IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

DENNIS T. MICKEL,

Plaintiff,

vs.

CHARLES L. WOLFF, JR., et al

CIV-R-79-239-ECR

DECREE
AND
PERMANENT INJUNCTION

The parties to this proceeding having executed a Stipulation for Settlement, approved by this Court on October 31, 1980,

IT IS ORDERED, ADJUDGED AND DECREED, that the Nevada State Prison shall immediately adopt and implement a Post Order and Policy Memorandum providing as follows:

A. Inmates within the Nevada State Prison who are classified with a custody status of Administrative Segregation or Protective Custody are indivdually permitted to participate, with a leader, in the Native American religious observance known as the pipe ceremony no less frequently than twice per calendar month. Inmates with the custody status of Administrative Segregation or Protective Custody are permitted access to

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materials, and visits with and communication from Native American spiritual leaders, in the same matter and to the same extent as other inmates with those security classifications are permitted access to religious literature and materials and visits with or communication from spiritual leaders or counselors.

B. Inmates within the Nevada State Prison who have custody status other than Punitive Segregation, Administrative Segregation, or Protective Custody are permitted to attend the Native American religious observance known as "sweat lodge" in the same manner and to the same extent as other inmates who have custody status other than Punitive Segregation, Administrative Segregation, or Protective Custody are permitted to attend religious observances; provided, that inmates with the custody status of protective custody may be permitted to attend sweat lodge when such attendance is consistent with their personal health and safety.

C. The Nevada State Prison recognizes that the Native American religious observance or ceremony known as the pipe ceremony may be conducted by an inmate who is a pipe holder, without the necessity of attendance or guidance by religious or spiritual leaders from outside of the institution. The Nevada State Prison further recognizes that the religious observance or ceremony known as sweat lodge

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holder, or an individual identified as a sweat leader by a pipe holder, without the necessity of attendance or guidance by religious or spiritual leaders from outside of the institution. The Nevada State Prison will permit the conduct of Native American religious observances by qualified inmates, as described in this paragraph C, without the necessity of attendance or guidance by religious or spiritual leaders from outside of the institution.

D. Inmates confined in the Nevada State Prison are permitted access to literature concerning Native American religious observances and ceremonies, and the materials necessary for Native American religious ceremonies and observances, in the same manner and to the same extent as inmates are provided access to literature concerning and materials necessary for other religious observances. The Nevada State Prison will provide, or will permit inmates to obtain, the materials necessary for the construction and maintenance of a sweat lodge within the institution; and,

IT IS FURTHER ORDERED, that the Post Order and Policy Memorandum adopted by the Nevada State Prison pursuant to this Decree and Permanent Injunction, or Post Orders and Policy Memoranda imposing no greater restrictions upon the rights of inmates of the Nevada State Prison, shall remain in full force and effect, and shall not be revoked, modified or abridged in any manner or with the effect that the opportunity of inmates

would be impaired or diminished; provided, that nothing in said Post Order and Policy Memoranda shall be construed to prevent a general lockdown of the institution or the implementation of other extraordinary security measures when appropriate, so long as any attendant curtailment of religious practices be justified by legitimate security interests, be applied in non-discriminary fashion, and be of general applicability; and,

IT IS FURTHER ORDERED, that copies of the Policy Memoranda adopted and implemented pursuant to this Decree and Permanent Injunction shall be provided to inmates of the Nevada State Prison upon request, and in all editions of the Nevada State Prison Orientation Handbook prepared after the entry of this Decree and Permanent Injunction, reference shall be made to the availability of Native American religious observances to interested inmates and to the existence of the Policy Memoranda relating to access to Native American religious observances; and,

IT IS FURTHER ORDERED, that if any provisions of the Stipulation for Settlement herein and this Decree and Permanent Injunction cause a result unintended by the parties or cause an ambiguous interpretation, the aggrieved party shall notify the other party by mail of the unintended result or ambigious interpretation. The parties shall have thirty (30) days after the date of the letter to resolve the problem among themselves, and if the parties are unable to reach agreement within such time, the issue may be submitted to this Court for resolution; and,

IT IS FURTHER ORDERED, that the defendants, their successors in their respective official capacities, and those persons acting in concert with or under the direction or control of the defendants or their successors in their respective official capacities, are permanently enjoined and restrained from taking any action contrary

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IT IS FURTHER ORDERED, that each party shall bear his or her own costs and attorneys foes herein.

Dated this 23d day of December, 1980.

Edward C. Reed.
UNITED STATES DISTRICT JUDGE

Presented By:

Richard E Olson
NEVADA INDIAN LEGAL SERVICES, INC.
Richard E. Olson, Jr.
Attorneys for Plaintiff

I hereby approve this Decree and Permanent Injunction in full satisfaction and settlement of all of the claims asserted by me or on my behalf in this proceeding.

Dated this 20 TH day of Dec-, 1980.

Dennis Talbot Mickle
DENNIS T. MICKLE

Copy received this 19TH day of December, 1980.
Approved/Not Approved as to form.
Approved/Not Approved as to content.

RICHARD H. BRYAN
ATTORNEY GENERAL OF NEVADA
Attorney for Defendants.

BY: Richard E Thornley
Richard E. Thornley
Deputy Attorney General
Criminal Division

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DENNIS T. MICKEL,

Plaintiff,

vs.

CHARLES WOLFF, JR., *et al.*,

Defendants.

3:79-cv-00239-LRH-VPC

ORDER

This matter comes before the Court with respect to a combined Motion to Intervene, Motion to Enforce Consent Decree, and Request for an Evidentiary Hearing. (Docket #153). The instant motion was filed by Eric Candido, Gary Hawes, Les Graham, Leonel Hernandez, and Country "Singing Horse" Stevens (hereafter "movants"), who are all inmates in the protective custody unit at Lovelock Correctional Center, and who are represented by counsel. Defendants, NDOC officials, filed a response to the motion on September 13, 2007. (Docket #158). Through counsel, movants filed a reply brief on October 2, 2007. (Docket #161).

I. Background of the Instant Action

The named plaintiff in this action, Dennis T. Mickel,[1] who was an inmate at Nevada State Prison at the time of filing this lawsuit, alleged that he was denied the right to practice his Native American religion in violation of the First Amendment. A consent decree was entered in this action on December 23, 1980, by District Judge Reed. (Docket #42). The salient points of the 1980

[1] As of October 1, 1980, plaintiff Mickel's pleadings indicate that he was incarcerated within the California Department of Corrections, at the California Medical Facility in Vacaville, California. (Docket #32).

consent decree are as follows:

- Inmates within the Nevada State Prison in administrative segregation or protective custody are individually permitted to participate in Native American religious pipe ceremonies no less frequently than twice per month. These inmates are permitted to access Native American religious materials, literature, and visits to the same extent as other inmates.

- Inmates within the Nevada State Prison with a custody status other than punitive segregation, administrative segregation, or protective custody are permitted to attend Native American religious sweat lodge ceremonies. Inmates in protective custody may attend sweat lodge when such attendance is consistent with their personal health and safety.

- Native American inmates at Nevada State Prison are permitted to access literature and materials concerning their religion in the same manner and to the same extent as other religions.

- Nevada State Prison will provide, or permit inmates to obtain, materials necessary for the construction and maintenance of a sweat lodge within the institution.

- The Post Order and Policy Memorandum adopted pursuant to the consent decree shall impose no greater restrictions upon the rights of inmates at Nevada State Prison, and shall not be revoked, modified, or abridged the practice or participation in Native American religious activities, except when legitimate security interests necessitate curtailment of religious practices in a non-discriminatory fashion.

All of the grants included in the 1980 consent decree are incorporated into the existing Administrative Regulation (AR) 809, which governs Native American religious activities of inmates within the Nevada Department of Corrections (NDOC). AR 809 contains additional and more detailed procedures for Native American practices including pipe ceremonies and sweat lodge, religious materials/supplies needed for pipe and sweat lodge ceremonies, special meals for sweat lodge days, religious visits from spiritual leaders, a Native American Inmate Council, procedures for the inspection of religious materials by correctional staff for security purposes, and other details.

II. Motion to Intervene, Motion to Enforce Consent Decree, and Request for an Evidentiary Hearing (Docket #153)

A. Movant's Allegations

Inmates Eric Candido, Gary Hawes, Les Graham, Leonel Hernandez, and Country "Singing Horse" Stevens bring a motion to intervene and to enforce the terms of the consent decree. (Docket #153). The movants are, and were at all relevant times, in Protective Custody/Protective Segregation at Lovelock Correctional Center. Movants are members of the "Tribe of Nation" Native American religious circle, a bona fide religious faith group recognized by the NDOC. Movants assert that they

have been denied rights guaranteed to them under the 1980 consent decree, the First Amendment, and the Religious Land Use and Institutionalized Persons Act (RLUIPA), codified at 42 U.S.C. §§ 2000cc-2000cc-5. The crux of movants' allegations are as follows:

- Since May 2006, movants have been barred from participating in sweat lodge ceremonies *with general population inmates*. Instead, movants have been provided a *separate circle for protective custody inmates* to engage in sweat lodge ceremonies. Movants have refused to participate in sweat lodge ceremonies because they claim that other protective custody inmates are "child molesters who do not share their spiritual beliefs."
- Prison officials have interfered with movants' ability to "pray, smudge[2] and gather as a circle in prayer.
- The prison library contains no Native American religious literature and recordings, but does contain such material on other religious faiths.
- Movants have been denied the right to have "prayer blankets" in which to wrap themselves while sitting in prayer. In contrast, Muslim inmates are allowed to have prayer rugs.
- Prison officials have denied movants the ability to engage in "traditional religious observance and ceremony that entails giving and sharing spiritual items with members of their religious circle."
- Prison officials have refused to allow movants to possess various spiritual items; items have been desecrated, confiscated, and/or destroyed. Movants seek the right to possess "spiritual packages" and seek compensation for the confiscated/desecrated items.[3]

B. Intervention as of Right

As an initial matter, defendants assert that Rule 24 of the Federal Rules of Civil Procedure requires a proposed complaint in addition to a motion to intervene and declarations. (Defendants' Opposition Brief, at p. 3). A formal complaint would be required if movants had not set forth the grounds for intervention. However, in the motion before this Court, movants have adequately set forth their allegations and grounds for intervention in their motion. *See Beckman Industries, Inc. v.*

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[2] "Smudging" refers to the Native American practice of "burning of sage and aromatic herbs." This definition is found online at http://findarticles.com/p/articles/mi_g2603/is_0005/ai_2603000543.

[3] The declaration of Country "Singing Horse" Stevens alleges that a piece of religious artwork was ripped off of his wall and destroyed, and that his ceremonial headbands were confiscated and destroyed. Also, his "Sacred Bundle" was confiscated, which included: "Our Sacred Pipe, Ceremonial Drum Stick, sacred herb pouches, Pipe bag, Pipe Bowl bag, red cloth Pipe regalia, small abalone shell (smudge bowl), pipe stem, totem lighter case (White Buffalo), tobacco pouch, matches bag, pipe cleaner sticks (beaded), spiritual choker, sacred red stone and pouch, Rattle, medium sage bag, prayer Feather, small orange handled scissors, altar cloth, and other items." (Stevens Declaration, at pp. 3-4). Several other confiscated items are listed on page 4 of Stevens' declaration, including feathers, beads, needles, nylon thread for bead weaving, a dream catcher, etc. Stevens estimates the value of all confiscated and/or desecrated items to be $2,200.00, plus $424.75 for replacement pipe and regalia. *Id*. at p. 4.

International Ins. Co., 996 F.2d 470, 474 (9th Cir. 1992) (approving intervention without a pleading where court was otherwise apprised of the grounds for the motion). Thus, the failure to include a complaint is not a valid basis for denial of the motion to intervene.

There are four requirements for intervention as of right under Fed. R. Civ. P. 24(a)[4]: (1) the intervention must be timely; (2) the movant must have a sufficiently protectable interest relating to the subject of the action; (3) the movant must be so situated that the disposition of the action may result in the practical impairment of the party's ability to protect that interest; and (4) the movant's interest must not be adequately represented by the existing parties to the lawsuit. *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001); *U.S. v. State of Oregon*, 913 F.2d 576, 587 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991). If the motion to intervene is not timely, the court need not address any other element. *Oregon*, 913 F.2d at 589.

1. Timeliness

Timeliness is the threshold requirement for intervention. Courts consider three criteria to evaluate timeliness: the stage of proceeding, prejudice to other parties, and the reason for and length of the delay." *U.S. v. Oregon*, 913 F.2d at 588. Where the intervenor waits until after a consent decree is entered, courts weigh that fact heavily against intervention. *Id.*

In the instant case, the consent decree was filed on December 23, 1980. (Docket #42). Movants filed their motion to intervene on August 6, 2007. (Docket #153). Inmate August Ardagna (who is not one of the current movants)[5] originally sought to intervene in this case on behalf of several inmates at Lovelock Correctional Center, including the current movants, in April 2004. (Docket #68). The motion was later withdrawn (Docket #97) and movants' motion for a settlement conference was granted in June 2005. (Docket #103). During the next year, Magistrate Judge Cooke

[4] Rule 24(a) reads: "On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practice matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

[5] August Ardagna has been paroled, which accounts for his absence as a movant in the pending motion to intervene. (Movants' Reply Brief, at fn.1).

held four settlement conferences, the last of which occurred on July 19, 2006. (Docket # 137).[6,7]

Movants argue that their delay in filing the instant motion to intervene is justified because their former counsel, Patrick Flanagan, withdrew from the case in April 2007, as he was appointed to a judgeship. (Docket #145). In May 2007, current counsel for movants, Terri Keyser-Cooper and Diane K. Vaillancourt, substituted in as counsel. (Docket #150, #151, #152). Movants explain that their counsel made several attempts to communicate with counsel for defendants in an attempt to reach an agreement, but no success was had, which led to the filing of the instant motion to intervene on August 6, 2007. (Docket #153).

Even taking into consideration movants' proffered reason for delay, and measuring time from the date that inmate Ardagna originally sought to intervene in April 2004, movants are woefully late in light of the stage of the proceedings of this action. Movants first sought to intervene in April 2004, more than 20 years after the consent decree was entered, and filed a proper motion to intervene 27 years after the consent decree.

In the 20-plus years since the consent decree was entered, the law of inmate religious rights has changed drastically. The 1980 consent decree was based on First Amendment law at that time. In 1987, the U.S. Supreme Court set forth a rational basis standard for First Amendment issues arising in the context of prisoner conditions of confinement cases. *Turner v. Safley*, 482 U.S. 78, 89 (1987) ("when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."); *see also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). Additionally, the Ninth Circuit has ruled that prisoners are protected by

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[6] While these settlement conferences were taking place, movants Eric Candido, Gary Hawes, Les Graham, Leonel Hernandez, and Country "Singing Horse" Stevens were transferred from LCC to NSP in August 2005. The subject of the four settlement conferences was disputes between general population inmates and protective custody inmates that had arisen over the use of Native American religious grounds. The parties also discussed AR 809, which governs Native American religious practices, which was revised as a result of the settlement conferences. (Docket #140, Report & Recommendation, filed August 22, 2006).

[7] In January 2006, inmate Mauwee and the Northern Continental Spiritual Circle filed a motion in this action for an order to compel. (Docket #119). Mauwee sought relief from the court because he and other members objected to sharing their Native American religious grounds with protective segregation inmates who were then housed at NSP. Due to the tensions within the prison, by May 2006, most of the protective segregation inmates were relocated from NSP back to LCC where they were provided their own religious grounds. The motion to compel was therefore denied on grounds of mootness. (Docket #140 and #141).

the Equal Protection Clause from intentional discrimination on the basis of their religion. *Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir. 1997). Later, the passage of RLUIPA imposed a strict scrutiny standard on prisons with respect to inmate religious issues. 42 U.S.C. §§ 2000cc-2000cc-5. Individuals may assert violations of RLUIPA in judicial proceedings and obtain appropriate relief. § 2000cc-2(a); *Cutter v. Wilkinson*, 544 U.S. 709, 714-16 (2005); *Warsoldier v. Woodford,* 418 F.3d 989, 994 (9th Cir. 2005). To accommodate a prison's need for institutional order and security, Congress adopted the "compelling governmental interest" and "least restrictive means" tests. *Warsoldier v. Woodford,* 418 F.3d at 994.

Finally, the Prison Litigation Reform Act ("PLRA") changed injunctive relief standards in civil actions concerning prison conditions. 18 U.S.C. § 3626. Most significantly, the PLRA states:

> the court shall not grant or approve any prospective relief unless the court finds that such relief if narrowly drawn, extends no further than necessary to correct the violation of a Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A) (1996). Moreover, the PLRA permits a defendant to see the termination or modification of prospective relief where such relief fails to meet the above standard. *See* 18 U.S.C. § 3626(b)(2); *Gilmore v. California*, 220 F.3d 987, 1008 (9th Cir. 2000). The requirements of the PLRA apply to cases pending upon the enactment of the PLRA. *See Hallett v. Morgan*, 296 F.3d 732 (9th Cir. 2002); *Oluwa v. Gomez*, 133 F.3d 1237, 1239-40 (9th Cir. 1998). In the instant case, the passage of time and significant developments in the statutory and case law have far surpassed the purview of the 1980 consent decree.

In addition to the passage of time and resulting change in the law, allowing movants to intervene at this stage would result in prejudice to defendants. "One of the 'most important' factors in determining timeliness is prejudice to the existing parties." *U.S. v. Oregon*, 913 F.2d at 588. If movants are allowed to intervene, defendants would be called upon to litigate what is essentially a new case – new facts, new plaintiffs, a new location (prison), and new law. The prejudice to defendants caused by movants' untimeliness is substantial and precludes intervention.

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2. Interest Relating to the Subject of the Action

"'[W]hether an applicant for intervention demonstrates sufficient interest in an action is a practical, threshold inquiry. No specific legal or equitable interest need be established.'" *Southwest Center for Biological Diversity v. Berg*, 268 F.3d at 818 (quoting *Green v. United States*, 996 F.2d 973, 976 (9th Cir. 1993) (internal citation omitted)). "'It is generally enough that the interest [asserted] is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Southwest Center,* 268 F.3d at 818 (quoting *Sierra Club v. United States EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993)). At the same time, "[a]n applicant demonstrates a 'significantly protectable interest' when 'the injunctive relief sought by the plaintiffs with have direct, immediate, and harmful effects upon a third party's legally protectable interests.'" *Southwest Center*, 268 F.3d at 818 (quoting *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1494) (9th Cir. 1995)).

The 1980 consent decree is limited in scope, in that it concerns only inmates "within the Nevada State Prison," not all inmates within the Nevada Department of Corrections (NDOC). (Docket #42). Movants assert an equitable and practical interest in protecting the Native American religious rights of all inmates, which is the same basic interest that was the subject of the 1980 consent decree. Assuming, *arguendo*, that movants have a significantly protectable interest relating to the subject of this action, the untimeliness of movants' attempt to intervene overshadows and outweighs this factor.

3. Practical Impairment of Party's Ability to Protect Interest

Assuming that movants have a demonstrated a significantly protectable interest, the court must determine whether those interests would, as a practical matter, be impaired or impeded by the disposition of this action. *Southwest Center*, 268 F.3d at 822. Movants assert that they have interests which are not the same as plaintiff Mickel's were at the time the consent decree was entered. However, movants have not identified how or why they are unable to protect their rights without being made parties to the consent decree.

4. Inadequate Representation by Parties to the Action

The prospective intervenor bears the burden of demonstrating that the existing parties may

not adequately represent its interest. *Southwest Center*, 268 F.3d at 822, citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983). The current version of AR 809 includes all of the provisions of the consent decree, as well as additional provisions for the practice of Native American religion available to all NDOC inmates. While movants contend that plaintiff Mickel cannot adequately represent their interests because he is now incarcerated in California, this does not mean that intervention in this action is appropriate. The new allegations made by movants exceed the scope of the consent decree and will not be included as part of this action.

Movants are not entitled to intervention as of right. While movants arguably have a significantly protectable interest, too much time has passed since the entry of the 1980 consent decree for a proper intervention. Allowing intervention at this juncture would result in prejudice to defendants. Moreover, the law governing inmate religious rights has undergone significant changes since the 1980 consent decree. Movants' motion to intervene as of right is denied.

C. Permissive Intervention

Fed. R. Civ. P. 24(b)(2) allows intervention in an action "when an applicant's claim or defense and the main action have a question of law or fact in common." The movant must also show that the application was timely and that the intervention would not "unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b)(2). A party seeking intervention under Rule 24(b)(2) must establish a basis for federal subject matter jurisdiction independent of the court's jurisdiction over the underlying action. *Id.*

In the instant case, the questions of law that led to the consent decree are different from the issues of law that are now applicable to claims of denial of inmate religious rights, such as the violations that movants now assert. *See Turner v. Safley*, 482 U.S. 78 (1987); Religious Land Use and Institutionalized Persons Act (RLUIPA), codified at 42 U.S.C. §§ 2000cc-2000cc-5. That is, because the law of prisoner religious rights has undergone significant change in the past 27 years since the consent decree was entered, it cannot be said that movants' claims and the main action have a common question of law.

Movants' allegations concern inmates' ability to exercise Native American religious rights, thus their claims have a *general* common question of fact to the main action. However, movants

assert new and different allegations than those involved in the main action. Movants do not have sufficiently similar questions of fact in common to support permissive intervention. Because movants' claims and the main action do not share common questions of law or fact, and due to the untimeliness of movants' attempt to intervene and prejudice to defendants, the motion for permissive intervention is denied.

D. Movants are Not Third-Party Beneficiaries

Movants contend that they are intended third-party beneficiaries to the 1980 consent decree. Consent decrees are generally viewed as contractual agreements and are given the status of a judicial decree. *Hook v. State of Arizona, Dept. of Corrections*, 972 F.2d 1012, 1014 (9th Cir. 1992). Parties to a contract may create enforceable contract rights in a third-party beneficiary. *Beckett v. Airline Pilots Association*, 995 F.2d 280, 286 (D.C. Cir. 1993). However, in the instant case, the plain language of the 1980 consent decree applies to inmates at Nevada State Prison. There is no language in the consent decree to indicate that enforceable rights were created for inmates at other institutions. Movants are not intended third-party beneficiaries and they cannot enforce the 1980 consent decree on such grounds.

III. Conclusion

Movants are not entitled to intervention as of right, due to untimeliness, prejudice to defendants, and significant changes in the law of the case. Movants are not entitled to permissive intervention, due to untimeliness and the lack of common issues of fact and law with the main action. Moreover, movants are not third-party beneficiaries to the 1980 consent decree and cannot enforce the decree. Finally, an evidentiary hearing is unnecessary and the request for the same is denied.

IT IS THEREFORE ORDERED that movants' Motion to Intervene, Motion to Enforce Consent Decree, and Request for an Evidentiary Hearing (Docket #153) are **DENIED.**

Dated this 4th day of January, 2008.

LARRY R. HICKS
UNITED STATES DISTRICT JUDGE

UNITS 1, 2 & 3

FILED

OCT 19 1982

CLERK, U. S. DISTRICT COURT
DISTRICT OF NEVADA
BY _____ DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT L. STICKNEY, et al.,

Plaintiffs,

vs.

ROBERT LIST, et al.,

Defendants.

No. CIV-R-79-11-ECR

ORDER

Defendants have moved for clarification of the previous order of the Court of May 14, 1982. A hearing on this motion was held in Court on October 18, 1982. Plaintiffs were represented by Robert L. Stickney pro se. Defendants were represented by Ernest Adler, Deputy Attorney General. Defendants' motion addresses the following matters:

1. In order to make repairs which are under way at the present time in the housing units, it may be necessary to move inmates to other units for short periods of time not to exceed a total of two weeks as to any inmate. This, in turn, may cause the units to which inmates are moved to become overcrowded. Since approximately two-thirds of the inmates in any one of the units will remain there during refurbishment of the unit, the normal complement of guards will remain on duty. During such periods of time the units to which inmates are moved may exceed the maximums permitted

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PLAINTIFF'S EXHIBIT 12

under the order of May 14, 1982.

The fact that the numbers of prisoners in the particular units will exceed the limitations imposed by the order of May 14, 1982, on this isolated occasion because of the present refurbishing project, does not appear to unreasonably endanger the safety of the inmates in light of its temporary nature. The short period of time involved and the limited number of inmates involved in such relocations is not found to violate the intent of the previous order of the Court.

2. During the course of an emergency, such as an escape or fire, it may be necessary to remove officers from the units for an extremely short period of time to insure the security of the institution. According to the existing procedure, if emergencies occur, off-duty personnel are called to the institution to assist in resolving the problem which has arisen, and as soon as the off-duty personnel arrive at the prison, the officers on duty return to their regularly assigned posts. The hearing in this matter indicated that the maximum time for off-duty personnel to arrive at the prison on such occasions will not exceed one to two hours. Removal of officers from the units under such exigent circumstances for periods of time not to exceed the foregoing time limitations is likewise found by the Court to be within the intent of the order of May 14, 1982.

3. According to regular daily routine, during mealtimes one officer from each of Units 1, 2 and 3, has customarily accompanied inmates to meals. During this period of time there are few, if any, inmates who remain in the units. The culinary areas are susceptible to problems [illegible] a confined area at one time. The procedure of the prison

for one officer from each of the said units to assist in supervision of the culinary area during mealtimes is also found to be within the intent of the order of May 14, 1982. It is the understanding of the Court that each of the mealtimes extends for a period of not to exceed approximately one hour. It is also the understanding of the Court that the prison administration is aware of the fact that some of the inmates may well realize that guard coverage is reduced during mealtimes and that those who may be intent on trouble may be inclined to cause problems during such periods of time when the number of guards in the units is reduced.

DATED: October 19, 1982.

Edward C. Reed

UNITED STATES DISTRICT JUDGE

FILED

MAY 14 1982

CLERK, U. S. DISTRICT COURT
DISTRICT OF NEVADA
BY _____ DEPUTY

ENTERED

MAY 14 1982

CLERK, U. S. DISTRICT COURT
DISTRICT OF NEVADA
BY _____ DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

ROBERT L. STICKNEY, ALBERT ROBERT, Individually and on behalf of all other persons similarly situated at the Northern Nevada Correctional Center, and the INMATE ADVISORY COMMITTEE of the Northern Nevada Correctional Center,

Plaintiff,

vs.

ROBERT LIST, Individually and in his official capacity as president of the Board of State Prison Commissioners; RICHARD BRYAN, Individually and in his official capacity as member of the Board of State Prison Commissioners; WILLIAM SWACKHAMER, Individually and in his official capacity as secretary of the Board of State Prison Commissioners; CHARLES L. WOLFF, JR., Individually and in his official capacity as Director of the Department of Prisons; WILLIAM LATTIN, Individually and in his official capacity as Superintendent of Northern Nevada Correctional Center; ELMER DAVIS, Individually and in his official capacity as Captain of Northern Nevada Correctional Center; and DOES I through X, Individually and in their official capacities as Agents and Employees of the named Defendants,

Defendants.

CIV-R-79-11-ECR

MEMORANDUM DECISION

AND JUDGMENT

Plaintiff, Robert L. Stickney, appearing in pro per on behalf of himself and all other persons similarly situated, filed this action on January 17, 1979, seeking, injunctive and declaratory relief in regard to certain conditions of confinement of the Northern Nevada Correctional Center (NNCC) alleged to constitute cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States. The request for damages contained in the complaint was subsequently deleted by stipulation.

On April 24, 1981, this Court entered an order certifying that this case be maintained as a class action pursuant to Rule 23 Fed.R.Civ.P. The class is confined to all present inmates at NNCC and those persons who may in the future be incarcerated there. Mr. Stickney is designated by the order as representative of the class. It is perhaps unusual that a pro se inmate should or could be a representative of a class. Mr. Stickney is a skilled inmate law clerk and, although a layman, has considerable experience and ability in researching legal matters and in preparation of pleadings. Mr. Stickney has appeared in this Court previously and has demonstrated a knowledge of court procedures. A serious effort was made both by the plaintiff and by the Court to attempt to obtain counsel to represent the plaintiff class. No attorney or attorneys would agree to take the case. Hence, it was determined by the Court that if this case was going to be brought at all it would have to be brought by Mr. Stickney, a layman, without the assistance of legal counsel. Thus, it appears appropriate to the Court that Mr. Stickney act as representative of the class and as the individual most qualified under the circumstances to properly present plaintiff's case.

The Court notes at the outset that at least one

circuit has held that it is plain error to permit an inmate unassisted by counsel to represent fellow inmates in a class action. Oxendine v. Williams, 509 F.2d 1405 (4th Cir. 1975). Wallace v. Hutto, 80 F.R.D. 739 (W.D. Vir. 1980). Rule 23(a)(4) of the Fed.R.Civ.P. provides that one or more members of a class may serve as representative parties on behalf of all only if "the representative parties will fairly and adequately protect the interests of the class."

This Court declines to follow the rule of the Fourth Circuit for several reasons. Because of the nature of the action it is more appropriately framed in the context of a class action than as a complaint brought solely on behalf of an individual. Since an unsuccessful effort was made to procure counsel to pursue the action on behalf of plaintiffs, this case could not have been litigated except pro se. Finally, the Court notes, as indicated above, that plaintiff Robert L. Stickney is not a garden variety prisoner pro se litigant and is sufficiently trained in the law to "fairly and adequately protect the interests of the class." Additionally, written notice of the class action was made through personal service to all inmates then incarcerated at NNCC in May, 1981. This notice indicated to each inmate within the class that fellow inmate Robert L. Stickney had been authorized to represent the class and that he was not an attorney. No objections have been received by the Court regarding such representation by any member of the class.

A court trial commenced on December 29, 1980, and continued through December 31, 1980. A substantial amount of evidence and testimony were presented at that time. Subsequently, following consultation with plaintiff and with counsel for defendants, the Court determined that an expert witness should be appointed pursuant to Rule 706 of the

Federal Rules of Evidence. Thereafter, pursuant to stipulation by the parties, Jerry Enomoto, former Director of Corrections of the State of California was appointed to inspect NNCC and to prepare a written report containing his findings.

In accordance with the order of the Court Mr. Enomoto made inspectional visits to NNCC on July 21, 23, 24, 27, 28, 29, 30 and 31, 1981. Following that, Mr. Enomoto's report dated September 1981 was completed and filed with the Court and a copy provided to the parties. On January 11, 1982, trial of this action was continued for the purpose of taking the testimony of Mr. Enomoto. After this testimony was received, both parties rested and the case was submitted to the Court for its decision, subject to filing of post trial briefs. Finally, the Court made a visit to NNCC on February 12, 1982, for the purpose of viewing conditions at the facility.

"It is unquestioned that '[c]onfinement in a prison ... is a form of punishment subject to scrutiny under the Eighth Amendment standards.'" Rhodes v. Chapman, 452 U.S. 337, 345, 101 S.Ct. 2392 (1981), quoting from Hutto v. Finney, 437 U.S. 678, 685, 98 S.Ct. 2565, 2570, 57 L.Ed. 522 (1978). The Eighth Amendment, applicable to the states through the Fourteenth Amendment, Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), prohibits punishments which are "cruel and unusual." As recently stated by the Ninth Circuit in Hoptowit v. Ray, Adv.op. p.646 (9th Cir. 1982), a most enlightening and informative case providing much needed guidance to the district courts:

> In entertaining a cause of action alleging Eighth Amendment violations in a state prison, federal courts must be cognizant of the limitations of federalism and the narrowness of the Eighth Amendment. Federal

> courts lack the power to interfere with decisions made by state prison officials, absent constitutional violations. Courts must recognize that the authority to make policy choices concerning prisons is not a proper judicial function.

In other words, "Prison reform, beyond the standards required by the Eighth Amendment, is the function of state government officials." Wright v. Rushen, 642 F.2d 1129, 1133 (9th Cir. 1981).

In Wright the Ninth Circuit sets forth the method of analysis which should be utilized by this Court in determining whether the challenged conditions of confinement here violate the Eighth Amendment. That is, each condition should be examined separately so that a determination can be made "whether that condition is compatable with 'the evolving standards of decency that mark the progress of a maturing society.'" 642 F.2d at 1133, quoting from Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958). Still, "each condition of confinement does not exist in isolation; the Court must consider the effect of each condition in the context of the prison environment, especially when the ill-effects of particular conditions are exacerbated by other related conditions." Id.

Thus, the function of the Court here is limited to determining whether any constitutional violations have occurred, "and to fashioning a remedy that does no more and no less than correct that particular constitutional violation." Hoptowit, supra, slip. op. at p.647. In fashioning any particular remedy, however, the district court must consider how such remedy will impact upon prison security and focus upon the costs involved in an attempt to avoid adopting "an unnecessarily expensive and comprehensive remedy." Wright v. Rushen, supra, 642 F.2d at p.1134.

The primary basis underlying plaintiff's claims is that the NNCC is overcrowded. It is conceded by defendants that the number of inmates retained in the facility exceeds design capacity. Under Rhodes v. Chapman, supra, however, this fact alone does not violate the Eighth Amendment. Plaintiff contends that as a result of overcrowding and understaffing, confinement conditions are unsafe and unsanitary. Plaintiff claims that there are frequent assaults by inmates on other inmates, that hygenic items are not made available to indigent inmates; that food is unsanitary and inadequate; that medical care is inadequate; that correctional officers are undertrained; that there is inadequate clothing; that laundry facilities are not adequate to provide inmates with sufficient clean clothing; and that due to the overcrowding inmates do not have a constitutional amount of living space. In addition, there are specific complaints concerning supervision of the psychiatric ward. Other specific complaints of significance are considered below.

Defendants claim that overcrowding at NNCC is largely mitigated by the fact that the vast majority of inmates are not locked up for extensive periods of time and are able to move about the institution, returning to their particular cells only for a limited number of hours each night. They allege that the prison is sanitary, clean, and that there is proper medical and psychological care for inmates. Defendants also assert that Nevada is simply growing too fast to keep up with its prisons; that it is not able to build new institutions fast enough to keep up with the number of prisoners being assigned to them. They claim that there is no callous indifference on the part of

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administrators, the legislature or the staff.

Prisoner Safety

An inmate has a right to be incarcerated in a reasonably safe environment. Ramos v. Lamm, 639 F.2d 559 (10th Cir. 1980); Hite v. Leeke, 564 F.2d 670, 673 (4th Cir. 1977), Finney v. Arkansas Board of Corrections, 505 F.2d 194, 201 (8th Cir. 1974), Doe v. Lally, 467 F.Supp. 1339 (D. Maryland 1979). This right includes being reasonably protected from constant threats of violence and sexual assaults from other inmates. Id. An inmate need not be assaulted to obtain relief. Woodhous v. Virginia, 487 F.2d 889, 890 (4th Cir. 1973).

It is the state's responsibility to protect its prison inmates. While it may be necessary to restrict their freedoms in certain ways in order to protect them, the state cannot simply force the inmates to choose between relinquishing their constitutional rights and jeopardizing their lives. Rudolph v. Locke, 594 F.2d 1076 (5th Cir. 1979). This does not require that prison officials completely obviate prison violence but that it be significantly controlled. The question before the Court is whether or not a deliberate indifference to the legitimate safety needs of the inmates exists at NNCC. Ramos, supra 639 F.2d at 573. Such an indifference may be evident from inadequate staffing or inadequate design of the facility causing limited visibility for guards to properly monitor inmate activity from secure vantage points. There is very little evidence in the record to indicate such an inadequate design of the facility.

The evidence in this case does, however, indicate that unless additional staff is provided to supervise the inmates confined in Units 1, 2 and 3, of NNCC, the inmates are not safe from violence or assaults from other inmates.

The claim that perhaps, as testified by several prison administrators, the number of assaults and the amount of violence is considered only about "average" for other similar institutions is not persuasive. The level of assaults and violence at NNCC exceeds constitutional standards and constitutes cruel and unusual punishment. The problem is due essentially to understaffing. There are simply not enough correctional officers in the units to supervise the inmates. A major contributing reason for this condition is overcrowding. If there are fewer inmates in the facilities, then fewer correctional officers may be required for supervisory purposes. Present staffing conditions constitute a deliberate indifference to the legitimate safety needs of the inmates in those units.

During the trial of this action the Court received evidence of numerous assaults and incidents of violence in the subject units. While there are some who may feel that the convicted inmates have, so to speak, "made their own beds and must therefore lie in them," the constitution does not permit prisoners to be incarcerated under unreasonably unsafe conditions and conditions at NNCC do not meet these constitutional requirements.

Evidence was received of fairly frequent so-called "hit and run" physical assaults of inmates at NNCC. There was evidence of inmates wearing masks having assaulted other inmates; evidence of homosexual rapes; as well as incidents of inmates being struck by such weapons as wood blocks and iron pipes. As a specific example, inmate Michael Dromiack testified to the misconduct of three other inmates who set him on fire while he was reclining on his bed.

Correctional Officer Captain Ewing testified that violent assaults, such as stabbing and broken bones, occur

at NNCC on an average of a little less than one per month. In addition, assaults tend to bunch up. For example, in July of 1980, inmate William Lynch was assaulted and beaten; inmate Robert Kelly was stabbed; inmate John Harris was stabbed; and Correctional Officer Rogers was stabbed. Nevada Director of Prisons Charles Wolff testified that the amount of violence in prisons generally and in NNCC in particular, correlates with overpopulation. He testified that the greater numbers of people, the more the disciplinary problems increase. What occurred in July of 1980 does not represent an isolated example of safety conditions for inmates at NNCC.

It is the expert opinion of Mr. Enomoto and it is the view of the Court that conditions in Units 1, 2 and 3 at NNCC are unsafe because of inadequate staffing of correctional officers supervising inmates in the subject units. It appears to the Court there is only one reasonable way to control assaults among inmates and that way is to direct supervision of the inmates by additional necessary correctional officers. It is clear that Courts may require prison officials to hire a sufficient number of guards to meet safety needs. Hootowit v. Ray, supra, at p.653. This finding by the Court comports with the testimony and report of Mr. Enomoto.

Mr. Enomoto found the number of correctional officers present on each watch in Units 1, 2, and 3 insufficient for a reasonable level of inmate safety. He found that at least two guards on watch during every shift in Units 1, 2 and 3 is the minimum required to insure a reasonable level of safety in each unit.

The hiring of the additional personnel necessary to meet safety requirement should not be excessive and the Court does not consider this an unnecessarily expensive

remedy. Certainly this action will impact positively on prison security.

The training of the correctional officers challenged by plaintiffs as failing to meet constitutional standards is, under Hoptowit, supra, a matter which is not cognizable in this action. Such would constitute impermissible judicial involvement with prison administration. In any event it appears to the Court that the training program for new correctional officers at NNCC is a good one.

There is one additional area relating to the inmates medical care which involves a potential threat to their safety. This is the use of inmate attendants in the psychiatric ward. There was some evidence presented that assaults on psychiatric patients by inmate psychiatric attendants have occurred on a few isolated occasions. Dr. Freeman, the prison physician, testified in support of the use of inmate psychiatric attendants. Inmate psychiatric attendants at NNCC consist primarily of inmates who themselves are former psychiatric patients. The Court does not doubt that the services of these individuals can be helpful. However, without proper direct supervision it is easy to see how such attendants may exploit and abuse their positions in respect to the very inmates they are ostensibly helping. In this case, however, insufficient evidence was presented to justify a finding of deliberate indifference to the potential present abuse in the program which poses an unreasonable threat to the safety of inmate patients. The assignment of inmate psychiatric attendants without direct supervision of free prison personnel, however, appears undesirable and could constitute a deliberate indifference to the legitimate safety needs of inmate psychiatric patients.

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Fire Safety

Fire safety presents a particular problem in a secure institution. It is difficult to accomplish both fire safety and security. There was some evidence received by the Court through the testimony of inmates that fire hoses and fire extinguishers were inoperable. Apparently prisoners fairly regularly discharge fire extinguishers. During Mr. Enomoto's inspection at NNCC it was found that three of the fire hoses were jammed in their containers and were crimped so that water would not pass through them. These were locked in the housing units.

Evidence indicated that these defects in fire safety found during the inspection were subsequently corrected. The evidence indicates that fire safety equipment is checked on a reasonable basis in the prison. There is no explanation for the breakdown indicated by the inspection. Certainly if there were to be injuries from a fire and it was demonstrated that fire equipment did not work, and that there had not been a procedure for regular inspection, then liability might accrue to those responsible. However, there is no credible evidence to indicate a deliberate indifference to fire safety needs; perhaps carelessness existed on this particular occasion, but this does not constitute a violation of constitutional dimensions.

Food

The inmates have a right to food that is nutritionally adequate, prepared and served under conditions which do not present an immediate danger to the inmate who consumes it. Ramos v. Lamm, supra, 639 F.2d at 570-71. The mere fact that the food is cold or otherwise cosmetically unappetizing does not mean that it does not meet constitutional standards. See Wright, supra.

Inmate witnesses made various complaints about the food service and the dining room at the prison. Many of these complaints are of the sort that one hears from soldiers, students and others who dine in institutional facilities. There is no evidence that the food at NNCC is not nutritious and little evidence that it is not palatable. Not only does the prison have expert non-inmate chefs, such as Elmer Mechum, but some of the inmates have extensive backgrounds in cooking, such as inmate Robert Globensky who works as a first cook and who formerly was a chef at the Sparks Nugget and at the Seattle Hilton (where he cooked for the President). The menus are modeled on that of the United States Army, though the food preparers are not always able to get the necessary ingredients to enable them to follow the established menu. The Court finds that the preponderance of the evidence shows that the food at NNCC is adequate and above minimum constitutional standards.

There has also been a complaint concerning the food cart which is used to transport food from the culinary department to Units 4 and 5 (which are primarily used to house prisoners in protective custody or isolation). The cart, which is used to transport food containers and the containers themselves are subject to considerable improvement but do not endanger the health of the inmates who receive the deliveries of food. The most serious problem in this respect relates to the transportation of the food across the prison yard and through the prison facilities outside of Units 4 and 5 by unsupervised inmates. Present use of the cart presents an opportunity there for inmates to place foreign matter in the food or to otherwise tamper with it. Steps should be taken to correct this potential abuse. However, there was no evidence presented to the Court that

such abuse has in fact occurred and thus relief as to this claim is not available.

Shelter

An inmate has the right to shelter which does not cause physical degeneration or threaten his mental well being. See Battle v. Anderson, 564 F.2d 388 at 403 (10th Cir. 1977). The prison is very much overcrowded but meets constitutional standards so far as the area provided for the individual inmates and as to conditions of heat, sanitation and provisions for basic necessities of life.

Each of the inmates housed in the dormitory units (Units 1, 2 and 3) at NNCC has approximately 60 square feet of living space. In view of the fact that free movement by the inmates in and about the institution during a major portion of the day is allowed, it does not appear that the living space of inmates housed in these units is inadequate from a viewpoint of constitutional requirements relating to such living space or conditions of shelter.

There are a considerable number of the inmates in Units 4 and 5 who are double-celled. In Unit 4 there are 52 cells double-bunked and a potential additional 30 cells which may soon be subject to double-bunking. In Unit 5 there are 60 cells where double-bunking is being practiced and an additional 30 cells which may soon be subject to double-celling. The size of these cells is approximately 67-70 square feet. A concerted effort is made to keep the prisoners out of these cells during a major portion of their waking hours. Close custody inmates may well be locked up for as long as twelve hours per day. Inmates who have assigned jobs, tasks or activities are generally locked up in these cells for only about six hours per day.

The recent case of Rhodes v. Chapman, supra, 452

U.S. 337 upheld the constitutionality of the practice of double-celling in a situation involving cells slightly smaller than those at issue here. Thus, absent some specific condition resulting from the double-celling, such as excess violence or failure to provide adequate medical care or an unsanitary environment, this practice does not per se constitute cruel and unusual punishment in violation of the Eighth Amendment. In order to find a constitutional violation in this context, the Court would be required to find "... evidence that double-celling under these circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment." Rhodes v. Chapman, supra, 452 U.S. at 348.

Medical Care

There exists a constitutional obligation to provide adequate medical care for those whom the state is punishing by incarceration. Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285 (1976). This obligation is violated when a deliberate indifference to the serious medical needs of prisoners is exhibited on behalf of prison officials. Id.429 U.S. at 104. Such indifference is shown when officials have prevented an inmate from receiving recommended or prescribed treatment or when an inmate is denied access to medical personnel capable of evaluating the need for treatment. See e.g., Todaro v. Ward, 565 F.2d 48 (2nd Cir. 1977); Inmates of Allegheny Cty. Jail v. Pierce, 612 F.2d 754 (3rd Cir. 1979); Newman v. Alabama, 349 F.Supp. 278, 284-86 (M.D. Alabama 1972); Laaman v. Helgemoe, 437 F.Supp. 269, 312 (D. N.H. 1977).

Accidental or inadvertent failure to provide adequate medical care or negligent diagnosis or treatment of a medical condition do not constitute a violation of the

Eighth Amendment. However, proof of repeated examples of negligent acts which indicate a pattern of conduct by prison medical staff, or proof of systemic and gross deficiencies in staffing, facilities, equipment or procedures may be sufficient to show that the inmate population is effectively denied access to adequate medical care. Id.

Under the applicable law the medical care provided to inmates at NNCC is constitutionally adequate. The prison has two doctors (one of whom is also a psychiatrist). There are also several nurses assigned to the prison. The prison maintains an infirmary and a psychiatrict ward with more than 30 beds. While there are some individual complaints, the preponderance of the evidence is that the medical care at NNCC is adequate and probably superior to that available in many prisons. Cf. Hoptowit v. Ray, supra. There was no credible evidence which indicates deliberate indifference to the medical needs of prisoners at NNCC.

Sanitation, clothing and laundry, bedding, provision for health and hygiene items, heat and boiler, water supply, vocational opportunities, recreation programs and maintenance

The focus as to these miscellaneous complaints is on the "deliberate indifference" of defendants and whether conditions as they exist are compatible with evolving standards of decency that mark the progress of a maturing society. Wright v. Rushen, supra 642 F.2d at 1133. With this standard in mind the Court briefly addresses the remaining claims of plaintiffs.

(a) Sanitation. There is no credible evidence that sanitary conditions at the prison do not meet constitutional standards. While sanitation could be improved, and it appears that cleaning

materials and supplies are often in short supply, none of these problems bring the sanitary conditions of the prison below those required by the constitution. The Court received the testimony of Mr. Neve, an inspector for the Nevada State Department of Health, who testified that regular inspections are made of the prison in the same manner inspection is conducted by the State in commercial housing and restaurant facilities. Deficiencies are reported to the Director of the Department of Prisons and to the Nevada Consumers Health Protection Services who are also advised of subsequent correction of such deficiencies. All in all, Mr. Neve gives the prison a good rating and has found nothing in his inspections which would in a commercial context provide a basis to close an commercial establishment. There are problems but sanitary conditions at the prison can be said to pass constitutional muster.

(b) Clothing and Laundry. Some of the prisoners have complained about the issue of clean clothing. There are periodic shortages of various sizes of items of inmate clothing at NNCC. When inmates go to the laundry department they are not always able to obtain clean clothing in their respective sizes immediately and often have to wait before clean clothing can be obtained. Many of the prisoners are allowed to wear their own civilian clothing. It does not appear that any of the prisoners are going without adequate clothing cleaned on a fairly regular basis. Apparently many of the inmates wash their own clothes in the

automatic washers available at NNCC. By and large, clothing does not seem to be a real problem at the institution.

(c) Bedding. The same complaint is made by prisoners relating to bedding as is made in regard to clothing. There is no evidence that any inmate is going without bedding cleaned on a fairly regular basis. While the conditions of the prisoners may not be up to the standards of many persons in the world outside the prison, the provision for bedding is constitutional.

(d) Health and hygiene items. There are apparently periodic shortages of items necessary for maintenance of personal hygiene. However, the evidence shows that by and large the prisoners are not forced to be without these items for significant periods of time.

(e) Heat and boiler. The prison has had problems with its boiler. There have been breakdowns which have affected supplies to the culinary department and the laundry. This is in part due to what one witness characterized as "bailing wire" maintenance. The complaint of the prisoners in respect to heat and to the operation of the heat and boiler are stated in general terms. Not all prisoners seem to have a problem in this regard. No constitutional violation can be said to exist here.

(f) Water supply. There have been some problems with the water system. Some of the pumps have been overloaded. There have been breakdowns where no water service was available. None of the

prisoners seem to have unduly suffered because of this. Again, there is no constitutional problem here.

(g) Job opportunities. The prison officials are making some efforts to keep the prisoners occupied and to provide job opportunities and vocational programs for them. Many prisoners do not have any job assignments because of a shortage of positions. In any event, the issues relating to access to such jobs and vocational, as well as educational, programs appear to be outside constitutional scrutiny as, "there is no constitutional right to rehabilitation." Hoptowit v. Ray, supra at p. 659.

(h) Recreation programs. There is a broad recreation program at the prison which includes almost every kind of sport one can think of, indoor and outdoor, from football to golf. The recreation personnel are well trained and offer programs and opportunities adequate for the institution.

(i) Maintenance. There are considerable complaints about maintenance of the institution but the preponderance of the evidence is that the prison is being reasonably well maintained. Apparently one of the major problems is that the inmates regularly destroy windows and light fixtures. Taking into consideration budgetary constraints the prison staff is making a reasonable effort to keep up with repairs. The level of maintenance at NNCC can by no means be considered to be below constitutional standards.

Remaining claims mentioned in the pleadings, in the pretrial order or in the testimony and evidence are not considered by the Court to be meritorious or worthy of further comment by the Court here.

This memorandum decision constitutes findings and fact and conclusions of law herein.

IT IS, THEREFORE, HEREBY DECLARED AND ADJUDGED that the conditions of incarceration in Units 1, 2 and 3 at NNCC constitute cruel and unusual punishment because of the grave danger posed to prisoner safety in view of the understaffing of correctional officers in said units. A level of staffing adequate to meet constitutional requirements for inmate safety requires that not less than two correctional officers to be on duty at all times in Units 1, 2 and 3 at NNCC. In the event that the number of inmates housed in any of Units 1, 2 and 3 shall exceed 172, then, to meet minimum constitutional requirements for inmate safety, a minimum of three correctional officers must be assigned to duty on a 24-hour basis in such unit. If all three of said units exceed an inmate population of 172, then said minimum staffing must also include an additional two roving officers who may move about said three units in accordance with established and appropriate prison procedures in order to provide reasonable safety for the inmates in those units.

Effective 90 days from this date an appropriate injunction shall issue enjoining defendants from the continued operation of said Units 1, 2 and 3 at NNCC should minimum staffing requirements as set forth herein not be maintained.

DATED: May 14, 1982.

Edward C. Reed

UNITED STATES DISTRICT JUDGE