffs' Memorandum") did not address the case law cited in Defendant's initial memorandum. A review of that case law supports the Defendant's motion, as does the language quoted by the Plaintiffs from the NHPA and NEPA.

The responsibility for ensuring compliance with environmental laws under HUD's CDBG program is found at 42 U.S.C. § 5304 (g) (1), which states:

. . . the Secretary, . . . may under regulations provide for the release of funds for particular projects to recipients of assistance under this chapter who assume all of the responsibilities for environmental review, decisionmaking, and action pursuant to such Act, and such other provisions of law as the regulations of the Secretary specify, that would apply to the Secretary were he to undertake such projects as Federal projects. . . .

The regulations promulgated by HUD to carry out the statutory directives refer to the “recipient as “the responsible entity.” 24 C.F.R. 58.2. That responsible entity has the responsibility for complying with both NEPA and NHPA. 24 C.F.R. 58.4(a) and 58.5(a). In this case, the responsible entity is the city of Sturgis. The mayor of Sturgis, as the “certifying officer”, is the “responsible Federal official” and must represent the responsible entity and be subject to the “jurisdiction of the Federal Courts.” 24 C.F.R. 58.13. In the Plaintiffs’ brief, they cite to language of both the NHPA and NEPA that refers to “the agency official” (NHPA) and the “responsible Federal official” (NEPA), both of which terms would identify the grant recipient, or the City of Sturgis, in this case.

The cases cited in the Plaintiffs’ Memorandum are not applicable to the instant case because they do not address the situation in which another federal statute, such as 42 U.S.C. § 5304(g)(1), specifically authorizes a recipient of federal funds to assume all of the responsibilities under NEPA and NHPA of the federal agency granting such funds. In both *Vieux Carre Property Owners v. Brown*, 875 F.2d 453, 455 (8th Cir. 1989), and *Western Mohegan Tribe of N.Y. v. New York*, 246 F.3d 230, 232 (2nd Cir. 2001), the courts explicitly

noted that no federal funds were involved in the construction of the contested projects. Similarly, *Wetlands Action Network v. U.S. Army Corps of Eng.*, 222 F.3d 1105 (9th Cir. 2000), involved the Army Corps of Engineers' decision to grant a permit to a private developer to fill some federally delineated wetlands rather than a federally funded project.

Finally, Plaintiffs have not cited any waiver of sovereign immunity that would give the court jurisdiction over HUD in Counts I and II of this lawsuit.

COUNT III

The Religious Land Use and Institutionalized Persons Act (“RLUIPA”) was passed in part as a result of the Supreme Court striking down the Religious Freedom Restoration Act (“RFRA”) as unconstitutional as applied to the States in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).¹ It clearly applies to state and local governments, and only to land use laws and regulations and institutionalized persons.

Section 2000cc refers to “land use regulation” and that “no government (not including the United States) shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person. Land use regulation is defined in § 2000cc-5(5) as meaning a “zoning or landmarking law,” neither of which is involved in the instant case nor could HUD impose any such law in the situation at issue. At the signing of RLUIPA, former President Clinton stated:

This Act will, in certain cases, forbid State and local governments from imposing a substantial burden on the exercise

¹ See Storzer & Picarello, Jr., “The Religious Land Use and Institutionalized Persons Act of 2000: A constitutional response to unconstitutional zoning practices.” 9 *George Mason L. Rev.* 929 (2001), pp 940-943.

of religion unless they could demonstrate that imposition of such a burden is the least restrictive means of furthering a compelling governmental interest. The Act would protect the exercise of religion in two situations: (1) where State and local governments seek to impose or implement a zoning or landmark law in a manner that imposes a substantial burden on religious exercise and (2) where State and local governments seek to impose a substantial burden on the religions exercise of persons residing or confined to certain institutions.

2000 WL 1371281. *See also*, excerpt from the Congressional Record at 146 Cong. Rec.

S7774-01, found at 2000 WL 1079346.

RLUIPA does not provide a waiver of sovereign immunity allowing a private cause of action against the United States. The section of the Act entitled “Judicial relief,” 42 U.S.C. § 2000cc-2 (a), states:

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. . .

The term government in that particular section allowing a private cause of action *does not* include the United States. 42 U.S.C. § 2000c-5(4).

Even if portions of RLUIPA referred to in the definitions section (§ 2000cc-5(4)(B)) were interpreted as including the United States as a “government”, those portions of the Act are not applicable in this case. Under § 2000cc-2(b), the Plaintiff would have the burden of persuasion to show that the CDBG law and regulations “substantially burden plaintiffs’ exercise of religion.” Plaintiffs have not identified or alleged any part of that law or those regulations that might burden the Plaintiffs’ exercise of religion. Their theory is that the project developed by the City of Sturgis may do so. In addition, under § 2000cc-3, HUD’s

CDBG laws and regulations do not fit any of the subsections where the term government is used, and would not affect this case.

Finally, the Spending Clause does not permit Congress to impose retroactive conditions on the use of federal funds. The Affidavit of Charles Kreiman states that the money used and to be allocated for the project at issue was appropriated and designated for the State of South Dakota in 1999, prior to the passage of the RLUIPA. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981).

Count IV

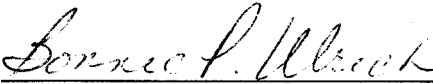
The Affidavit of Charles Kreiman shows the process of how CDBG grants are awarded and distributed and affirms that no action by HUD in this case in any way burdened the Plaintiffs' exercise of religion. Even if the Court were to determine that the location of the proposed shooting range is a burden on the exercise of Plaintiffs' religion, the Secretary of HUD should not be pulled into the lawsuit solely because it allocated CDBG grant funds to the State of South Dakota as required by law. Under RFRA, the nexus simply does not exist between HUD and the conduct complained of.

Conclusion

For all of the foregoing reasons, the Defendant Martinez again urges the Court to grant his Motion to Dismiss.

Date: March 21, 2003

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CERTIFICATE OF SERVICE

I, Bonnie P. Ulrich, hereby certify that on March 21, 2003, a true and correct copy of the foregoing **DEFENDANT MEL MARTINEZ' REPLY BRIEF** was faxed to:

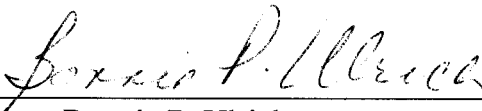
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