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**FILED**

MAR 05 2003

  
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, )

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. )  
)  

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AMENDED  
COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION

### Nature of this Action

1. Plaintiffs bring this action pursuant to the National Historic Preservation Act, the National Environmental Policy Act, and the Religious Land Use and Institutionalized Persons Act, for a preliminary and permanent injunction restraining defendants from constructing a shooting range near Bear Butte.

### Parties

2. All plaintiffs other than Defenders of the Black Hills are Indian Tribes. Defenders of the Black Hills is an unincorporated association whose members are predominantly Native American, and who share a common interest in protecting Bear Butte and those who pray there from defendants' unlawful and unwise project.

3. Plaintiffs and their members (all of whom are hereinafter identified as "plaintiffs") have an aboriginal interest in practicing their religion at Bear Butte. Plaintiffs are among the most impoverished people in the United States. Plaintiffs' society and culture have been under almost constant pressure from the dominant non-native society since the two first came into contact. The deleterious effects of this are well-known, and include a short life expectancy, a high poverty rate, a high infant mortality rate, and high levels of social and individual distress.

4. Plaintiffs' practice of their religion is inseparable from who they are, and from their survival as individuals and peoples.

5. Defendant Mel Martinez is United States Secretary of Housing and Urban

Development and is sued in his official capacity. Defendants Sturgis Industrial Expansion Corporation and City of Sturgis sponsored a proposal by defendant Black Hills Sportsman's Complex, Incorporated, to construct a shooting range near Bear Butte, primarily using United States Government funds provided by the United States Department of Housing and Urban Development. Defendant Black Hills Council of Local Governments is a private organization which provides assistance to local governments, and which prepared an environmental assessment for this project.

#### Jurisdiction

6. The court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343(3), and 28 U.S.C. § 1343(4).

#### Facts

7. Bear Butte has unique religious and cultural importance to plaintiffs.

8. The proposed undertaking interferes with plaintiffs' free exercise of their religion.

9. The proposed undertaking adversely impacts on a nationally-important traditional cultural property.

10. The shooting range defendants wish to construct is located within about four miles of Bear Butte.

11. Up to 10,000 rounds per day or more will be fired during daylight hours; 10,000 rounds per day is equivalent to an average of one round every five seconds

throughout all daylight hours.

12. The noise from the shooting will be plainly audible to plaintiffs attempting to practice their religion at Bear Butte. The noise will drastically infringe on their ability to do so. The noise will interfere with their ability to engage in hanblecheya (vision quest), an essential part of their religion, and will interfere with their ability to encounter their Creator.

13. Sometimes the noise from the shooting range will be louder, and sometimes it will be less loud, due to variables such as the size of the weapon being fired, wind, humidity, temperature, and other natural conditions. Sometimes the noise will come in volleys, sometimes it will come at regular intervals, and sometimes it will come at irregular intervals.

14. The human experience of a particular noise, such as gunfire, is a subjective experience which cannot be accurately or appropriately defined based on mathematical factors alone; human factors are at least as important as mathematical factors in determining the human experience of a particular noise.

15. Defendant Black Hills Council of Local Governments knew all this, and knew the laws under which plaintiffs sue.

16. The only noise study done by defendant Black Hills Council of Local Governments, or anyone, was conducted by persons with no significant environmental knowledge or training, using methods those persons were only vaguely familiar with, using

an extremely limited range of data, and totally disregarding human factors, all of which produced unreliable, misleading, and meaningless results.

17. Even that noise study showed that the noise from the shooting range will have a significant impact on plaintiffs who attempt to continue to practice their religion at Bear Butte.

18. Before the shooting range was planned to be near Bear Butte, it was planned for a location nearer Sturgis and farther from Bear Butte; non-Indians objected to that location in part because of the noise the shooting range would produce, and based on those objections, the proposed location was moved to its current location, farther away from the non-Indians and nearer Bear Butte.

19. When plaintiffs objected to the new location of the shooting range, defendants ignored their objections.

First Cause of Action  
National Historic Preservation Act

20. The plaintiffs for this cause of action are all Indian tribes listed in the caption.

21. The defendant for this cause of action is Mel Martinez, in his official capacity as United States Secretary of Housing and Urban Development.

22. The National Historic Preservation Act of 1966 (NHPA), codified at 16 U.S.C. § 470 et seq., and regulations promulgated thereunder, set forth certain

requirements concerning the effect of any undertaking on a place which is included in or eligible for inclusion in the National Register of Historic Places.

23. Bear Butte is included on the National Register of Historic Places as a National Historic Landmark.

24. Section 106 of NHPA, codified as 16 U.S.C. § 470f, requires that the head of any federal agency, such as defendant Martinez, prior to the approval of the expenditure of any federal funds on the undertaking, take into account the effect of the undertaking on a National Historic Landmark such as Bear Butte.

25. Defendant Black Hills Council of Local Governments, under federal law, was delegated the role of federal agency official responsible for compliance with section 106 of NHPA.

26. NHPA authorizes the Advisory Council on Historic Preservation (ACHP) to promulgate regulations to guide agencies in implementing the statutory requirements, and ACHP has done so. They are found at 36 CFR Part 800.

27. The regulations of defendant Martinez's own agency, 24 CFR § 50.4, require applicants for Housing and Urban Development (HUD) funds to comply with NHPA and the ACHP regulations.

28. Section 101(d)(6)(B) of NHPA, codified as 16 U.S.C. § 470a(d)(6)(B), required defendant Black Hills Council of Local Governments, on behalf of defendant Martinez, to consult with any Indian tribe that attaches religious and cultural significance

to a historic property, such as Bear Butte, that may be affected by an undertaking.

29. Defendant Black Hills Council of Local Governments violated 36 CFR § 800.2(c)(2)(ii) by:

- a. failing to make plaintiffs a “consulting party” (§800.2(c)(2)(ii)(A)),
- b. denying plaintiffs their right to identify their concerns about Bear Butte (§800.2(c)(2)(ii)(A)),
- c. denying plaintiffs their right to advise on the identification and evaluation of Bear Butte (§800.2(c)(2)(ii)(A)),
- d. denying plaintiffs their right to articulate their views on the undertaking’s effects on Bear Butte (§800.2(c)(2)(ii)(A)),
- e. denying plaintiffs their right to participate in the resolution of adverse effects (§800.2(c)(2)(ii)(A)),
- f. denying plaintiffs their right to be consulted in a sensitive manner respectful of tribal sovereignty (§800.2(c)(2)(ii)(B)), and
- g. refusing to recognize the government-to-government relationship between the federal government and Indian tribes (§800.2(c)(2)(ii)(C)).

30. Defendant Black Hills Council of Local Governments failed to make a reasonable and good faith effort to identify Indian tribes to be consulted in the Section 106 process, as required by 36 CFR § 800.2(c)(2)(ii)(A).

31. Defendant Martinez, acting through his delegatee Black Hills Council of Local Governments, failed to fulfill his responsibility under section 110(f) of NHPA, codified as 16 U.S.C. § 470h-2(f), which requires that prior to the approval of any federal undertaking which may directly and adversely affect any National Historic Landmark, “the head of the responsible federal agency shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to such landmark.”

32. Defendant Black Hills Council of Local Governments knowingly, willfully, and intentionally failed, and despite demand refused, to comply with the requirements of these and others laws, including but not limited to the requirements for consultation with plaintiffs, and the further legally required procedures for addressing and attempting to resolve adverse effects, as more fully set forth in the Memorandum in Support of Motion for Preliminary Injunction filed herewith.

33. Defendant Black Hills Council of Local Governments knew and understood the requirements under NHPA for consultation with Indian tribes, and willfully and in bad faith chose to break those laws, in an intentional attempt to circumvent them so as to avoid objections by plaintiffs to the project, all for the purpose of ensuring that the project be constructed, as desired by defendant Sturgis Industrial Expansion Corporation, defendant City of Sturgis, and defendant Black Hills Sportsman’s Complex.

34. Defendant Black Hills Council of Local Governments was told several times by several entities that it was breaking these laws, yet it continued to break them, hoping



and expecting that it would get away with its lawlessness so that the project would be built as desired, and without regard to the rights and interests of plaintiffs.

35. Because of these failures and refusals to comply with the law, the shooting range cannot lawfully proceed, and no further expenditure of federal funds for it is lawful.

Second Cause of Action  
National Environmental Policy Act

36. The plaintiffs for this cause of action are all plaintiffs listed in the caption.

37. The defendant for this cause of action is Mel Martinez, in his official capacity as United States Secretary of Housing and Urban Development.

38. Everything said above is incorporated herein.

39. The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., and regulations promulgated pursuant to it, declare national environmental policy and set forth procedures to implement it.

40. Defendant Martinez's expenditure of federal funds for construction of the shooting range is a major federal action significantly affecting the quality of the human environment.

41. Defendant Black Hills Council of Local Governments, under federal law, was responsible for the project's compliance with NEPA and the regulations promulgated pursuant to NEPA.

42. Defendant Black Hills Council of Local Governments failed to comply with

NEPA by preparing an inadequate, incomplete, and biased Environmental Assessment.

43. Defendant Black Hills Council of Local Governments knew that plaintiff tribes were the people most affected by this project.

44. Defendant Black Hills Council of Local Governments failed to communicate with plaintiff tribes about this project, and thus failed to gather the information essential to assess the environmental effects of this project on the people most affected by it.

45. Even after consultation was demanded, defendant Black Hills Council of Local Governments still failed to communicate with plaintiffs in any systematic way, and utterly failed to communicate with plaintiffs meaningfully, by reaching its conclusion first and communicating second, exactly the opposite of how the process is supposed to work.

46. These failures and refusals were willful, knowing, and in bad faith, and for the purpose of evading objections by plaintiffs to the project, in order to attempt to ensure that the project be constructed, as desired by defendant Sturgis Industrial Expansion Corporation, defendant City of Sturgis, and defendant Black Hills Sportsman's Complex.

47. Defendant Black Hills Council of Local Governments acted arbitrarily and capriciously by failing (a) to determine adequately, fairly, and in good faith whether an Environmental Assessment is sufficient or whether an Environmental Impact Statement is required, (b) to prepare an adequate, fair, and complete Environmental Assessment, and (c) to prepare an Environmental Impact Statement.

48. Because of these bad faith actions, failures, and refusals to comply with the

law, the shooting range cannot lawfully proceed, and no further expenditure of federal funds for it is lawful.

Third Cause of Action  
Religious Land Use and Institutionalized Persons Act

49. The plaintiffs for this cause of action are all Indian tribes listed in the caption.

50. This cause of action is brought against all defendants.

51. Everything said above is incorporated herein.

52. The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) protects religious uses of land such as the use made by plaintiffs of Bear Butte.

53. RLUIPA applies to this project.

54. Plaintiffs have a property interest in Bear Butte.

55. Bear Butte is “regulated land” under the RLUIPA.

56. All defendants are “government” within the meaning of the RLUIPA.

57. Defendants’ placement of the shooting range limits and restricts plaintiffs’ use of their land, and constitutes “land use regulation” under the RLUIPA.

58. Defendants’ land use regulation imposes a substantial burden on the religious exercise of plaintiffs and their members, which is not in furtherance of a compelling governmental interest and is not the least restrictive means of furthering that compelling governmental interest.

59. The substantial burden is imposed in a program or activity that receives federal financial assistance.

60. The substantial burden affects commerce with Indian tribes.

61. 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.

62. The land use regulation unreasonably limits religious assemblies.

63. All defendants other than defendant Martinez acted under color of state law to subject plaintiffs to the deprivation of rights secured by the laws of the United States, within the meaning of 42 U.S.C. § 1983.

64. The shooting range cannot lawfully proceed, and no further expenditure of federal funds for it is lawful.

Fourth Cause of Action  
Religious Freedom Restoration Act

65. The plaintiffs for this cause of action are all plaintiffs listed in the caption.

66. The defendant for this cause of action is Mel Martinez, in his official capacity as United States Secretary of Housing and Urban Development.

67. Everything said above is incorporated herein.

68. The Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1 et

seq., provides increased protection from the federal government for the exercise of religion.

69. The shooting range, if constructed at its planned location, would constitute a substantial burden on plaintiffs' exercise of their religion.

70. The placement of the shooting range near Bear Butte is not in furtherance of a compelling governmental interest.

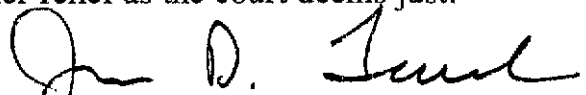
71. The placement of the shooting range near Bear Butte is not the least restrictive means of furthering a compelling governmental interest.

72. Plaintiffs use Bear Butte for the purpose of religious exercise.

WHEREFORE, plaintiffs request relief as follows:

1. For a preliminary and permanent injunction restraining defendant Martinez from expending any more federal funds for the shooting range at its present planned location near Bear Butte;
2. For a preliminary and permanent injunction restraining all defendants from constructing the shooting range at its present planned location near Bear Butte;
3. For costs of this action including a reasonable attorney's fee; and
4. For such other and further relief as the court deems just.

Dated: March 5, 2003



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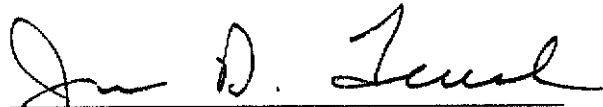
Certificate of Service

I certify that on this 5<sup>th</sup> day of March, 2003, I served this document on defendants by hand delivery of one true copy to the office of Robert A. Mandel, Assistant United States Attorney, Federal Building, Rapid City, SD, and by mailing one true copy, first-class U.S. mail postage prepaid, to the following persons:

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