

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHEROKEE NATION WEST,)	
)	
Plaintiffs,)	
)	Case No. 14-CV-612-JED-TLW
vs.)	
)	Jury Trial Demand
ARMY CORP OF ENGINEERS and TOM)	
HEATHCOCK, in his official capacity as)	
Operations Project Manager for Fort)	
Gibson Lake.)	
)	
Defendants.)	

PLAINTIFF’S VERIFIED COMPLAINT

Comes now the plaintiff, CHEROKEE NATION WEST, and sues the ARMY CORP OF ENGINEERS and TOM HEATHCOCK, in his official capacity as Operations Project Manager of Fort Gibson Lake, and states as follows:

I. INTRODUCTION

1. Plaintiff seeks equal access to Fort Gibson Lake to hold a religious ceremony on November 7, 2014, March 2015 and on future dates. Although Fort Gibson Lake is open to the general public for indiscriminate use, the Defendants denied Plaintiff equal access to the public area of Fort Gibson Lake because Plaintiff wanted to hold a religious ceremony, and such ceremony was considered “sacrilegious” by the government Defendants.

2. Denying Plaintiff access to the public area of Fort Gibson Lake violates the Establishment Clause of the United States Constitution as it was hostile to religion and favored one religious group over another. In addition, such denial violated the Free Exercise, Free Speech, Due Process and Equal Protection Clauses of the United States

Constitution. Finally, Defendant's actions and policies violated the Religious Freedom Restoration Act, 42 U.S.C. § 2000(bb) ("RFRA") and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1, *et seq.* ("RLUIPA").

3. Plaintiff seeks a temporary restraining order, preliminary and permanent injunctive relief allowing them to access the public portions of Fort Gibson Lake so they can hold their religious ceremony, on the same terms and conditions as all others have access to the public land at Fort Gibson Lake, and to enjoin the Defendants' unconstitutional policies and actions.

4. Plaintiff seeks an order declaring Defendants' actions to be in violation of the Establishment Clause and the rights to freedom of speech, religion, due process and equal protection, as guaranteed by the First and Fifth Amendments to the United States Constitution, the Religious Freedom Restoration Act, and RLUIPA.

5. Plaintiff also seeks damages based on Defendants' policies and actions that violated its constitutional and statutory rights.

II. JURISDICTION AND VENUE

6. This action arises under the United States Constitution; federal law, particularly RFRA, 42 U.S.C. § 2000(bb), and RLUIPA, 42 U.S.C. §2000cc-1, *et seq.*

7. This Court is vested with original jurisdiction over these federal claims by operation of 28 U.S.C. §§ 1331, 1343 and 1367.

8. This Court is vested with authority to grant the requested declaratory judgment by operation of 28 U.S.C. §§ 2201, *et seq.*

9. This Court is authorized to issue the requested injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.

10. This Court is authorized to award attorneys fees pursuant to 42 U.S.C. § 1988.

11. Venue is proper in this Court under 28 U.S.C. § 1391(b), in that the defendant Army Corp of Engineers resides in this district.

III. PARTIES

12. Plaintiff CHEROKEE NATION WEST is an unincorporated association of Native Americans.

13. Defendant ARMY CORP OF ENGINEERS is a division of the United States Government.

14. Defendant TOM HEATHCOCK is sued in his official capacity as Operations Project Manager of Fort Director for Fort Gibson Lake.

IV. FACTUAL ALLEGATIONS

15. Plaintiff has operated as an unincorporated Indian tribe in Oklahoma since before 1819.

16. Plaintiff has a sincere religious belief to hold spring and fall fire ceremonies on Fort Gibson Lake at the Taylor Ferry North area.

17. The fire ceremonies need to be held at the Fort Gibson Lake, Taylor Ferry North site because Plaintiff believes there are a number of mounds at that location that the Western Cherokee believe were used by their ancestors. The Cherokee Nation West people have lived in the Fort Gibson Lake area for centuries; with communities and burials throughout the area and a regional capital located on a nearby branch creek.

18. Plaintiff believes that the fire ceremonies need to be held at Fort Gibson Lake to service the needs of the ancestors.

19. Plaintiff believes that the Creator had requested for them to use that access to Mother (The Earth) to regenerate the earth and the relationship with the ancestors.

20. Every year, Plaintiff holds two fire ceremonies: A fall fire ceremony and a spring fire ceremony. The ceremonies act as a welcoming of life. Plaintiff believes that the spring ceremony welcomes the return of life to the Earth, celebrating the rebirth of the world into spring time. Plaintiff believes the participants are renewing their ties to the Earth and reaffirming their place within the natural order. This connection to the rebirth of the Earth is further strengthened by beliefs that the fire mounds act as the womb of the Earth where the new life has been growing and protected all winter.

21. The Fire Ceremony is also of importance to the burial customs of the Cherokee Nation West. Plaintiff believes that when the fire is kindled, it lights the way for the souls of the departed to return to the earth and the great cycle of life. Plaintiff believes the souls follow the light of the fire to find their way back into the Earth. Without the light of the fire to guide them, Plaintiff believes the souls will continue to be lost.

22. The location of the Fire Ceremonies is critical as Plaintiff believes certain locations have strong Mother energies and easier access to Mother. These locations have been in use for centuries and Mother energies grow stronger as ceremonies are performed. Plaintiff believes that their ancestors know these locations and their spirits go to these locations for renewal.

23. On or about February 28, 2012, Dr. Timothy Jones, Anthropologist and Advisor for the Cherokee Nation West, on behalf of Plaintiff, went to the Tulsa District,

US Corps of Engineers office in Tulsa, OK (1645 S. 101st East Ave, 74128) to ask what was needed for Plaintiff to have a Spring New Fire Ceremony on Fort Gibson Lake.

24. During this meeting, Dr. Jones was given a list of the Tulsa District Lake Managers with addresses and phone numbers and was told that the Fort Gibson Lake Manager was Tom Heathcock.

25. On or about March 2, 2012, Dr. Jones called Tom Heathcock to explain that Plaintiffs wanted to have a Sacred Fire Ceremony at the Taylor Ferry North Recreation Area at dusk on March 21, 2012. Dr. Jones gave Defendant Heathcock a brief description of the ceremony, pointing out the size of the fire would be about three feet in diameter and the twenty to thirty people would be attending. They discussed that the fire would be built in the safe rocky/sandy area on the north end of the beach.

26. Dr. Jones informed Mr. Heathcock of the importance of the area to the religious beliefs of Plaintiff. Dr. Jones informed Mr. Heathcock that the Western Cherokee Nation laid partial claim to the prehistoric mounds that are located there, the Western Cherokee communities lived in the immediate area, several members of the Western Cherokee were buried nearby, and as the regional Capital of the Nation was located nearby on a branch creek.

27. Tom Heathcock gave Dr. Jones verbal permission for the Plaintiff to use the location and referred him to Kirk Currel to help with the plans.

28. On or about March 5, 2012, Kirk Currel called Dr. Jones to discuss the arrangements for the ceremony. Dr. Jones informed him that the Plaintiff would like to have the fire ceremony in the rocky/sandy area on the north side of the beach and that twenty to thirty people would be attending.

29. Mr. Currel said everything would be fine and that he would email a Special Event Permit to Dr. Jones.

30. On or about that evening, Dr. Jones received a copy of the Special Event Permit as an email attachment.

31. On or about March 6, 2012, Harold Aldridge and Dr. Timothy Jones delivered the permit application to Mr. Heathcock in person at his office at Fort Gibson.

32. During this meeting, Dr. Jones explained to Mr. Heathcock the basic procedures of the Fire Ceremony, the layout of the area and the people who would be attending.

33. Dr. Jones also explained to Mr. Heathcock the religious significance of this area to the Plaintiff. He explained that Plaintiff believes that the islands off shore from the beach were prehistoric mounds that the Western Cherokee claims as their descent since before The Sixty Years War about 800 to 900 years ago. Dr. Jones also explained that the Western Cherokee community stayed in the area to care for the mounds that reached over the whole region of the lake. Dr. Jones explained that additional Western Cherokee returned to the area in the mid-1700s and communities formed where major streams entered the current lake. Dr. Jones told Tom Heathcock that archaeological remains of the Western Cherokee community where the regional Capital was located in the late 1820s and early 1830s was nearby. Dr. Jones also explained who the Western Cherokee are and how they are different than the Cherokee Nation of Oklahoma, the Keetoowah and the Eastern Band Cherokee.

34. Mr. Heathcock said he did not see any problems with having the event.

35. On or about March 8, 2012, Dr. Jones received a telephone call from Tom Heathcock. During this call, Mr. Heathcock informed Dr. Jones that the Western Cherokee could not have their Fire Ceremony at the Taylor Ferry Recreation area or anywhere near the mounds.

36. When asked why, Mr. Heathcock said the Cherokee Nation of Oklahoma had filed a complaint saying that it was sacrilege for the Cherokee Nation West to hold their Fire Ceremony at any location in the Taylor Ferry Recreation area.

37. When asked for Defendant's understanding of why the Cherokee Nation of Oklahoma objected, Mr. Heathcock said because the Cherokee Nation of Oklahoma considered such use sacrilegious.

38. Dr. Jones then asked if Plaintiff could have the ceremony at another location that was in view of the mounds. Dr. Jones suggested Hickory Creek where it comes into the lake across from the mounds at Taylor Ferry Beach. Defendant Heathcock did not grant or deny this request, but said he would look into it.

39. On or about March 11, 2012, Defendant Heathcock sent Dr. Jones an email as a follow up to the March 8, 2012 telephone conversation. Mr. Heathcock formally stated the denial of Plaintiff's Special Events Permit. In that email, Tom also cited two Executive Orders, 13007 (1996) and 13175 (2000) and a President Clinton April 29, 1994 memorandum "Government to Government Relations with Native American Governments".

40. On or about March 21, 2012, the Cherokee Nation West set up their Spring Fire Ceremony location on Hickory Creek.

41. At about 4:45 on March 21, Dr. Jones received a telephone call from Defendant Heathcock. During this call, Defendant Heathcock told Dr. Jones that Plaintiff could not have the Fire Ceremony at Hickory Creek.

42. On or about August 4, 2012, Dr. Jones filled out and hand delivered a Special Event Permit application so the Plaintiff could use Fort Gibson Lake near the mounds for their fall fire ceremony and hand delivered the application to the Army Corp of Engineers Fort Gibson Lake Headquarters.

43. On or about September 10, 2012, having not yet heard back from the Defendants, Dr. Jones wrote a second letter to Defendants asking for permission to use the land for their fire ceremony. Harold Aldridge and Dr. Jones hand delivered the letter to the Corps of Engineers Fort Gibson Lake Headquarters.

44. On or about September 12, 2012, Mr. Aldridge and Dr. Jones went to talk to Defendant Heathcock at the Corps of Engineers Fort Gibson Headquarters to see if they could get an answer to their Special Permit Request for the Fall Fire Ceremony.

45. Mr. Heathcock said that because their intended religious use was sacrilege to the Cherokee Nation of Oklahoma, their request was denied.

46. During 2013, Plaintiff's Elders and Spiritual Specialists sought their Creator as to what to do about having the Fire Ceremonies at Taylor Ferry North. Plaintiff believes that the Creator informed them to wait and they would be informed about making new attempts in the future.

47. On or about March 1, 2014, Plaintiff's Elders and Spiritual Specialists stated that they believed the Creator had requested that the Spring New Fire Ceremony should be held at the Taylor Ferry North location on Fort Gibson Lake on April 14, 2014.

Plaintiff believes that it was very important that that access to Mother (The Earth) be established for balance with Creator.

48. On or about March 18, 2014, Dr. Jones hand delivered a permit request to the office of Defendant Heathcock for Plaintiff to use the public area at Fort Gibson Lake for the Spring fire ceremony.

49. On or about March 21, 2014, Dr. Jones received an email from Defendant Heathcock stating that Plaintiff could not have the Spring New Fire Ceremony based on consultation with federally recognized tribes.

50. On or about September 17, 2014, Dr. Jones hand delivered a Special Event Permit application to Defendant Heathcock to use the public land at Fort Gibson Lake for their Fall fire ceremony.

51. On or about September 19, 2014, Dr. Jones received an email from Kirt Curell with cc to Tom Heathcock and Jonathan Polk stating that Plaintiff could not have the Fire Ceremony based on consultation with federally recognized tribes. He cited as justification President Clinton's April 29, 1994 memorandum "Government-to-Government Relations with Native American Governments" and Executive Orders 13007, 13084, 13175.

52. Plaintiff wants to hold these fire ceremonies at Fort Gibson Lake in March 2015, and beyond.

53. All acts of the Defendants, their officers, agents, servants, employees, or persons acting at their behest or direction, were done and are continuing to be done under the color and pretense of state law, including the ordinances, codes, regulations, customs, policies and usages of the Army Corp of Engineers.

54. Defendant Heathcock is the final policy maker for the Army Corp of Engineers concerning who can access Fort Gibson Lake.

55. It is the custom, policy and practice of Defendants to not allow Plaintiff access to Fort Gibson Lake for them to hold a fire ceremony.

56. Plaintiff has no adequate or speedy remedy at law to correct or redress the deprivations of their federal rights by Defendants.

57. Unless and until enforcement of the illegal actions and policies of the Defendant are enjoined, the Plaintiffs will suffer and continue to suffer irreparable injury to their federal rights.

COUNT 1
VIOLATION OF RELIGIOUS FREEDOM RESTORATION ACT,
42 U.S.C. § 2000(bb)

58. Plaintiff realleges all matters set forth in the preceding paragraphs and incorporates them herein.

59. Plaintiff has a sincerely held religious belief to hold a fire ceremony on public land at Fort Gibson Lake, near the mounds.

60. Defendants have a custom, policy and practice of denying Plaintiff equal access to public land to hold their religious ceremony.

61. Defendants custom, policy and practice places a substantial burden on Plaintiff's religious beliefs and practices.

62. Defendants' custom, policy and practice do not serve a compelling governmental interest, nor are they narrowly tailored to achieve any governmental interest.

63. The Defendants' custom policy and practice thus violates the Religious Freedom Restoration Act.

WHEREFORE, Plaintiff respectfully prays that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

COUNT 2
VIOLATION OF THE ESTABLISHMENT CLAUSE

64. Plaintiff realleges all matters set forth above.

65. Defendants' policies and actions prefer one religious group and beliefs over another.

66. Defendants' policies and actions of denying Plaintiff access to the public land at Fort Gibson Lake because such use would be "sacrilegious" prefers one religious group over another, and violates the Establishment Clause.

67. Defendants' policies and actions of denying Plaintiff equal access to the public land at Fort Gibson Lake is hostile towards religion.

68. Defendants do not have a valid secular purpose for their policies and actions.

69. Defendants policies and actions endorse one religious group over another.

70. Defendants' policies and actions have the effect of promoting one religious group over another.

71. Defendants' policies and actions excessively entangle the government with religion.

72. Defendants policies and actions thus violate the Establishment Clause.

WHEREFORE, Plaintiff respectfully prays that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

**COUNT 3
VIOLATION OF RLUIPA**

73. Plaintiff realleges all matters set forth above.

74. Defendants' policies and actions violate Plaintiff's free exercise of religion rights as guaranteed by RLUIPA, 42 U.S.C. §2000cc, *et seq.*

75. Plaintiff's religious beliefs are sincerely and deeply held.

76. Defendants' policies and actions impose a substantial burden on Plaintiff's religious exercise.

77. Defendant's policies and actions are not in furtherance of a compelling governmental purpose.

78. Defendants' policies and actions are not the least restrictive means of furthering any governmental interest.

79. Upon information and belief, Defendants receives federal financial assistance.

80. Upon information and belief, Defendants' policies and actions affect commerce with foreign nations, among the several states, or with Indian tribes.

81. Defendants' policies and actions permit them to make individualized assessments of the proposed uses of property within the City, including the Property at issue in this case.

82. Defendants' policies and actions treat Plaintiff on less than equal terms with nonreligious organizations, institutions, and assemblies.

83. Defendants' policies and actions discriminate against Plaintiff on the basis of religion.

84. Defendants' policies and actions unreasonably limit Plaintiff within the jurisdiction Fort Gibson Lake

WHEREFORE, Plaintiff respectfully prays that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

COUNT 4
VIOLATION OF FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT OF
THE UNITED STATES CONSTITUTION.

85. Plaintiff realleges all matters set forth in the preceding paragraphs and incorporates them herein.

86. Plaintiff has a sincere religious belief to hold a fire ceremony at Fort Gibson Lake.

87. There is no compelling state interest sufficient to justify the Defendants' discriminatory treatment of Plaintiff.

88. The Defendants' refusal to allow Plaintiff to have equal access to the land at Fort Gibson Lake is not the least restrictive means to accomplish any government interest.

89. The Defendants' policy and actions as described herein are not the least restrictive means of achieving a governmental interest.

WHEREFORE, Plaintiff respectfully prays that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

COUNT 5
VIOLATION OF FREE SPEECH

90. Plaintiff realleges all matters set forth above.

91. The public land at Fort Gibson Lake is public fora.

92. The public land at Fort Gibson Lake is traditional public fora.

93. Defendants have permitted various groups to access the public land at Fort Gibson Lake for indiscriminate use and to engage in various speech activities.

94. Defendants have a custom, policy and practice of allowing groups to access the public lands at Fort Gibson Lake for their own intended uses, including speech.

95. Defendants denied Plaintiff access to the public land at Fort Gibson Lake based on the viewpoint of their speech.

96. Defendants denied Plaintiff access to the public land at Fort Gibson Lake based on the content of their speech.

97. Defendants' policies and actions in denying Plaintiff access did not serve a compelling governmental interest, nor were they narrowly tailored to achieve a compelling governmental interest.

98. Defendants' policies and actions in denying Plaintiff access fail strict scrutiny and rational basis review.

99. Defendants' policies and actions in allowing other groups, including the Cherokee Nation, to object to other's use of the public land is an unconstitutional infringement on speech. Such policy lacks appropriate safeguards to prevent viewpoint based speech restrictions, and resulted in viewpoint based speech restrictions in this matter.

WHEREFORE, Plaintiff respectfully prays that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

**COUNT 6
VIOLATION OF EQUAL PROTECTION**

100. Plaintiff realleges all matters set forth in the preceding paragraphs and incorporates them herein.

101. Defendants have a policy and practice of allowing the public to access land at Fort Gibson lake for indiscriminate use.

102. On information and belief, Defendants have allowed other organizations to access land and Fort Gibson Lake.

103. On information and belief, Defendants have allowed other organizations to access land at Fort Gibson Lake for religious ceremonies.

104. On information and belief, Defendants have allowed other organizations to access land at Fort Gibson Lake and build fires.

105. On information and belief, Defendants have allowed other organizations to camp at Fort Gibson Lake.

106. On information and belief, Defendants have allowed other organizations to build camp fires at Fort Gibson Lake.

107. Defendants have a policy, practice and custom of not allowing Plaintiff to access the land at Fort Gibson Lake to hold their religious ceremony.

108. Defendants' policy, practice and custom treats Plaintiff dissimilarly from other organizations.

109. Defendants do not have a compelling governmental interest for their custom, policy and practice.

110. Defendants' custom, policy and practice is not the least restrictive means of achieving the government's interest.

111. Defendants' do not have a rational basis for their policies and actions towards Plaintiff as described herein.

112. This unequal treatment constitutes a violation of the Plaintiff's equal protection rights as guaranteed by the Fifth Amendment of the United States Constitution.

WHEREFORE, Plaintiff respectfully prays that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

COUNT 7
VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT
OF THE UNITED STATES CONSTITUTION.

113. Plaintiff realleges all matters set forth in the preceding paragraphs and incorporates them herein.

114. Defendants have a policy and practice unequally allowing access to public land at Fort Gibson Lake.

115. Defendants have interpreted and enforced this policy in an unconstitutional and discriminatory manner.

116. This policy lends itself to discriminatory enforcement by government officials in an arbitrary and capricious manner.

117. Defendants have enforced its policy in discriminatory ways, such as denying Plaintiff access based on subjective objections from other groups.

118. Defendants' policy thus violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

WHEREFORE, Plaintiff respectfully prays that the Court grant the equitable and legal relief set forth hereinafter in the prayer for relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests the following relief:

- A. That this Court enter a judgment declaring the Defendants' policies and actions of denying Plaintiff access to the public lands at Fort Gibson to be an unconstitutional violation of the Establishment Clause, Plaintiff's free speech rights as guaranteed by the First Amendment to the United States Constitution, due process and/or equal protection rights as guaranteed by the Fifth Amendment to the United States Constitution, Religious Freedom Restoration Act, and the Religious Land Use and Institutionalized Person's Act;
- B. That this Court enter a temporary restraining order and a preliminary and permanent injunction prohibiting Defendants from discriminating against Plaintiffs, and giving them access to the public lands on the same terms and conditions as others, to hold their religious fire ceremony on public lands at Fort Gibson Lake;
- C. That this Court award Plaintiff compensatory and nominal damages;
- D. That this Court grant Plaintiff's reasonable attorney's fees and costs;
- E. That this Court grant such other and further relief as to which the Plaintiff may be entitled.

Respectfully submitted this 9th day of October, 2014.

/s/ Brently C. Olsson
Brently C. Olsson
CHEEK LAW FIRM, PLLC
311 N. Harvey, Suite 200
Oklahoma City, Oklahoma 73102
Phone: (405) 272-0621
Fax: (405) 232-1707
bolsson@cheeklaw.com

Joel Oster*
KS Bar 18547
OSTER LAW FIRM
22052 W. 66th St, # 192
Shawnee, KS 66226
913-206-7575

Brian Utsey*
21001 N. Tatum Blvd Ste 1630-132
Phoenix, AZ 85050
(480) 538-5024
AZ Bar # 024267

ATTORNEYS FOR PLAINTIFFS

* Pro hac vice motion to be submitted

VERIFICATION OF COMPLAINT

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that I have read the foregoing Verified Amended Complaint and the factual allegations thereof and that to the best of my knowledge the facts alleged therein are true and correct.

Executed this 10th day of October, 2014.

/s/ Marlin McKay _____
Marlin McKay,
Speaker of the Greater Council for the
Cherokee Nation West

/s/ Jimmie Jones _____
Jimmie Jones,
Spiritual Advisor for the Cherokee Nation
West