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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

NORTHERN CHEYENNE TRIBE, ROSEBUD SIOUX TRIBE, YANKTON SIOUX TRIBE, CROW CREEK SIOUX TRIBE, STANDING ROCK SIOUX TRIBE, and DEFENDERS OF THE BLACK HILLS,	)	Civ. 03-5019
Plaintiffs,	)	
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.	)	

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM,
AND RESPONSE TO FALSE DECLARATION OF CHARLES A. KREIMAN,
RE: DEFENDANT MARTINEZ'S MOTION TO DISMISS

This memorandum responds to Defendant Martinez's Reply Brief and to the false Declaration of Charles A. Kreiman, both served late Friday afternoon, March 21.

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I. FACTS

Martinez takes the position that his only role in this project was to provide funding. His reply brief asserts at p. 5 that "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."

With his reply brief, Martinez filed a sworn declaration from Charles A. Kreiman, paragraph 9 of which states: "There is no prior HUD review or approval of the specific activities funded by grants the state makes to local governments."

The facts show otherwise. Black Hills Council of Local Governments, which prepared the Environmental Assessment, relied on "consultation with the HUD Regional Environmental Officer" in the summer of 2002. Page 51 attached to Affidavit of James D. Leach in Support of Motion for Preliminary Injunction and Speedy Hearing, filed February 28 (hereinafter "Leach Affidavit.") Lindquist sought "guidance" from the HUD Regional Environmental Officer regarding the objections of the South Dakota State Historic Preservation Office (SHPO). Leach Affidavit page 52.

On January 10, 2003, HUD reviewed the noise issues raised by the National Park Service, the Standing Rock Sioux Tribe, and the Advisory Council on Historic Preservation, with respect to the effect the shooting range will have on the religious practices by Indian tribes and their members at Bear Butte National Historic Landmark.

HUD Regional Environmental Officer Howard S. Kutzer advised Steve Harding of South Dakota's Community Development Block Grant Program "I concur with the determination of NO ADVERSE EFFECT of this proposed project on religious practices by Indian tribes and their members at the Bear Butte National Historic Landmark." After explaining his reasoning, Kutzer on behalf of HUD advised South Dakota "You may proceed with the environmental Release of Funds as of January 3, 2003, as requested." (emphasis added) The letter concludes by asking Harding to call Kutzer if he "may be of further assistance." A copy of this letter is attached.

Kreiman's sworn declaration is false. The factual basis of Martinez's motion to dismiss is unfounded.

II. PROCEDURAL STATUS AND STANDARD OF REVIEW

Martinez has not identified the rule pursuant to which he moves to dismiss. Presumably the original motion was filed pursuant to F.R.Civ.P. 12(b)(6). When Martinez filed the affidavit of Mr. Kreiman, this converted the motion to one for summary judgment under Rule 56, which requires that all parties be allowed "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." F.R.Civ.P. 12(b)(6).

"In considering a motion to dismiss, we must assume that all the facts alleged in the complaint are true. Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). The complaint must be liberally construed in the light most favorable to the

plaintiff. Fusco v. Xerox Corp., 676 F.2d 332, 334 (8th Cir. 1982). A Rule 12(b)(6) motion to dismiss a complaint should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle the plaintiff to relief. Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986)." Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994).

If the Court intends to consider Mr. Kreiman's affidavit and decide the motion under F.R.Civ.P. 56, it may deny the motion or else grant plaintiffs the additional time to which they are entitled for discovery before the motion is decided. "The Supreme Court has been careful to state that the rules regarding the proper opposition to a summary judgment motion apply only after adequate time for discovery has been allowed." Costello, Porter v. Providers Fidelity Life Insurance Company, 958 F.2d 836, 839 (8th Cir. 1992), citing Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L.Ed.2d 265, 106 S.Ct. 2548 (1986).

III. ARGUMENT

Counts I and II

Martinez argues that "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." Brief p. 2. This is a distinction without a different. Martinez cites no authority in support of his position.

Winkler v. Chicago School Reform Board of Trustees, 2001 U.S. Dist. Lexis 13960 (N. D. Ill.), contradicts Martinez's position. Plaintiffs in Winkler sued numerous parties, including the Secretary of Housing and Urban Development, in an Establishment Clause claim, alleging in Count 3 of the complaint that HUD improperly allocated Community Development Block Grant money to the Boy Scouts. 2001 U.S. Dist. Lexis 13960 *9. HUD moved to dismiss on the same grounds as it has moved to dismiss here, namely that the Community Development Block Grant Program allocates money to state and local grantees, not directly to the Boy Scouts. "Essentially, HUD contends that plaintiffs are picking a fight with the wrong party as it is not directly responsible for funds generated by these two statutes [CDBG and another program] being passed along to the BSA [Boy Scouts of America]." 2001 U.S. Dist. Lexis 13960 *29.

The court rejected this argument. "HUD has not supported its assertion that the challenged statutes are any less amenable to suit because the funds are channeled through the Secretary of HUD to other organizations. The funds still originate through a congressional expenditure program which the plaintiffs challenge violates the Establishment Clause. HUD has not presented the court with justification to impose a bar to taxpayer standing where the routing of those funds pass through a chain of

administration." 2001 U.S. Dist. Lexis 13960 *30.

So it is here. Martinez has not presented the court with justification to impose a bar to the extremely strong federal historic preservation and environmental protection interests underlying NHPA and NEPA simply because the routing of the funds for the shooting range pass through a chain of administration.

Martinez argues that "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." Brief p. 3. A suit against a "government officer in his official capacity is not a suit against the sovereign if (1) the officer's powers are limited by statute and his actions were ultra vires, . . ." Larson v. Domestic and Foreign Commercial Corporation, 337 U.S. 682, 689, 69 S.Ct. 1456, 1461, 93 L.Ed. 1628 (1949). All four causes of action allege violation of federal statutes. In addition, each of the statutes authorizes suit against the government, without which the statutes would be meaningless.

Count III (RLUIPA)

Martinez's reply brief attacks Count III more broadly than he did in his original brief. In case the Court chooses to consider issues raised for the first time by Martinez in his reply brief, plaintiffs provide the following response.

Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction and Speedy Hearing addresses at p. 34 the broad applicability of RLUIPA's basic rule against

substantial burden by a government on religious exercise in the absence of a compelling government interest and no less restrictive means of furthering it. The rule applies where "(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability; (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with . . . Indian tribes, even if the burden results from a rule of general applicability; or (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(a)(2). Under each of these separate tests, the rule applies here.

"Land use regulation" is defined broadly to include "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest." 42 U.S.C. § 2000cc-5(5) (emphasis added).

Martinez and the other defendants, acting together, with Martinez supplying most of the money, the authorization to spend it, and alleged expertise (see attached January 10, 2003 letter of Howard S. Kutzer) applied City of Sturgis zoning law by authorizing the building of the shooting range near Bear Butte, which if built will limit plaintiffs' use of

their land. See Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction and Speedy Hearing, p. 35-37. RLUIPA is construed "in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution." 42 USC § 2000cc-3(g).

Martinez contends that the provisions of RLUIPA which apply to the federal government may not be used in judicial proceedings, citing 42 USC § 2000c-5(4). This argument would render meaningless 42 USC § 2000c-5(4)(B) and the two parts of RLUIPA cited therein, including section 4(b) (42 USC § 2000cc-2(b)).

Martinez argues that plaintiffs "have not identified or alleged any part of [the Community Development Block Grant] law or those regulations that might burden the plaintiffs' exercise of religion." Brief p. 4. Martinez's argument misses the point of this lawsuit. The shooting range, which is the creation of all defendants, using mostly taxpayer money supplied by Martinez, is what would burden plaintiffs' exercise of their religion.

Finally, relying on the discredited Kreiman declaration, Martinez asserts that Count III must be dismissed because the CDBG funds at issue were "appropriated and designated for the State of South Dakota in 1999, prior to the passage of the RLUIPA," so that to apply RLUIPA to the use of them would be an unconstitutional retroactive condition on the use of federal funds, prohibited by Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 25 (1981).

Plaintiff's responses to this argument are:

- The City of Sturgis applied for these funds on May 8, 2002, not in 1999. Leach Affidavit, attached page 1.
- The attached letter of Howard Kutzer shows that he authorized a Release of Funds on January 10, 2003, not in 1999.
- Martinez's attorneys conceded at the March 17, 2003 telephone hearing that most of the money for the project is still in a federal bank account.
- The portion of Kreiman's Declaration on which Martinez relies, paragraph 12, states "The funds used for the State's grant to Sturgis were from the FY 1999 grant, since funds from that grant were the oldest grant from which funds remained available for distribution at the time of the State's award to the City." This sentence seems to mean only that Martinez uses a First-In-First-Out (FIFO) accounting system. The accounting system Martinez uses, be it First-In-First-Out, First-In-Last-Out, Last-In-First-Out, or anything else, cannot conceivably control plaintiffs' rights, nor could Congress have conceivably intended such a result.
- Injunction relief is prospective, not retroactive. "When the plaintiff's request for relief is a prospective injunction, application of new or amended statutes is not a retroactive application of the law. Indeed,

this court has a responsibility to consider the law currently in force when the plaintiff seeks prospective relief." Kikumura v. Hurley, 242 F.3d 950, 960 n. 5 (10th Cir. 2001) (internal citation omitted).

- If the Court finds that the foregoing arguments do not dispose of Martinez's Pennhurst argument, plaintiffs are entitled to time for discovery of the relevant facts on this issue, as discussed in section II of this brief.

Count IV (RFRA)

Martinez's argument is that, based on the facts set forth in Mr. Kreiman's sworn declaration, 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." Brief p. 5. In response, plaintiffs rely on all the facts, law, and argument set forth above, and on the attached January 10, 2003 HUD letter.

Dated: March 24, 2003

Respectfully submitted,

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Certificate of Service

I certify that on the 24th day of March, 2003, I served this document on defendants by faxing one true copy to:

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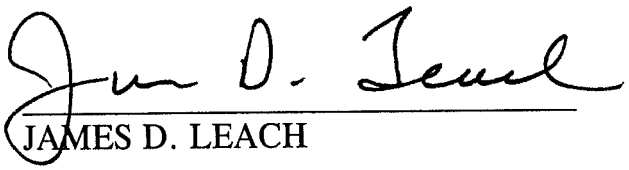

JAMES D. LEACH