

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

NATIVE AMERICAN COUNCIL OF
TRIBES, BLAINE BRINGS PLENTY, and
CLAYTON CREEK,

Plaintiffs,

vs.

DOUGLAS WEBER, Warden of South
Dakota State Prison; DENNIS KAEMINGK,
Secretary of the Department of Corrections,

Defendants.

Civ. No. 09-4182

**PLAINTIFFS'
POST-TRIAL BRIEF**

Plaintiffs Native American Council of Tribes (NACT), Blaine Brings Plenty, and Clayton Creek respectfully request that this Court enter judgment in their favor on their claims tried to the Court on March 27-29, 2012, and grant injunctive relief to allow them and their fellow inmates who practice the Lakota religion to use tobacco in their traditional religious ceremonies.

STATEMENT OF THE CASE

The Plaintiffs brought this action against the Defendants alleging violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, as well as the First and Fourteenth Amendments, seeking injunctive relief to require the Defendants to allow them to use tobacco in their religious ceremonies. The Plaintiffs have not alleged any physical injury and have not sought compensatory damages on any of their claims. Rather, they seek declaratory and injunctive relief, costs, and attorney fees. The Plaintiffs

filed their second amended complaint on June 15, 2010. (Doc. 71). The Defendants moved for summary judgment.

On September 20, 2011, the Court granted in part and denied in part the Defendants' motion. (Doc. 109). Regarding the RLUIPA claim, this Court first held that because the truth and sincerity of the Plaintiffs' claims regarding the use of tobacco in the exercise of their religion was at issue, questions of fact precluded summary judgment on whether the total ban constituted a substantial burden within the meaning of that statute. (Doc. 109 at 12).¹ Second, this Court held that the Defendants had not submitted evidence showing that the total ban on tobacco advanced a compelling government interest and instead offered "only post hoc rationalizations to defend their alleged security concerns." (Doc. 109 at 18). Finally, this Court held that the Defendants did not choose the least restrictive means available to further the compelling interest that they sought to advance. (Doc. 109 at 18-20).

This Court also denied summary judgment on the plaintiff's First and Fourteenth Amendment claims and granted the motion on the claims involving the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996, and international law. (Doc. 109 at 20-25). A court trial was held on March 27-29, 2012 on the Plaintiffs' remaining claims.

STATEMENT OF THE FACTS

Blaine Brings Plenty and Clayton Creek are American Indians and direct descendants of their ancestral Lakota people. The Lakota traditionally lived in the Dakotas west of the Missouri River. (T 232). In contrast, the Dakota lived east of the Missouri River and the

¹ *Cf. Cryer v. Massachusetts Dep't of Correction*, 763 F.Supp.2d 237, 239-40 (D.Mass. 2011) (holding that genuine issues of material fact existed regarding whether complete ban on tobacco in all forms substantially burdened Native American inmate's religious practice in violation of RLUIPA).

Nakota lived in the Yankton area. (T 232). In South Dakota prisons, 27 percent of the total population is Native American, the highest percentage of any state, with the vast majority being Lakota affiliated with the Oglala Sioux Tribe. (T 232-33; Ex. 114).

Blaine Brings Plenty

Blaine John Brings Plenty is an enrolled member of the Oglala Sioux Tribe. (T 150). He grew up in Porcupine on the Pine Ridge Indian Reservation. (T 149). From an early age, Brings Plenty was raised in the traditional Lakota religion. (T 150). One of his early memories is making tobacco ties with his mother. (T 150). His grandfather, Dave Badger, was a pipe carrier and an announcer at Powwows. (T 150). Brings Plenty has been incarcerated at the South Dakota State Penitentiary in Sioux Falls since 1989. (T 150-51). He is a former president of NACT and remains on its council. (T 59, 101, 158-59; Ex. 25).

Clayton Creek

Clayton Creek was born on the Cheyenne River Indian Reservation. (T 69). He is an enrolled member of the Minnecojou Lakota from the Cheyenne River Sioux Tribe. (T 113). One of his earliest memories is participating at the age of five in a traditional Lakota *Yumipi* healing ceremony conducted by his grandfather, Moses Afraid of Lighting, in which tobacco was used as an offering to the spirits. (T 70-72). Creek was an inmate at the South Dakota State Penitentiary in Sioux Falls from 2001 to 2010, except for a short period of time in 2009. (T 93, 115). Since September of 2010, he has served at the Mike Durfee State Prison, a low-medium facility in Springfield. (T 93, 115). Creek is a former vice-president of NACT. (T 100).

Lakota spirituality

Brings Plenty and Creek practice a traditional form of Lakota spirituality dating back hundreds if not thousands of years before European settlement of the Americas. The Lakota religion emphasizes ritual and ceremony as a means of connecting to the universe and the spirits in all living things. (T 29). Three of the most important ceremonial gifts to the Lakota from the Creator are the sweat lodge, the sacrament of tobacco in the fire, and the sacred pipe.² Tobacco is an integral part of each of these ceremonies.³

The sweat lodge

The sweat is a purification ritual in which the lodge, or *Inipi*, represents the female womb and the ceremony's culmination a rebirth. (T 26-27, 151-53; Ex. 30). Here is an example of a sweat lodge:



² Many Lakota teachings, passed down throughout the ages by oral history, were first documented in the 1920's by Black Elk, a medicine man or traditional healer (the preferred term), in his account of the seven sacred rites of the Oglala Sioux. (T 57, 196, 200-01; Ex. 30).

³ A Lakota word for some tobacco is "cunli." (T 62). "Kinnikinnick" refers to various mixtures of tobacco and other plants used by different tribes. (T 53, 63).

(Exs. 14, 15). In a sweat ceremony, the interior of the structure fills with steam from stones heated in a fire supervised and guarded by a person of honor called the fire keeper. (T 44, 156, 179-80). After the lodge is prepared, the individuals enter and kneel in a circle to be led in rounds of ritual songs, prayers, and a pipe ceremony in which tobacco and cansasa (red willow bark) are smoked. (T 41, 153-54). As Brings Plenty described:

When it gets real hot, the drops are hot when you put the water on the rocks, and it makes a lot of steam and it starts to hurt. That's like *Tunkashila* [the Creator] blowing his breath on you to let you know how small and weak you are, but he's blowing life on you at the same time.

The darkness inside the sweat, I was told that's kind of like – like when it gets hot in there and you can't breathe or its gets too hot for you, the steam does, that's the darkness that's inside you, your own darkness, your own fear that you feel inside you. That's *Tunkashila*, the darkness, that's part of his creation you see. And when the door opens, each door that opens, it's kind of like a new – it's bringing new life to you.

... It's a purification ceremony to purify all of your – to help your negativity, the negative energy you feel in your body. It helps release that ...

(T 152). Brings Plenty is one of two fire keepers for the sweat lodge at the South Dakota State Penitentiary. (T 155, 178). He and Clayton Creek have participated in sweats as a part of their Lakota religion since their youth. (T 73, 86, 157).

The sacrament of burning tobacco

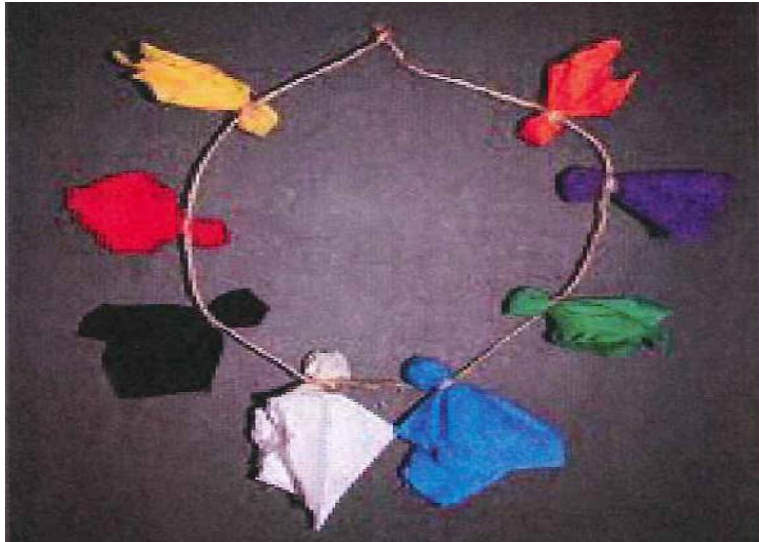
The sacrament of tobacco in the fire, called the *Ta Ani Cha*, is a form of prayer and communion with the Creator and other spirits. (T 27-28). "Tobacco ties" are typically made by the individual worshipper using tobacco, string, and some cloth. (T 30-31; Ex. 32). Each tie represents a prayer and an offering to the spirits:

Tobacco is used to make tobacco tie offerings. Each offering, as you see here, represents a prayer, each prayer. A long time ago before the cloth, this

was done by leather, a real fine leather. Each tie represents a prayer, and is offered to the spirit and later burned into a fire.

(T 31). In that way, a tobacco tie is similar to a rosary in the Catholic faith. (T 53, 490-91).

In a rosary, “[e]ach bead represents a certain prayer. The tobacco tie is the same. Each tie represents a certain prayer.” (T 53). These are traditional Lakota tobacco ties:



(Ex. 23). Tobacco ties and prayer flags (essentially larger versions of *Ta Awi Cha*) are often hung outside on trees before they are taken down and burned as offerings:

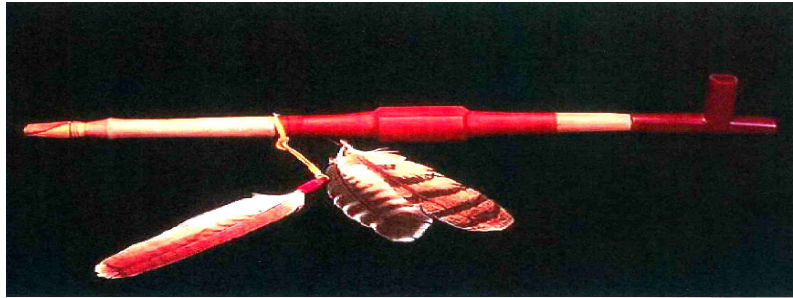


(Exs. 22, 35; T 39-40, 85). The colors of these particular flags signify the four directions, as well as all of the races of humanity. (T 38-40, 90).

Tobacco ties and prayer flags are placed inside the stone altar and hung inside the sweat lodge and then burned as an offering in the fire when the ritual is over. (T 41-42, 86, 153, 155-56). Tobacco ties and prayer flags are also burned as offerings at other Lakota religious ceremonies such as the *Lawampi* (a thanksgiving ceremony in which tobacco is offered to the spirits), *Ponmons*, and the Sundance. (T 42, 84, 87-91, 105-06, 379, 490-91, 495; Ex. 30). For Lakota, tobacco is the only acceptable offering to be used in tobacco ties and prayer flags. (T 33-34, 40, 85-86, 90, 381; Ex. 33). Once they are burned, the smoke of the tobacco carries the prayers to the Creator. (T 91). Brings Plenty and Creek have used tobacco ties and prayer flags as a central part of their Lakota religion since the earliest days of their youth. (T 73, 85-86, 90, 109, 157).

The sacred pipe

The sacred pipe is also a form of prayer in which tobacco, often in combination with other herbs including red willow bark (*cansasa*), are smoked as an offering to the Creator to bring peace to all living things. (T 28-29). This occurs during the sweat ceremony, as well as individual pipe ceremonies and other Lakota rituals. (T 153-54). Here are some modern examples of a sacred pipe:



(Exs. 16, 17, 19, 20).

In Lakota tradition, the sacred pipe was brought to their people by the White Buffalo Calf Woman, a beautiful maiden dressed in white buckskin who transformed herself into a snow white calf. (T 35-36, 109, 148). The coming of the Buffalo Maiden is somewhat akin to a “New Testament” of the traditional Lakota religion. (T 64). Along with her gift of the sacred pipe, she brought red willow bark to be smoked as a mixture with tobacco in the pipe, as well as sweetgrass to use as a smudge to cleanse. (T 63, 199). From that time, “[t]he Lakota mixed tobacco and cancasea together using sweetgrass to smudge.” (T 148-49).

The sacred pipe was to be used by the Lakota “as a prayer to create or to bring peace and harmony to people in their future.” (T 36). As traditional healer Richard Moves Camp explained:

When we fill the bowl and when we smoke the pipe, the smoke is significant. It represents the spirit, the spirit of the being, all the human beings, all walks of life, including the winged, the four-legged, the creation story. When you smoke the pipe, the smoke is a sign that there is life. There’s a life. There’s a spirit of everything there is that we talk about, and the smoke is what that represents.

(T 52). The smoke from the tobacco mixture in the pipe is the vehicle that carries prayers to the *Wakan-Tanka*, the Creator or Great Spirit. (T 61, 154). As described by the Buffalo Maiden in Black Elk’s traditional account, “[a]ll these peoples, and all the things of the

universe, are joined to you who smoke the pipe – all send their voices to *Wakan-Tanka*, the Great Spirit. When you pray with this pipe, you pray for and with everything.”⁴

The original pipe from the Buffalo Maiden has been passed down for generations and is held today by Arvol Looking Horse, pipe carrier for the Seven Council of Fires, which includes the Lakota, Dakota, and Nakota peoples. (T 36-3, 427). Each Lakota family carries their own family pipe that is passed down from generation to generation. (T 43, 195-96).

Individual Lakota may also carry their own sacred pipes that represent the original pipe given to their people by the Buffalo Maiden. (T 43). It is a great honor and responsibility to be a pipe carrier in the Lakota religion. (T 43). A person that carries the pipe is required to live a good, clean, and healthy life, abstaining from drugs and alcohol and following the traditional ways. (T 43). Both Brings Plenty and Creek are pipe carriers (there are five at the South Dakota State Penitentiary) and have used tobacco in their pipe ceremonies since they began practicing their Lakota religion. (T 73-76, 109, 154, 157, 177).

Richard Moves Camp

At trial, the Plaintiffs presented the expert testimony of Richard Moves Camp, a respected Oglala holy man of the Lakota faith whose spiritual beliefs reflect their own. (T 21-23, 85, 157). Moves Camp was born on and grew up on the Pine Ridge Indian Reservation. (T 21). He is a member of the Teton Band of Oglala Lakota and has been a traditional healer for more than 36 years. (T 22; Ex, 31). For most of his life, Moves Camp was mentored by elders in the ways of Lakota spirituality. (T 23). His ancestors were among the spiritual advisors to Crazy Horse. (T 32).

⁴ Joseph Epes Brown, *The Sacred Pipe: Black Elk's Account of the Seven Rites of the Oglala Sioux*, 6-7 (University of Oklahoma Press 1953, 1989).

In the 1970's, Moves Camp was instrumental in consulting with former Warden Solem regarding the initial placement of a traditional Lakota sweat lodge at the South Dakota State Penitentiary and participated in the blessing ceremony when it was first used. (T 25). Moves Camp has consulted with several penal institutions that permit the use of tobacco in traditional Lakota religious ceremonies, including San Quentin, Folsom, Fort Leavenworth, and facilities in Wisconsin, Minnesota, and California. (T 26, 237; Exs. 1, 2, 3). He has also testified before Congress on behalf of Native American religious freedom. (T 50).

As Moves Camp testified, tobacco has been a significant part of Lakota spirituality and culture for more than a thousand years, long before the Europeans made contact. (T 24).⁵ Its use among North America's indigenous peoples can be traced to contact with Central and South America. (T 24). The use of tobacco in sweats, tobacco ties, prayer flags, and the sacred pipe is fundamental to the Lakota religion. (T 55). As a traditional healer, Moves Camp smokes a mixture of tobacco and red willow bark in his pipe. (T 63-64, 67). Every Lakota medicine man or traditional healer (the preferred term) uses tobacco in traditional religious ceremonies. (T 52). As Moves Camp testified:

Being deprived, like taking the tobacco away from, it's almost like taking a Bible away from the church. It's like saying you can go to church, but you can't use the Bible. Like I said earlier, tobacco is a very important part of the ceremonies of the indigenous people for thousands of years. The concept of

⁵ "If there is one aspect unique to aboriginal religion in the Americas, it is the ritual use of tobacco. As noted by an eighteenth-century observer: 'All the Indian nations we have any acquaintance with, frequently use it on the most religious occasions.' (Adair 117: 408). Elsewhere in the world one can find such relatively common particulars of Native American religion as the ritual use of sweat ceremonials, fermented beverages, dog sacrifice, and shamanic trance. The focus on tobacco as the primary sacred plant is ubiquitous throughout the Americas save for the Arctic, but in parts of Central and South America other sacred plants may be of equal importance." Jordan Paper, *Offering Smoke: The Sacred Pipe and Native American Religion*, 3 (University of Idaho Press 1988).

the tobacco, the plant, is a sacred plant. It's like a God to many people. It's a sacrament.

So before the pipe was ever brought to the people, there was the tobacco for particularly Lakota people. It's played an important role. It's like a center. We have these offerings. We put tobacco in them. When we see an elder, we give them tobacco. It doesn't mean we smoke it all the time. That has nothing to do with it. The idea of the tobacco is a holy sacrament to our people. That goes with many different Tribes. So being deprived is probably not so good.

(T 51-52). For a traditional Lakota, the total ban on tobacco at the penitentiary is taking away their ability to pray in the way that their religion teaches. (T 55).

The Native American Church

Although sometimes confused by outsiders, the Native American Church is very different and completely separate from the traditional Lakota religion practiced by Brings Plenty and Creek. (T 45, 106, 172, 184). In fact, the Native American Church is a blending of Native American spirituality and *Christianity* that also has roots in the religious use of peyote in the southwestern United States. (T 45-46, 273, 348-49, 385, 498). Members of the Native American Church also traditionally used tobacco, but they roll it in corn husks to smoke it rather than using a pipe. (T 47, 106, 499). Richard Two Dogs, Roy Stone, Bud Johnston and Breon Lake, witnesses called by the Defendants at trial, are all members of the Native American Church or other churches that are different from the traditional Lakota religion practiced by Brings Plenty and Creek. (T 106-07, 498). Moreover, as recognized by the Defendants, “[t]here is no formal guide to practicing [the Native American] religion so there are variances in the manner of practice among and between individuals, groups and tribes.” (Ex. 110 at NACT 036).

The prison's ban on tobacco in Lakota religious ceremonies

When Brings Plenty and Creek first entered the South Dakota State Penitentiary, Native American inmates were permitted to purchase tobacco from the prison and practice their Lakota religion by attending sweat ceremonies, making tobacco ties and prayer flags to offer to the spirits, and smoking tobacco and red willow bark in pipe ceremonies. (T 80, 91, 160). Of course, the prison did not pay for the tobacco and does not pay for any religious items used in Lakota ceremonies. (T 100, 198-99). Rather, after the prison itself stopped selling tobacco, such materials were paid for through donations to the Native American Council of Tribes, a non-profit organization dedicated to helping Indian prisoners freely practice their religion. (T 100, 160).

Mary Montoya, the volunteer supervisor of religious activities at the state penitentiary, was the “outside treasurer” for NACT, as well as other religious organizations in the prison, and was responsible for purchasing and distributing religious supplies, including tobacco for use in Lakota religious ceremonies. (T 102-03, 181, 241, 458-59). In that capacity, Montoya worked with Blaine Brings Plenty and other officers of NACT to help coordinate Lakota religious ceremonies. (T 167-68).

General tobacco ban

In 1998, the smoking of tobacco was banned at all South Dakota prisons. (T 545). That same year, the sacred pipe used by NACT was taken away by the prison administration, apparently at the urging of a staff member who was also a Christian minister. (T 160; Ex. 127). After the Lakota inmates filed a protest with Warden Weber, the pipe was returned and Native American inmates were permitted to continue to use tobacco in their traditional

religious ceremonies. (Ex. 127). In 2000, a ban on all tobacco (to include chewing tobacco) went into effect at South Dakota correctional facilities, again with an exception for the use of tobacco in traditional Native American religious ceremonies. (T 546).

Change in the mixtures

In 2004, as the result of accusations that tobacco was being misused, the mixture of tobacco permitted to be used was changed to 50 percent tobacco and 50 percent red willow bark. (T 91, 163-64, 244). In 2005, the allowed mixture was changed to 25 percent tobacco and 75 percent red willow bark and they began to grind the mixture into a dust. (T 245, 472). This mixture remained the same until the date of the total ban of tobacco for religious purposes in 2009. (Ex. 109 at NACT 013).

NACT's policies

Earlier, NACT had written to the cultural affairs coordinator requesting enforcement of a policy whereby only the NACT pipe keeper and two spiritual committee members could have access to the materials used to make tobacco ties. (Ex. 26; T 95, 161-63). NACT then voluntarily enacted a sanction among its members for misusing tobacco:

MISUSE OF PIPE AND/OR TIE MIXTURE:

The ability to have pipe and tie mixture with tobacco in it is a privilege accorded only to the Native groups in the prison system, which is otherwise tobacco free. To protect this privilege, NACT wants to ensure the mixture is used in the sacred way for which it is intended.

Any NACT member who has received pipe or tie mixture containing tobacco from the group and has been found with it in the unit or any other area not designated for ceremonies, will be banned from receiving pipe and tie mixture containing tobacco for a period of six months. The transportation of the mixture from where it is distributed to the site of the ceremony is permissible, as is the return of unused mixture to the distribution point. A second offense

will result in an indefinite ban, which may be lifted only by action of the NACT council when they are convinced he will not misuse the mixture again.

(Ex. 28 – NACT Bylaws, Article XIV; T 164-66, 277-78).

The prison administration, however, did not enforce NACT's policy of only allowing certain Lakota spiritual advisors to make the tobacco ties and prayer flags. (T 484-85). Instead, the administration elected to allow anyone to sign up and purchase these materials. (T 163, 484-85). In 2008, Mary Montoya began allowing any person to purchase tobacco mixtures and make them into tobacco ties in a room without any direct supervision. (T 96, 254). In addition, the tobacco was stored in either Montoya's office or the unit manager's office, which were not secure locations. (T 96-98, 168; Ex. 110 at NACT 036 ("Do NOT assume Unit staff offices are secure storage areas")). Predictably, the lack of supervision and essentially unmonitored access led to some abuse by insincere participants. (T 96-97). In 2009, the prison did begin enforcing the same six-month ban on anyone caught with unauthorized tobacco, regardless of its source, though it did not adopt the indefinite ban for a second violation that NACT's bylaws imposed. (T 92, 133, 249, 276, 278).

Removal of tobacco from Native American religious ceremonies

On September 19, 2009, a chance conversation occurred between Mary Montoya, Warden Weber, and Sidney Has No Horses, a holy man visiting the penitentiary, in which Has No Horses referred in some fashion to banning the use of tobacco. (T 300). As the result of this conversation, the prison administration mistakenly concluded that he had suggested a complete ban on tobacco. (T 250). That impression was false. As Has No Horses testified at trial, he only meant to convey two things: that he only uses red willow bark (cancasa) in his sacred pipe and that the use of tobacco should be banned for specific,

individual inmates caught desecrating the Lakota religion by removing tobacco from a tobacco tie or prayer flag to use for non-spiritual purposes. (T 380-81, 394-95, 600-01).

As he further testified, Has No Horses always uses tobacco in his tobacco ties and prayer flags and agrees that tobacco is central to the traditional Lakota religion. (T 376, 380-84, 389). In fact, he testified that he specifically notified the Warden and his staff of the importance of using tobacco in Lakota tobacco ties and prayer flags. (T 383).

The prison administration, however, immediately leaped into action as the result of Has No Horses' offhand and misinterpreted comments. Mary Montoya and Jennifer Wagner conferred briefly with a few outside individuals such as Roy Stone, Bud Johnston, and Breon Lake, who were all either affiliated with the Native American Church or, in the case of Bud Johnston, the President of his own self-created church. (T 250-51, 298, 308, 430-31). None of these outsiders could speak for the traditional Lakota religion practiced by Brings Plenty, Creek, and other inmates in the state prison system. (T 431). Moreover, the prison administration only spoke with them about pipe mixtures, and did not inquire regarding the use of tobacco as a sacrament in tobacco ties and prayer flags. (T 298-99).

Nonetheless, a revised policy was quickly drafted and enacted that completely banned the use of tobacco, in any way, in traditional Lakota or other Native American ceremonies at the penitentiary. (T 300-01, 552; Ex. 109). Jennifer Wagner, the cultural activities coordinator from 2003 to 2011, informed prison staff that tobacco was being removed from all Native American ceremonies as of October 19, 2009 at the request of "Medicine Men":

Effective today, 10/19, tobacco is being removed from all Native American Ceremonies *per the request of Medicine Men* who lead ceremonies at our facilities. Please see the attached letter Warden Weber has sent to the inmates, Tribal

Liaisons, and Medicine Men. This letter is being delivered to the pipe carriers and sundancers this morning by Unit Staff.

...

When inmates come to you to complain, please remind them that *we are honoring the request of the respected Medicine Men and are going back to their traditional ways.*

(Ex. 108 (emphasis supplied)). In her affidavit submitted in support of the Defendants' summary judgment motion, Wagner likewise stated that the Department of Corrections decided to ban tobacco "Based upon the advise [sic] and recommendation of the Medicine Men and Spiritual Leaders who conducted Native American ceremonies at the DOC facilities" (Doc. 81-1). At trial, Wagner initially claimed that the total ban was enacted for security concerns. (T 303). After she was confronted with her prior Affidavit and the e-mail that she wrote at the time of the ban (Ex. 108), however, she admitted that the Department of Corrections decided to institute the ban based upon the advice of the medicine men and spiritual leaders. (T 304). She further admitted that by removing all tobacco from religious ceremonies, the Defendants believed that they would be returning the Native American inmates to their traditional ways. (T 304).

The Warden's October 19, 2009 letter attached to Wagner's e-mail likewise relied upon the misunderstanding that had its genesis in the comments of Sidney Has No Horses as the rationale for instituting a ban, although he did mention previous abuse of tobacco:

Medicine Men and Spiritual Leaders, who lead ceremonies at our facilities, have brought to our attention that tobacco is not traditional to the Lakota/Dakota ceremonies and that it is too addictive to be used for ceremonies. They have requested that tobacco be removed from Native American Ceremonies so that participants of these ceremonies will focus on their spiritual paths and not abusing the tobacco.

Effective 10/19/09, the SDDOC will follow the advice of the respected Medicine Men and Spiritual Leaders and remove tobacco from Native American Ceremonies. All Native American ceremonies will continue with the use of other botanicals (cansasa, sage, bitter root, bearberry, lovage, flat cedar, sweet grass, etc).

(Exs. 109, 108; T 201, 238). The prison administration did not consult with Plaintiffs or other Native American inmates about instituting this total ban. (T 201). It also did not reach out to the Oglala Sioux Tribe, although it is now aware that the Oglala Sioux Tribe, as expressed in a letter from its President, supports the inmates' use of tobacco in traditional Lakota religious ceremonies. (T 292-94).

ARGUMENT

I. THE PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF UNDER RLUIPA.

In order to protect the exercise of religious beliefs by prisoners, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), which provides that:

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, ... even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc–1(a)(1)–(2) (“Section 3”); *see also* *Sossamon v. Texas*, 131 S.Ct. 1651, 1656 (2011); *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005). As the Eighth Circuit has explained, section 3 of RLUIPA “prohibits substantial burdens on religious exercise, without regard to discriminatory intent.” *Van Wyhe v. Reisch*, 581 F.3d 639, 654 (8th Cir. 2009). Under this provision, “religious exercise” is defined as “including the exercise of religion, whether or

not compelled by, or central to, a system of religious belief.” *Id.* § 2000cc-5(7)(A). It is thus acknowledged that “[b]y enacting RLUIPA, Congress established a statutory free exercise claim encompassing a higher standard of review than that which applies to constitutional free exercise claims.” *Gladson v. Iowa Dep’t of Corrections*, 551 F.3d 825, 832 (8th Cir. 2009); *Murphy v. Missouri Dep’t of Corrections*, 372 F.3d 979 (8th Cir. 2004) (*Murphy I*).

RLUIPA provides for “a cause of action to enforce the heightened free exercise right it creates.” *Van Wyke*, 581 F.3d at 649 (citing *id.* § 2000cc-2(a)-(g) (“Section 4”)). In such an action, “if the institutionalized person ‘produces prima facie evidence to support a claim,’ by showing that the government practice substantially burdens the person’s exercise of religion, then the government bears the burden of persuasion on every other element of the claim.” *Van Wyke*, 581 F.3d at 649 (quoting *id.* § 2000cc-2(b)).

A. The prison policy prohibiting all tobacco use in religious ceremonies has placed a substantial burden on the Plaintiffs’ ability to exercise their Lakota religion.

In order to make out a prima facie claim under RLUIPA against a state official, a plaintiff “must show, as a threshold matter, that there is a substantial burden on his ability to exercise his religion.” *Van Wyke*, 581 F.3d at 655 (quoting *Singson v. Norris*, 553 F.3d 660, 662 (8th Cir. 2009)) (additional citation omitted). In order to constitute a substantial burden, the Eighth Circuit has required that government policy or actions must significantly inhibit or constrain conduct or expression that manifests some central tenet of a person’s individual religious beliefs, meaningfully curtail the ability to express adherence to his or her faith, or deny a reasonable opportunity to engage in those activities that are fundamental to his or her

religion. See *Gladson*, 551 F.3d at 832; *Murphy v. Missouri Dep't of Corrections*, 506 F.3d 1111, 1115 n. 7 (8th Cir. 2004) (*Murphy II*) (quoting *Murphy I*, 372 F.3d at 988).

Recently, however, the Supreme Court clarified that “RLUIPA bars inquiry into whether a particular belief or practice is ‘central’ to a prisoner’s religion.” *Cutter*, 544 U.S. at 725 (citing 42 U.S.C. at § 2000cc-5(7)(A)). In later decisions, the Eighth Circuit has recognized this limitation of its prior jurisprudence. See *Van Wybe*, 581 F.3d at 656; *Gladson*, 551 F.3d at 832-33; *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 n. 7 (8th Cir. 2008). Under the *Murphy* test, as modified by *Cutter*, “the inmate bears the burden of establishing that the correction facility has placed a substantial burden on his sincerely-held religious beliefs.” *Gladson*, 551 F.3d at 833. Whether a plaintiff “can establish the truth or sincerity” of a religious belief “is a matter to be decided at trial” by the finder of fact. See *id.* A prison “must permit a reasonable opportunity for an inmate to engage in religious activities but need not provide unlimited opportunities.” *Van Wybe*, 581 F.3d at 657.

In light of the testimony at trial, it is clear that tobacco is, in fact, a central or fundamental part of the traditional Lakota religion and that the complete removal of tobacco from Lakota religious ceremonies at the facilities of the South Dakota Department of Corrections has placed a substantial burden on the sincerely held religious beliefs of Blaine Brings Plenty and Clayton Creek. As Creek testified, “[t]obacco is essential to our belief. Tobacco is an offering. It’s one of the greatest offerings we can give to our Higher Power. He gives us life, and he gives us what we have today. In return, we offer – we can offer tobacco.” (T 86-87). “Tobacco,” he continued, “the fundamental part about it is the offering that we make, the sacrament that we give. As Lakotas, we believe we should always

give rather than receive.” (T 111). Brings Plenty also sincerely testified that the use of tobacco in offerings and ceremonies is a central tenet of his Lakota beliefs. (T 158).

As further explained by Richard Moves Camp and averred by both of the Plaintiffs, the complete prohibition on the use of tobacco in their religious ceremonies has essentially stripped them of the ability to properly pray and substantially interferes with the proper expression of their religious beliefs. (T 21-23, 51-55, 85, 111, 157). Indeed, after hearing the Plaintiffs testify, even Warden Weber does not appear to doubt the sincerity of their beliefs regarding the central importance of tobacco to their traditional Lakota religion. (T 587-88). Clearly, the Plaintiffs have met their prima facie burden under RLUIPA of establishing a substantial burden on their ability to exercise their religion.

B. Completely prohibiting the use of tobacco in Lakota religious ceremonies is not in furtherance of a compelling governmental interest.

Under RLUIPA, once a plaintiff's prima facie burden has been met, prison officials are charged with the affirmative burden to establish that a challenged policy or action is the “least restrictive means” to achieve a “compelling government interest.” 42 U.S.C. § 2000cc-1(a)(1)–(2); *Sossamon*, 131 S.Ct. at 1656. In the application of the “compelling government interest” standard, the Supreme Court has stated that “context matters” and the RLUIPA does not “elevate accommodation of religious observances over an institution’s need to maintain order and safety.” *Fegans v. Norris*, 537 F.3d 897, 901 (8th Cir. 2008) (quoting *Cutter*, 544 U.S. at 722). The analysis, however, must also be conducted with reference to the particular individuals and circumstances at issue and religious rights cannot be substantially burdened simply out of a desire to enforce general policies. 42 U.S.C. § 2000cc-1(a) (providing that prisons cannot “impose a substantial burden on the religious

exercise of a person residing in ... an institution ... even if the burden results from a rule of general applicability”).

It is recognized that “prison security is a compelling state interest, and that deference is due to institutional officials’ expertise in that area.” *Fowler v. Crawford*, 534 F.3d 931, 933 (8th Cir. 2008) (quoting *Cutter*, 544 U.S. at 725 n. 13). Although a prison’s interest in order and security is compelling, “to ensure prison policies are in furtherance of that compelling interest, officials’ security concerns must be ‘grounded on more than mere speculation, exaggerated fears, or post-hoc rationalizations.” *Fowler*, 534 F.3d at 939 (citation omitted); *see also Hamilton v. Schrivo*, 74 F.3d 1545, 1554 n. 10 (8th Cir. 1996) (“prison authorities must do more than offer conclusory statements and post hoc rationalizations for their conduct”). In other words, prison officials cannot “justify restrictions on religious exercise simply by citing to the need to maintain order and security in a prison. They ... must demonstrate that they actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.” *Alvarez v. Hill*, 518 F.3d 1152, 1156 (9th Cir. 2008) (citations omitted).

At trial the Defendants offered post-hoc rationalizations that security issues were the motivation for the removal of tobacco from Lakota religious ceremonies. Similar to their predicament at the summary judgment stage, however, the Defendants’ written communications in October 2009 demonstrate that the actual reason that they instituted the complete ban on tobacco use in Lakota religious ceremonies was their interpretation of Has No Horses’ comments in September 2009 and their desire to return the Native American

inmates to what the prison administration defined as their traditional ways. (Ex. 108, 109).⁶ The cultural activities coordinator, who was integral in making and implementing the swift decision to ban tobacco from Lakota religious ceremonies, likewise admitted at trial that the decision was based upon what they believed to be the advice and recommendation of religious leaders. (T 304).

The record demonstrates that from the time that Warden Weber misinterpreted Has No Horses' comments on September 18, 2009 to the date of the ban one month later, the investigation conducted by prison staff was solely to determine if they could justify the ban for religious reasons, rather than safety or security reasons. (T 250). The Defendants did not consult religious leaders for safety or security reasons, rather they sought justification for the ban on religious grounds. In fact, prison officials drafted written statements for religious leaders to sign (T 252) and solicited other written justifications to support the ban (Ex. 138, 6). Of course, the individuals that they briefly consulted during this time were not even practitioners of the traditional Lakota religion and had different religious practices than the Plaintiffs. (T 106-07, 498). Immediately after obtaining what they believed was sufficient evidence of a religious justification for the complete ban of tobacco, the Defendants abolished the decades-long policy of allowing inmates practicing the Lakota religion to use tobacco in their religious ceremonies. (Ex. 109). Interestingly, the Defendants continued to refer to "tobacco ties" in new policies adopted after the ban on tobacco for religious purposes. (Ex. 110). At the trial, however, the Defendants, their counsel and their witnesses renamed "tobacco" ties to "prayer" ties. (T 229, 237, 477, 560, 578).

⁶ Given the evidence at trial concerning the importance of tobacco in traditional Lakota religion, it would seem that if the Defendants' desire was to return the Native American inmates to their traditional ways, the Defendants would voluntarily and immediately repeal the total ban.

In summary, the primary grounds cited by the prison administration in its communications announcing the policy change was its mistaken conclusion, based upon misinformation, that “tobacco is not traditional to the Lakota/Dakota ceremonies...” (Exs. 109, 108; T 201, 238, 304). Such a rationale, however, is expressly prohibited under RLUIPA in denying religious accommodation. 42 U.S.C. § 2000cc-5(7)(A); *see also Koger v. Bryan*, 523 F.3d 789, 798 (7th Cir. 2008) (explaining that prison officials who denied dietary accommodation on the ground that prisoner’s professed religion did not impose such restrictions required the prisoner “to establish exactly what RLUIPA does not require”). Defendants’ after-the-fact attempt in this litigation to assert that the motivation for complete removal of tobacco from all Lakota religious ceremonies was the safety or security of DOC facilities is flatly contradicted by the evidence in the record.

Moreover, the Defendants did not carry their burden of proving that a total ban on the use of tobacco for religious purposes furthers an interest in safety and security. Warden Weber made conclusory statements that he believes that there is less violence in the prison and it is a safer environment than before the removal of tobacco from Lakota religious ceremonies and that there have been “[f]ar less rule infraction reports for possession of or use of tobacco.” (T 563-64). These broad generalizations are not supported by the record evidence in this case. First, the prison maintains written records of violence among the inmates and they could have been produced to the Court. (T 596, 282). The Defendants’ failure to produce even one such record of violence discredits the accuracy of the Warden’s testimony on this issue. The general ban on tobacco was imposed in 1998 and the ban on its use for religious purposes began on October 19, 2009. (T 545; Ex. 109). Thus, for a period

of eleven years in which Native American inmates were allowed to use tobacco for their religious ceremonies, the Defendants could not produce credible evidence of even one specific incidence of violence related to tobacco that was used in religious ceremonies. In fact, the Warden admitted that in over 31 years of working for the DOC and being in charge of security he was not aware “of there ever being a problem, whether it was a problem of violence or any other issues that may cause us concern at the sweat lodge.” (T 533). He stated that there were “incidents” in the unsupervised room where tobacco ties were made, but he clarified that he was not aware of any actual violence during any of the Native American religious ceremonies. (T 575). Jennifer Wagner testified that if there was a video recording of an incident of violence in the room where tobacco ties were made she certainly would have retained a copy and could have produced it to the Court. (T 283).

Second, as for Warden Weber’s second pronouncement regarding a decrease in the number of disciplinary reports since the ban, the Warden admitted that he does not receive the actual disciplinary reports or any reports that advise him of the type of violations that occurred. (T 592). Rather, he is supplied with only summary reports that show the number of minor and major disciplinary infractions on a monthly basis. (T 592). The Defendants’ failure to produce even one of those reports before the ban and after the ban to demonstrate for this Court the alleged effectiveness of the ban further calls into doubt the accuracy of the Warden’s testimony.

Third, the Defendants produced a list of tobacco-related violations before the total ban on tobacco for religious purposes went into effect (Ex. 146), but failed to produce similar proof of violations after the ban. Thus, the Defendants’ proof fails to establish the

extent of the disciplinary problem before the ban in comparison to after the ban was enacted.

Fourth, the list of tobacco-related violations shows that for a 13-month period of time, there were 33 tobacco-related violations by NACT members, which includes inmates found with commercial cigarettes and chewing tobacco that could not possibly have originated with the religious ceremonies. (Ex. 146). The Defendants did not introduce evidence to establish that 33 violations in a 13-month period of time posed any risk to the safety and security of either the inmates or staff at the prison. Warden Weber received reports on a monthly basis to show the total number of disciplinary violations (T 592), but the Defendants chose not to present that evidence to allow the Court to evaluate the alleged severity of tobacco-related disciplinary violations. This failure is likely because it would defeat their claims given that there are likely several hundred disciplinary violations in a 13-month period of time, which would dwarf the disciplinary issues involving tobacco used in religious ceremonies.

Fifth, Jennifer Wagner testified that tobacco-related violations are not severe enough to warrant sentencing inmates to administrative segregation, which is the most severe form of disciplinary segregation at the penitentiary. (T 324-25). Administrative segregation is reserved for “repeated rule violations that jeopardize the security and safety of staff and inmates.” (T 284). Inmates committing tobacco-related violations are typically sentenced to five days in the special housing unit, a significantly less restrictive form of punishment. (T 285). Accordingly, Wagner’s admission regarding punishment for such infractions discredits

the Defendants' claim that a total ban on tobacco was necessary to the security and safety of the prison.

Finally, even if the Defendants had proven that there was any positive change in the safety or security of the prison after October 19, 2009, they have not met their burden to show that the tobacco ban was the *cause* of any such increase in safety or security. The Defendants did not claim or produce evidence that the only change in safety and security measures from 2009 to 2012 was the ban on the religious use of tobacco. No evidence of the other measures implemented in the DOC facilities to improve the safety or security of the prisons exists in the record for the Court to make a determination that somehow the ban on tobacco for religious purposes *resulted in* an increase in safety or security.

Moreover, Defendants have not met their burden to establish that a complete ban on tobacco at the lower security-level institutions in South Dakota would further any security or safety interests at those particular institutions. Creek is housed at the Mike Durfee State Prison, which is a low-medium security institution. (T 93, 115). No evidence exists in the record of the extent of any safety or security issues at the Mike Durfee State Prison or of any incidents of violence related to the religious use of tobacco at that institution.

The fact that the Defendants could only produce vague, conclusory and unsupported testimony of a safety or security concern related to the religious use of tobacco further demonstrates that they are attempting to marshal a post-hoc rationalization for their October 2009 decision to remove tobacco from traditional Lakota religious ceremonies. If they truly made the decision to ban the religious use of tobacco for a safety or security reason, rather than because they sought to define Plaintiffs' religious beliefs for them, they

would have been able to support such a claim with the type of evidence mentioned above. The Defendants have thus failed to meet their burden of proof on this element of their asserted defense to the Plaintiffs' prima facie case under RLUIPA. *See Van Wyke*, 581 F.3d at 649 (quoting 42 U.S.C. § 2000cc-2(b)) (explaining that "if the institutionalized person 'produces prima facie evidence to support a claim,' by showing that the government practice substantially burdens the person's exercise of religion, then the government bears the burden of persuasion on every other element of the claim").

C. The total ban on the use of tobacco in Lakota religious ceremonies is not the least restrictive means of furthering any compelling government interests in this case.

Even if one assumes that the prison administration's recent elimination of the exception to the tobacco ban in effect for years allowing its use in Lakota religious ceremonies was in fact motivated by a compelling governmental interest in order and security, rather than an attempt to impose their definition of traditional Lakota religion on the Plaintiffs, it is abundantly clear that the total ban now imposed was not the least restrictive alternative available to further that interest.

Both the Plaintiffs and Richard Moves Camp, a Lakota traditional healer, agreed that it would be acceptable if only pipe carriers and fire keepers were responsible for making the tobacco ties and prayer flags and even if tobacco ties were made by someone else, such as a volunteer outside of the prison. (T 56, 97, 131-32). This option could also be limited to only pipe carriers and fire keepers who have no tobacco-related disciplinary infractions. Warden Weber admitted that limiting the number of inmates making tobacco ties could be effective in controlling the unauthorized use of tobacco. (T 562). Plaintiffs and Moves

Camp further agreed that it would be acceptable if prison staff or volunteers transported tobacco ties, prayer flags, and tobacco pipe mixture directly to the site of their religious ceremonies where the tobacco would then immediately be burned or consumed in the fire. (T 44, 56, 99, 173). They also agreed to accept a mixture of 10 percent tobacco and 90 percent red willow bark, or even a mixture containing only five percent tobacco, as opposed to a total ban. (T 103, 145, 173). Finally, they would readily agree to any other additional security measures, such as searches after a sweat ceremony, and more severe penalties for misusing tobacco, such as cell restriction, disciplinary segregation or administrative segregation. (T 145-47). As to searches, the prison has two dogs specifically trained to search for tobacco, which could be used as inmates leave the tobacco tie room or leave any ceremony where the tobacco mixture is allowed. (T. 541).

Another less restrictive alternative to a complete ban in all facilities is to allow tobacco for religious purposes in some of the South Dakota correctional institutions or portions of the institutions that have lower levels of security than the Jameson Annex in Sioux Falls, which is maximum security. To address the increased security risk of maximum-security inmates, Defendants could consider allowing tobacco mixtures for only certain Lakota ceremonies, such as at the sweat lodge where the Warden testified there have been no security problems for over 31 years (T 533) or during pipe ceremonies that are supervised by prison staff or volunteers. Additionally, Defendants could consider allowing the use of tobacco mixtures for a lesser number of Lakota ceremonies each week or each month where they could have direct supervision for that shortened period of time and could do immediate searches for tobacco using their dogs.

None of these less restrictive alternatives was considered by the Defendants before the total ban was instituted less than a month after the administration received information from one individual outside of the prison suggesting that tobacco was not essential to Lakota pipe ceremonies. (T 109-10, 285, 310-11, 327, 563, 589). The Defendants' complete failure to consider multiple less restrictive alternatives, and the availability of many such reasonable alternatives to a complete ban on any religious use of tobacco by the Plaintiffs, is a clear violation of RLUIPA, warranting prospective injunctive relief. *See Alvarez*, 518 F.3d at 1156 (holding that prison officials have the affirmative burden to prove that they "actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice"); *Murphy*, 372 F.3d at 989 (holding that the court is to explore any possible least restrictive means).

Although not controlling, courts may consider evidence of what other prisons have done to accommodate inmates' religious practices in assessing claims brought under RLUIPA. *See Fowler*, 534 F.3d at 942. This Court can take judicial notice that the federal prison system allows use of tobacco in Native American religious ceremonies. *See Cryer*, 763 F.Supp.2d at 248 (citing Federal Bureau of Prisons, Program Statement: Religious Beliefs and Practices, Statement P5360.09 12/31/2004) at 20(I)-(J) (directing each institution to develop supplement which must include procedures for "using tobacco for rituals"): http://www.bop.gov/policy/progstat/5360_009.pdf) (attached to this brief as **Ex. A**).

In addition, numerous state prison systems, including Minnesota, Wisconsin, and California allow inmates to use tobacco for religious rituals. (T 26, 237; Exs. 1, 2, 3). Indeed, many courts have concluded that a prison's restrictions regarding tobacco do not

impose a substantial burden precisely because they still allow the use of tobacco in some form. *See Fowler*, 534 F.3d at 933 (noting that practitioners of Native American faith at Jefferson City Correctional Center are permitted to possess a “sacred bundle” consisting of “a prayer pipe, sage, cedar, sweet grass, tobacco, a medicine bag, and prayer feathers”); *Caldwell v. Folino*, 2011 WL 4899964 * 8-9 (W.D.Pa. Oct. 14, 2011) (noting that Pennsylvania Department of Corrections allows limited access of tobacco to Native American inmates); *Delgado v. Ballard*, 2011 WL 7277826 * 8 (S.D.W.Va. Oct. 6, 2011) (noting that “MOCC’s Operational Procedure permits the plaintiff to smoke a tobacco mixture in a prayer service”); *Hopson v. TDCJ-CID*, 2011 WL 4554379 * 2-3 (E.D.Tex. Sept. 29, 2011) (noting that TDCJ policies only prohibited Native American’s possession of tobacco in his individual cell); *Newberg v. GEO Group, Inc.*, 2011 WL 2533804 * 2-5 (M.D.Fla. June 27, 2011) (holding that “Plaintiff’s claims are moot due to the implementation of a new FCCC policy permitting Native American residents to smoke tobacco, smudge, and perform other Native American rites and ceremonies”); *Vega v. Rell*, 2011 WL 2471295 * 3 (D.Conn. June 21, 2011) (noting that Native American prisoners “can burn tobacco”); *Bostwick v. Oregon Dep’t of Corrections*, 2011 WL 1261168 * 2 (D.Or. March 31, 2011) (noting that while “inmates are not permitted to have tobacco in their cells because the inmate could use it himself or sell it to other inmates, ... Religious volunteers do bring tobacco for use during ceremonies where the volunteer supervises its use”); *Taylor v. Hubbard*, 2010 WL 3033773 * 2 (E.D.Cal. July 30, 2010) (explaining that inmate was permitted tobacco during ceremonies but not in cell); *Thunderhorse v. Pierce*, 364 Fed. Appx. 141, 147-48 (5th Cir. 2010) (per curiam) (upholding ban on pipe use in cells); *Bailey v. Rubenstein*, 2009 WL 1034614 * 2 (S.D.W.Va. April 15, 2009)

(denying motion for injunctive relief and RLUIPA claim because prison policy permitted Native American inmate “to smoke in religious ceremonies despite the generally applicable tobacco ban”); *Skenandore v. Endicott*, 2006 WL 2587545 * 13 (E.D.Wis. Sept. 26, 2006) (upholding restrictions where inmates were permitted to smoke tobacco in religious ceremonies outside of cell); *Farrow v. Stanley*, 2005 WL 2671541 * 5 (D.N.H. Oct. 20, 2005) (granting summary judgment to prison officials where system-wide prohibition on pure tobacco did not impose substantial burden because prison policy permitted use of kinnikinnick and tobacco mixture).

Despite the Warden’s testimony that he had tried “everything he could think of,” he did not even consider the alternatives to a complete ban that exists in written policies of several maximum security institutions, other than possibly Minnesota, that allow Native Americans to use tobacco for their religious purposes. (T 590). The widespread use of less restrictive alternatives in all of these other facilities lends substantial credence to the practicality and workability of the less restrictive alternatives to a complete ban on the use of tobacco in Lakota religious ceremonies that the Defendants never considered or attempted to implement. *C.f. Spratt v. Rhode Island Dep’t of Corrections*, 482 F.3d 33, 42 (1st Cir. 2007) (explaining that ability of federal prison system to accommodate religious exercise with less restrictive alternatives constituted evidence of feasibility of such measures in state prison system for purposes of RLUIPA). As a result, the Defendants have completely failed to meet their affirmative burden of proof on this element of RLUIPA as well, warranting judgment in favor of the Plaintiffs.

CONCLUSION

The Plaintiffs appreciate Warden Weber's attempts on various levels to work with them in accommodating their religion. In fact, NACT even assisted in presenting the Warden with a Star Quilt from the Oglala Sioux Tribe, a great honor and sign of respect. (T 169-70, 174, 536-37). Federal law, however, prohibits the prison administration from completely removing tobacco from the Plaintiffs' traditional Lakota religious ceremonies where that action is not in furtherance of a compelling governmental interest or available less restrictive alternatives were not considered, as evident in this case. The Defendants have already conceded that appropriate injunctive relief entered by this Court on the Plaintiffs' RLUIPA claim would be deemed applicable to all adherents to the traditional Lakota religion confined to the South Dakota Department of Corrections. (T 571). As to their remaining claims brought pursuant to the First and Fourteenth Amendments, the Plaintiffs seek no further relief.

The Plaintiffs respectfully request that this Honorable Court enter judgment in their favor on the RLUIPA claim and grant appropriately tailored injunctive relief permitting them and their fellow inmates who practice the Lakota religion to use tobacco in their traditional religious ceremonies as their indigenous ancestors have done on this continent from time immemorial.

Dated this 18th day of May, 2012.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy **Plaintiffs' Post-Trial Brief** was served via electronic filing upon:

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