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FILED IN UNITED STATES DISTRICT
COURT, DISTRICT OF UTAH

SEP 13 2010

BY  D. MARK JONES, CLERK
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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

OKLEVUEHA NATIVE AMERICAN
CHURCH

Plaintiff,

v.

ERIC H. HOLDER, JR.
In his official capacity as Attorney General of
the United States, U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001; and

MARK SHURTLEFF
In his official capacity as Attorney General of
the State of Utah,
Office of the Attorney General
Utah State Capitol Complex
350 North State Street, Suite 230
Salt Lake City, UT 84114-2320; and

DRUG ENFORCEMENT AGENCY
12154 East Easter Avenue
Centennial, CO 80112-6740; and

FEDERAL BUREAU OF INVESTIGATIONS
257 East 200 South, Suite 1200
Salt Lake City, UT 84111-2048

Defendants.

Case: 2:10-cv-00892
Assigned To : Waddoups, Clark
Assign. Date : 09/10/2010
Description: Oklevueha Native American C
hurch v. Holder et al

COMPLAINT FOR
DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF

Plaintiff Oklevueha Native American Church (“NAC”), by and through its attorneys, hereby brings this action pursuant to 5 U.S.C. §703 and alleges against Defendant Attorney General Eric H. Holder, Jr., *et al*, (“Defendants”) as follows:

SUMMARY OF THE ACTION AND RELIEF SOUGHT

1. This is a civil action to enforce the rights of the NAC and to end Defendants’ policy of conducting drug raids on the church grounds of the NAC and arresting its individual members and spiritual leaders for the religious use, possession, and distribution of peyote, a sacrament of the Native American Church.

2. The NAC is a federally recognized church for the expression of Native American spirituality, and has been the ongoing target of various searches and seizures, both from church property and also from the U.S. mail. NAC members have been arrested and intimidated by the Federal Government, the State of Utah, and their respective officers and agencies, explicitly because of their religious practices.

3. There has been an exemption to the federal drug laws in place for more than 40 years, codified at 21 C.F.R. 1307.31 (the “Exemption”), allowing NAC members to use peyote for strictly religious purposes.

4. Despite a history of jurisprudence, statutory law, and case law evidencing the unique relationship between the United States Government and the Native American tribes, and specific to this case, their religious practices, the Federal Government and the State of Utah continue to arrest its spiritual leaders, terrorize the NAC’s members, conduct drug raids on its properties, and generally contribute to the oppression and persecution of the NAC.

5. As is true with all religions, the religious practices of Native American culture have spread beyond the boundaries of those persons with a specific ethnic heritage, in this case, tribal ancestry. The religious practices of the NAC are currently being practiced by Native Americans and non-Native Americans alike.

6. Furthermore, as American Indians continue integrating with the broader American population, a required “blood quantum,” as the primary basis for determining who is a protected Native American religious practitioner becomes an increasingly greater burden and acts as a form of cultural genocide on later generations who wish to continue the Native American religious practices, views and values. With respect to the NAC, which is an authenticated and legitimate Native American tribal and treaty religious organization, it is time that such a basis be abolished in favor of extending full religious freedom and protection to the NAC as a broader based, American religious choice. The Utah Supreme Court has essentially agreed with this result by recognizing the NAC as a legitimate Native American Church in Utah and consequently, applied the peyote exemption to all NAC members, regardless of whether they can establish some arbitrary “blood quantum” or connection to a federally recognized tribe.

7. The NAC is seeking a declaratory judgment holding that it and all of its members qualify for the federal exemption relating to the religious use of peyote, since the NAC is an authentic and recognized Native American religious organization. Accordingly, members of the NAC shall have the right to use peyote in religious ceremonies without federal or state governmental interference, harassment, or intimidation, either through the search and/or seizure of persons or property, or arrest when the purpose of such is principally to deny, interfere with or limit the legitimate religious use of peyote by NAC members.

8. The NAC is also seeking a preliminary injunction requiring the various federal agencies and the State of Utah to recognize and honor the Exemption from registration provided to the NAC and its members. The NAC requests that the court bar enforcement, as against the NAC, of those sections of the Federal Controlled Substances Act and the Utah Controlled Substances Act (21 U.S.C. § 801 *et seq.*; Title 58, Chapter 37, Sec. 8 *et seq.*, of the Utah Code, respectively) which proscribe peyote possession, use, and distribution until this matter is resolved. The actions of the United States and State of Utah are contrary to the Exemption, insofar as these actions restrict the religious use, possession, and distribution of peyote by the NAC's members.

PARTIES

9. Plaintiff Oklevueha Native American Church is a federally recognized church. The NAC has branches in 29 states as well as branches in Canada, Mexico, Peru, and on several federally recognized Indian reservations including those of the Navaho, Paiute, Lakota Sioux, and Seminole tribes. The church's mission is to "to provide a safe environment for indigenous earth based healing spiritual ceremonies." The Native American Church itself was formally organized in 1918 to encompass various Native American spiritual beliefs that existed among the several tribes, and the Oklevueha Native American Church was founded in 1997.

10. Attorney General Eric H. Holder Jr. is the current Attorney General of the United States of America, and as such is charged with enforcing the nation's federal laws.

11. Attorney General Mark Shurtleff is the current Attorney General of the state of Utah, and as such is charged with enforcing Utah state law.

12. The Drug Enforcement Administration and the Federal Bureau of Investigations are both federal agencies which act on behalf of the United States Government and the U.S. Attorney General in investigating violations of federal law, and specific to this case, violations of the Controlled Substances Act.

JURISDICTION AND VENUE

13. Jurisdiction is proper in this court because the litigation arises under federal law, namely the First Amendment to the United States Constitution, the Fifth Amendment to the Constitution, and the Fourteenth Amendment to the Constitution, as well as the Religious Freedom and Restoration Act, 42 U.S.C. § 2000bb.

14. Venue is appropriate in the District Court of Utah pursuant to 28 U.S.C. §1391(b)(2), as many of the police actions which are central to this matter have been conducted within the state, and there are multiple branches of the NAC within the state.

15. An actual case or controversy has arisen between the parties as the NAC has been the subject of both state and federal law enforcement actions, and its members continue to fear reprisal from both the federal and state government for their religious beliefs.

16. The relief requested in this matter is proper pursuant to 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 28 U.S.C. § 2412 (costs and fees). Furthermore, a preliminary injunction is warranted in this matter pursuant to Chalk v. United States Dist. Ct., 840 F.2d 701, 704 (9th Cir. 1988).

STATEMENT OF FACTS

17. Quanah Parker, a Chief of the Comanche tribe, is credited as the founder of the Native American Church movement. This movement, which started in the 1880's as a vehicle to consolidate many Native American spiritual traditions and ceremonies into a single religious entity, was formally incorporated in 1918 as the Native American Church. The original church was organized with the help of James Mooney, an ethnologist in the Bureau of American Ethnology and an employee of the Smithsonian Institute. James Mooney, the ethnologist, was the great-grandfather to James "Flaming Eagle" Mooney, a co-founder of the Oklevueha Native American Church. James "Flaming Eagle" Mooney's involvement with various issues relating to this complaint shall be described *infra*, beginning at paragraph 20.

18. Peyote is often referred to by members of the NAC as "the sacred medicine," and has been used by indigenous populations of northern Mexico and by various Native American tribes for thousands of years. The Tonkawa, the Mescalero, and the Lipan Apache are believed to be the first of the Native American tribes that incorporated the use of peyote into their religious ceremonies in present-day America. They were also the principal group to introduce peyote to newly arrived migrants, such as the Comanche and Kiowa from the Northern Plains. Documented evidence of the religious, ceremonial, and healing uses of peyote dates back well over 2,000 years.

19. Present day medicine men and women of the NAC are the only persons allowed to administer peyote during sincere religious ceremonies, as they are trained spiritual leaders who have expert knowledge of the ancient art, use and practices of the NAC, and have demonstrated a commitment to personally live the traditional Native American religious values that are expected of all medicine persons. Furthermore, it is church policy not to distribute

peyote to anyone that is not a *bona fide* member and committed practitioner of the NAC's beliefs and spiritual values.

20. In October of 2000, the Oklevueha Native American Church of Utah was raided by Utah state police, after which James "Flaming Eagle" Mooney and his wife, Linda Mooney, were arrested on charges of multiple felony counts which included "engag[ing] in a continuing criminal enterprise" and of engaging in a "pattern of unlawful activity" by possessing and distributing peyote, a controlled substance, to members and visitors in their religious services.

21. On appeal, the Supreme Court of the State of Utah held that the federal exemption to peyote use for members of the Native American Church, codified at 21 C.F.R. 1307.31, does not restrict peyote use for bona fide religious ceremonies only to those persons belonging to federally recognized tribes. In so doing, the court dismissed the case against the Mooneys.

22. However, James "Flaming Eagle" Mooney has continued to receive substantial opposition from the state of Utah regarding his ministries, and specifically from Attorney General Shurtleff. As a medicine man, Mooney was previously involved in promoting and assisting in NAC ceremonies for incarcerated persons within Utah Department of Corrections, but is now denied any opportunity to conduct church ceremonies.

23. Similarly, one of the NAC's programs in Utah has historically been that of aiding addiction recovery and depression by providing rehabilitative, non-denominational spiritual guidance. Recently, Mooney has been refused court appointments as a diversion program for drug offenders.

24. During the initial raid by Utah state law enforcement in 2000, several thousand peyote buttons were seized. They were never returned, and were allowed to spoil while in the state's custody. In addition to peyote, sacred prayer pipes were also seized.

25. In June of 1999, David Hamblin, a member and active practitioner of the NAC's religious ceremonies, was arrested and charged by the state of Utah with possession of a controlled substance with the intent to distribute, for possessing a single button of peyote. A year later, in October of 2000, Hamblin was charged by the state of Utah with possession of a controlled substance.

26. David Hamblin's case was consolidated by the lower courts in the appeal of the Mooney's case to the Utah Supreme Court. David Hamblin's case was dismissed after the ruling relating to the Mooney's was issued.

27. In 2005, charges were brought by the United States against James "Flaming Eagle" Mooney, Linda Mooney, and Nicholas Stark for conspiracy to possess peyote with intent to distribute, conspiracy to distribute peyote, and distribution of peyote. In 2006, at the direction of the United States, these charges were dismissed.

28. Members of the NAC continue to fear reprisal from both state and federal governments for openly practicing their religion.

COUNT I

VIOLATION OF THE RELIGIOUS FREEDOM RESTORATION ACT.

42 U.S.C. § 2000bb-1(a)

29. All of the above statements are incorporated herein as if fully re-alleged in their entirety.

30. 42 U.S.C. § 2000bb-1(a) states as follows: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."

31. All laws that criminalize the use, distribution, and possession of peyote by sincere members of the NAC substantially burden the exercise of their religion. As is specific to this case, those laws are the Federal Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, and the Utah Controlled Substances Act, Title 58, Chapter 37, § 8 *et seq.*, of the Utah Code

32. The governments' actions are not supported by a compelling interest, nor are they the least restrictive means of accomplishing the governments' goals.

33. Consequently, the Defendants are in violation of 42 U.S.C. § 2000bb-1.

COUNT II

VIOLATION OF U.S. CONST., AMEND. I - FREE EXERCISE CLAUSE

34. All of the above statements are incorporated herein as if fully re-alleged in their entirety.

35. The First Amendment to the U.S. Constitution states, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."

36. The sacramental use of peyote is integral to the free exercise of religion by the NAC and its members. Peyote use in religious ceremony is roughly akin to Holy Communion in Catholicism and other Christian traditions, the Lord's Supper for members of the Church of Jesus Christ of Latter Day Saints, engaging the various Mitzvot for practitioners of Judaism, the Four Noble Truths of Buddhism, and so on.

37. Prohibiting the use of peyote by certain NAC members constitutes a direct violation of the free exercise clause.

COUNT III

VIOLATION OF U.S. CONST., AMEND I - ESTABLISHMENT CLAUSE

38. All of the above statements are incorporated herein as if fully re-alleged in their entirety.

39. The First Amendment to the U.S. Constitution states, in relevant part, that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”

40. By denying the Exemption to the NAC and its members because some of the practitioners are not members of a federally recognized tribe, the state of Utah and the federal government, and their officers and agencies, prohibit the ability of all members of the NAC to freely use peyote in their religious ceremonies and for religious purposes, and are directly promoting the establishment of only those NAC church organizations which politically restrict their membership to those who are members of a federally recognized tribe.

41. Consequently, the state and federal governments are in violation of the establishment clause of the First Amendment.

COUNT IV

VIOLATION OF U.S. CONST., AMEND. XIV - EQUAL PROTECTION CLAUSE

42. All of the above statements are incorporated herein as if fully re-alleged in their entirety.

43. The Fourteenth Amendment to the U.S. Constitution states, in relevant part, that “no state shall...deny to any person within its jurisdiction the equal protection of the laws.”

44. By refusing to allow members of the NAC the right to practice their religion freely and openly, which includes conducting a variety of indigenous spiritual ceremonies including the sacramental use of peyote, and by affording the right to partake in a sacrament of their choosing to members of many other religions, the state and federal governments and their agencies are denying the equal protection of the laws to the NAC and its members.

45. Equal protection guarantees are not limited to certain races or ethnic backgrounds, nor could they conceivably be, as to do so would be violative of the very core of the guarantee. As such, equal protection affords religious freedom to the members of the NAC, be they Native American or not, and demands that sincere and *bona fide* members be allowed to use the traditional sacrament of the NAC.

COUNT V

VIOLATION OF U.S. CONST., AMEND. V - DUE PROCESS,

AS APPLIED TO THE FEDERAL GOVERNMENT

46. All of the above statements are incorporated herein as if fully re-alleged in their entirety.

47. The Fifth Amendment to the U.S. Constitution states, in relevant part, that “No person shall...be deprived of life, liberty, or property, without due process of law.”

48. Due process has come to encompass a larger swath of substantive rights, namely those fundamental rights that are “implicit in the concept of ordered liberty.” Freedom to practice the religion of one’s choice in the manner that one sees fit is recognized as such a fundamental right. The NAC, by its claim as an authentic Native American religion, having a federal exemption allowing the use of peyote in its religious ceremonies, extends that right to all

of its members regardless of race. The misapplied limitations on that right, requiring its members to meet some quantum of Native American ancestry, is a form of cultural and religious genocide and is not imposed on any other religion in America. Though the NAC is small in comparison to other religious organizations in the United States, the Native American religion has a unique and rightful place in America's religious fabric. Despite the fact that a blood quantum may currently be required for voting and other property rights under certain tribal constitutions, such a requirement in a religious context denies due process to NAC's practitioners.

49. Consequently, Due Process under the Fifth Amendment prohibits the federal government from limiting the religious use of Peyote by NAC members based on an arbitrary demonstration of a particular blood quantum.

COUNT VI

VIOLATION OF U.S. CONST., AMEND. XIV, - DUE PROCESS,

AS APPLIED TO THE SEVERAL STATES

50. All of the above statements are incorporated herein as if fully re-alleged in their entirety.

51. The Fourteenth Amendment to the U.S. Constitution states, in relevant part, that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

52. The Bill of Rights, including the First Amendment, has been incorporated as against the several states through the operation of the Due Process clause of the Fourteenth

Amendment. As such, the guarantees of the rights enshrined by the free exercise clause and the establishment clause are also effective within the states.

53. By taking police action against the NAC and its individual members for practicing their religion, the state of Utah has engaged in a continuing and deliberate violation of the NAC's and its members' First Amendment rights. As such, Utah is in violation of both the First Amendment and the Due Process clause of the Fourteenth Amendment.

COUNT VII

VIOLATION OF U.S. CONST., AMEND. XIV, -

PRIVILEGES AND IMMUNITIES CLAUSE

54. All of the above statements are incorporated herein as if fully re-alleged in their entirety.

55. The Fourteenth Amendment to the U.S. Constitution, states in relevant part, that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States..."

56. The Privileges and Immunities clause, long dormant in U.S. jurisprudence, is a guarantee that the privileges owed to citizens of the United States shall not be restricted or limited by any state.

57. In the present case, the state of Utah has perniciously abridged the privileges of its own citizens, namely members of the NAC, by repeatedly interfering with their ability to peaceably practice their religion. NAC members have been made the subject of numerous investigations, criminal proceedings, and harassment. As citizens of the United States, they are entitled to enjoy the same privileges that are provided to all other practitioners of other faiths.

As applies specifically to this case, they should enjoy the privilege of partaking in their traditional sacrament, peyote, regardless of their tribal affiliation or ethnicity.

COUNT VIII

VIOLATION OF 21 C.F.R. 1307.31 –

FEDERAL PEYOTE EXEMPTION FOR THE NATIVE AMERICAN CHURCH

58. All of the above statements are incorporated herein as if fully re-alleged in their entirety.

59. 21 C.F.R. 1307.31 states, in relevant part, that “The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in *bona fide* religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration.”

60. Insofar as is relevant to this case, NAC members only use peyote in *bona fide* religious ceremonies.

61. Members of the NAC are exempt from the application of the Controlled Substances Act regarding peyote use in the context stated in paragraph 40 above.

62. 21 C.F.R. 1307.31 makes no requirements, either explicitly or implicitly, that NAC members show some tribal affiliation or Native American ancestry in order to qualify for the exemption.

63. Consequently, the Federal Government is in violation of 21 C.F.R. 1307.31 when it acts to enforce federal laws criminalizing peyote use, possession, and distribution against any member of the NAC, regardless of race or tribal affiliation, when such use, possession or distribution is in connection with a *bona fide* religious ceremony of the NAC.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff hereby prays for the following relief:

64. A preliminary injunction barring the Defendants from engaging in any enforcement action against the Plaintiff during the pendency of this matter, including but not limited to conducting raids on church premises relating to peyote possession, use, or distribution; arresting church members for peyote possession, use, or distribution; or otherwise interfering in the religious practices of the Oklevueha Native American Church;

65. A declaratory judgment stating that federal drug laws do not preclude the possession, use, or distribution of peyote in the context of Native American Church ceremonies without regard to Native American ancestry or membership in a federally recognized tribe;

66. A declaratory judgment holding as unconstitutional any and all state laws that limit the use of peyote in the context of Native American Church ceremonies to persons of Native American ancestry or to members of federally recognized tribes;

67. An award of attorney's costs, fees, and expenses pursuant to 42 U.S.C. § 1988 or as otherwise permitted by law;

68. An award of such other damages and further relief as the court sees fit to award.

Dated this 9th day of September, 2010

Respectfully Submitted,



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