UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

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CLERK

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

MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION AND SPEEDY HEARING

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I. INTRODUCTION

> Then I was standing on the highest mountain of them all, and round about beneath me was the whole hoop of the world . . . . The sacred hoop of my people was one of many hoops that made one circle, wide as daylight and as starlight, and in the center grew one mighty flowering tree to shelter all the children of one mother and one father.
>
> And I saw that it was holy.
>
> Black Elk Speaks, John G. Neihardt (Pocket Books ed. 1972) p. 36.

> I gave my heart to the mountains the minute I stood beside this river with its spray in my face . . . . By such a river it is impossible to believe that one will ever be tired or old . . . it is purity absolute. Watch its racing current, its steady renewal of force: it is transient and eternal.
>
> The Sound of Mountain Water, Wallace Stegner (Doubleday 1969) p. 42.

* * * * * * * * *

Defendants intend to construct a shooting range near Bear Butte. So far they have purchased land and made some preliminary studies. Construction has not begun. Ninety-one percent of the cost of the project--$825,000 out of a total cost of $900,000--will come from taxpayers through the United States Department of Housing and Urban Development.

Bear Butte is central to the religious practice of plaintiffs and their members (who

are hereinafter collectively referred to as "plaintiffs.") No other place like Bear Butte exists or can ever be created. The United States government placed Bear Butte on the National Register of Historic Places as a National Historic Landmark.

Thomas E. O'Dell, in his classic study of Bear Butte, Mato Paha (Edwards Brothers, 1942), p. 163, writes:

> There are other laccoliths[1] in the United States--in Utah, Colorado, Arizona, Montana, and on the Pacific Coast--but they lack uniqueness and often accessibility. Many unique and wonderful features characterize Bear Butte: the unusually large exposure of volcanic core, visible for 100 miles; the belt of sedimentary rocks, bounded by the grass line; the exposed formations at the base, first observed by Hayden; Circuit Flats, discovered by Jaggar; the great, unscaled talus slopes, marked by trails of extinct animals; the volcanic lake, restored by the government; the tepee rings at the base, where the Indians camped; and the stones in the forks of the trees, placed there by Indians generations ago. There is no other mountain like it.

Bear Butte is "sacred to many American Indians, and its ceremonial area is visited by thousands each summer." South Dakota Department of Game, Fish and Parks web site, http://www.state.sd.us/gfp/sdparks/bearbutt/bearbutt.htm. "In most religions, specific

[1]A laccolith is "a mass of igneous rock formed from magma that did not find its way to the surface but spread laterally into a lenticular body, forcing overlying strata to bulge upward." Webster's Unabridged Dictionary (2001).

areas or sites hold great spiritual significance. Bear Butte is such a place. Many American Indians see the mountain as a place where the creator has chosen to communicate with them through visions and prayer." Id. Visitors are advised: "During your visit, you will see colorful pieces of cloth and small bundles or pouches hanging from the trees. These prayer cloths and tobacco ties represent the prayers offered by individuals during their worship. Please respect these offerings and leave them undisturbed." Id.

Defendants intend to operate the shooting range during daylight hours, and have projected up to 10,000 rounds fired per day, which is equivalent to about one every five seconds during summer daylight hours. The 10,000 rounds per day figure is only defendants' estimate; they are not bound by it, and far more rounds per day could be fired, reducing the average time between rounds to two or three seconds or less.

Defendants' own inadequate, incomplete, and misleading noise study was prepared by persons who are not competent to study the complicated subject of how noise will be transmitted from the shooting range. Defendants' own study shows that the noise created by these thousands of daily rounds will be plainly heard by plaintiffs who are attempting to pray at Bear Butte.

Defendants previously planned to situate their shooting range at another location outside Sturgis which would not have had this impact on Bear Butte. The neighboring landowners, who are non-Indian, objected to the noise, so defendants moved the location of the shooting range. When plaintiffs objected to the noise at Bear Butte resulting from

the new location, defendants refused to moved the location again.

Nothing prevents defendants from finding a new location for the shooting range out of earshot of Native Americans who want to continue to use Bear Butte for prayer as their ancestors have done.

II. A PRELIMINARY INJUNCTION SHOULD BE GRANTED

F.R.Civ.P. 65 authorizes issuance of a preliminary injunction. "The standard for issuance of an injunction requires consideration of the threat of irreparable harm to the movant, the balance between this harm and the harm created by granting the injunction, the likelihood of success on the merits, and the public interest." Davis v. Francis Howell Sch. Dist., 104 F.3d 204, 205-6 (8th Cir. 1997) (citations omitted). "In balancing the equities no single factor is determinative." Dataphase Systems, Inc. v. C. L. Systems, 640 F.2d 109, 113 (8th Cir. 1981) (en banc).

A. IRREPARABLE HARM TO PLAINTIFFS IS CERTAIN

Since construction of the shooting range will mean that plaintiffs' First Amendment rights will be infringed, plaintiffs meet the irreparable harm standard for issuance of a preliminary injunction. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976). "When an alleged deprivation of a

constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." 11A Wright, Miller & Kane, Federal Practice and Procedure, § 2948.1 at 161 (2d ed. 1995).

B. THE BALANCE OF HARMS FAVORS PLAINTIFFS

Plaintiffs' interest is in continuing to practice their religion as they have done since, in their traditions, time immemorial. Defendants' interest is in shooting guns. Defendants can shoot their guns now, just as they always have; they just don't have a place within earshot of Bear Butte where they can all shoot together. An injunction will simply restrain them from being able to do something new. The balance of these interests overwhelmingly favors plaintiffs.

C. THE PROBABILITY THAT PLAINTIFFS WILL SUCCEED ON THE MERITS IS HIGH

Plaintiffs will show herein that the probability they will succeed on the merits is high. This is well above the standard required to justify a preliminary injunction. Plaintiffs need not "prove a greater than fifty per cent likelihood that [they] will prevail on the merits." Dataphase Systems, Inc. v. C. L. Systems, 640 F.2d 109, 113 (8th Cir. 1981) (en banc). Rather, "[t]he very nature of the inquiry on petition for preliminary relief militates against a wooden application of the probability test. At base, the question

is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." Id.

1. NATIONAL HISTORIC PRESERVATION ACT

Congress enacted the National Historic Preservation Act (NHPA) in 1966, based on findings that "the spirit and direction of the Nation are founded upon and reflected in its historic heritage," that "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people," and that "historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency." 16 U.S.C. § 470(b)(1)-(3).

As part of the NHPA, Congress created a National Register of Historic Places. 16 U.S.C. § 470a. The National Register of Historic Places is "composed of districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture." 16 U.S.C. § 470a(1)(A). Bear Butte is included on the National Register of Historic Places as a National Historic Landmark.

Section 106 of the National Historic Preservation Act, codified as 16 U.S.C. § 470f, provides: "The head of any federal agency having direct or indirect jurisdiction over a proposed federal or federally assisted undertaking in any State . . . shall, prior to the approval of the expenditure of any Federal funds on the undertaking . . . take into account

the effect of the undertaking on any . . . object that is included in . . . the National Register [of Historic Places]." Thus defendant Martinez, as head of a federal agency providing federal assistance to the shooting range, was required prior to approving spending federal money to take into account the effect of the shooting range on Bear Butte.

The NHPA provides: "<u>In carrying out its responsibilities under section 106 [16 U.S.C. § 470f], a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A)</u>." 16 U.S.C. § 470a(d)(6)(B) (emphasis added). The "properties described in subparagraph (A)" are "Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization [which] may be determined to be eligible for inclusion on the National Register [of Historic Places]." 16 U.S.C. § 470a(d)(6)(A).

Thus, defendant Martinez was required to consult with "any Indian tribe . . . that attaches religious and cultural significance" to Bear Butte.

All plaintiff tribes attach religious and cultural significance to Bear Butte. This is not a secret. Any person who has been to Bear Butte, read about it, or checked it on the internet knows that Native Americans attach religious and cultural significance to Bear Butte. The South Dakota Department of Game, Fish & Parks website alone makes this clear. Yet defendant Martinez failed to consult as required.

Defendant Martinez acted through defendant Black Hills Council of Local

Governments, to which Martinez delegated the role of federal agency official responsible for compliance with section 106 of NHPA. This does not release defendant Martinez from any of his obligations. "[T]he agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines." 36 CFR § 800.2(a)(3).

NHPA creates a Council on Environmental Policy as an independent agency of the Untied States Government. 16 U.S.C. § 470i(a). The Council promulgated regulations implementing the consultation requirement of 16 U.S.C. § 470a(d)(6)(B). These regulations include 36 CFR §§ 800.2(c)(2)(ii)(D), 800.4(c)(1), 800.4(d)(1), and 800.5(c)(2)(ii). Defendant Martinez, acting through defendant Black Hills Council of Local Governments, ignored each and every one of them.

NHPA 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, and shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking." 16 U.S.C. § 470h-2(f) (emphasis added).

Defendant Martinez, acting through defendant Black Hills Council of Local Governments, did none of these things.

Council on Environmental Policy regulations implement this part of the statute by creating a mandatory process to determine, address, and attempt to minimize and resolve potential adverse effects on a National Historic Landmark such as Bear Butte. 36 CFR §§ 800.10(a), 800.2, 800.4, 800.6, and 800.7.

Defendant Martinez, acting through defendant Black Hills Council of Local Governments, ignored these regulations and this mandatory process.

Defendant Martinez's own regulations recognize that his agency, its contractors (such as defendant Black Hills Council of Local Governments), and recipients of its funds (such as defendants Sturgis Industrial Expansion Corporation, City of Sturgis, and Black Hills Sportsman's Complex) must comply with the National Historic Preservation Act and the Advisory Council on Historic Preservation regulations. 24 CFR §§ 50.4 and 58.

On May 8, 2002, defendants City of Sturgis and Sturgis Industrial Expansion Corporation applied for $825,000 in Community Development Block Grant Funds for a shooting range with a total construction budget of $900,000, to be operated by defendant Black Hills Sportsman's Complex. The application was prepared by defendant Black Hills Council of Local Governments. Attachment 1 to Affidavit of James D. Leach in Support of Motion for Preliminary Injunction and for Speedy Hearing. (All documents cited herein are attached to this affidavit; they are referred to as "A" followed by the page number

stamped on the document.)

The application calls for the construction of three rifle ranges including a bench rest range with 10 covered stations, a silhouette range with 10 shooting stations, a high-power rifle DCM range, four combination skeet and trap ranges, two separate handgun pistol ranges (an "action pistol range" called a "cowboy action range," and a "plinker range" which will have an unstated number of "separate ranges for pistol and rifle use,") and a "sporting clay range" with eight shooting stations. A 6. This totals at least 12 separate shooting ranges with an unknown number of shooting stations apparently well in excess of 30.

On May 9, 2002, one day after the proposal was submitted--the time it takes mail to get from Sturgis to Pierre--the State of South Dakota approved it. A 14.

The shooting range was planned for the Alkali Road area outside Sturgis, but non-Indians who lived near the proposed shooting range objected to it, because of noise and other issues, so the proposed location was moved away from these non-Indians to its current proposed location near Bear Butte. A 15.

Defendant Black Hills Council of Local Governments, on behalf of all the other defendants, and as delegatee of the role of federal agency official responsible for compliance with section 106 of NHPA on behalf of defendant Martinez, began an Environmental Assessment process on June 26, 2002. The Executive Director and Environmental Certifying Officer for Black Hills Council of Local Governments is Van

A. Lindquist. As part of this process Mr. Lindquist wrote to the South Dakota State Historic Preservation Office (SHPO). A 16-21.

On July 3, 2002, defendant Black Hills Council of Local Governments received a document titled "Intensive Cultural Resources Inventory of the Black Hills Sportsman's Complex & Access Road," which it had commissioned from two local contractors. A 22-29. The report states that Bear Butte is a National Historic Landmark lying 4 miles south of the project area. The report identifies Bear Butte as "a sacred site for Northern Plains Indian tribes including the Lakota, Northern Cheyenne, Hidatsa, Crow and others." A 25.

The report alleges that "the noise of the firearms is not expected to carry as far as the Butte," but cites as the source of this claim only a "personal communication" from Mr. Lindquist. A 25, 27. Mr. Lindquist had no factual basis whatsoever for making this claim. A noise study conducted shortly afterwards, which is described below, proved that Mr. Lindquist's claim was false.

The South Dakota State Historic Preservation Office refused to sign off on the project, declaring in a July 10, 2002 letter that it "is currently unable to make a determination concerning the effect of your proposed undertaking on the non-renewable cultural resources of South Dakota." It referred to a copy of the "Intensive Cultural Resources Inventory" it had just received, and stated: "To assess the potential impact of this project the SHPO requests more information regarding the type of study used to determine the various noise levels and the potential effect on Bear Butte National Historic

Landmark." A 30. (At this point there had been no noise study of any kind).

In response to this request, Mr. Lindquist requested, and obtained on or about August 1, 2002, a "noise study" (A 31-36) which is a classic example of junk science. It was prepared by persons who have no expertise in noise, based on a model from a self-interested party which admittedly ignores numerous variables and should not be used for design purposes.

The noise study was originated by John Glasford, a member of the Board of Directors of Black Hills Sportsman's Complex, and thus a person with a vested interest in finding that noise would not be a significant impact on Bear Butte. Mr. Glasford does not have an educational degree in any relevant field.

Mr. Glasford took a page titled "A Simple Model" from a National Rifle Association (another friend of shooting projects) publication. "A Simple Model" states: "To determine if a range is in compliance with applicable laws, maximum and peak level measurements are easily made with a simple sound level meter. By firing a number of rounds with firearms, these levels can be estimated. However, L dn [decibel level] is much more difficult to calculate prior to construction." A 33.

"A Simple Model" states that it was used to predict decibel level "from small-arms ranges," that "military weapons were used in developing the model, e.g. M 16's and .45 cal. pistols," and warns that "topographical features, meteorological conditions, and other variables have been overlooked in this propagation model." A 33.

Defendant's project application, A 6, shows that a wide variety of weaponry will be fired at the shooting range, not just one small caliber rifle, the M-16 (which fires .223 caliber shells), and one handgun, the .45. It is common knowledge that many hunting rifles are much larger than .223 caliber, and make much more noise than an M-16.

Mr. Glasford engaged two economists, Dr. Mike Madden and Dr. Chuck Vanderziel, neither of whom claim any expertise in noise, simply as math consultants to do the math required by the NRA model. Drs. Madden and Vanderziel used two arbitrary assumptions of the number of shots fired per day, 5,000 and 10,000. The wide variance between the two numbers reflects the fact that defendants have no idea how many shots will be fired per day at the shooting range.

Using the 10,000 shot figure, the National Rifle Association model predicts that at a range of 3 miles, the estimated noise level, ignoring "topographical features, meteorological conditions, and other variables," would be about 38 decibels. A 35.

Attached to the noise study is a one page unsigned document from an unknown author titled "Basic Overview of the Environmental Noise Problem." According to this document, 38 decibels is on the borderline between "moderate" (41 to 60 decibels) and "faint" (21 to 40 decibels). A 36. The document itself cautions against using this information for design purposes: "The sound levels shown for occupied rooms are typical general activity levels only and do **not** represent criteria for design." A 36 (boldface in original).

Gunshots from different guns are of different loudness, so any one particular decibel reading cannot conceivably represent how gunshots from a variety of guns will sound.

Defendant's study demonstrates that more gunshots result in a higher noise level. According to the study, 5,000 shots per day create a noise level 3 miles away of 35 decibels, whereas 10,000 shots per day create a noise level 3 miles away of 38 decibels. Therefore 15,000 or 20,000 shots per day would produce higher noise levels. (Decibels are measured on a logarithmic scale, not an arithmetic scale; a sound which is 10 decibels higher than another sound has 10 times as much sound intensity, and contains 10 times the energy. Loudness is a psychological and physical sensation caused by sound; an increase of 10 decibels causes the sound to be perceived as about twice as loud.)

The human experience of noise is a subjective experience in which human factors are at least as important as mathematical factors, as most people who have ever sat in a dentist's chair and heard a relatively low-decibel whine from a dentist's drill will agree. The "Basic Overview" document recognizes: "The traditional definition of noise is that it is 'unwanted sound.' Sound becomes unwanted when it . . . interferes with our normal activities such as sleeping, conversation, or recreation . . . ." A 36. Or when it interferes with prayer.

On July 30, 2002, <u>before even receiving the noise study</u>, Mr. Lindquist sent to defendant City of Sturgis for publication a Notice of Finding of No Significant Impact and Request for Release of Funds. A 37-39.

On August 7, 2002, the South Dakota State Historic Preservation Office again wrote Mr. Lindquist, again advising him that it was "unable to make a determination concerning the effect of your proposed undertaking on the non-renewable cultural resources of South Dakota." The SHPO specifically called Mr. Lindquist's attention to the laws he was violating, including Section 106 of the National Historic Preservation Act, the regulations contained in 36 CFR Part 800, and section 110(f) of the Act. The SHPO stated that "Because of the potential for an adverse effect, the SHPO requests more information regarding the type of study used to determine the various noise levels and there [sic] potential effect on Bear Butte National Historic Landmark." A 40.

The SHPO advised Lindquist of his duty to consult with Indian tribes: "In accordance with 36 CFR Part 800.2, the State Historic Preservation Office has a responsibility to advise and assist the agency in identifying consulting parties including federal, state and local governments and organizations. Consulting parties shall include tribes that attach religious and cultural significance to Bear Butte National Historic Landmark, please visit the National Consultation Database." A 41 (emphasis added).

If before August 7 Lindquist was ignorant of the requirements of NHPA and the regulations promulgated pursuant to it, as of that date he no longer can claim good faith ignorance. This would not be the last time these laws were called to his attention.

If Lindquist visited the National Consultation Database, he found in boldface print the statement that "Only direct interaction with all of the appropriate representatives

satisfies Federally mandated consultation requirements." A 42. He also found (partially in boldface) the statement that "Consultation with Native Americans is critical in planning many Federal projects." A 44. (The attached copies come up when "National Consultation Database" is entered into the Google search engine).

On September 11, after having done nothing to comply with the NHPA, Lindquist certified "that this project has undergone a complete Environmental Review." A 46.

The same day, the National Park Service wrote Lindquist requesting inclusion in the section 106 review process as an interested party, and stating "it is our understanding that the proposed action may have a potential effect on Bear Butte National Historic Landmark (NHL)." A 47.

On October 4, the State Historic Preservation Office again wrote Mr. Lindquist, again citing Section 106 of NHPA and 36 CFR Part 800, and again advising that it was "currently unable to make a determination concerning the effect of your proposed undertaking on the non-renewable cultural resources of South Dakota." The SHPO noted receipt of the "noise study," and stated "because of the potential for an adverse effect, the SHPO requests written comments from the consulting parties regarding the various noise levels established in the predictive model and the effect on cultural and religious ceremonies held at Bear Butte NHL [National Historic Landmark]. SHPO again told Lindquist that "consulting parties shall include tribes that attach religious and cultural significance to Bear Butte National Historic Landmark, please visit the National

Consultation Database." A 48.

On October 17, the United States Department of the Interior wrote Lindquist, stating that "Of primary concern . . . is the possible effect of repetitive percussive noise on the neighboring Bear Butte National Historic Landmark (NHL). This NHL is nationally significant for its spiritual association with several Plains Indians tribes, and continues to serve a spiritual role for many visitors to the site." A 49.

After reviewing the "noise study," including the fact that it is based on M-16' s and .45 caliber pistols, the Department of the Interior asked Lindquist two questions. First, "Are these calculations the same for the other types of firearms to be accommodated at the proposed sportsman's complex?" Second, "What is the difference between a steady, soft sound, versus a repetitive percussive soft sound, and what is the affect [sic] on the quality of experience at the Bear Butte NHL?" A 49.

The Department of the Interior stated: "To resolve these questions, the NPS suggests that the Black Hills Council of Local Governments conduct a gunfire test, and invite the interested parties involved in the section 106 process to experience the sound levels from Bear Butte." A 49.

Lindquist never answered either of these questions, and never conducted the suggested testing.

Instead, on October 30, Lindquist wrote the State Historic Preservation Office, once again claiming that all requirements for the project had been satisfied. A 51. Lindquist

attached an "Addendum" dated October 29 which noted receipt of the Department of the Interior's October 17 letter. Lindquist claimed that the Department of the Interior letter did "not state a negative comment towards the project," failed to address either of the Department's questions, and stated that the proposal for testing was "not practical." A 53.

On November 4, the State Historic Preservation Office wrote back to Lindquist. This time the SHPO made even more explicit what it had already told Lindquist in its previous letters: that he was required to consult with all Indian tribes that attach religious and cultural significance to Bear Butte, citing him chapter and verse of the applicable law and regulations: "The SHPO recommends that your organization on behalf of Housing and Urban Development (HUD) consult with any Tribe that attaches religious and cultural significance to Bear Butte National Historic Landmark pursuant to Section 800.2(c)(2)(B)(ii). 'Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian Tribe or Native Hawaiian organization shall be a consulting party.'" A 54.

SHPO's November 4 letter once again refused to concur with Lindquist's "Finding of No Significant Impact," noting that such a determination "does not exist within the National Historic Preservation Act of 1966 (as amended)." A 54. SHPO enclosed a folder, "Protecting Historic Properties, A Citizen's Guide to Section 106 Review," which

explained this subject to Lindquist in simple terms. A 55-66.

On November 7, the Standing Rock Sioux Tribe Historic Preservation Office wrote to the State Historic Preservation Office "requesting inclusion and consultation in the section 106 review of the proposed Black Hills Sportsman's Complex and access road." The Tribe advised: "The people of Standing Rock have cultural and spiritual ties to Bear Butte National Historic Landmark and believe the noise levels generated by the Sportsman's Complex would adversely affect the integrity and [sic] of Bear Butte and consequently interfere with ceremonial activities." A 67.

On November 13, the State Historic Preservation Office finally concurred in Mr. Lindquist's finding of no adverse effect. However, the same letter warned Lindquist: "Concurrence of the State Historic Preservation Office does not relieve the federal agency official [Lindquist] from consulting with other appropriate parties, as described in 36 CFR Part 800.2(c)." A 68.

The same day, the Standing Rock Sioux Tribe wrote Lindquist expressing its concern "that the gunfire would adversely affect the integrity of Bear Butte and disrupt ceremonial activities," agreeing with the National Park Service's October 17 request for "a gunfire test so that interested parties could experience sound levels from Bear Butte," and telling Lindquist that "as provided in Section 101(d)(6)(b) of the National Historic Preservation Act, the Standing Rock Sioux Tribe attaches religious and cultural significance to Bear Butte and we can and do request consultation on a government-to-

government level." A 69.

On November 19, in response to the November 13 concurrence of the SHPO, Lindquist sent a legal notice of the Section 106 determination for the project to defendant City of Sturgis for publication. A 71.

On November 22, the Advisory Council on Historic Preservation wrote Lindquist. Section 106 of NHPA, codified as 16 U.S.C. § 470f, provides: "The head of any . . . Federal agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with respect to [an] undertaking." Lindquist had not previously communicated with the ACHP. The ACHP told Lindquist (A 72-73):

- "By Federal law, the Black Hills Council [of Local Governments] is delegated the role of the Federal agency official with responsibility for compliance with section 106 of the NHPA."
- "We understand that the proposed Black Hills Sportsman's Complex, which will include a commercial shooting range and access road, will be located about four miles from Bear Butte, a National Historic Landmark. Bear Butte is significant as a sacred and historically important site for Lakota and other Indian people, and is the location of continued religious practices by Indian tribes and their members. The National Park Service and the Standing Rock Sioux Indian Tribe have written to you with concerns that noise from the proposed Black

Hills Sportsman's Complex may disrupt the continued use of Bear Butte for religious and cultural practices. Additionally, the Tribal Historic Preservation Officer (THPO) of the Cheyenne River Sioux Tribe have [sic] expressed the same concerns to us in a telephone conversation this morning."

- "It appears that the Black Hills Council's determination of No Adverse Effect did not include consultation with Indian tribes who may attach religious and cultural significance to Bear Butte. We have received a copy of a letter to you from the Standing Rock Sioux Tribe dated November 13, 2002 and had a recent telephone conversation with both the Standing Rock THPO and Cheyenne River THPO in this regard. Neither tribe has been appropriately contacted by the Cheyenne River THPO [sic - should read "Black Hills Council"] in this regard. Neither tribe has been appropriately contacted by the Black Hills Council to consult on the determination of the Area of Potential Effects or the Determination of Effect, including application of the Criteria of Adverse Effect of this project on Bear Butte. Consultation with Indian tribes directly is necessary. The Black Hills Council needs to ensure that its Determination of Effect and supporting project documentation reflect appropriate consultation with

> Indian tribes that attach religious and cultural significance to Bear Butte National Historic Landmark."

On December 3, Lindquist sent identical letters to the Advisory Council on Historic Preservation, the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, and the Rosebud Sioux Tribe, thanking them for their letters about the project, telling them his view of the situation, and refusing to acknowledge that he had violated the law by excluding the tribes from the consultation process. A 74-85.

Lindquist's excuse for not involving the tribes as required by law, and as repeatedly requested by several parties as described above, was that the Black Hills Council (i.e. Lindquist himself) and state agencies "agreed that the [South Dakota] Tribal Government Relations Office for South Dakota would fulfill the tribal consultation requirement." A 75. Lindquist's letter to the South Dakota Tribal Government Relations Office is A 86-87; South Dakota's five-line response is A 88.

Lindquist has never explained to anyone how consultation with a South Dakota agency could satisfy his duty to consult with tribes. Lindquist has never provided any authority for this procedure. There is no such authority. The State of South Dakota and Indian tribes are frequently at odds on many issues. The State of South Dakota is no more an agent for Indian tribes than Indian tribes are an agent for the State of South Dakota.

In summary, defendant Black Hills Council of Local Governments was delegated defendant Martinez's role to comply with NHPA, and acting through Mr. Lindquist

knowingly, willfully, and in bad faith failed and refused to comply with NHPA by refusing to consult with Indian tribes that attach religious and cultural significance to Bear Butte. He knew who they were, he knew they attach religious and cultural significance to Bear Butte, he was told several times by several parties that he had to consult with them, and he was even told what laws he was breaking by not consulting with them. He intentionally sought to circumvent the consultation requirements, and the related requirements for determination of adverse effects and resolving disputes, in order to try to ensure that the project be constructed as planned.

An agency official "must complete the section 106 process 'prior to the approval of the expenditure of any Federal funds on the undertaking . . .'" 36 CFR § 800.1(c). The delegated agency official, Black Hills Council of Local Governments, hasn't even started the section 106 process for this project, let alone completed it. Mr. Lindquist's bias and prejudgment are grossly arbitrary and capricious. His refusal to follow the law is unlawful. Plaintiffs are overwhelmingly likely to succeed on the First Cause of Action under NHPA and related regulations.

2. NATIONAL ENVIRONMENTAL POLICY ACT

NEPA declares a federal policy "to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future

generations of Americans." 42 U.S.C. § 4331(a).

Under NEPA, the federal government is required to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment," and to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(A) and (E).

In this case, a simple and obvious alternative is to locate the shooting range at some other place so it will not affect Bear Butte National Historic Landmark and the peoples who pray there as their ancestors did.

This alternative was never considered.

Defendant Martinez, acting through its designated environmental agent Black Hills Council of Local Governments and its environmental officer Van Lindquist, violated NEPA in many respects.

(i) <u>Failure to comply with 36 CFR § 800.8</u>

Title 36 CFR § 800.8, titled "Coordination With the National Environmental Policy Act," sets forth a process under which historic preservation interests are addressed under NEPA.

Under § 800.8, an agency (or its designee, in this case defendant Black Hills Council of Local Governments) "should consider their section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner." § 800.8(a)(1). Whether an undertaking is a "major Federal action significantly affecting the quality of the human environment, and therefore requires preparation of an environmental impact statement (EIS) under NEPA, should include consideration of the undertaking's likely effects on historic properties." Id.

"Indian tribes . . . who may be concerned with the possible effects of an agency action on historic properties should be prepared to consult with agencies early in the NEPA process, when the purpose of and need for the widest possible range of alternatives are under consideration." § 800.8(a)(2). Plaintiffs would have been glad to consult early in the process, and to help point out the obvious alternatives, had anyone asked them to do so.

"Agency officials should ensure that preparation of an environmental assessment (EA) and finding of no significant impact (FONSI) or an EIS and record of decision (ROD) includes appropriate scoping, identification of historic properties, assessment of effects upon them, and consultation leading to resolution of any adverse effects." § 800(a)(3). Plaintiffs were obvious parties to be included through the scoping, assessment, consultation, and resolution process required by NEPA. Instead of including them,

defendant Black Hills Council intentionally excluded them.

"During preparation of the EA or draft EIS (DEIS), the agency official shall: Identify consulting parties either pursuant to § 800.3(f) or through the NEPA scoping process with results consistent with § 800.3(f)." § 800.8(C)(1)(i). Under § 800.3(f), "the agency official shall identify any other parties entitled to be consulting parties and invite them to participate as such in the section 106 process." § 800.3(f)(2) provides: "The agency officials shall make a reasonable and good faith effort to identify any Indian tribes . . . that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties." As demonstrated above, defendant Black Hills Council knew that plaintiff tribes were entitled to be consulting parties, yet refused to invite them to be consulting parties.

In addition, an Indian tribe that attaches religious and cultural significance to a historic property and requests in writing to be a consulting party "shall be one." § 800.3(f)(3). Plaintiff Standing Rock Sioux Tribe so requested. A 69.

"During preparation of the EA or draft EIS (DEIS) the agency official shall . . . [c]onsult regarding the effects of the undertaking on historic properties with . . . Indian tribes . . . that might attach religious and cultural significance to affected historic properties, . . . where appropriate, during NEPA scoping, environmental analysis, and the preparation of NEPA documents." § 800.8(c)(1)(iii). No such consultation took place.

Black Hills Council of Local Governments utterly failed to comply with § 800 et

seq., even though § 800 was specifically and repeatedly called to its attention. A 40, 41, 48, 54, and 68. Black Hills Council's knowing refusal to comply with the law is bad faith; it is less than all citizens have the right to expect from their government, and from private agencies that are paid to assume government functions.

(ii) Arbitrary and capricious environmental assessment and decision not to prepare an EIS

Judge Kornmann's recent decision in Rosebud Sioux Tribe v. Gover, 104 F. Supp. 1194 (D.S.D. 2000), although reversed on the issue of standing, 286 F.3d 1031 (8th Cir. 2002), provides an overview of the law regarding judicial review of an agency's environmental assessment and its decision not to prepare an environmental impact statement.

"The Council on Environmental Quality ('CEQ') regulations implement NEPA and provide that an agency should prepare an environmental assessment for an action if the agency decides it is not categorically excluded from the impact statement requirement. The EA functions as a preliminary environmental inquiry. See 40 C.F.R. § 1501.4(b). The assessment 'shall include brief discussions of the need for the proposal, . . . of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.' 40 C.F.R. § 1508.9(b)." Rosebud Sioux Tribe v. Gover, supra, 104 F. Supp. at 1207. "The first question is whether the EA adequately identifies and

describes . . . alternatives to the proposed action, ..." Rosebud Sioux Tribe v. Gover, supra, 104 F. Supp. at 1208.

The "Alternatives Considered" section of Mr. Lindquist's Environmental Assessment is one paragraph long. It states: "This is the second project location proposed by the Sub-recipient. After receiving public comment during the application hearing on the Alkali Road site, the Sub-recipient sought a more publically acceptable site. The site now proposed for the project was offered to the Sub-recipient by a single land owner with adequate land to provide a buffer zone for the project. The Sub-recipient has retained the services of a noted architect/engineer to prepare a Master Plan for the selected site. The Sub-recipient has required that the Master Plan take into consideration appropriate environmental, noise, and safety design criteria." A 94 (emphasis added).

The alternative of moving the shooting range to where it will not affect Bear Butte was not even mentioned, let alone considered. The location was moved from the "Alkali Road site" because it was not "publically acceptable." The "public" to whom the Alkali Road site was not acceptable is the white public. The new location is not "publically acceptable" to plaintiffs and their thousands of members, but they are only Indians, and thus not part of the "public" whose wishes need be considered, let alone honored, and who need not even be asked, let alone listened to. Plaintiffs know these are harsh words, but they believe the record both justifies and compels them.

A finding of no significant impact (FONSI) in an environmental assessment must

"present the reasons why an action . . . will not have a significant effect on the human environment." 40 C.F.R. § 1508.13, quoted at Rosebud Sioux Tribe v. Gover, supra, 104 F. Supp. at 1207. The court applies an arbitrary and capricious standard to review this determination. Lockhart v. Kenops, 927 F.2d 1028, 1032 (8th Cir. 1991).

In reviewing the agency's FONSI, the court determines whether the agency "took a hard look at the project, identified relevant areas of concern, and made a convincing case for the FONSI. . . . A decision to forego preparation of an EIS will not be found arbitrary and capricious if it appears from the record that the decision was based on a reasoned evaluation of the relevant factors." Rosebud Sioux Tribe v. Gover, supra, 104 F. Supp. at 1207 (internal citations and quotations omitted).

Under the arbitrary and capricious standard, the Finding of No Significant Impact is inadequate on the issue of the impact of noise on the ability of members of plaintiff tribes to pray at Bear Butte:

- The Environmental Assessment did not "present the reasons why an action . . . will not have a significant effect on the human environment," it merely concluded, without any input from the affected people, that there would be no significant effect on them.
- The agency did not "t[ake] a hard look at the project, identif[y] relevant areas of concern, and ma[ke] a convincing case for the FONSI"; nor was the decision "based on a reasoned evaluation of the

relevant factors." (1) The agency failed to consult with any persons who have a religious interest in Bear Butte; (2) the agency failed to ask whether noise that might be tolerable briefly in ordinary life might be intolerable to Native Americans engaged in prolonged prayer, fasting, or hanblecheya (vision quest); (3) the agency failed to identify the effect of the project on Native American spirituality; (4) the agency began the process by falsely claiming, without any factual basis, that "The noise of the firearms is not expected to carry as far as the Butte"; (5) the agency requested a noise study then issued a "Finding of No Significant Impact" prior to receiving the study; (6) when advised to visit the National Consultation Database on the internet, a process that would have taken less than 30 seconds, the agency either refused to do so, and thereby missed important information, or else did so and ignored what it found; (7) the agency selected unqualified, biased persons to study the noise issue; (8) the noise study addressed only shooting from "small-arms ranges" involving one rifle, the .223 caliber M-16, even though much larger caliber rifles which are much louder are regularly used by civilians and will be used at the shooting range; (9) the noise study ignored the warning in the model it used that "topographical features,

meteorological conditions, and other variables" are not considered by the model; (10) the noise study used arbitrary assumptions of 5,000 rounds per day and 10,000 rounds per day, figures with no basis in fact; (11) the agency ignored the fact that if 5,000 rounds per day create a 35 decibel sound and 10,000 rounds per day create a 38 decibel sound, then a greater number of rounds will produce some unknown louder sound; (12) the agency always described the result as "faint" even though 38 decibels, according to the unknown author of an unsigned document, actually is on the borderline between "moderate" (41 to 60 decibels) and "faint" (21 to 40 decibels); (13) the agency failed to explain how any one decibel level can represent the sound of many different guns of different loudness; (14) the agency failed to answer the Department of the Interior's two questions, namely "Are these calculations the same for the other types of firearms to be accommodated at the proposed sportsman's complex?" and "What is the difference between a steady, soft sound, versus a repetitive percussive soft sound, and what is the affect [sic] on the quality of experience at the Bear Butte NHL?"; (15) the agency failed to conduct a gunfire test, and invite the interested parties involved in the section 106 process to experience the sound levels

from Bear Butte, as recommended by the Department of the Interior and as requested by the Standing Rock Sioux Tribe; and (16) the agency ignored the obvious reality that the human experience of noise is a subjective experience in which human factors are at least as important as mathematical factors, preferring instead to rest its entire conclusion on a solely mathematical concept of noise; all of which are discussed above.

- The agency delegatee, Black Hills Council of Local Governments, began by completely prejudging the issue, made a "Finding of No Significant Impact" before receiving the noise study it had commissioned, then sought to reach a predetermined conclusion of no significant impact, did not consult the people it should have consulted, used junk science, and pushed forward with blinders on exactly when it should have slowed down, consulted plaintiffs, carefully addressed the noise issues through qualified environmental scientists, stood quietly at Bear Butte for two or three hours feeling themselves in plaintiffs' shoes, consulted people who could have explained the impact that the noise from the shooting range will have on Native American prayer, and carefully considered the alternative of moving the shooting range to another location.

In reviewing the sufficiency of a decision under NEPA, a reviewing court may allow presentation of evidence outside the agency record, particularly where there is a "need for additional explanation of the agency decision," or "bad faith or improper behavior." Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803, 808 (8th Cir. 1998). Both tests are met here. Further, Black Hills Council's willful non-consultation with plaintiffs prevented them from making a record before the agency.

The FONSI fails the arbitrary and capricious test.

"A court should consider four factors in determining whether an agency's decision to forego an EIS is arbitrary and capricious: (1) whether the agency took a hard look at the problem, as opposed to bald conclusions, unaided by preliminary investigation; (2) whether the agency identified the relevant areas of environmental concern; (3) whether, as to problems studied and identified, the agency made a convincing case that the impact is insignificant; and (4) if there was impact of true 'significance,' whether the agency convincingly established that changes in the project sufficiently minimized it." Audubon Society of Central Ark. v. Dailey, 977 F.2d 428, 434 (8th Cir. 1992). Under all these standards, the agency's decision to forego an EIS, without more study than it conducted, was arbitrary and capricious.

The likelihood that plaintiffs will succeed on the Second Cause of Action under NEPA and related regulations is high.

3. RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000. RLUIPA provides: "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly or institution--(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1).

This 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 three separate tests, the rule applies here.

A person is entitled to assert a violation of RLUIPA as a claim in a judicial

proceeding and obtain appropriate relief against a government. 42 U.S.C. § 2000cc-2(a). If plaintiff shows a prima facie case of violation of 42 U.S.C. § 2000cc, the government bears the burden of persuasion on every element of the claim, except that plaintiff bears the burden of persuasion on whether the law, regulation, or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

RLUIPA "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of th[e] Act and the Constitution." 42 U.S.C. § 2000cc-3(g).

"Government," as used in RLUIPA, is defined broadly to include any state governmental entity, municipal government, department, or official of a state or municipal government, or any other person acting under color of state law. 42 U.S.C. § 2000cc-5(4)(A). For the purposes of 42 U.S.C. §§ 2000cc-2(b) and 2000cc-3, "government" includes the United States, its officials, and any other person acting under color of Federal law. 42 U.S.C. § 2000cc-5(4)(B). Thus RLUIPA applies to all defendants. All defendants are sued by all tribal plaintiffs pursuant to it.

"Land use regulation" means "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).

Defendants' land use regulation limits and restricts the tribes' use of their land. The map attached as A 109 shows the land at Bear Butte owned by the Northern Cheyenne Tribe and by the Rosebud Sioux Tribe. The map shows another parcel listed as "U.S.A. For Cheyenne and Arapaho Tribes Property." This is an abbreviation; the actual owner of this parcel is "The United States of America in trust for the Cheyenne-Arapahoe Tribes of Oklahoma, and the Northern Cheyenne Tribes of Montana, <u>with a reserved right of access for other Indians for whom the area has a traditional religious significance</u>." A 110 (emphasis added). All plaintiffs are "Indians for whom the area has a traditional religious significance," thus they all have a right of access, which constitutes "an ownership, leasehold, easement, servitude, or other property interest in the regulated land," under the statute.

"Religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). "The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc-5(7)(B).

Putting these pieces of RLUIPA together yields the following law as to this cause of action:

(1) Defendants may not impose or implement the shooting range near Bear Butte if the shooting range imposes a substantial burden on the religious exercise

of plaintiffs;

(2) Unless defendants can demonstrate that imposition of the burden on plaintiffs

(A) is in furtherance of a compelling governmental interest, and

(B) is the least restrictive means of furthering that compelling governmental interest;

(3) If plaintiffs show a prima facie case of violation of this prohibition, the defendants bear the burden of persuasion on every element of the claim;

(4) Except that plaintiffs bear the burden of persuasion on whether the location of the shooting range substantially burdens their exercise of religion.

Plaintiffs are likely to prevail on this cause of action. For them, Bear Butte is a place of religious worship, spiritual renewal, and cultural salvation. They believe, and will testify, and will produce evidence, that the shooting range at its present location will substantially burden the exercise of their ancestral religion; no longer will they have the tranquility needed to experience Bear Butte and encounter their Creator. This is why they bring this lawsuit.

Once plaintiffs establish this element of their cause of action, defendants cannot prevail, because defendants never will be able to show that location of the shooting range within earshot of Bear Butte "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest," as required by RLUIPA for them to prevail. There are innumerable other potential shooting

range sites in western South Dakota which are out of earshot of Bear Butte.

D. THE PUBLIC INTEREST FAVORS AN INJUNCTION TO PRESERVE THE STATUS QUO PENDING THE OUTCOME OF THIS LAWSUIT

Every law plaintiffs seek to vindicate--the National Historic Preservation Act, the National Environmental Policy Act, and the Religious Land Use and Institutionalized Persons Act--protects the public interest.

The National Historic Preservation Act is based on a finding of Congress that "the preservation of [our] irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans . . . ." 16 U.S.C. § 470(b)(3)-(4). The Act is intended to encourage historic preservation in the face of expanding "urban centers, highways, and residential, commercial, and industrial developments." 16 U.S.C. § 470(b)(5).

The National Environmental Policy Act is intended "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation . . . ." 42 U.S.C. § 4321.

As to RLUIPA, "The First Amendment, by prohibiting laws that proscribe the free exercise of religion, demonstrates the great value placed on protecting religious worship from impermissible government intrusion . . . . RLUIPA is clearly in line with this positive constitutional value. Moreover, by fostering non-discrimination, RLUIPA follows a long tradition of federal legislation designed to guard against unfair bias and infringement on fundamental freedoms. See, e.g. Title VI, 42 U.S.C. § 2000d et seq. (2002); Title VII, 42 U.S.C. § 2000e et seq. (2002); Title IX, 20 U.S.C. § 1681 (2002)." Mayweathers v. Newland, 314 F.3d 1062, 2002 U.S. App. Lexis 26844, *5-6 (9th Cir.).

Native Americans have suffered enormously as members of a dominant non-Native society which for decades treated them with overt racism. Native Americans today live with the legacy of that overt racism. The suffering of Native American people is common knowledge. Religion is a critical element in preserving and protecting tribes and their members today. The public interest favors protection of Native American religious rights, and survival of Native American tribes, culture, and people. The public interest favors maintaining the status quo until the merits of this lawsuit are determined.

III. A SPEEDY HEARING SHOULD BE HELD

Plaintiffs request a speedy hearing on this motion so that defendants cannot rush forward with their project and then claim they are so far along that they should be allowed to complete it. Defendants' knowing, bad faith failure to comply with the law more than

fully justifies any incidental burden that may be placed on them by proceeding promptly to hearing on this motion. Defendants know the facts of their own project and therefore are able to respond promptly to this motion, if they choose not to stipulate to stay the project pending the outcome of this lawsuit.

IV. CONCLUSION

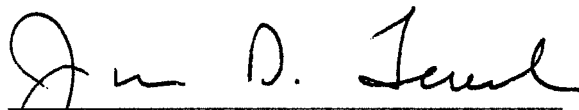
"The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated." Dataphase Systems, Inc. v. C. L. Systems, 640 F.2d 109, 113 n. 5 (8th Cir. 1981) (en banc).

All factors favor issuance of a preliminary injunction.

Plaintiffs respectfully request that the court grant a preliminary injunction which (1) restrains defendant Martinez from expending any more federal funds for the shooting range at its present planned location near Bear Butte, and (2) restrains all defendants from constructing the shooting range at its present planned location near Bear Butte.

Dated: February 28, 2003

Respectfully submitted,



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