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,	:	**DEFENDANTS' RESPONSE TO UNITED STATES' STATEMENT OF INTEREST**
vs.	:	
DOUGLAS WEBER, Warden of South Dakota State Prison, and DENNIS KAEMINGK, Secretary of the Department of Corrections,	:	
Defendants.	:	

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Long after a three-day trial and near the conclusion of post-trial briefing, the United States filed a Statement of Interest (Doc. 181) to address the substantial-burden analysis under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc ("RLUIPA"). The United States challenged the trial strategy of both sides, but primarily argued that the Defendants have misconstrued the standard under RLUIPA. In doing so, however, the United States misconstrues the Defendants' argument and asks the Court to apply an unduly narrow and therefore incorrect substantial-burden analysis

that conflicts with Eighth Circuit precedent. Defendants Douglas Weber and Dennis Kaemingk respectfully request that the Court decline to apply the standard as construed by the United States.

1. The standard is not "whether an institution's policy interferes with an exercise of a religion."

a. The United States does not cite the proper standard

The substantial-burden analysis is not "whether an institution's policy interferes with an exercise of a religion." (Doc 181 at 8.) This standard is far too narrow, not supported by authority, and not the standard stated by the Eighth Circuit, which the United States does not acknowledge. "Interference" is not the standard. Rather, "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.* In its summary-judgment decision, the Court cited the standard as stated in *VanWyhe*. (Doc. 109 at 8.)

The standard requires the Court to make judgments about the extent to which the challenged regulation interferes with a plaintiff's religious exercise. The conduct must "significantly" inhibit, "meaningfully" curtail, or deny "reasonable opportunities" to engage in "fundamental" activities. *VanWyhe*, 581 F.3d at 656. The United States does not explain how the Court can apply this standard, which is obviously different than determining whether a policy "interferes with an exercise of a religion," without evidence of the role that tobacco plays in traditional Lakota spirituality. The Court's summary-judgment decision acknowledged this, stating that the Plaintiffs "could have provided more analysis on the role of tobacco in their religious ceremonies, particularly the pipe, tie, and flag ceremonies," and noting that "Plaintiffs have alleged that tobacco is a natural and longstanding part of their religious exercise." (Doc. 109 at 12.) The substantial-burden analysis requires more than testimony about a plaintiff's personal belief.

In challenging the Defendants' argument, the United States misconstrues the Defendants' position. The Defendants have not asked the Court to determine "the importance and centrality of tobacco use to the plaintiffs' religious practice." (Doc 181 at 2, 7.) The Defendants have not asked the Court to decide matters of religious doctrine or the centrality of a particular religious practice. Rather, the Defendants have argued that given (1) the differing tobacco-related practices between traditional Lakota spiritual

leaders, (2) the unanimity that the use of cansasa in the ceremonial pipe is traditional to Lakota spirituality, (3) the availability of cansasa to be smoked in the ceremonial pipe and used in making prayer ties, and (4) the many other ways in which the Plaintiffs are allowed to practice their religion, denying them tobacco is not a substantial burden.

Just as the United States does not cite the appropriate standard or explain how the Court can determine whether the denial is a substantial burden without any evidence of the role of tobacco in Lakota spirituality, the United States does not explain why the testimony of Richard Moves Camp that he uses as little as 1% tobacco in his own pipe mixture is irrelevant, which it would be if the Court were to adopt the position of the United States. Not even the Plaintiffs in their reply brief argued that this testimony is irrelevant. Ultimately, the Court must decide the legal question whether providing only cansasa for use in smoking the ceremonial pipe and making prayer ties is a substantial burden when limiting the amount of tobacco to 1% of the pipe mixture would be acceptable. *Cf. Love v. Reed*, 216 F.3d 682, 689 (8th Cir. 2000) (in First Amendment context, holding that refusing to provide inmate with food on Saturday to be eaten on Sunday substantially burdened inmate's ability to practice religion because inmate had "no consistent and dependable way" of exercising his right to observe the Sabbath); *United States v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012) (in RFRA context, citing *Love* in discussing that a substantial burden exists when a rule provides "no consistent and

dependable way" to observe a religious practice). Here, the Plaintiffs have a consistent and dependable way to practice Lakota spirituality. They are able to use the ceremonial pipe and to make prayer ties with cansasa, which is traditional to the Lakota. The position of the United States leaves no room for this analysis, which is necessary in determining whether the ban is a substantial burden.

b. The Court can consider the Plaintiffs' sincerity.

The Court can address the Plaintiffs' sincerity in their stated beliefs that they must have some tobacco for their religious practice, which the United States concedes. (Doc. 181 at 8 ("[o]f course, courts are permitted to examine the sincerity of religious belief under RLUIPA").) One way that sincerity is evaluated is by looking at what other followers of the Plaintiffs' same religion say about the role of tobacco and cansasa. The United States does not explain how sincerity could otherwise be evaluated.

The Fifth Circuit has held that "the Supreme Court's express disapproval of any test that would require a court to divine the centrality of a religious belief does not relieve a complaining adherent of the burden of demonstrating the honesty and accuracy of his contention that the religious practice at issue is important to the free exercise of his religion." *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004). Therefore, an inmate must show that the requested religious property or practice is so important to his faith that not having the requested property or practice will substantially burden his religious

exercise. *Id*. The Supreme Court has also 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).

The question of sincerity also allows a court to consider whether the stated religious beliefs have any foundation. A belief that has no foundation in religious doctrine cannot be sincerely held. In *Smith v. Beauclair*, 2006 U.S. Dist. LEXIS 56561 * 27-28 (D. Idaho 2006), for example, an inmate requested a diet of natural foods and a large quantity of meat allegedly required by his Cherokee beliefs, but the inmate did not clearly establish that the requested diet was actually linked to his individualized Cherokee beliefs, so he could not prove that his current diet substantially burdened his religious exercise. If inmates did not need to show foundation for their religious requests, one can imagine the challenges for prison officials. Congress did not intend that inmates could define their own religion in prison, limited only by their belief. While the Defendants do not argue that the Plaintiffs' belief that they should be allowed to smoke tobacco is unsupported in Lakota practice, the Plaintiffs' position that cansasa is not acceptable to them, coupled with evidence that it is traditional to the Lakota and

evidence of the Plaintiffs' own infractions for abusing tobacco, presents a legitimate question of sincerity.

c. The United States ignores the breadth of "religious exercise."

While stressing the "broad, inclusive standard of religious exercise" (Statement of Interest at 9), the United States ignores that the Court cannot limit its substantial-burden analysis to whether the tobacco ban burdens only Plaintiffs' use of the ceremonial pipe and tobacco ties. The Eighth Circuit and other courts have defined an inmate's "religious exercise" under RLUIPA as the broader practice of a certain religion. *See Smith v. Allen*, 502 F.3d 1255, 1277 (11th Cir. 2007) (court defined Smith's religious exercise as the practice of Odinism); *Adams v. Mosley*, 2008 U.S. Dist. LEXIS 73879 (M.D. Ala. 2008), adopting recommendation and order of the magistrate judge, *Adams v. Mosley*, 2:05-CV-352-MHT (Doc. 104 at 19-20) (Adams' religious exercise is the practice of Native American religion); *Runningbird v. Weber*, 2006 U.S. App. LEXIS 22269 (8th Cir. 2006), affirming 2005 U.S. Dist. LEXIS 25234 (Native American inmates are provided numerous, reasonable opportunities to practice their religion). Courts do not "cabin the definition of 'religious exercise' in a way which focuse[s] on a particular act of worship; rather, the court define[s] 'religious exercise' as constituting the broader practice of religion." *Adams*, 2008 U.S. Dist. LEXIS 73879.

The issue is therefore not whether banning tobacco "interferes" with the Plaintiffs' use of the pipe and ties, but whether the ban substantially burdens their ability to practice Lakota spirituality. The Defendants argue that having 100% cansasa and no tobacco rather than 99% cansasa and 1% tobacco for two ceremonial practices of the Plaintiffs' overall religious exercise is not a substantial burden under Eighth Circuit precedent. *See, e.g., Runningbird*, 2006 U.S. App. LEXIS 22269 (8th Cir. 2006), affirming 2005 U.S. Dist. LEXIS 25234 (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); *see also Wickner v. Symmes*, 2007 WL 426795 * 8 (D. Minn. 2007) (although Native American inmate could not participate in smudging and pipe ceremonies, inmate could still study the scriptures, pray, and meet with clergy, observe holy days, and worship in other ways).

The United States is therefore too restrictive in suggesting that evidence from Lakota spiritual leaders was improper. (Doc. 181 at 9.) The statement of interest fails to address how not having any tobacco rather than 1% in the pipe mixture "significantly inhibit[s] or constrain[s]" or "meaningfully curtail[s]" Plaintiff's overall religious exercise.

2. The United States, while not challenging the Defendants' arguments that the tobacco ban is the least restrictive means of furthering the prison's compelling governmental interests, improperly discusses alternatives employed elsewhere.

The United States maintains that its statement of interest "only addresses defendants' argument that plaintiffs' religious exercise is not substantially burdened by the ban on tobacco." (Doc. 181 at 7.) But the United States also states that the Court should consider whether other correctional institutions allow or disallow ceremonial tobacco as part of its least-restrictive-means analysis. (*Id*. at 6.)

The Eighth Circuit has cautioned against comparing one prison to another. *See Fowler v. Crawford*, 534 F.3d 931, 941 (8th Cir. 2008). But if the Court considers other policies as requested by the Plaintiffs and the United States, the Court should also consider that other correctional institutions likewise ban tobacco entirely, including ceremonial tobacco, in order to further compelling governmental interests. Thus, if the Court takes judicial notice of the Federal Bureau of Prisons Program Statement, then the Court should likewise take judicial notice of other state correctional policies.

Idaho, Nebraska, and Wyoming have policies allowing tobacco alternatives but banning tobacco for use in Native American ceremonies. *See* Nebr. Dept. of Corr. Servs. Admin. Reg. 208.1; Idaho Dept. of Corr. Policy 403; Wyo. Dept. of Corr. Policy and Proc. #5.600 (attached as Exhibit A). Other states have no exceptions to their general tobacco ban for religious or ceremonial use. For example, New Hampshire's and Alabama's tobacco-free policies do not contain any exception for religious or ceremonial

use. *See N.H. Dept. of Corr. Health Servs. Policy and Proc. Dir. 6.09; Adams v. Mosley*, 2008 U.S. Dist. LEXIS 73879 (M.D. Ala. 2008).[1]

Ultimately, the United States does not address the testimony offered at trial that limiting tobacco use in certain ways for ceremonial purposes did not and would not work in South Dakota. As *Fowler* cautions, the Court should be wary of relying on what other prisons allow when considering whether the tobacco ban is the least restrictive means available to further compelling governmental interests at South Dakota's institutions.

Conclusion

For these reasons, the United States is not persuasive that the Defendants' substantial-burden analysis is either wrong or misapplied.

[1] The New Hampshire and Alabama district courts concluded that allowing kinnikinick but banning tobacco does not substantially burden the religious exercise of a practicing member of the Lakota Sioux Nation, Native American Sacred Circle or Native American religion. *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); *Adams*, 2008 U.S. Dist. LEXIS 73879, adopting recommendation and order of the magistrate judge, 2:05-CV-352-MHT (Doc. 104 at 19-20) (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).

Dated this 25th day of July, 2012.

WOODS, FULLER, SHULTZ & SMITH P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July, 2012, I electronically filed the foregoing Defendants' Response to United States' Statement of Interest 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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