

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

FILED

MAR 17 2003


CLERK

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

CIV03-5019

Plaintiffs,

**DEFENDANT MEL MARTINEZ'
MOTION TO DISMISS**

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.

COMES NOW the Defendant, Mel Martinez, in his official capacity as United States Secretary of Housing and Urban Development (HUD), by and through his attorney, Assistant U.S. Attorney Bonnie P. Ulrich, and moves the Court to dismiss the Complaint against him for the following reasons and on the following grounds:

1. The First and Second Causes of Action should be dismissed because, pursuant to 42 U.S.C. § 5304(g) and 24 C.F.R. Part 58, the State of South Dakota and the City of Sturgis have assumed HUD's responsibilities under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA).


2. The Third Cause of Action should be dismissed because the Religious Land Use and Institutionalized Persons Act (RLUIPA) does not apply to HUD because neither Secretary Martinez nor HUD is a "government" as defined by RLUIPA.

3. The Fourth Cause of Action should be dismissed because under the allegations of the Complaint, and the applicable law, HUD did not take any action that could be construed as substantially burdening the Plaintiffs' exercise of religion.

In support of this Motion, and by this reference incorporated herein, is a Memorandum of Law.

Date: March 17, 2003

JAMES E. McMAHON
United States Attorney


BONNIE P. ULRICH, AUSA
Chief, Civil Division
PO Box 5073
Sioux Falls, SD 57117-5073
605-330-4401, ext. 119

CERTIFICATE OF MAILING

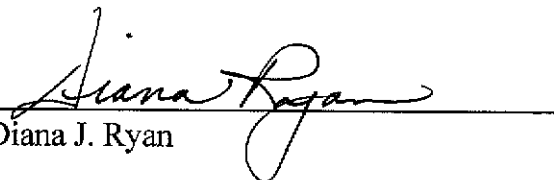
I, Diana J. Ryan, hereby certify that on March 17, 2003, a true and correct copy of the foregoing **DEFENDANT MEL MARTINEZ' MOTION TO DISMISS** was faxed to:

James D. Leach
605.341.0716

Dale R. Hansen
605.347.4466

Donald P. Knudsen
605.342.9503

Timothy Becker
605.342.3616


Diana J. Ryan

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Defendants.

I. HUD’s State CDBG Program -- NEPA and NHPA Responsibilities

A. STATUTES AND REGULATIONS

The subject case involves the Community Development Block Grant (“CDBG”) program, which is authorized by Title I of the Housing and Community Development Act of 1974, as amended, 42 U.S.C. § 5301 *et seq.* (“Title I”), and specifically, the State CDBG program, which is authorized by 42 U.S.C. § 5306(d). Under the State CDBG program, the U.S. Department of Housing and Urban Development (“HUD”) provides CDBG funds to

state governments, which distribute them to units of general local government that are not eligible for CDBG funds pursuant to HUD's Entitlement Grant program. *See*, 24 C.F.R. Part 570, Subpart I.

The instant litigation concerns a HUD grant to the State of South Dakota pursuant to the State CDBG program. The State, in turn, made a grant to the city of Sturgis, South Dakota, for the city to grant to the Black Hills Sportsman's Complex, Incorporated, for a shooting range. Among other causes of action, the plaintiffs allege that HUD Secretary Martinez, acting through the Black Hills Council of Local Governments, which performed an environmental assessment of the project, failed to comply with NEPA and NHPA prior to approving the expenditure of federal funds for the shooting range. See Amended Complaint for Preliminary and Permanent Injunction ("Amended Complaint"), First and Second Causes of Action.

Title I, however, specifically authorizes the HUD Secretary to adopt regulations providing for the assumption by HUD recipients of HUD's responsibilities under NEPA and similar laws. In addition, for the State CDBG program, Title I requires the states to perform HUD's actions under NEPA and the other laws and provides that such performance shall be deemed to satisfy the Secretary's responsibilities thereunder. 42 U.S.C. § 5304(g).

HUD regulations providing for the assumption of HUD's environmental responsibilities by its recipients and, when applicable, by the states, are set forth at 24 C.F.R. Part 58. Sections 58.1(a) and (b)(1) make clear that Part 58 applies to the CDBG program. The definitions at sections 58.2(a)(5)(iii) and (7)(i) make clear that Sturgis is both the "recipient" and the "responsible party" under Part 58.

Section 58.4(a) required Sturgis, as the responsible entity, to “assume the responsibility for environmental review, decision-making, and action that would otherwise apply to HUD under NEPA and other provisions of law that further the purposes of NEPA, as specified in § 58.5.” Among those other provisions of law is NHPA. 24 C.F.R. § 58.5(a).

In order to obtain CDBG funds from South Dakota for the shooting range project, Part 58 required Sturgis to submit a request for release of funds (“RROF”) and a certification as required by 42 U.S.C. § 5403(g) to the State. *See*, 24 C.F.R. §§ 58.13 and 58.71. Pursuant to Part 58, under the terms of the certification, Sturgis’ certifying officer was the “responsible Federal official” as that term is used in § 102 of NEPA and 42 U.S.C. § 5403(g) and, as such, was responsible for all the requirements of NEPA § 102, the related regulations at 40 C.F.R. Parts 1500 through 1508 and 24 C.F.R. Part 58, and NHPA. *See*, 24 C.F.R. § 58.13.

Because the shooting range is being funded through the State, Part 58 also required South Dakota to exercise HUD’s responsibilities with respect to approval of Sturgis’ certification and RROF. *See*, 24 C.F.R. § 58.4(b)(2). Pursuant to Part 58, South Dakota’s approval of Sturgis’ certification satisfied the HUD Secretary’s responsibilities under NEPA and NHPA. *See*, 24 C.F.R. §§ 58.42(b)(2) and 58.77(a).

In addition, Part 58 provides: “Persons and agencies seeking redress in relation to environmental reviews covered by an approved certification shall deal with the responsible entity and not with HUD.” 24 C.F.R. § 58.77(b).

Although Part 58 requires HUD to perform limited environmental monitoring (24 C.F.R. § 58.77(d)(1)), it makes clear that whether or not HUD takes any action when it becomes aware of environmental deficiencies, the responsible entity’s certifying officer

remains “the responsible Federal official under § 58.13 with respect to projects and activities for which the Certifying Officer has submitted a certification under this part.” 24 C.F.R. § 58.77(d)(2).

Of even more significance for purposes of the subject litigation are the HUD State CDBG program regulations, which prohibit HUD from terminating funds for a project without due process. Pursuant to 24 C.F.R. § 570.495(a)(3), if HUD determines that a state or unit of general local government has failed to comply with any CDBG program requirement, it must give the state an opportunity to contest the finding and submit a plan for corrective action. If the state is unsuccessful in contesting the validity of the finding to HUD’s satisfaction, or if the state’s plan for corrective action is not satisfactory to HUD, HUD may take any one of several actions to prevent the continuation of the deficiency including, but not limited to, advising the state to suspend or terminate disbursement of funds for a deficient activity or grant. If the state’s response to these actions is not appropriate, HUD may withdraw the state’s grant to a unit of general local government or require the state to do so, among other corrective actions, but only after first giving the state notice and opportunity for a hearing, although HUD may suspend payments after such notice and pending the hearing. 24 C.F.R. § 570.496.

At the present, HUD does not have sufficient information to determine whether either South Dakota or Sturgis has failed to comply with the CDBG program’s environmental requirements set forth in 24 C.F.R. Part 58. Only on the afternoon of March 14, 2003, did the Agency receive the environmental review record prepared by the Black Hills Council of Local Governments. There has not yet been the opportunity to review it or conduct any other

investigation. Therefore, HUD is not in a position to even begin the lengthy process required to suspend or terminate grant funds to Sturgis for the shooting range.

B. CASES

All courts that have been presented with the issue have upheld 42 U.S.C. § 5304(g) and 24 C.F.R. Part 58. *Brandon v. Pierce*, 725 F.2d 555, 560 (10th Cir. 1984), the first circuit court case on point, involved a direct challenge to 24 C.F.R. Part 58, which the plaintiffs-appellants argued constituted an unlawful delegation of HUD's duties under 42 U.S.C. § 4332, which requires all federal agencies to perform their environmental responsibilities under NEPA "to the fullest extent possible." In response, the Tenth Circuit stated that 42 U.S.C. § 5403(h) (now § 5403(g)) "makes clear that Congress intended to transfer NEPA responsibilities from the federal agency to the local grant applicant." As a result, it concluded that HUD's environmental regulations are a valid implementation of statutory authority and should be sustained. *Id.*

In an earlier case, *Monarch Chem. Works, Inc. v. Thone*, 604 F.2d 1083, 1085 n. 2 (8th Cir. 1979), the Eighth Circuit noted the recipient's assumption of HUD's environmental responsibilities pursuant to former 42 U.S.C. § 5403(h) but was not asked to rule on the validity of the arrangement. (This is the only Eighth Circuit case even remotely on point that could be found at this writing.) *See also, Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168 (3rd Cir. 2000), which noted the applicability of 42 U.S.C. § 5403(g) to the Urban Development Action Grant program and described the requirements of 24 C.F.R. Part 58 in detail.

Particularly relevant to the subject case is *Heeren v. City of Jamestown*, 39 F.3d 628, 632 (6th Cir. 1994), an Equal Access to Justice Act case, in which the Sixth Circuit upheld the district court's finding that HUD's position was substantially justified because HUD had lawfully delegated its NEPA compliance duty to the city of Jamestown pursuant to 42 U.S.C. § 5304(g). The Sixth Circuit rejected the plaintiff-appellant's argument that once HUD learned of allegations that Jamestown was not substantially complying with NEPA, it should have taken action. The court stated: "It was not HUD's responsibility, however, to monitor Jamestown's substantive compliance with NEPA. Plaintiff's argument would require that HUD assume responsibilities that Congress expressly authorized HUD to delegate."

In *Heeren*, the court rejected the argument that HUD should have acted even though HUD had given CDBG funds directly to Jamestown. In the present case, HUD should be found to have even less of a duty to act because the State of South Dakota rather than HUD made the CDBG grant to Sturgis for the shooting range. As a result, South Dakota rather than HUD had the duty to approve Sturgis' NEPA certification.

The courts have also recognized the recipient's assumption of HUD's responsibilities under NHPA. In *N. Oakland Voters Alliance v. City of Oakland*, 1992 WL 367096 (N.D. Cal.), the court concluded that Oakland had assumed HUD's responsibilities under NHPA by executing a CDBG grant agreement with HUD and, hence, only Oakland was obligated to ensure compliance with NHPA. *See also, S. Portland Ave. Block Ass'n, Inc. v. Pierce*, 1988 WL 101306 at 4 (E.D. N.Y.), and *Nat'l Center for Pres. Law v. Landrieu*, 496 F.Supp. 716, 731 (D. S.C.), *aff'd*, 635 F.2d 324 (4th Cir. 1980).

C. CONCLUSION

Based on the above, the Plaintiffs' First and Second Causes of Action against HUD Secretary Martinez should be dismissed because, pursuant to 42 U.S.C. § 5304(g) and 24 C.F.R. Part 58, the State of South Dakota and the City of Sturgis have assumed HUD's responsibilities under NEPA and NHPA. In addition, even if HUD had solid evidence (which it cannot have until it reviews the environmental review record referred to above) that either South Dakota or Sturgis had failed to comply with NEPA or NHPA, it would have to initiate and complete a lengthy due process procedure before withholding funds from the shooting range project or requiring South Dakota to do so.

II. Religious Land Use and Institutionalized Persons Act ("RLUIPA")

A. STATUTE

The Plaintiffs' Third Cause of Action in the subject case is under RLUIPA. The Amended Complaint states that the cause of action is against all Defendants, including HUD Secretary Martinez. ¶ 50. The Amended Complaint also alleges that all Defendants are "government" within the meaning of RLUIPA. ¶ 56.

RLUIPA prohibits any government from imposing or implementing a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person unless the government demonstrates that the application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000cc(1). 42 U.S.C. § 2000cc(2). RLUIPA defines "government" to include states, counties, municipalities and similar entities but not the Federal government. 42 U.S.C. § 2000cc-5(4). Although

RLUIPA authorizes the United States to bring an action to enforce its provisions, it does not require the Federal government to do so. 42 U.S.C. § 2000cc-2(f). Finally, RLUIPA permits a person whose religious exercise has been burdened in violation of the statute to assert that violation as a claim in a judicial proceeding and obtain appropriate relief against the government. 42 U.S.C. § 2000cc-2(a).

B. CONCLUSION

Based on the above, Plaintiffs' Third Cause of Action against HUD Secretary Martinez should be dismissed because RLUIPA does not apply to HUD because neither Secretary Martinez nor HUD is a "government" as defined by RLUIPA.

III. Religious Freedom Restoration Act ("RFRA")

A. STATUTE

The Plaintiffs' Fourth Cause of Action is under RFRA. The Amended Complaint states that the cause of action is against Secretary Martinez. ¶ 66. The Plaintiffs' Fourth Cause of Action does not state explicitly what Secretary Martinez did to violate RFRA. Giving the Plaintiffs the benefit of the doubt, however, one might infer that they are complaining that Secretary Martinez expended funds for the shooting range project despite the failure of his delegate, the Black Hills Council of Local Governments, to comply with NHPA or NEPA. ¶ 67, incorporating prior allegations.

RFRA prohibits the federal government from substantially burdening a person's exercise of religion even if the burden results from a rule of general applicability unless the government demonstrates that the application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that

compelling governmental interest. 42 U.S.C. §§ 2000bb-1 & 2000bb-2(1). It applies to all federal law, and the implementation of that law, whether statutory or otherwise and irrespective of date. 42 U.S.C. § 2000bb-3. Finally, RFRA authorizes a private right of action similar to that of RLUIPA. 42 U.S.C. § 2000bb-1.

B. CASES

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held RFRA to be unconstitutional as applied to state law because Congress had exceeded its authority under § 5 of the Fourteenth Amendment. Subsequently, Congress amended RFRA to apply only to Federal entities and those acting under color of Federal law. Pub. L. 106-274, 114 Stat. 806 (2000).

The Supreme Court has not yet ruled on the constitutionality of RFRA as applied to federal law. The Eighth Circuit, however, has upheld RFRA as applied to federal law, rejecting both separation of powers and Establishment Clause arguments. *In re Flores*, 141 F.3d 854 (8th Cir. 1998).

No cases could be located in which the federal government was found to be liable under RFRA for actions taken by a state or local government. The most relevant case I found is *Doe v. Louisiana Psychiatric Med. Ass'n*, 1995 WL 746657 (E.D. La.), a case decided prior to *City of Boerne*, in which the court found that the Louisiana Psychiatric Medical Association (“LPMA”) had not been acting under color of law because there was insufficient nexus between LPMA and the government. The court stated that whether a sufficient nexus exists is an “essentially factual determination [that] hinges upon whether the state is shown to be sufficiently connected with the particular aspect of the defendant’s conduct complained of,


so that the respondent's act is treated as that of the state itself." *Id.* at 1, quoting *Slims v. Jefferson Downs, Inc.*, 611 F.2d 609, 611 (5th Cir. 1980).

C. CONCLUSION

Despite the absence of much, if any, relevant case law, the Plaintiffs' Fourth Cause of Action should be dismissed because HUD did not take any action that could be construed as substantially burdening the Plaintiffs' exercise of religion. As discussed in more detail in section I. above, Sturgis was responsible for complying with NHPA and NEPA. Similarly, it was the State of South Dakota, and not HUD, that released funds to Sturgis for the shooting range project.

Date: March 17, 2003

JAMES E. McMAHON
United States Attorney


BONNIE P. ULRICH, AUSA
Chief, Civil Division
PO Box 5073
Sioux Falls, SD 57117-5073
605-330-4401, ext. 119

Of counsel: Michal F. Stover
Department of Housing and
Urban Development
Office of Counsel
Region VIII, Denver
633 - 17th Street
Denver, CO 80202-3607

CERTIFICATE OF MAILING

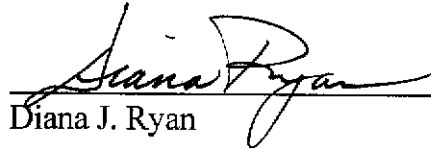
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