UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

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CIV. 09-4182

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

Plaintiffs,

vs.

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

Defendants.

DEFENDANTS' POST-TRIAL BRIEF

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After a three-day trial before the Court, Defendants Douglas Weber and Dennis Kaemingk offer this brief to discuss the evidence produced at trial and its application to the Plaintiffs' claims under RLUIPA and the United States Constitution, and to respond to the Plaintiffs' post-trial brief (Doc. 173).

1. Relevant facts

a. The history of tobacco use in Native American spirituality in the DOC.[1]

Cigarettes were banned throughout the South Dakota Deparment of Corrections in 1998 due to many problems associated with smoking. (Tr. at 3.545-46.)[2] Chewing tobacco was still allowed, but was also banned in 2000 for the same reasons and because former smokers became chewers. (*Id.* at 3.546-47.) Tobacco remained available, however, for Native American spiritual uses, until the decision was made in 2009 to remove it altogether. (*Id.* at 2.238-39, 2.301-02; Exs. 109, 110, 103.)

The decision was the result of "a very long process," including, as the Warden testified, "at least nine years of efforts to try to control the problems we were experiencing with still allowing tobacco in for the Native American ceremonies." (*Id.* at 3.547-48.) Initially, Mary Montoya brought tobacco into the SDSP and the Jameson Annex where it was distributed to inmates. Pipe carriers could obtain tobacco for use in ceremonies and keep it in their cells. (*Id.* at 2.242-43.) Beginning in 2005, tobacco could not be kept in an inmate's cell. (*Id.* at 2.243.) Instead, it was kept in locked boxes

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[1]The Plaintiffs' brief refers to books and treatises that were not discussed or introduced at trial. (*See*, *e.g.*, Pls' Br. at 10 n.5.) The Defendants object to reliance on texts that are not in evidence. If the issue is not subject to judicial notice, the decision should be based on the trial record. *See*, *e.g.*, *Clark v. Internal Revenue Service*, 2011 U.S. Dist. LEXIS 81839, at *4 n.1 (D. Haw. July 26, 2011) (refusing to take judicial notice of matters not presented at trial).

[2]All of the transcript references are to __.__, volume followed by page.

in the offices of unit staff. (*Id*. at 2.241-42.) Earlier, in 2004, the DOC sponsored a spiritual conference to which multiple spiritual leaders were invited and the importance of the use of tobacco was discussed. (*Id.* at 2.243.) The conference was called by the Warden because of problems, and invitations were sent to spiritual leaders previously approved by security. (*Id.* at 3.471.) In addition to DOC staff, at least three spiritual leaders attended, namely John Around Him, Rick Two Dogs, and Charlie White Elk. (*Id.* at 2.244.) As a result of the spiritual conference, the amount of tobacco allowed was changed to a 50/50 mixture of tobacco and red willow bark, or cansasa, and only 1/4 cup of tobacco would be allowed for each ceremony. (*Id*. at 2.244-45.) It had previously been unlimited. (*Id.*) In July, 2005, the mixture was further changed to 25% tobacco, 75% cansasa, and the tobacco had to be ground. (*Id.* at 2.245-47, Ex. 133.)[3] The amount of tobacco in the mixture was later reduced to 1/8 cup. (*Id.* at 2.459, 3.472.)

In addition to these steps, in early 2009, the Native American Council of Tribes (NACT) itself imposed a six-month ban prohibiting inmates who were disciplined for abusing tobacco from purchasing pipe mixture containing tobacco. (*Id.* at 1.134; 2.248.) In the summer of 2009, the DOC started policing the ban because NACT's enforcement was ineffective. (*Id.* at 2.249-50.) Mary Montoya testified that from 2007 to 2008, the

[3]Only the tobacco, not the mixture (Pls' Br. at 13), was ground. (Tr. at 3.474.)

amount of tobacco being purchased for spiritual ceremonies increased markedly. (*Id.* at 3.476-77; Ex. 148.)

Only after these steps failed to curtail the abuse of tobacco did the Defendants impose a complete ban.

b. The conflicting positions of spiritual leaders.

It is undisputed that Native American spiritual leaders disagree whether it is essential to use tobacco in the ceremonial pipe or in tobacco ties. Richard Moves Camp testified for the Plaintiffs that tobacco is traditional and essential. (*Id.* at 1.27-28, 1.34, 1.51.)[4] Roy Stone, a Lakota spiritual leader from Rosebud, testified that the inmates do not need to use commercial tobacco, and that cansasa is traditional for the Lakota. (Stone depo., Doc. 153-2, at 11-12.) Rick Two Dogs, a Lakota spiritual leader from Porcupine on the Pine Ridge Reservation, testified that inmates do not need to use commercial tobacco in their pipes or ties and flags, and that cansasa is traditional and acceptable. (Two Dogs depo., Doc. 153-1, at 18-19; Ex. 143.) Through a written statement he brought to his deposition, and which was admitted as Exhibit 143 (Tr. at 3.598), Two Dogs testified that, "[i]deally, the sacred red willow bark should be used for making the canli wapahta (chanh-lee wah-pahta) or tobacco ties and waunyeyapi (prayer

[4]Moves Camp testified that tobacco is a sacrament and an offering, but that "doesn't mean we smoke it all the time. That has nothing to do with it." (Tr. at 1.51.)

flags)." (Ex. 143.) Breon Lake, a Dakota spiritual leader from Flandreau, testified that the White Buffalo Calf Woman brought cansasa for use in the pipe, and that cansasa is therefore traditional. (Tr. at 2.338-40.) Sidney Has No Horses, a spiritual leader from the Pine Ridge Reservation, testified that he uses cansasa in his pipe because that was what he "was taught generation after generation. We used the cansasa in that sacred bowl, in that sacred bowl that is connected to that stem." (*Id.* at 2.372.)[5] Stone, Two Dogs, and Has No Horses are all spiritual leaders who were invited to the SDSP by NACT. (*Id.* at 1.125; 1.182.) Clayton Creek testified that he did not object to any of them being invited to the SDSP. (*Id*. at 1.125-26.)

It is also undisputed that cansasa, or red willow bark, is traditional to Lakota spirituality. Richard Moves Camp agreed that the White Buffalo Calf Woman brought cansasa to the Lakota, and that it was traditional for the Lakota people to smoke cansasa. (*Id.* at 1.63.) Moves Camp uses a mixture of cunli and cansasa in his own pipe--about 5% cunli, but as little as 1%, and the rest cansasa. (*Id.* at 1.29-30, 1.63-64.) Thus, there was no evidence at trial that by allowing inmates to smoke cansasa, the Defendants are compelling the Plaintiffs to use something that is not traditional to the Lakota people.

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[5]Based on the testimony of Two Dogs and Stone, it is incorrect that "[e]very Lakota medicine man or traditional leader (the preferred term) uses tobacco in traditional religious ceremonies." (Pls' Br. at 10.)

Both Creek and Brings Plenty testified that they have continued to smoke their pipes using cansasa. (*Id.* at 1.144; 1.192.)

All of the spiritual leaders called by the Defendants testified that the pipe is used for prayer, that the smoke carries the prayers to the Creator or the Great Spirit, and that it is possible to pray without using a pipe. (*Id.* at 2.339-40, 342; 2.370-72; Stone Depo. at 10; Two Dogs Depo. at 17.) Richard Moves Camp testified that without tobacco "[i]t would be hard for [a Lakota] to pray. I guess you'd have to really go deep within." (Tr. 1.55.) Moves Camp also testified that people who are not pipe carriers "still find a way to pray." (*Id*. at 1.62.) The record therefore does not support the statement that for a Lakota, the tobacco ban "is taking away their ability to pray in the way that their religion teaches." (Pls' Br. at 11.)

c. Native American spirituality in context at the SDSP.

Native American inmates are afforded an array of opportunities for spiritual exercise. The weekly schedule of events at both the SDSP and Jameson was in evidence. (Ex. 112, 113.) There are two weekly sweat ceremonies at both the SDSP and Jameson. (Tr. at 2.225.) There is a sweat lodge at every DOC facility in South Dakota. (*Id.* at 2.219.) Approximately 35 inmates can fit in the sweat lodge. (*Id*. at 1.127.) The sweats are not supervised by a volunteer or a correctional officer. (*Id*. at 1.128; 2.226.) There are also two weekly pipe ceremonies at the SDSP and Jameson, and one at Unit C, the

minimum-security unit. (*Id*. at 2.219-20.) There are also sweats for special reasons, like a family death, the opportunity to participate in making tobacco or prayer ties, NACT or LDN council meetings, Native American Church,[6] Native American culture class, and spiritual conferences. (*Id.* at 2.229-31.) The activities for both Creek and Brings Plenty were documented in Exhibit 132. (*Id.* at 2.228-29.) Clayton Creek, for instance, testified that he attends sweats every week, that he has attended NACT and LDN council meetings, that he goes to pipe ceremonies every week, that he participates in making prayer ties every week, and that he has taught a class on Native American culture since 2004. (*Id.* at 1.119-23.) In general, Jennifer Wagner testified that Native American inmates are allowed more activities than many other religious groups, and more activities than are allowed in neighboring states. (*Id.* at 2.228, 2.238.)

The evidence was undisputed that the Warden encourages religious observance in general and Native American religious activities in particular. (*Id.* at 3.531-32.) The evidence was also undisputed that the Warden has worked to foster good relationships with the tribes throughout South Dakota. (*Id.* at 3.534-37.)

d. Tobacco for spiritual uses was abused.

[6]Inmates smoke the ceremonial pipe at Native American Church at the SDSP. (Tr. at 2.231.)

It is undisputed that after the general tobacco ban starting in 1998, tobacco has been contraband except when authorized for use in spiritual ceremonies. It is also undisputed that the tobacco available for Native American spiritual ceremonies was abused.

Both Brings Plenty and Creek were disciplined for abusing tobacco. Creek was disciplined on June 13, 2006 for having a plastic bag and yellow envelope containing tobacco that was divided up into small packages. (*Id.* at 1.135-36; Ex. 121.) Creek was also disciplined for an incident on July 8, 2005, when he gave tobacco from his pipe mixture to another inmate. (*Id*. at 1.136-37; Ex. 122.) Creek was disciplined again on April 6, 2005, for having an envelope stuffed with a small bag of tobacco and cigarette rolling papers. (*Id.* at 1.137-38; Ex. 124.) On July 28, 2003, Creek was written up for having tobacco in a sock stored in his locker box. (*Id.* at 1.139-40; Ex. 127.) Creek also testified that there were inmates who he thought attended a sweat or a pipe ceremony because they wanted tobacco. (*Id.* at 1.132.)

Brings Plenty was disciplined on April 25, 2008, for having a bag of Zigzag rolling papers containing a trace of tobacco in his pocket. (*Id.* at 1.186; Ex. 116.) On December 13, 2006, after making tobacco ties, Brings Plenty was written up for having a small pouch hidden in his pipe bag in which he had tobacco and a small screen. (*Id.* at 1.188; Ex. 117.)

Breon Lake testified not only as a spiritual leader, but as a former inmate from 2005-2007. (*Id.* at 2.331-32.) Lake testified that as a pipe carrier, he was approached by other inmates who offered him sodas and tokens in exchange for his pipe mixture. (*Id.* at 2.336.) He saw that other inmates who were pipe carriers "would have stores" and were "wealthy." (*Id.*) He asked that tobacco be removed from his pipe mixture, and that he was threatened because of it. (*Id.*) He saw Native Americans "picking apart the tobacco," removing and discarding the cansasa. (*Id.* at 2.337.) Lake saw inmates take the tobacco they obtained to roll cigarettes with it, and said that there was a black market for tobacco. (*Id.* at 2.339.) It was valuable. "If you had tobacco, you were the big man in there. You were a rich man." (*Id.* at 2.339.) He testified that he was threatened by inmates. (*Id.* at 2.338.) Lake's firsthand account was undisputed.

Beginning in early 2009, NACT and LDN kept a list of inmates banned from purchasing pipe mixture for six months. (*Id.* at 2.248; Ex. 146.) The list itself is persuasive evidence of a problem. Mary Montoya testified that she posted the list in her office, and not one inmate on the list ever challenged his name being on the list. (*Id.* at 3.475.)

Jennifer Wagner testified that she learned of abuses "almost immediately" when she became the Cultural Activities Coordinator in 2003. (*Id.* at 2.209, 2.233.) She learned that the inmates were taking pages made of rice-paper from Bibles and using

them to roll cigarettes with tobacco that was separated from the pipe mixture[7]; that Mary Montoya's nickname among the inmates was "Tobacco Packin' Mama," and that she had posted a sign above her office door that said "No tobacco stored here." (*Id.* at 2.234.) Based on the disciplinary reports that she saw and conversations with security staff, Wagner knew that tobacco was contraband that could be used to pay off gambling debts, for gang activity, and for sexual favors. (*Id.* at 2.235.)

Warden Weber also testified to the challenges posed by tobacco abuse. Recognizing that "[s]ecurity is the top thing we do, the No. 1 priority, safety and security," (*id*. at 3.538), Weber testified that contraband is a serious issue that the DOC handles aggressively with cameras, security staff, searches, and dogs, among other means. (*Id.* at 3.540-41.) He was aware after the general tobacco ban in 1998 that tobacco available for Native American spiritual purposes created a black market in the institutions. (*Id.* at 3.549.) Part of the basis for his knowledge was conversations with inmates who have talked to him "dozens and dozens of times each year about the problems caused by certain individuals who may want the trafficking contraband, and the problems they are causing them and others." (*Id.*) Weber testified to his knowledge of inmate-on-inmate violence related to the possession of tobacco as contraband. (*Id.* at

[7]This particular abuse was written into DOC policy. (Ex. 109 at NACT 013, ¶ D.3.)

3.549-50, 3.575.) He testified that he was aware of instances when Native Americans making tobacco ties were caught smoking the tobacco there, and that the tobacco that was ground for use in the pipe mixture was "confiscated out in the general population." (*Id.* at 3.550-51.) He testified to rule infraction reports in which inmates admitted that the contraband tobacco they had came from tobacco intended for spiritual ceremonies. (*Id.* at 3.551.)

Notably, the DOC acted in part based on concerns about addiction to tobacco motivating some inmates who were not sincere about their attendance at spiritual ceremonies. Charlie White Elk had talked to Mary Montoya about his observation of inmates coming to ceremonies who looked like addicts (*id.* at 3.506), and Montoya testified that she had observed addictive behavior at ceremonies. (*Id.* at 3.518.)

e. The decision to ban the use of tobacco in Native American spirituality.

When asked how long it took him to conclude that a tobacco ban for all uses throughout the DOC was necessary, Weber answered, "[a] very long time. All of the nine-year period." (*Id.* at 3.552.) Following the spiritual conference in 2004 and the various efforts taken to reduce the amount of tobacco trafficking inside the DOC's prisons, Weber met with Sidney Has No Horses when Mary Montoya called him to say

that Has No Horses wanted to meet with him. (*Id.* at 3.555.)[8] Weber testified that Has No Horses said "that he thought tobacco should not be allowed at the prison." (*Id.* at 3.555.) He said that Has No Horses "totally agreed it was a problem," and that "he felt very strongly about the subject, about not wanting any tobacco inside the prison." (*Id.* at 3.555-56.) Mary Montoya's recollection was similar. She first heard Has No Horses address the inmates with whom he was meeting. He told them "that they should not be using commercial tobacco in their ceremonies." (*Id.* at 3.478.) When Has No Horses met with Montoya and the Warden, he told the Warden "he thought that tobacco should be taken out of the Penitentiary because it was not something traditional." (*Id.* at 3.479.) Montoya made notes of the conversation, in which she stated that Has No Horses said that he was "removing cunli from the prison." (Ex. 105.) She testified that she used those words because the inmates had asked Has No Horses "to be, for lack of a better word, to be their main medicine man," and that "[h]e thought, as such, he had the authority to tell them what to do in the spiritual matter, so he told them that he was removing tobacco." (Tr. at 3.480.) She thought it "was a very historical occasion." (*Id.*)[9]

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[8]The meeting was arranged at the request of Has No Horses. It was not "a chance conversation." (Pls' Br. at 14.)

[9] Has No Horses testified at trial that he uses tobacco like American Spirit in his tobacco ties. (Tr. at 2.380-81.) He testified both that he did and did not discuss that

After the meeting, the Warden told Jennifer Wagner that she needed to consult other spiritual leaders and medicine men. (*Id.* at 2.250.) She "continued conversations" she had previously had with Charlie White Elk, Rick Two Dogs, Roy Stone, and Bud Johnston. (*Id.* at 2.250-52.) White Elk, who is deceased, wrote a letter in which he supported the idea of removing tobacco from spiritual ceremonies. (*Id.* at 2.251-52; Ex. 138.)[10] Based on this support, Weber discussed the idea of a tobacco ban with the Secretary of Corrections, Tim Reisch, and then decided to implement the ban. (*Id.* at 3.557.) Weber testified that he made the decision after trying everything else he thought could correct the problem. "We had tried everything we knew to do and weren't being real effective. So the decision was made then to take tobacco out completely." (*Id.* at 3.552.) Weber repeated that he "didn't think there were anymore options available." (*Id.*

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subject with the Warden and Mary Montoya. (*Id*. at 2.380-81, 2.383.) He also testified that he later spoke to Mary Montoya and told her that if an inmate desecrated a tobacco tie by removing the tobacco, the individual inmate should be punished, "not the whole populous." (*Id*. at 2.394.) Both the Warden and Mary Montoya testified that Has No Horses clearly told them at the Penitentiary that all tobacco should be removed, and that they did not think there was a misunderstanding. (Tr. at 3.585-86, 3.498.)

[10]The letter was not received for the truth of the matter asserted, but to show that the DOC acted in part on the letter. (Tr. at 2.252.) The letter was later re-offered, but refused, to prove the truth of the matter asserted based on corroborating testimony from Mary Montoya. (*Id.* at 3.506; 3.598-99.) In the letter, White Elk discussed his observation of "addictive behavior patterns," and stated that he supported the positions of Has No Horses and Roy Stone concerning the use of mixing commercial tobacco with "traditional pipe tobacco for use in their ceremonies." (Ex. 138.) Nothing in the contemporaneous documents limits the discussion to smoking tobacco in the pipe.

at 3.559.) The decision was made public to tribal liaisons, spiritual leaders, pipe carriers, and sundancers through a letter from the Warden dated October 19, 2009. (Ex. 103.) After sending the letter, Weber heard back from no one. "Nobody called me to ask if there were exceptions or why I had gotten to the point I had gotten to, other than the explanation in the letter. No one, not one single person, called me to talk to me about it." (Tr. at 3.558-59.)[11] Jennifer Wagner testified that she talked to several tribal liaisons, who told her that they "understood that we had tried everything that we could, and they respected the decision." (*Id*. at 2.258; 2.320-21.) Wagner also testified that several inmates thanked her for the decision. (*Id*. at 2.258.) Moves Camp, for instance, saw "some media, newspapers somewhere that said something about tobacco banning," but did nothing until he was contacted by counsel about a month before trial. (*Id*. at 1.59-60.) Moves Camp has not been to the SDSP since the 1980's, when he visited an incarcerated relative. (*Id*. at 1.58.)

The evidence does not support either the claim that after the meeting between the Warden and Has No Horses, the prison administration "immediately leaped into action"

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[11]The statement in Plaintiffs' Brief that the Oglala Sioux Tribe supports the inmates' use of tobacco (Pls' Br. at 17) is apparently based on proposed Exhibit 13, a recent letter from John Yellow Bird Steele, which was refused at trial. (Tr. at 1.205.) To the extent the statement is based on a question at trial depending on Yellow Bird Steele's letter, it was based on hearsay. (Tr. at 2.292-93.) Sidney Has No Horses testified at trial that Yellow Bird Steele is Catholic "and he had no knowledge of the traditional way." (*Id*. at 2.392.)

(Pls' Br. at 15), or the statement that the spiritual leaders with whom Jennifer Wagner conferred could not "speak for the traditional Lakota religion practiced by Brings Plenty, Creek, and other inmates in the state prison system." (*Id.*) It is undisputed that Roy Stone, Rick Two Dogs, and Sidney Has No Horses were all Lakota spiritual leaders invited to the SDSP or Jameson by NACT or LDN. (*Id.* at 1.125, 1.182.)[12]

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[12]Only Clayton Creek testified that Two Dogs and Stone are members of the Native American Church. (Pls' Br. at 11; Tr. at 1.107.) Neither Two Dogs nor Stone was asked that question by Plaintiffs' counsel at their depositions, which were taken for use at trial. (*See* Docs. 153-1, 2.) Both testified, however, that they are recognized Lakota spiritual leaders on the Pine Ridge and Rosebud Reservations (Two Dogs depo. at 5-7; Stone depo. at 6-7), and they have been invited to the SDSP by NACT, so it is unclear why Plaintiffs think that they cannot speak to issues in the case. Two Dogs and Stone have both led traditional Lakota ceremonies at the SDSP. (Stone Depo. at 9; Two Dogs Depo. at 11-12.) Two Dogs learned from and was trained by Thomas American Horse and his uncle Joseph Horn Chips. (Two Dogs Depo. at 6.) He is related to Richard Moves Camp. (Two Dogs Depo. at 9; Tr. at 1.67-68.)

Everyone testified to differences in practice and belief. Sidney Has No Horses testified at trial that part of his family are members of the Native American Church, and that he uses peyote, which is not traditional Lakota. (Tr. at 2.385.) Has No Horses testified that the Native American Church people "won't touch the pipe" (*id.*), but it is undisputed that the Native American inmates at the SDSP who attend Native American Church smoke the pipe. (Tr. at 2.231.) Breon Lake, who is Dakota, testified that he is a member of the Native American Church, but that his branch of the church practices "the pipe ways," and does not use peyote. (*Id.* at 2.348-49.) Creek testified that his "religion is the sweat lodge." (*Id.* at 1.107.) Brings Plenty has attended both Native American Church and St. Dysmas, which is a Christian service. (Tr. at 1.183-84; Exs. B2, 118.)

Thus, Creek's testimony is insufficient to establish that Stone, Two Dogs, and Has No Horses as Lakota spiritual leaders invited to the SDSP by NACT are unqualified to address the issues in this case. There is similarly no reason to conclude that the testimony of Lake and Has No Horses is irrelevant because they do not agree on all

f. The DOC's position is unique.

While Jennifer Wagner testified that she did some research into the practices in surrounding states as part of her work investigating ways to control tobacco used for spiritual ceremonies, her research supports the conclusion that the DOC's position is unique among correctional institutions because of the significant population of Native American inmates in South Dakota. Wagner testified that the DOC tracks inmates by tribal affiliation, and that most of the Native American inmates in South Dakota are Lakota; the largest group, 27.4%, come from the Pine Ridge Reservation. (Tr. at 2.231-33; Ex. 114.)[13] Of the total inmate population, Native Americans are approximately 27%. (*Id.* at 2.233.) That number is high compared to other states, with the next highest being about 10%. (*Id.*)

2. The tobacco ban does not violate RLUIPA.

a. The ban is not a substantial burden.

Under RLUIPA, "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that the imposition of the burden on that person–(1) is in

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issues with the Plaintiffs.

[13]Plaintiffs are incorrect in stating that "the vast majority" of Native Americans in DOC custody are affiliated with the Oglala Sioux Tribe. (Pls' Br. at 3.)

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. The plaintiff bears the initial burden of proving that a prison regulation imposes a substantial burden on religious exercise. "Religious exercise" is defined by RLUIPA as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7).

RLUIPA does not define "substantial burden." The Eighth Circuit Court of Appeals has held, "largely consistent with [its] First Amendment cases, that to demonstrate a substantial burden on the exercise of religion, a government policy or action 'must significantly inhibit or constrain religious conduct or religious expression; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion.'" *Van Wyhe v. Reisch*, 581 F.3d 639, 656 (8th Cir. 2009) (quoting *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008)). This constitutional standard is only "somewhat" altered based on RLUIPA's definition for "religious exercise" that extends to religious practices not "compelled by, or central to" a certain belief system. *Id.*

The Eighth Circuit has not addressed whether providing cansasa rather than tobacco to Lakota and other Native American inmates substantially burdens their

religious exercise under RLUIPA. The Eighth Circuit has, however, upheld the prison's decision to limit the tobacco allowed Native American inmates because limiting the amount of tobacco does not substantially burden religious exercise, and compelling governmental interests for safety and security support a tobacco limitation. *See Runningbird v. Weber*, 198 Fed. Appx. 576 (8th Cir. 2006), *affirming* 2005 U.S. Dist. LEXIS 25234 (D.S.D. 2005). The reasoning in both the Eighth Circuit's and district court's opinions in *Runningbird* also supports upholding the prison's complete tobacco ban.

The district court decision in *Runningbird* held that under RLUIPA, "[a] prisoner need not be afforded his preferred means of practicing his religion as long as he is afforded sufficient means to do so." 2005 U.S. Dist. LEXIS 25234 at * 9 (quotation omitted). The district court noted that Native American inmates are provided numerous, reasonable opportunities to practice their religion, including access to religious artifacts and participation in religious ceremonies. *Id*. at 9-10. Therefore, limiting the amount of tobacco given to inmates did not substantially burden Runningbird's religious exercise. *Id.* at 10; *see also Van Wyhe*, 581 F.3d at 657 (prison "must permit a reasonable opportunity for an inmate to engage in religious activities but need not provide unlimited opportunities"); *Wickner v. Symmes*, U.S. Dist. LEXIS 7834 (D. Minn. 2007) (although Native American inmate cannot participate in smudging and pipe ceremonies, inmate can

still study the scriptures, pray, and meet with clergy, observe holy days, and worship in other ways).

Other decisions from the Eighth Circuit and outside jurisdictions also support a conclusion that allowing Native American inmates to use red willow bark rather than tobacco does not substantially burden their religious exercise. For example, a New Hampshire district court held that allowing kinnikinick, a tobacco alternative, does not substantially burden the religious exercise of a practicing member of the Lakota Sioux Nation. *See Farrow v. Stanley*, 2005 U.S. Dist. LEXIS 24374 *14-16 (D. N.H. 2005) (granting prison's motion for summary judgment and dismissing RLUIPA claim); 2004 U.S. Dist. LEXIS 1518 * 14-15 (D. N.H. 2004) (denying motion for temporary injunction because prison tobacco ban did not substantially burden inmate's religious exercise).

In *Farrow*, prison officials decided to use kinnikinick as a tobacco substitute after they consulted with several members of the Native American community. *Id.* The Native American community responded that "tobacco is not essential to the practice of Farrow's religion since 'the creator looks at the intent in the prayer not the offering in one's hand.'" 2004 U.S. Dist. LEXIS 1518 at * 15. After consulting members of the Native American community, prison officials determined that using kinnikinick was acceptable and did not cause Native American inmates to violate their religious beliefs or

depart significantly from religious traditions. 2005 U.S. Dist. LEXIS 24374 at *14-16. For this reason, the court granted summary judgment. *Id.*

An Alabama district court agreed that no substantial burden exists when Native American inmates have access to a tobacco alternative rather than tobacco. *See Adams v. Mosley*, 2008 U.S. Dist. LEXIS 73879 (M.D. Ala. 2008), adopting recommendation, 2:05-CV-352-MHT (Doc. 104 at 19-20) Sept. 5, 2008 (granting summary judgment in favor of prison officials where Native American inmate failed to demonstrate how use of the tobacco-free herb kinnikinick rather than tobacco itself imposes a substantial burden on his religious exercise or causes him to depart significantly from his religious traditions). The court recognized that "Adams would prefer the use of tobacco during various Native American ceremonies and rituals," but he failed to "show why the alternative herb, which is available to him, is not sufficient for his religious needs." *Id.* The court concluded that the tobacco ban did not burden his religious exercise. *Id.*

The Plaintiffs fail to prove a substantial burden for the same reason. The Plaintiffs and Richard Moves Camp contend that tobacco is fundamental to traditional Lakota spirituality. (Tr. at 1.27-28, 34, 51.) But they fail to explain why the alternative, cansasa, which is available and also is indisputably traditional to the Lakota religion, is not sufficient for their religious needs. Plaintiffs' own expert uses between 95% and 99% cansasa in his pipe and testified that, although tobacco is a sacrament and offering,

that "doesn't mean we smoke it all the time." (*Id*. at 1.51.) Cansasa is also an offering, and is a means of prayer. (Tr. at 1.62.)

RLUIPA prevents prisons from significantly inhibiting an inmate's religious expression, meaningfully curtailing his ability to adhere to his faith, or depriving him of a reasonable opportunity to engage in religious activity. *Van Wyhe*, 581 F.3d at 657. Here, the record establishes that for some Lakota, a mixture of tobacco and cansasa is used in spiritual ceremonies, for others, only cansasa is used. Because cansasa is indisputably traditional, the Plaintiffs are not denied a meaningful opportunity to practice Lakota spirituality.

At some point the question relates to sincerity. The Supreme Court has held that prison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic: "Although RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion, . . . the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity." *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005). Given the traditional use of cansasa and the conflicting teachings, beliefs, and practices of different Lakota spiritual leaders, the Plaintiffs' position becomes somewhat dogmatic. Given their own disciplinary records and their attendance at Native American church or Christian services, there is a factual basis to conclude that their position is not sustainable. When the evidence supports the

use of 99% cansasa and 1% tobacco, the Court can reasonably conclude that the burden is not substantial.

b. Prison order and security is a compelling governmental interest.

"A prison's interest in order and security is always compelling." *Fowler v. Crawford*, 534 F.3d 931, 939 (8th Cir. 2008). In *Fowler*, the Eighth Circuit readily accepted the proposition that the prospect of allowing a sweat lodge at the Jefferson City Correctional Center created serious safety and security concerns satisfying the prison officials' burden of proving that prohibiting a sweat lodge was in furtherance of a compelling governmental interest. *Id.* The court reached this conclusion based on "JCCC officials' legitimate fears," and held that officials "need not endure assaults, drug indulgence, or sexual improprieties before implementing policies designed to prevent such activities in an uneasy atmosphere." *Id.*

In this case, the Defendants have not acted based on their fears, but on their actual experience, over nine years, dealing with tobacco. The evidence was not speculation about what might happen; it was evidence of what happened. The evidence established that:

- both Brings Plenty and Creek were disciplined for possessing tobacco, which both had access to as pipe carriers for spiritual ceremonies (Exs. 116, 117, 121-25, 127; Tr. at 1.75-76; 1.135-40; 1.154; 1.186-89);
- Brings Plenty was disciplined for having a screen in his tobacco pouch (Ex. 117; Tr. at 1.188-89);

- NACT itself recognized that tobacco was abused because it enacted a policy to prevent inmates who abused tobacco from obtaining pipe mixture, and no inmate whose name was on the list challenged that fact (Ex. 146; Tr. at 1.134, 2.248);

- tobacco that was ground for use in spiritual ceremonies was confiscated as contraband elsewhere in the institution (*id*. at 3.550-51);

- Breon Lake testified to his firsthand experience as an inmate to being threatened by inmates who wanted his tobacco (Tr. at 2.331-32, 2.336, 2.337-39);

- Lake testified to a thriving black market for tobacco (*id*. at 2.339);

- Mary Montoya testified to her personal observation of inmates attending ceremonies because they wanted to smoke tobacco (*id.* at 3.518);

- Charlie White Elk told Mary Montoya, and wrote a letter to the Warden, about his observation of inmates attending ceremonies who exhibited "addictive behavior" (Ex. 138; Tr. at 3.506);

- the DOC devoted staff and other resources to policing tobacco designated for spiritual ceremonies (*id.* at 3.552);

- Jennifer Wagner testified from her regular review of disciplinary reports and conversations with security staff that tobacco was used to pay off gambling debts and for sexual favors (Tr. at 2.234-35);

- the Warden and his senior staff discussed the problems and issues created by tobacco being allowed only for spiritual ceremonies on a regular, if not weekly, basis for over nine years (*id*. at 3.564, 3.549-50, 3.552);

- the Warden had conversations with inmates about the problems they faced because of the trafficking in tobacco (*id*. at 3.549-51);

- the Warden knows based on his experience that allowing inmates to run "stores" is "never good for anybody, the institution, or even the person who maybe is collecting contraband and reselling it" because eventually "he'll

get in trouble, either by us if we find out about it, or the other inmates will hurt him at some point, because they're either going to rob him, or they'll believe they've been ripped off by him, or they will incur debt, and somebody will need to collect on that debt. All of those things have happened and happened numerous times over the years." (*id*. at 3.548);

- when presented with the possibility of a tobacco ban, it was supported by multiple spiritual leaders who had been invited to the SDSP by NACT (Stone depo. at 12; Two Dogs depo. at 19; Exs. 106 (ruling reserved); 107, 138, 143; Tr. at 2.338-40; 2.372);

- the Warden concluded that tobacco for spiritual ceremonies created a safety risk to inmates and staff;

- after tobacco was removed from spiritual ceremonies, the number of disciplinary incidents related to possession of tobacco as contraband declined (Tr. at 3.563);

- after tobacco was banned, the number of inmates attending the time to make tobacco ties and the pipe ceremonies declined (*id*. at 2.259-60; Ex. 141);

- after tobacco was banned, the Warden concluded that the facilities are safer today than they were before (*id*. at 3.564).

Given their own disciplinary histories, Brings Plenty and Creek are in no position to dispute that a black market for tobacco existed, that inmates were disciplined for possessing tobacco as a contraband item, that inmates were threatened over their possession of tobacco, and that the Warden concluded that the situation presented an unacceptable risk to the safety of both inmates and staff.

Instead, Brings Plenty and Creek argue that the evidence was not specific or conclusive enough to meet the Defendants' burden. (Pls' Br. at 22-25.) The central

problem with this argument is that it ignores the deference due to prison officials in matters of prison safety and security.[14] The Eighth Circuit relied in *Fowler* on the Supreme Court's decision in *Cutter*, 544 U.S. 709, in which the Court held that Section 3 of RLUIPA did not violate the Establishment Clause. 534 F.3d at 941. In upholding the constitutionality of RLUIPA, Justice Ginsburg's opinion repeatedly stressed the deference due to prison officials. The Court stated "[w]e do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety." *Id.* at 722. The Court noted that "[w]e have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitive to security concerns." *Id.* The Court noted that "context matters," and that lawmakers who supported RLUIPA "were mindful of the urgency of discipline, order, safety, and security in penal institutions." *Id.* at 723. Quoting legislative history, the Court noted that lawmakers "anticipated that courts would apply the Act's standard with 'due deference to the experience and expertise of prison and jail administrators in establishing

[14]The argument that the 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 interest at those particular institutions" (Pls' Br. at 26) ignores the Defendants' agreement that any relief that the Court orders in the case would apply to DOC's facilities state-wide. Brings Plenty and Creek cannot reasonably obtain a state-wide remedy by fiat and yet require the Defendants to present evidence of the same issues at each institution to justify the ban. To the contrary, if there are relevant institutional differences, they would be equally relevant to the relief requested, which is the Plaintiffs' burden, as discussed below in section 3.

necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.'" *Id.* Finally, in noting the procedural context of the case, the Court noted that "[it] bears repetition . . . that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area." *Id.* at 725 n.13.

No such deference is anywhere to be found in the Plaintiffs' brief: Jennifer Wagner's testimony was not credible because she did not bring disciplinary reports or video (*id.* at 23); the Warden's testimony was not credible because he did not bring statistics on institutional violence (*id.* at 23); evidence that inmates were disciplined for abusing tobacco while making tobacco ties was not credible because there was no evidence of violence and no video of the incidents (*id.* at 24); evidence of tobacco-related violations by NACT members was insufficient because it did not establish a risk to safety and security (*id.* at 24); evidence that the situation changed after the ban was insufficient because it was not statistical. (*Id.* at 24-25.)[15] The mandate that the Court offer deference to the judgment and consideration of prison officials does not require this sort of proof. It is enough that the Defendants provided evidence of actual disciplinary

[15]Plaintiffs' argument that the Warden should have presented a monthly report for total disciplinary violations before and after the ban (Pls' Br. at 25) would have proved nothing. The Warden did not testify that he kept a log of disciplinary violations related to tobacco, only that he knew there were fewer based on conversations with his senior staff.

reports for the plaintiffs and others; evidence from a former inmate who observed inmates running stores based on tobacco trafficking and who personally was threatened because he had tobacco for spiritual ceremonies; evidence that NACT itself acted to prevent tobacco abuse; and evidence that the Warden concluded that tobacco threatened the safety and security of staff and inmates.

Finally, Brings Plenty and Creek argue that because prison officials relied on the opinions of spiritual leaders in supporting their decision to ban tobacco, the ban was not motivated by security concerns. (Pls' Br. at 21-22.) This argument that the Defendants' testimony is pretextual appears to be based on the Court's summary judgment decision, in which the Court noted that the evidence presented in support of the motion for summary judgment did not address security and safety: "[t]he record lacks any evidence that the October 2009 policy was motivated by defendants' concern for the safety or security of DOC facilities." (Doc. 109 at 18.) In asserting this argument following trial, the Plaintiffs rely on only two pieces of evidence, which were previously offered in support of the motion for summary judgment: the Warden's letter announcing the ban (Ex. 103), and Jennifer Wagner's e-mail of the same date (Ex. 108), both of which referred to the support of spiritual leaders for the decision. (Pls' Br. at 22.) The Warden's letter states in the opening paragraph, however, that tobacco tie mixtures and pipe mixtures had increasingly been abused, that many inmates had been caught

separating the tobacco, which was then sold or bartered to other inmates, and that the tobacco was being trafficked for reasons unrelated to the spiritual ceremonies for which it was intended. (Ex. 103.)

Moreover, that the Defendants relied on the advice and support of spiritual leaders in making and explaining the decision to ban does not mean that they acted without regard to security and safety. To the contrary, the Warden's letter states that the DOC reached out to Native Americans "to help prevent the abuse of tobacco." (Ex. 103.) Were this a mere pretext, presumably there would be some evidence of the Defendants' true motive, like an intent to discriminate against Native Americans practicing traditional Lakota spirituality. But no such evidence was presented at trial. To the contrary, the undisputed evidence established that the Warden has been solicitous and supportive of Native American spiritual practices and observance, which explains why the Warden investigated whether it was important to Native American spiritual practice to have tobacco. Under RLUIPA, the DOC could have imposed a ban without considering the extent to which it burdened the Plaintiffs' ability to practice their religion. It is ironic that the Defendants are now criticized because the DOC forestalled the ban until it was satisfied that Lakota spiritual leaders supported it. Moreover, contrary to the argument that the Defendants sought to justify the ban for religious reasons, the Warden clearly

testified that no spiritual leader could dictate policy or practice for the DOC. (Tr. at 3.587.)

The Court should consider the evidence presented at trial that was not part of the summary judgment record, which established that there were abuses resulting in disciplinary action, that a black market existed, and that the Warden concluded as a prison administrator that the situation was no longer tolerable. Given the deference due to prison officials, this evidence was legally sufficient to establish a compelling governmental interest in prison security.

c. The tobacco ban is the least restrictive means to achieve the State's interest.

After the Court concludes that the State imposed the tobacco ban in order to further a compelling governmental interest, the Court must determine whether the tobacco ban is the least restrictive means of furthering the compelling governmental interest. *See* 42 U.S.C. § 2000cc-1. In construing the least-restrictive-means test, the Eighth Circuit has noted that an overly-restrictive approach "would be inconsistent with congressional intent," and that the Supreme Court in *Cutter* counseled restraint and due deference to the experience and expertise of prison officials. *Fowler*, 534 F.3d at 941 (citing 544 U.S. at 722-23).

Other courts have agreed that a tobacco ban is the least restrictive means for addressing the safety and security concerns regarding tobacco in prisons. *See Roles v.*

Townsend, 64 P.3d 338, 339-40 (*Id*. App. 2003); *Brunskill v. Boyd*, 2005 U.S. App. LEXIS 8135, 141 Fed. Appx. 771 (11th Cir. 2005); *Smith v. Beauclair*, 2006 U.S. Dist. LEXIS 56561 (D. Idaho 2006). In *Roles*, the court recognized that the state's compelling interests included eliminating the black market for tobacco. *Roles*, 64 P.3d at 339-340. If inmates were allowed to have *any* tobacco it would jeopardize their safety, significantly burden prison staff and resources to regulate the tobacco use, and compromise prison staff. *Id*. Denial of tobacco was therefore the least restrictive means. *Id*.

In *Brunskill*, an inmate indicated that tobacco was necessary for the practice of his religion, but the prison denied his request for security, health, and safety reasons. 141 Fed. Appx. at 773. The Eleventh Circuit affirmed the denial of his request for tobacco because the denial was the least restrictive means of furthering compelling governmental interests in the security, health, and safety of inmates and staff. *Id*. at 776. Similarly, in *Beauclair* the Idaho district court dismissed as a matter of law a Cherokee inmate's RLUIPA claim challenging the prison's outright tobacco ban because the tobacco ban was the least restrictive means of furthering a compelling government interest. *Id*. at 26. The court concluded, "even under the stricter standard of RLUIPA, smoking and burning tobacco" will not be accommodated. *Id*. The tobacco ban was supported by "obvious

security concerns" and "other significant interests in the IDOC facilities that override [p]laintiff's request, such as the health effects on other inmates." *Id*.

In *Fowler*, the Eighth Circuit held that a plaintiff, to overcome the deference that is afforded prison officials, must provide "substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations." 534 F.3d at 938 (emphasis added) (quoting *Hamilton v. Schriro*, 74 F.3d 1545, 1553 (8th Cir. 1996)). Prison officials need not endure assaults, drug indulgence, or sexual improprieties before implementing policies designed to present such activities in an uneasy atmosphere. *Id*. at 939. Nor do prison officials charged with managing such a volatile environment need to present evidence of actual problems to justify security concerns. *Id*.

Based on this standard, the Defendants do not need to "'refute every conceivable option in order to satisfy the least restrictive means prong.'" *Fowler*, 534 F.3d at 940 (quoting *Hamilton*, 74 F.3d at 1556). As in considering whether the Defendants have established a compelling governmental interest, a district court must act with restraint and "'due deference to the experience and expertise of prison and jail administrators'" in considering the least restrictive means. *Id.* at 941 (quoting *Cutter*, 544 U.S. at 723). Thus, a district court must be careful not to construe the least restrictive means test so narrowly that federal judges become "'the primary arbiters of what constitutes the best

solution to every religious accommodation problem' in state penal institutions." *Id.* (quoting *Lovelace v. Lee*, 472 F.3d 174, 215 (4th Cir. 2006) (Wilkinson, J., dissenting)). In this context, the testimony of prison officials about why a possible alternative to the challenged action would not protect the state's interest in order and security must be rebutted "'by substantial evidence' that the officials exaggerated their response to security considerations." *Id.* (quoting *Hoevenaar v. Lazaroff*, 422 F.3d 366, 371-72 (6th Cir. 2005)).

Brings Plenty and Creek have proposed several alternatives to the total ban: (1) search all inmates attending sweats, pipe ceremonies, or the time set for making tobacco ties; (2) station a correctional officer inside the sweat lodge or allow tobacco only at sweats; (3) reduce the amount of tobacco to 10% or even 5% of the mixture; (4) station a correctional officer inside the room when tobacco ties are made; (5) allow only pipe carriers to make tobacco ties; (6) tighten up storage and distribution methods; (7) impose stiffer sanctions for tobacco abuse; (8) vary the policy by institution; and (9) limit tobacco to fewer ceremonies. (Pls' Br. at 27-28.) Contrary to the statement that "[n]one of these less restrictive alternatives was considered by the defendants before the total ban was instituted," (Pls' Br. at 29), the Warden addressed each one that was raised at trial in his testimony.

He testified that searches were impractical, staff-intensive, ineffective, and would appear to discriminate against Native Americans. Except for the random searches that have been done as a matter of course, the Warden testified that he

> would not consider searching every Native American inmate that participated in a sweat or any other Native activity, for that matter, because I don't do that with any of the other religious groups, the Buddhists, Christians, the Jewish inmates, the Asatru, or anyone else. I strongly believe if I were to search all Native Americans, I better be prepared to search all inmates who participate in cultural or religious activities, or I believe it sends a horrible message, and, frankly, I would be and probably should be in trouble for that practice.

(Tr. at 3.559-60.) He further testified that pat searches are ineffective.

> [T]rying to recover small amounts in which the tobacco bundles or ties would be of contraband off an inmate through a pat search is very ineffective. It usually is not going to be fruitful. It usually won't produce any contraband, just because inmates can be rather ingenious where they place these items on their body or on their person or in their clothing, which would make it virtually impossible to discover on a pat search.

(*Id.* at 3.560.)

Warden Weber testified that he considered limiting tobacco tie attendance to only pipe carriers. He testified that "[i]t was talked about," but he thought it would be "terribly unfair" for the DOC to determine who could attend a spiritual activity. (*Id*. at 3.560-61.) "Furthermore, I know that I learned that it was, in fact, pipe carriers, and in some cases Sundancers, and others who did, in fact, pick up rule infractions for trafficking in or using commercial-type tobacco either during or after their ceremonies.

So I think that would have been ineffective." (*Id.* at 3.561.) Both Brings Plenty and Creek are pipe carriers, and both had tobacco violations. Even after the ban, a past president of NACT has recently been disciplined for possessing tobacco. (Ex. 139; Tr. at 2.236.)

Warden Weber further testified that storage and distribution methods were secure and could not reasonably be improved. (Tr. at 3.561-62.) He was aware of only one instance when tobacco was stolen from Mary Montoya's office, and after that, tobacco was stored in a locked box behind a locked door. (*Id.*) Brings Plenty and Creek offered no evidence that additional staff could be available to carry tobacco directly to an activity. There was no evidence either that outside volunteers are available to make prayer ties, or that the idea, which was not presented at trial, would be acceptable for security reasons. A sealed prayer tie could obviously contain contraband.

The Warden testified that senior staff talked "over the years" about putting uniformed security staff in the room during each Native American spiritual ceremony, but he thought it would be ineffective, and he did not have sufficient staff to do it.

> We talked about 30-plus inmates in the room doing tobacco ties. In my mind a one-to-one, one inmate to one staff member, probably would have prevented any manipulation of that tobacco. Of course that's not feasible. So I could have placed a correctional officer in that room or two correctional officers in that room, if I had the staff, which I don't have for that particular post, but I could have done that. In my mind I would not have been effective. I would not have prevented anything. Staff are easily distracted. Staff are easily pulled in one direction when something

> happens, where they've maybe even left. Again, I think it could have easily been defeated if I would have assigned one or two correctional officers to that room.

(*Id.* at 3.562-63.)

Senior staff considered reducing the percentage of tobacco to 5% or 10%, but did not think it would change anything.

> We had gradually reduced the amount of tobacco over the years systematically until we got to the 25 percent mixture. It really didn't have a whole lot of effect. In my mind whether it's 25 percent or 10 percent or 5 percent, it's still tobacco, and it's still a sought-after commodity and still something that made some inmates very rich, and it also gave some inmates the currency and clout and influence they needed at the prison to do some sometimes less-than-honorable things.

(*Id.* at 3.563.)

There was also testimony about the efficacy of sanctions for tobacco abuse. There is no evidence in the record that the sanctions imposed were outside correctional standards, or that harsher sanctions would have had a greater deterrent effect. Notably, the disciplinary sanction imposed on Clayton Creek for having tobacco in his sock on July 28, 2003, was 20 days of disciplinary segregation, which is a fairly harsh sanction. (Ex. 127; Tr. at 1.139-40.) The sanction did not deter Creek, who was disciplined again for an incident on April 6, 2005, and given 10 days of disciplinary segregation. (Ex. 124; Tr. at 1.137-38.) The Warden testified that he does not favor long periods of disciplinary segregation; he sees it as poor correctional practice. "It's the last resort. It's

kind of a dead end. Not much good comes out of placing inmates in those units." (Tr. at 3.543.) He tells staff that he does not "want them to write a rule infraction report as the first option," and that where possible, disciplinary issues should be resolved informally. (*Id.*) Disciplinary segregation also "interrupts other positive things happening in inmates' lives, like the ability to participate in cultural activities or religious activities. It also, in all likelihood in the case of major rule infractions, would and could cause an inmate to stay in prison longer than his presumptive parole would dictate." (*Id.* at 3.544.) Jennifer Wagner testified that it would not be standard correctional practice to use administrative segregation, which is a long-term administrative placement starting at 90 days, for disciplinary reasons. (*Id.* at 2.324-25.)

The suggestion that policy and practice could vary by institution is contrary to the agreement Plaintiffs sought and obtained that any relief granted would apply throughout the DOC. (Tr. at 3.571.) The Plaintiffs offered no evidence about this alternative.

Finally, there was testimony about policies and procedures in other states, which the Eighth Circuit has said is not conclusive. "Courts have repeatedly recognized that 'evidence of policies at one prison is not conclusive proof that the same policies would work at another institution.'" *Fowler*, 534 F.3d at 941 (quoting *Spratt v. Rhode Island Dep't Corr.*, 482 F.3d 33, 42 (1st Cir. 2007)). If it were conclusive or persuasive in this case, for instance, that the Missouri Department of Corrections allows tobacco for Native

American spiritual uses, then *Fowler* was wrongly decided. At issue in *Fowler* was whether inmates could have a sweat lodge, the denial of which the Eighth Circuit upheld. 534 F.3d at 943. What happens in Missouri, in other words, is the inverse of what happens in South Dakota, where a sweat lodge is allowed, but tobacco is not. Indeed, in a number of cases, the courts have upheld the denial of a sweat lodge under RLUIPA. *Hamilton*, 74 F.3d 1545 (no RFRA violation for denying Native American inmates a sweat lodge); *Newberg v. Geo Group, Inc.*, 2011 U.S. Dist. LEXIS 68955*31-32 (M.D. Fla. 2011) (not having sweat lodge did not substantially burden Native American religious exercise under RLUIPA or First Amendment); *Hyde v. Fisher*, 203 P.3d 712, 723 (Idaho App. 2009) (denying sweat lodge was least restrictive means of serving compelling governmental interest); *Blake v. Howland*, 26 Mass. L. Rep. 335*23, 30 (Mass. Super. Ct. 2009) (no RLUIPA violation for either tobacco or sweat lodge ban); *Jonas v. Schriro*, 2006 U.S. Dist. LEXIS 69427*17 (D. Ariz. Sept. 25, 2006) (denying inmates sweat lodge did not violate RLUIPA).

The testimony about what happens at other institutions does not support a conclusion that there are less restrictive alternatives to the tobacco ban in South Dakota. In Minnesota, for instance, a small amount of tobacco is allowed for spiritual ceremonies, but under very restrictive conditions that would not work in South Dakota. Jennifer Wagner testified that in Minnesota "they do allow a small amount of tobacco, but it can

only be brought in by a Native American volunteer who is able to show his tribal enrollment papers. And if there is no volunteer, there is no ceremony, and there is no tobacco. They have one sweat every other week at one facility, and maybe one sweat a week at other facilities. Without the volunteers, no tobacco." (Tr. at 2.237.) The testimony was undisputed that it is difficult to get spiritual leaders to come to the SDSP and to other facilities to lead spiritual ceremonies, and that attendance has declined, likely for financial reasons. (Tr. at 2.448-49.) Moreover, unlike Minnesota, inmates in South Dakota have sweats that are unsupervised by either a volunteer or correctional staff, which makes Minnesota's practice on tobacco a poor comparison. As for other states with significant Lakota populations, Wagner testified that both North Dakota and Nebraska are tobacco free. (Tr. at 2.237, 2.288-89.) Iowa still allows anyone to smoke, so tobacco for religious ceremonies is not an issue. (*Id*. at 3.590.)

The Plaintiffs cite to a dozen cases in which tobacco use in a prison or correctional facility is mentioned (Pls' Br. at 30-31), but the cases generally do not address the third factor of RLUIPA. In many of the cases, the court mentions tobacco in dicta, and the policy or practice was not at issue and not part of the holding of the case. *See, e.g., Hopson v. TDCJ-CID*, 2011 WL 4554379 (E.D. Tex. Sept. 29, 2011) (case decided based on exhaustion of administrative remedies); *Newberg*, 2011 U.S. Dist. LEXIS 68955 (challenge to "smoke free" policy was moot based on new policy, so court

did not consider merits of Free Exercise Clause challenge); *Vega v. Rell*, 2011 WL 2471295 (D. Conn. June 21, 2011) (plaintiff was muslim inmate who wanted his prayer rug cleaned and sprayed with perfume or air freshener and noted that Native Americans can burn tobacco). In some of the cases in which some aspect of a tobacco policy was directly at issue, the court found that the policy did not substantially burden the inmate's religious exercise. *See, e.g., Delgado v. Ballard*, 2011 WL 7277826 (S.D. W. Va. Oct. 6, 2011) (policy allowing use of mixture of tobacco and red willow bark did not substantially burden inmate's free exercise), adopted by 2012 U.S. Dist. LEXIS 16807 (as a matter of law, tobacco ban is least restrictive means for furthering multiple compelling governmental interests; *Bostwick v. Oregon Dep't of Corrections*, 2011 WL 1261168 (D. Or. Mar. 31, 2011) (policy precluding inmates from keeping tobacco in their cells but allowing religious volunteers to bring tobacco for ceremonies was not substantial burden). Given the admonition in *Fowler* that what works at one prison is not conclusive proof of what will work at another, 534 F.3d at 941, these cases do not establish the availability of alternatives to the tobacco ban that will work in South Dakota.

In their brief, Brings Plenty and Creek also offer evidence based on a policy of the Federal Bureau of Prisons. (Pls' Br. at 29.) The cited program statement from 2004, however, provides that each institution should adopt its own procedures for the use of

tobacco, which makes the issue inappropriate for judicial notice, given that there is no evidence of a policy or practice at any particular federal institution. *See Wood v. Krenz*, 392 N.W.2d 395, 398 (N.D. 1986) (evidence showing different policies and practices in dealing with seismographic activities on leased land raises a dispute which precludes the taking of judicial notice); *Glover v. Cole*, 762 F.2d 1197, 1200 n.6 (4th Cir. 1985) ("judicial notice is an inappropriate device for remedying a failure of proof"). If the evidence were relevant, it should have been offered at trial.

Ultimately, the Warden testified that "the Department of Corrections and prisons specifically vary greatly," and that "what I come away with when I meet on a national level with my counterparts, a lot of states do a lot of very different things." (Tr. at 3.590.) In this context, the Eighth Circuit has stated that as between a federal appeals court or a prison official familiar with a particular institution, the prison official is best suited to make decisions for the institution when the issue is based on "disputed matters of professional judgment." *Fowler*, 534 F.3d at 943. "When we are presented only with disputes regarding professional judgment, 'our inferences must accord deference to the views of prison authorities' where those views rest on more than mere speculation and conjecture." *Id*. (quoting *Beard v. Banks*, 548 U.S. 521 (2006)). There is no basis in the record for the Court to conclude over the professional judgment of the Defendants that what is done in some other state will work in South Dakota.

The Warden testified to numerous efforts that failed to reduce the abuse of tobacco allowed for spiritual uses, including enhanced supervision, reducing the amount of tobacco, adding cameras, increasing disciplinary sanctions in some cases, meeting numerous times with NACT and LDN, and meeting with outsiders. (Tr. at 3.552.) These efforts, the long process of trying to accommodate tobacco use, and the testimony that the alternatives that Brings Plenty and Creek proposed at trial would be ineffective, impractical, impossible for staffing reasons, or poor correctional practice, are together sufficient evidence that the ban was the least restrictive means available to achieve the State's compelling interest in order and security.

3. Plaintiffs have failed to prove a constitutional violation.

In addition to their RLUIPA claim, the Plaintiffs alleged that the tobacco ban violates the First and Fourteenth Amendments. But the Plaintiffs did not address either their First or Fourteenth Amendment claims in their post-trial brief. By not addressing the First and Fourteenth Amendment claims, the Plaintiffs have waived their constitutional claims. *See Williams v. Sisseton--Wahpeton Sioux Tribal Council*, 387 F. Supp. 1194, 1201 (D.S.D. 1975) (by waiving the opportunity to present evidence or legal analysis regarding fraud and discrimination claims, plaintiff failed to carry his burden of showing such conduct, and his claims, therefore, must be denied).

If the Plaintiffs' First and Fourteenth Amendment claims are considered, the claims nonetheless fail under the more deferential constitutional standards. To prevail on the First Amendment claim, the Plaintiffs must first prove a "substantial burden" on their ability to practice their religion. *Patel*, 515 F.3d at 813; *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997). As stated above, the Plaintiffs cannot prove that using traditional red willow bark rather than tobacco is a substantial burden.

Plaintiffs' First Amendment claim also fails because the tobacco ban is reasonably related to the compelling governmental interests in safety, security, and order. Although the substantial burden analysis is similar under RLUIPA and the First Amendment, the Court applies a rational-basis analysis under *Turner v. Safley*, 482 U.S. 78, 84 (1987) for the First Amendment claim, as opposed to the strict-scrutiny standard under RLUIPA. *See, e.g., Cutter*, 544 U.S. at 714.

Under the First Amendment, the issue is whether the ban on tobacco use in Native American religious ceremonies is reasonably related to legitimate penological interests. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). This "reasonableness" test is less restrictive "[t]o ensure that courts afford appropriate deference to prison officials." (*Id*.) The four factors for the Court to consider are: (1) whether the regulation has a logical relationship to legitimate and neutral governmental interests; (2) whether the inmates possess alternative means of exercising their First Amendment rights; (3) the

impact of accommodation on the asserted right on other inmates, prison personnel, and the allocation of prison resources; and (4) whether there are obvious, easy alternatives to the policy adopted. *Id*. at 350-53.

As discussed above, the tobacco ban satisfies even the heightened strict-scrutiny standard under RLUIPA, because the tobacco ban is the least restrictive means for furthering safety and security in the State's correctional institutions. But even if the Court were to conclude that a less restrictive alternative to the tobacco ban were available, the tobacco ban would satisfy the *O'Lone* factors. (1) The tobacco ban is rationally related to the institutional safety and security concerns established at trial. (2) The evidence also established that the Plaintiffs have numerous alternative means of exercising their First Amendment rights, like the use of cansasa, attendance at sweats, pipe ceremonies, and Powwows, and the ability to possess and use many other traditional herbs and botanicals. These freedoms are alternative means. *See Newberg*, 2011 U.S. Dist. LEXIS 68955 at 31-32 (because Native Americans were allowed to participate in the sacred pipe ceremony and smudging, and other Native American ceremonies, the prohibition against a sweat lodge was an "incidental effect" or "an inconvenience" on Plaintiff's religious exercise, which is insufficient to demonstrate a substantial burden); *Blake*, 26 Mass. L. Rep. at 335 (after listing all the Native American religious practices available, court held that denying Native American residents tobacco or a sweat lodge

did not substantially burden their religious exercise). (3) The impact on the State of accommodation is not theoretical. It was proved over at least nine years of allowing tobacco, and resulted in significant time and attention devoted to stopping trafficking in tobacco. (4) There are no effective alternatives to the tobacco ban, let alone obvious and easy alternatives. As stated above, the tobacco ban is the least restrictive means for securing institutional safety, security and order. The First Amendment claim therefore fails under the *Turner* analysis.

Although the Complaint pleaded a claim under the Fourteenth Amendment, the facts do not suggest an equal-protection claim, and a free-exercise claim does not exist under the Fourteenth Amendment absent evidence that the DOC has treated Native Americans arbitrarily. *See Robinson v. Horn*, 2000 U.S. Dist. LEXIS 11088*26 (E.D. Pa. 2000) ("unless the regulations are 'arbitrary,' the prisoner's claims must fail because religious discrimination 'is governed by the religious clauses of the First Amendment, leaving for the equal protection clause only a claim of arbitrariness unrelated to the character of the activity allegedly discriminated against'" (quoting *Reed v. Faulkner*, 842 F.2d 960, 962 (7th Cir. 1988))). The Plaintiffs have not presented any facts or legal analysis establishing a Fourteenth Amendment claim, and there are no facts in the record. Thus, the Defendants respectfully request that the Court enter judgment on the constitutional claims in their favor.

4. Plaintiffs have failed to prove that they are entitled to injunctive relief under the PLRA.

The Court asked the parties to address what liability, if any, it could impose against Warden Weber or Secretary of Corrections Denny Kaemingk if it concluded that the tobacco ban violated RLUIPA or the First or Fourteenth Amendments. (Tr. at 3.602-03.) First, money damages are not available under RLUIPA, and Plaintiffs have stated that they seek only injunctive relief. *See Sossamon v. Texas*, 131 S. Ct. 1651, 1658-60 (2011) (money damages unavailable under RLUIPA). Second, the Prison Litigation Reform Act applies to this case and therefore limits both attorney fees and the scope of prospective relief. *See* 18 U.S.C. § 3626(a)(1); 42 U.S.C. § 1997e(d); *Sisney v. Reisch*, 533 F. Supp. 2d 952, 965 (D.S.D. 2008) (Eleventh Amendment bars money damages and Prison Litigation Reform Act further restricts a prevailing prisoner plaintiff to "an award of attorney fees for 150 percent of the damages award").

Assuming that they are entitled to injunctive relief, the relief must comply with the PLRA. The Plaintiffs have not, however, proposed an injunction that would comply with 18 U.S.C. § 3626(a)(1), which governs prospective relief. Congress enacted the PLRA to impose greater procedural and substantive restrictions on federal court authority to issue broad injunctions regulating conditions in state and local prisons. *Tyler v. Murphy*, 135 F.3d 594, 595 (8th Cir. 1998). The PLRA provides that no injunction shall be granted "in any civil action with respect to prison conditions ... unless the court finds

that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the federal right." 18 U.S.C. § 3626(a)(1); *Tyler*, 135 F.3d at 596.

In addition, the Court must give substantial weight to any adverse impact caused by the relief on public safety or the operation of the criminal justice system. *See I.S.B. v. State Com'r of Admin.*, 2011 U.S. Dist. LEXIS 37036 * 8 (D. S.D. 2011) (quoting 18 U.S.C. § 3626(a)(1)). In *I.S.B.,* the court refused prospective relief because granting prospective relief would require the court to interfere with the management of South Dakota county jails. *Id*. The court acknowledged that "[i]t is not the role of federal courts to micro-manage state corrections." *Id*. (citing *Klinger v. Dept. of Corr.*, 31 F.3d 727, 733 (8th Cir. 1994)). The Court also recognized that federal courts must afford appropriate deference and flexibility to state officials trying to manage a volatile environment. *Id*. (citing *Sandin v. Conner*, 515 U.S. 472, 483 (1995)).

The PLRA essentially flips RLUIPA's least-restrictive-means analysis by requiring that the Plaintiffs prove that the prospective relief they seek is the least restrictive means necessary to correct a RLUIPA violation. The Plaintiffs must also prove that the requested prospective relief will not adversely affect the safety, security, and order of the DOC's institutions. The Plaintiffs, however, have not asked the Court for any particular relief, which makes discussion of this standard difficult at best.

Based on the PLRA, the Court cannot enter a broad injunction, but must specify how, when, where, and to whom tobacco would be allowed. But the Plaintiffs do not even propose an injunction that would comply with the PLRA or address the requirements of Federal Rule of Civil Procedure 65(d), which requires that every order granting an injunction and every restraining order (a) state the reasons why it issued; (b) state its terms specifically; and (c) describe in reasonable detail--and not by referring to the complaint or other document--the act or acts restrained or required.

To be narrowly tailored, an injunction in this case would have to address all the safety and security concerns identified by the Defendants without requiring the State to expend additional resources. In particular, the injunction would have to address how often each correctional institution must provide Native American inmates tobacco, how much tobacco must be provided for each ceremony, what percentage of the pipe mixture must be tobacco, where the tobacco must be stored, how safety and security concerns addressed at trial would be alleviated, which inmates would be allowed tobacco during the ceremonies, and what disciplinary measures could be implemented for disciplinary violations. The Plaintiffs have offered the Court no assistance, and should not be heard to make a specific proposal in a reply brief.

Conclusion

In *Runningbird*, the Eighth Circuit wrote that "under RLUIPA, Congress did not intend to burden prison operations but rather to maximize protection of inmates' religious rights without undermining prison security, order, and discipline." 198 Fed. Appx. at 579 (quoting *Murphy v. Missouri Dep't of Corrections*, 372 F.3d 979, 986-88 (8th Cir. 2004). And in *Fowler*, the Eighth Circuit wrote that through RLUIPA, "Congress sought to eliminate 'frivolous or arbitrary' barriers impeding prisoners' exercise of religion." 534 F.3d at 942. The ban on tobacco is not frivolous or arbitrary, but a justified response to a longstanding problem.

The Defendants respectfully request that the Court enter judgment in their favor.

Dated this 20th day of June, 2012.

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CERTIFICATE OF COMPLIANCE

In accordance with D.S.D. Civ. LR 7.1(B)(1), I certify that this brief complies with the requirements set forth in the Local Rules. This brief was prepared using WordPerfect X4, Times New Roman, 13 font, and contains 11,931 words. I have relied on the word count of the word-processing program to prepare this certificate.

Dated this 20th day of June, 2012.

/s/ James E. Moore
One of the Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 2012, I electronically filed the foregoing Defendants' Post-Trial Brief with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following:

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