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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
CIVIL DOCKET NO. 5:99CV105-V

TRI-COUNTY PAVING, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**MEMORANDUM AND ORDER**
	)	
ASHE COUNTY and ASHE COUNTY BOARD OF COMMISSIONERS,	)	
	)	
Defendants.	)	

THIS MATTER is before the Court on Defendants' "Motion for Summary Judgment", filed December 20, 2000. Plaintiff's response was filed on January 19, 2001, and Defendants' reply was filed on February 14, 2001.

Pursuant to 23 U.S.C. §636(b)(1)(B) and the standing order of designation, this Court referred the aforesaid motion to United States Magistrate Judge Carl Horn III for recommended disposition. In an opinion filed on March 22, 2001, Magistrate Judge Horn recommended that Defendants' motion for summary judgment be granted and that Plaintiff's complaint be dismissed with prejudice. Plaintiff filed objections to the Memorandum & Recommendation on April 6, 2001, Defendants responded on April 20, 2001, and Plaintiff replied on April 25, 2001.

I. STANDARD OF REVIEW

The Federal Magistrate Act provides that "a district court shall make a *de novo* determination of those portions of the report or specific proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); Camby v. Davis, 718 F.2d 198, 200 (4th Cir.1983); Keeler v. Pea, 782 F.Supp. 42, 43 (D.S.C. 1992). *De novo* review is not required by the statute when an objecting

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party makes only general or conclusory objections that do not direct the court to any specific error in the magistrate judge's recommendations. Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir.1982). Furthermore, the statute does not on its face require review of any issue that is not the subject of an objection. Thomas v. Arn, 474 U.S. 140, 149 (1985); Camby, 718 F.2d at 200. Nevertheless, a district judge is responsible for the final determination and outcome of the case, and accordingly this Court has conducted a careful review of Magistrate Judge Horn's Memorandum and Recommendation as well as a *de novo* review of those issues specifically raised in Plaintiff's objections.

II. FACTUAL & PROCEDURAL BACKGROUND

Plaintiff objects to certain findings of fact contained in the Magistrate Judge's "Memorandum & Recommendation." Specifically, Plaintiff argues that the Magistrate Judge "sets forth and relies on numerous material facts which are either 1) objectively wrong; 2) not found in the record; or 3) contested by the parties and for the jury decide." (Plaintiff's Objections at 2).

Upon review, the Court disagrees with the Plaintiff and finds the Magistrate Judge's findings of fact sufficiently supported by the record. Furthermore, the Court finds that the "disputed" facts outlined in Plaintiff's objections are immaterial to the legal issues before this Court. Accordingly, the Court adopts the factual and procedural findings made by the Magistrate Judge on pages two through six of his opinion.

Nevertheless, in an effort to provide a more accurate and thorough representation of the evidence, the Court clarifies the following facts:

1. The proposed site for Plaintiff's asphalt plant is located within the jurisdiction of Ashe County, North Carolina, between the Towns of Jefferson and West Jefferson. (Plaintiff's Objections at 3).

2. At some time prior to August 1997, Leonard and Lucien Jordan held an informal meeting with George Yates, Chairman of the Ashe County Board of Commissioners, and told him that they were planning to build and operate an asphalt plant on the existing Tri-County property. (Plaintiff's Objections at 3).

3. On October 15, 1998, Debbie Jordan, Leonard Jordan's daughter-in-law, met with Gaye Jones, the assistant to the Director of Building Inspections for Ashe County, in hopes of attaining a building permit for the Plaintiff. At that time, Ms. Jones informed Ms. Jordan that the Plaintiff would need a set of signed and sealed blueprints before it would be granted a building permit. It remains unclear whether Ms. Jordan was told that a wastewater permit would also be needed. (D.Jordan Deposition at 15).[1]

4. Robert Reed, Director of Building Inspections for Ashe County, normally conducts a comprehensive plan review, taking anywhere from two days to two weeks, before issuing a building permit for larger construction projects. It is without dispute that Mr. Reed neither conducted a plan review nor issued a building permit in this case. At his deposition, Mr. Reed testified that he would have conducted the plan review for Plaintiff's application on the day it was received but that he "probably had some other inspections to do." (Reed Deposition at 20).

5. On November 12, 1998, in response to reports that the Plaintiff was "blasting" in preparation of erecting an asphalt plant, a North Carolina Department of Environment and Natural Resources (NCDENR) employee called a member of Ashe Citizens Against Pollution

[1] According to her deposition, Ms. Jones told Ms. Jordan at the October 15, 1998 meeting that a "septic permit" was needed to complete Plaintiff's application. (G.Jones Deposition at 13). Nevertheless, in viewing the evidence in a light most favorable to the Plaintiff, the Court relies on the testimony of Ms. Jordan on this matter.

(ACAP) and stated that he "intended" to call Tri-County "to advise them not to commence with construction until the permit is received." (Defendants' Reply Brief, Exhibit A).

6. On November 17, 1998, an NCDENR employee called Joe Gaines, Plaintiff's engineer, and told him not to "commence construction" without a permit. (Defendants' Reply Brief, Exhibit A).

7. At no point during the one-year Moratorium or after the enactment of the Polluting Industries Development Ordinance ("PIDO") did Plaintiff apply for or receive a variance or special use permit. (Plaintiff's Objections at 6; Defendants' Reply at 6).

8. Plaintiff had notice of the scheduled second reading and re-vote of the Moratorium by virtue of Leonard and Lucien Jordan's attendance at the Commissioner's meeting on October 19, 1998. (Plaintiff's Objections at 6; Defendants' Reply at 5).

III. DISCUSSION OF LAW

In the "First Amended Complaint," filed February 17, 2000, Plaintiff asserts various causes of action stemming from three distinct acts or omissions of the Defendants. Specifically, Plaintiff contends that the Defendants' refusal to issue a building permit, enactment of the Moratorium, and enactment of the PIDO violated its due process and equal protection rights under the United States and North Carolina Constitutions.[2] Plaintiff further asserts that the PIDO is unconstitutional in that it is vague, arbitrary, and indefinite.

The Court shall address each of these matters herein.

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[2] North Carolina courts have consistently interpreted the "equal protection" and "due process" clauses of the North Carolina Constitution as synonymous with their counterparts under the Fourteenth Amendment of the United States Constitution. Since Plaintiff failed, in both its "First Amended Complaint" and in its "Objections...", to assert any legal distinctions between its state and federal claims, the Court shall not distinguish between them in this Order. See Simeon v. Hardin, 339 N.C. 358, 377 (1994).

A. **Plaintiff's Equal Protection Claims**

Plaintiff contends that the Defendants violated its rights to equal protection of the law under both the North Carolina and United States Constitutions. In its objections to the Memorandum and Recommendation, Plaintiff states: "There is no legitimate governmental purpose in breaking the law, as Ashe County did in refusing to even consider Tri-County's permit application, refusing to explain why it was not considered or processed, and in passing a moratorium without any evidence and in direct contravention of North Carolina law." (Plaintiff's Objections at 11). Additionally, Plaintiff asserts that it was treated differently by the Defendants than other "similarly situated" persons or businesses in Ashe County. (Plaintiff's Objections at 7-10).

The Fourth Circuit Court of Appeals has set forth a two-component test for determining whether a governmental regulation of land use violates the Equal Protection Clause of the Fourteenth Amendment.[3] In Sylvia Development Corp. v. Calvert County, Md., 48 F.3d 810, 820 (4th Cir. 1995), the Fourth Circuit held:

> Whether a statute or administrative action employs a classification explicitly or implicitly, the equal protection analysis of that state action consists of the same two components. The first, a substantive component, requires us to examine whether the end that the state seeks to achieve is a legitimate governmental purpose. In determining whether a statutory purpose is legitimate, substantial judicial deference is required so that the court does not substitute its value judgments for those established by the democratically chosen branch...The second component of the equal protection analysis, the procedural component or means analysis, examines whether the classification appropriately furthers the legislative purpose. As a general proposition, legislation will be sustained if the classification utilized by the statute is rationally related to a legitimate state interest.

(Internal quotations and citations omitted). Accord City of Cleburne v. Cleburne Living Ctr., 473

[3] In its Objections, Plaintiff makes the argument that the Defendants may not "regulate land use" by passing a Moratorium unless it does so through its zoning authority. Upon review, the Court disagrees with the Plaintiff and finds that Defendants' enactment of a moratorium in this case was a valid exercise of its police powers and not in violation of North Carolina law. See Cellco Partnership v. Haywood County, et al., Civil No. 1: 98CV23, *6 (1998), aff'd 1999 WL 556444 (4th Cir. 1999).

U.S. 432, 440 (1985); and United States v. Commonwealth of Virginia ("VMI II"), 44 F.3d 1229, 1236 (4th Cir. 1995).

Applying the above law to the facts of this case, the Court finds that the Defendants satisfied both of the requirements laid out in Sylvia. As for the first component, the Court need only look to the text of the Moratorium and the PIDO to uncover a "legitimate governmental purpose" in this case. For example, the Moratorium explicitly provides:

> The purpose of this ordinance shall be to protect the public health, safety, general welfare, and property values of the citizens of Ashe County from potential adverse health effects caused by these facilities; such as documented, potential harmful emissions, and any aesthetic or property value damage to adjacent communities.

Moratorium, "Purpose," attached as Exhibit B to Amended Complaint. In the same light, the PIDO states in pertinent part:

> For the purpose of promoting health, safety, and general welfare of its citizens and the peace and dignity of the county, the Ashe County Commissioners hereby establish certain criteria relating to polluting industries to accommodate activities as defined herein.

PIDO, §159.02. Additionally, there is no evidence that the Defendants' objectives were any less legitimate in denying Plaintiff's application for a building permit.

For these reasons, the Court finds that the Defendants' actions and/or omissions in this case were "legitimate" in that they promoted the health, safety, and well-being of the citizens of Ashe County. The Court therefore adheres to the advice of the Fourth Circuit and shall not "...substitute its value judgments for those established by a democratically chosen branch..." Sylvia at 820.

As for the second component of Sylvia, Defendants need only show that their actions "appropriately furthered" a legitimate legislative purpose. Since the Plaintiff is not a member of a suspect class, great deference must be given to the discretionary acts of the Defendants. According to the Supreme Court, "When social or economic legislation is involved, the states are permitted

wide latitude in adopting classifications to further legitimate governmental purposes." City of Cleburne, at 432.

Upon review of the evidence, the Court finds that Defendants' decision to deny and/or refuse to review Plaintiff's application for a building permit was rationally related to a legitimate governmental end. Even had Plaintiff's application been timely and complete, arguendo, the Defendants' actions were not unreasonable in light of the environmental and safety concerns raised in this case.[4] Furthermore, both the Moratorium and the PIDO sought to limit the proximity of a pollution-causing industry from the citizens of Ashe County. Their enactment clearly furthered an important legislative interest.

Lastly, Plaintiff contends that it was treated differently from other "similarly situated" persons or businesses in Ashe County. In support of its position, Plaintiff relies on a case from the Supreme Court of Connecticut. In Thomas v. City of West Haven, 249 Conn. 385, 402 (1999), the court held:

> In a situation...which involves the alleged selective treatment by public officials who, under the statutes of this state and the regulations of the city, possess broad discretion in decisions relating to zone change applications...the factors that render applicants similarly situated for comparison purposes necessarily are based upon the procedural requirements imposed on those seeking to obtain zone changes. The appropriate group for comparison to the plaintiffs, therefore, includes all applicants who were before the commission requesting a zone change during the same general time period as the plaintiffs, and who thus, theoretically, were subject to the same rules and requirements.

Relying on Thomas, Plaintiff argues that the scope of those "similarly situated" in this case is not merely all other asphalt plants but rather anyone "seeking to obtain building permits in the

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[4] According to the evidence, at least two citizens' advocacy groups in Ashe County, the Ashe Citizens Against Pollution and the Blue Ridge Environmental Defense League, were opposed to the building of an asphalt plant and asked that the matter be placed on the agenda for the October 19, 1998 meeting of the Ashe County Board of Commissioners. (Defendants' Brief at 6).

same time period or, with regard to the moratorium and PIDO, those seeking to establish a legitimate business in Ashe County." (Plaintiff's Objections at 10).

After considering the law in this area, the Court finds Plaintiff's argument to be without merit. Even if this Court interprets the phrase "similarly situated" as broadly as the court in Thomas, it does not change the glaring fact that Plaintiff failed to provide any specific evidence that it was treated unfairly by the Defendants. In fact, all the Plaintiff was able to show was that other businesses in Ashe County were granted building permits while its application was denied. Plaintiff fails to recognize, however, that it was the first applicant in 30 years to attempt to build an asphalt plant in Ashe County and that its application was presented in an incomplete and untimely manner. This says nothing of the fact that Plaintiff's project was met with great public disapproval and led to the enactment of a moratorium and pollution-controlling ordinance.

For these reasons, the Court refuses to treat the Plaintiff as "similarly situated" to anyone and everyone in Ashe County who recently applied for a building permit or sought to establish a business.

Thus, the Court finds that Plaintiff failed to make a viable equal protection claim under either the North Carolina or United States Constitutions and therefore adopts the recommendation of the Magistrate Judge on this matter.

B. Plaintiff's Due Process Claims

1. Procedural Due Process

Plaintiff next contends that Defendants' acts and omissions in this case violated its rights to procedural due process under the North Carolina and United States Constitutions. Specifically, Plaintiff argues that the Magistrate Judge failed to properly interpret North Carolina law in determining whether or not it had a vested property interest in this case. In its objections, Plaintiff

states: "Based upon the twin misconceptions that (1) a landowner must have a building permit to obtain a vested right and (2) that a building permit is not enough to obtain a vested right, the M&R incorrectly interprets North Carolina law and concludes that Tri-County did not have the 'necessary permits' to obtain a vested right." (Plaintiff's Objections at 17).

The law for this matter is once again set forth in Sylvia. According to the Fourth Circuit, a Plaintiff may not prevail on a procedural due process claim unless it (1) has a property interest; (2) of which the Defendants deprived it; and (3) without due process of law. Sylvia, 48 F.3d at 826. The Supreme Court has found that a plaintiff does not have a vested property interest unless it has a "legitimate claim of entitlement." It is not enough that a plaintiff have only an "abstract need or desire" for the property or a "unilateral expectation" of obtaining an interest. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Furthermore, the Supreme Court has held that state law is the proper vehicle for determining when a "legitimate claim of entitlement" exists. As stated in Roth:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

According to North Carolina law, a plaintiff's common law right to build on his property vests when: (1) the party has made expenditures or incurred contractual obligations; (2) in good faith; and (3) in reasonable reliance *on or after* the issuance of a valid building permit, if such a permit is required by law. The burden is on the landowner to prove each element. See Browning-Ferris Industries of South Atlantic, Inc. v. Guilford County Board of Adjustment, 126 N.C. App. 168 (1997). In other words, the Plaintiff in this case does not have a vested property right until it obtains all "necessary permits" required by law and makes substantial expenditures in good faith and in reliance of such permits. (M&R at 11).

The property right asserted by the Plaintiff in this action is an interest in building an asphalt plant in Ashe County, North Carolina. According to North Carolina law, a party must apply for and be granted certain permits before it may begin construction on such a project.[5]

Pursuant to N.C. Gen. Stat. §153A-357(a), "No person may commence or proceed with...construction...of any building...without first securing from the inspection department with jurisdiction over the site of the work each permit required by the State Building Code and any other State or local law or local ordinance or regulation applicable to work." Furthermore, according to the Ashe County Land Usage Ordinance §150.24, an "inspector" may issue a building permit in Ashe County only if:

> proper application for a permit has been made, and the appropriate Inspector is satisfied that the application and the proposed work comply with the provisions of this chapter and the appropriate regulatory codes in force at the time.[6]

After review of the evidence, it is the Court's understanding that Plaintiff never properly applied for or was granted a building permit in this case. In fact, at the time Plaintiff presented its application, it lacked an air quality permit, wastewater permit, written application, and all necessary

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[5] In its objections, Plaintiff argues that a building permit is not a necessary prerequisite for obtaining a vested property right in North Carolina. The Plaintiff refers the Court to Scott v. Greenville County, 716 F.2d 1409, 1418 (4th Cir. 1983), which held that an applicant for a building permit had a protected property interest in the permit upon the mere "presentation of an application and plans showing a use expressly permitted under the then-current zoning ordinance." In making its argument, however, Plaintiff fails to recognize that Scott is based on South Carolina law and involves an applicant who met all the applicable requirements for obtaining a building permit. Furthermore, there is no evidence that a "then-current zoning ordinance" exists in this case.

[6] See Also N.C. Gen. Stat. §143.215.108(a)(2)("no person shall do any of the following things...until such person shall have applied for and received from the Commission a permit...(2) Build, erect, use or operate any equipment which may result in the emission of air contaminants or which is likely to cause air pollution."); N.C. Gen. Stat. §130A-338("Where construction...is proposed to be done upon....a place of business...no permit required for electrical, plumbing, heating, air conditioning or other construction...shall be issued until an authorization for wastewater system construction has been issued...")

signed and sealed blueprints.[7] In short, the Plaintiff never maintained a vested property right in this case.

Even had the Plaintiff obtained all necessary permits required by law, it failed to make any substantial expenditures in good faith and in reliance of such permits. According to Koontz v. Davidson County Board of Adjustment, 130 N.C. App. 479, 482 (1998):

> [w]hen, at the time a builder obtains a permit, he has knowledge of a pending ordinance which would make the authorized construction a non-conforming use and thereafter hurriedly makes expenditures in an attempt to acquire a vested right before the law can be changed, he does not act in good faith and acquires no rights under the permit.

According to the evidence, Plaintiff had notice of pending legislation regarding the construction of its asphalt plant on October 19, 1998, the day the first vote on the Moratorium was held.[8] Thus, October 19th was the absolute last day that Plaintiff could have made "substantial expenditures" in hopes of attaining a vested property right. As stated previously, however, Plaintiff had yet to obtain a building permit, air quality permit, or wastewater permit by that time.

The Court therefore finds that any "substantial expenditures" made by the Plaintiff were simply "in hope or expectation" of receiving the necessary permits and not in reliance of them. (M&R at 12-13).

Alternatively, Plaintiff contends that it is well-settled in North Carolina that vested property rights may be acquired in a variety of ways without obtaining a building permit. According to its

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[7] Plaintiff was not granted an air quality permit until May 10, 1999 and a wastewater permit until October 18, 1999. Plus, according to the testimony of Robert Reed, Plaintiff failed to submit all of the signed and sealed blueprints required by the Ashe County Building Code.

[8] Plaintiff may have had notice as early as October 5, 1998, when Mr. Yates publically denounced the project at an Ashe County Board of Commissioner's meeting. Nevertheless, it is without dispute that Plaintiff was aware of the pending legislation by October 19, 1998, when both Lucian and Leonard Jordan attended the Commissioner's meeting held on that day.

Objections, such instances may include "...special or conditional use permits, certificates of zoning compliance, preliminary plat and site plan approvals, and existing zoning or lack thereof." (Plaintiff's Objections at 14). See Also Cardwell v. Smith, 106 N.C. App. 187 (1992); In re Campsites Unlimited, 287 N.C. 493 (1975).

While the Court recognizes that a building permit is not necessarily a prerequisite for obtaining a vested property right, it fails to see how any of the alternative examples provided by the Plaintiff apply to this action. There is no evidence that a special or conditional use permit, a certificate of zoning compliance, or a site plan approval were granted in this case. Furthermore, Plaintiff could not have been acting in reliance of a pre-existing zoning law since its property has remained unzoned since it bought the land in 1983. (Amended Complaint at 2).

Since the Court can think of no legal or equitable argument for why a vested property right existed in this case, it rejects Plaintiff's procedural due process claim and adopts the recommendation of the Magistrate Judge on this matter.

2. Substantive Due Process

In order to make a viable substantive due process claim, the Plaintiff must demonstrate "(1) that [it] had property or a property interest; (2) that the state deprived [it] of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency." Sylvia, 48 F.3d at 827.[9]

As stated previously, Plaintiff failed to maintain a valid property interest in this case. Nor has Plaintiff provided any evidence that the Defendants actions were "beyond the outer limits of

[9] See Also Rucker v. Harford County, 946 F.2d 278, 281 (4th Cir. 1991) (protection of substantive due process covers only state action which is "so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or adequate rectification by any post-deprivation state remedies.")

legitimate governmental action." Id. In fact, as discussed above, the Defendants actions were rationally related to a legitimate governmental interest. Thus, the Court necessarily rejects Plaintiff's substantive due process claim.

C. Plaintiff's Remaining Claims

Lastly, Plaintiff asserts in its "Amended Complaint" that the PIDO is vague and indefinite, and "fails to provide any reasonable opportunity to know what is prohibited..." (Amended Complaint at 7). Specifically, Plaintiff argues that the terms "objectionable" and "adverse effect," as they appear in §159.05 of the ordinance, are unconstitutionally vague and subject to varying interpretations. According to the Plaintiff, the average industry in Ashe County is unable to determine whether it produces "objectionable" levels of pollution or whether such pollution has an "adverse effect" on the health and safety of the citizens of Ashe County.[10]

The Supreme Court of the United States has found a law to be unconstitutionally vague if "persons of common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391 (1926); See Also U.S. v Griffen, 585 F.Supp 1439, 1443 (M.D.N.C. 1983). Since legislatures draft statutes with such sufficient generality that they apply to the prescribed conduct, it is not necessary that they define each and every term contained in the statute. Id. In other words, a quantity of exactness is not required. According to State v. Dorsett, 3 N.C. App. 331, 335 (N.C. Ct. App.1968),

> A criminal statute is not rendered unconstitutional by the fact that its application may be uncertain in exceptional cases, nor by the fact that the definition of the crime contains an element of degree as to which estimates might differ, or as to which a jury's estimate might differ from defendant's, so long as the general area of conduct

[10] The term "Polluting Industry" is defined in the PIDO as "an industry which produces objectionable levels of noise, odors, vibrations, fumes, light, smoke, air pollution or other physical manifestations that may have an adverse effect on the health, safety or general welfare of the citizens of Ashe County." (PIDO §159.05).

against which the statute is directed is made plain.[11]

Applying the above law to the facts of this case, the Court finds that the PIDO is not unconstitutionally vague or indefinite. The meaning of terms contained in the statute are quite clear and are reasonably determinable by people of common intelligence. Connelly, 269 U.S. at 391.

Since Plaintiff failed to make any viable constitutional claims, the Court grants the Defendants' motion for summary judgment and dismisses the Plaintiff's "Amended Complaint" with prejudice.

IV. ORDER

IT IS, THEREFORE, ORDERED that Defendants' "Motion for Summary Judgment" is hereby **GRANTED** and Plaintiff's "Amended Complaint" is hereby **DISMISSED, WITH PREJUDICE.**

THIS the 22d day of June, 2001.

RICHARD L. VOORHEES
UNITED STATES DISTRICT COURT JUDGE

[11] Specifically, the court in Dorsett held that the ordinance in question did not have to define in decibels the intensity of the noise prohibited by the ordinance. The court relied on the commonly accepted meanings of various terms in finding that the ordinance was not unconstitutionally vague.

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United States District Court
for the
Western District of North Carolina
June 26, 2001

* * MAILING CERTIFICATE OF CLERK * *

Re: 5:99-cv-00105

True and correct copies of the attached were mailed by the clerk to the following:

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Bureau of Prisons	( )
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Other_____ (

Date: 6/26/01

Frank G. Johns, Clerk

By: Tammy Evans
Deputy Clerk