

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

JIMMY KINSLOW
Plaintiff

v. No.

CIV-07-1167 MV/RLP

NEW MEXICO CORRECTIONS DEPARTMENT,
JOE WILLIAMS, MIKE HEREDIA,
LUPE MARSHALL, GERMAN FRANCO,
JEFF MULAC,

Defendants.

**DEFENDANTS RESPONSE TO PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGEMENT**

COMES NOW DEFENDANT, The New Mexico Corrections Department ("NMCD") and Employees of NMCD by and through counsel, the Office of General Counsel for NMCD, and Responds to Plaintiff's Motion for Partial Summary Judgment and Prays the Court to Deny this motion, and as grounds thereof submits the following:

INTRODUCTION

As Plaintiff has presented a novel issue to the court in this district, some matters need to be presented before going into the discussion for denial of this Motion.

In dealing with religious issues, courts have determined that the appropriate starting point is the Religious Freedom Restoration Act passed by Congress in 1993 and found to be inapplicable to the States by the U.S. Supreme Court in *City of Borne v. P.F. Flores*, 521 U.S. 507. See i.e. *Wilson v. Moore*, 270 F. Supp.2d 1328, *Combs v. Corrections Corp. of America*, 977 F. Supp. 799.

As various U.S. District Courts and U.S. Circuit Courts have considered the matter, most are in agreement that the starting point is to see if the complaint is against a federal institution; if not, the case does not continue.

While appealing to 42 U.S.C. §2000cc 1-5, for the proposition that the matter is resolved, Plaintiff has refused to acknowledge that the language is not so comprehensive as to encompass the proposition presented in the complaint.

Only one circuit has suggested that a Constitutional issue may be reached in a context such as that presented in this case, see *Combs v. Corrections Corp of America*, yet the decision and discussion there is beyond the scope of Tenth Circuit court decisions.

In the Tenth Circuit, the major defining cases discussing religious freedom and native American classification are three cases that were combined into one. That case, *U.S. v. Hardman*, 297 F.3d, 116, CA 10 (N.M.) 2002, dealt with the right of non-native American's to possess eagle feathers.

In the analysis, the starting point was, again, the RFRA passed in 1993. Important to note is that those cases were against a Federal agency, not a state agency or prison.

In this instance, Plaintiff is in a State facility, and thus under State laws and regulations. If we are able to reach the Constitutional issue, it must be examined through the less restrictive lens of rational relationship, not a compelling governmental interest test.

With that brief introduction, we address Plaintiff's contention and reasons for his Motion for Partial Summary Judgment.

**DEFENDANT’S REQUEST FOR THE COURT TO DENY
PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff makes his Motion for Partial Summary Judgment based on the First Amendment, 42 U.S.C. §2000cc 1-5, 42 U.S.C. §1983 and State Law §28-22-1 et seq., NMSA 1978, The New Mexico Religious Freedom Restoration Act and cites to the sworn Verified Complaint and Defendants admissions made in the answer to that Complaint.

The constitutional issue is set aside as referencing the statute will suffice for consideration and denial of the motion.

Plaintiff insists on describing the criteria of NMCD policy as a “racial screening test”, yet it is well established that that status of native American is more along the lines of a political status, see *Morton v. Mancari*, 417 U.S. 535 (1974), and not racial definition. To insist on this misnomer in the complaint is to attempt to take the complaint beyond the limited instances where the policy, and the right defined therein, is implicated.

The rest of Plaintiff’s observations and demands for partial summary judgment are premised on the definition of native American as a “racial” classification.

The cases mentioned discuss the unique status of native Americans, and their classification as a uniquely described class of individual, with uniquely tailored statutes and laws for the protection of their culture and history.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when there are no genuine issues of material fact in dispute. Plaintiff seems to overlook that what he has put at issue is what he has

labeled a “racial screening test” to practice native American religious rites in a State prison.

Citing to 42 U.S.C. §2000cc 1-5, the argument fails in that Plaintiff is trying to show that “native American” is a racial designation. As noted previously, it is not.

Further, the very State statute that he cites for the proposition that native American religious rites are to be allowed in state institutions clearly defines *who* a native American is. Somehow Plaintiff leaps from the defining character of native American per the statute he relies upon for his contention of religious worship and ignores the definitions incorporated within the statute as to who a native American is. The issue that he has brought forward was that it was necessary for him to show native American ancestry or affiliation to participate in native American religious rituals.

There is no genuine issue of material fact; per the State statute he needed to show native American ancestry to enjoy the benefits and protections of the statute. Thus, the first cause is not in dispute, and there is no need to go further. There is no complaint for the court to resolve, and the matter should be dismissed.

The constitutional issue raised as a second claim is part of the first issue raised. As the first item is resolved by resorting solely to statutory text, there is no need to venture into consideration of a constitutional question.

ARGUMENT

Per the State statute, an inmate must show that he is a member of a native American tribe to participate in native American religious rites if incarcerated in a prison within the State of New Mexico.

This is not a racial exclusion policy, but one in conformity with native American wishes to preserve the native American culture and belief system to those who are native American.

The Governmental Purpose as promulgated in the statute cited is that defined by native Americans in conjunction with state lawmakers in drafting a statute which is implemented as a policy at the NMCD level.

State Law 33-10-1 et seq., has to be read completely to recognize that the statute does specifically define who a native American is, and thus who is afforded the protections of this statute. As such, NMCD policy, developed to comport to State statute, requires NMCD to ascertain the native American heritage of those who express desires to participate in the native American religious rituals for individuals incarcerated in a state facility.

Attempting to define and then insist that a whole class of persons are kept from the freedom to worship a religion of their choice is far beyond the scope of the issue before the court. This complaint is specific to Plaintiff, a native American inmate who provided evidence of his native American affiliation to be allowed to engage in native American Religious rites as per §33-10-1 et seq.

This is not a matter of religious freedom as much as a situation where native Americans are attempting to preserve their cultural and historical identity through religious rituals that are part and parcel of their native American identity. This is made very clear by the plain language of the statute in question:

. . . to provide a program of counseling for native Americans confined in penal institutions in New Mexico . . .to increase the availability of Indian spiritual leaders for teaching native Americans in the areas of Indian history, cultural sensitivity and Indian religion . . .

§33-10-2.

As the religious rituals and beliefs are incorporated into the sense of identity of a native American, it is natural that native Americans would take steps to assure the continuity of such a belief system to heirs of native Americans. Thus, the statutory requirement and definition of a native American.

CONCLUSION

As this is a matter solely within the confines of a State institution, the consideration of the RFRA is not applicable to the situation before the court.

Plaintiff has based his argument on State statute, which is quite clear with regards to the protections afforded to native Americans. More importantly, the statute referred to defines a native American, and proscribes the need to identify a native American before extending protections under the statute to any person.

As the Statutory text clearly defines a native American, and the New Mexico Corrections Department Policy in questions is in accord with the Statute, there is no violation of the statute in requiring proof of native American ancestry or affiliation prior to allowing the participation of an individual in native American religious rites.

WHEREFORE, Defendants ask the court to Deny Plaintiff's motion for Partial Summary Judgment.

Respectfully submitted,

OFFICE OF GENERAL COUNSEL
NEW MEXICO CORRECTIONS DEPT.

/s/ Carlos Elizondo
Deputy General Counsel
P.O. Box 27116
Santa Fe, NM 87502-0116
(505) 827-8691

I hereby certify that true and correct copies
of the foregoing pleading were mailed to the
following this 1st day of July 2008:

Pro se Plaintiff Jimmy Kinslow, Inmate #27363
Penitentiary of New Mexico
P.O. Box 1059
Santa Fe NM 87504

/s/ Carlos Elizondo