CASE NO. 06-8093

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
Winslow Friday,	)
	)
Defendant-Appellee	)

On Appeal from the United States District Court
for the District of Wyoming
The Honorable William F. Downes
District Judge
D.C. No. 05-CR-260-D

BRIEF OF AMICUS CURIAE OF THE NORTHERN ARAPAHO TRIBE IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

BRIEF FILED UNDER CONSENT OF ALL PARTIES

Respectfully submitted,

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ORAL ARGUMENT IS REQUESTED
ATTACHMENTS INCLUDED (DIGITAL FORM)

Statement of Identity and Interest of *Amicus Curiae*

The Northern Arapaho Tribe ("Tribe") is a federally recognized Indian tribe.[1] There are approximately 8,000 enrolled members of the Tribe. Of those tribal members, approximately 4,500 reside on the Wind River Indian Reservation in central Wyoming. The Tribe has long struggled to keep its culture and traditional beliefs viable and continuing. It is deeply committed to preserving its religion and traditions. The Tribe believes that the Religious Freedom Restoration Act is a critical means of protecting and preserving its belief system.

Defendant-Appellee, Winslow Friday ("Friday"), is an enrolled member of the Tribe. The bald eagle taken by Friday was taken for use in the Arapaho Sun Dance in 2005. The United States District Court for the District of Wyoming allowed the Tribe to be an *Amicus Curiae* party below. All parties have consented to the filing of this brief. Therefore, the Tribe is authorized to file a brief as *Amicus Curiae*, pursuant to F.R.A.P. 29(a).

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[1] See, Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 53 FR 52829(1998).

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ARGUMENT

I. THE "EAGLE" TAKE PERMIT SYSTEM IS A SHAM - THERE HAS NEVER BEEN A TAKE PERMIT ISSUED FOR A BALD EAGLE

A. The Only "Eagle" Take Permits Ever Issued Were for Golden Eagles.

The United States ("U.S.") repeatedly asserts that it has issued Indian religious take permits for "eagles." See e.g., Aplt. Brf. p. 23, 24, 26. That statement is inaccurate and misleading. While the U.S. Fish and Wildlife Service ("USFWS") has issued take permits for *golden* eagles; not one has been issued for a *bald* eagle. Tr. Tr. p. 290. The USFWS says it has not done the requisite biological studies necessary for the issuance of a bald eagle take permit. Tr. Tr. p. 300. Testimony at the hearing showed that the application process for bald eagle take permits, if such permits existed, would be more complex than for golden eagles because, in addition to the lack of biological studies, the bald eagle is on the Endangered Species list. Tr. Tr. p. 300-01. According to testimony for the U.S., an opinion from the Solicitor's Office of the U.S. Department of Interior also would be necessary before a take permit for a bald eagle could be issued. Id. This belies the government's argument that take permits for bald eagles are "available and have been issued in short order." Aplt. Brf. p. 12. Golden eagles are not threatened or endangered, yet bald eagles are currently listed as a "threatened" species. The bald eagle is protected under the Endangered Species Act ("ESA")(16

U.S.C. §§ 1531-1543), the Migratory Bird Treaty Act ("MBTA")(16 U.S.C. §§ 703-711), and the Bald and Golden Eagle Protection Act ("BGEPA")(16 U.S.C. § 668). The golden eagle is covered by the BGEPA and the MTBA but not by the ESA since the golden eagles are neither threatened nor endangered. Golden eagles are only protected under the BGEPA as an additional protective measure for *bald eagles* because, as the U.S. acknowledges, young golden eagles are difficult to distinguish from bald eagles. Aplt. Brf. 2.

B. There Has Never Been a Take Permit Issued Pursuant to the Terms of 50 C.F.R. §22.22.

The government's brief is replete with statements claiming that eagle take permits have been issued pursuant to the regulations under the BGEPA. See e.g., Aplt. Brf. p. 23, 24, 26. The regulations authorize issuance of permits only to *tribal members*, but no permit has ever been issued to a tribal member as an individual, such as Winslow Friday, and not as an official or representative of tribal government. In pertinent part, the relevant regulation states:

> We will issue a permit *only to members* of Indian entities . . ..
>
> ...
>
> Your application for any permit under this section must also contain the information required under this section,§13.12(a) of this subchapter, and the following information:
>
> ...
>
> (3) *Name of tribe with which applicant is associated*.
>
> ...
>
> (5) You must attach a *certification of enrollment in an Indian tribe*

> that is federally recognized under the Federally Recognized Tribal List Act of 1994, 25 U.S.C. §479a-1, 108 Stat. 4791 (1994). The certificate must be signed by the tribal official who is authorized to certify that an *individual* is a duly enrolled member of that tribe, and must include the official title of that certifying official.

50 C.F.R. §22.22 (emphasis added).

The permits issued by the USFWS instead have gone to the "Hopi tribe," (Aplt. Brf. p. 5) the "Navajo tribe," (Id.) the "Taos Pueblo" (Id.) and the "Jemez Pueblo." (Id. at n. 3).[2] There is no evidence of record that any permit has ever been issued to a tribal member as a private individual. 50 C.F.R. §22.22 does not provide authority to issue permits to Indian tribes or to pueblos; nor is there authority to issue permits to individuals on behalf of a tribe.[3]

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[2]Brian Milsap, Chief of the USFWS Division of Migratory Bird Management, testified:

> Q. Now these permits you've been speaking of that - - in Region 2, were these all issued to tribes as opposed to individuals?
> A. I actually believe they were. I'd have to look at each one. I don't have them in front of me, but I believe they were issued to individuals on behalf of the tribe. ...
>
> A. I guess it is issued to the Hopi Tribe with the principal officer referenced as the chairman/chief executive officer of the tribe.
> Q. Okay. The - - the permittee on the permit is the Tribe?
> A. The tribe, correct.

Tr. Tr. p. 311.

[3]Such take permits issued to tribes or to pueblos may be being issued *ultra vires*.

The U.S. rails against "unregulated" taking of bald eagles. See Aplt. Brf. pp. 38, 47, 48 and 49. This argument is only advanced for the purpose of muddying the water. The issue before the Court is whether there is a "permit process" in place to provide take permits for bald eagles to tribal members for use in traditional religious ceremonies or whether requiring Friday to apply for a permit would have been futile because such permits are not available.

II. THE U.S. AVOIDS ITS DUTY TO ISSUE TAKE PERMITS BY REFUSING TO COMMUNICATE WITH ITS TRUST BENEFICIARIES

On July 9, 1940, less than one month after the Bald Eagle Act[4] was signed into law, Secretary of the Department of the Interior, Harold L. Ickes, wrote:

> That Indians have legal rights is a matter of little practical consequence unless the Indians themselves and those who deal with them are aware of those rights. . . . Ignorance of one's legal rights is always the handmaid of despotism.

Felix S. Cohen, *Handbook of Federal Indian Law* page v (1945).

It has been 67 years since Secretary Ickes penned this truism. Today, the Department of the Interior still refuses to discuss the availability of take permits. The failure to disclose this information violates the trust obligations the U.S. government owes to Indians and Indian tribes.

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[4] June 8, 1940, c. 278, 1, 54 Stat. 250. See also, United States v. White, 508 F.2d 453 (8th Cir. 1974).

The U.S. keeps the existence of take permits a closely guarded secret. Brian Milsap, Chief of the USFWS Division of Migratory Bird Management, testified,

> we have not engaged in any - - any real outreach outside of our own internal efforts to make the regional offices aware of the process by which we're dealing with these now[.]

Tr. Tr. 294.

In other words, there is no outreach regarding the availability or even the existence of take permits. Moreover, take permits are not discussed outside of USFWS; worse than that, the internal discussion is only within the regional offices. Information is not disseminated to *local offices that have contact with the public.*

USFWS Agent Doug Goessman testified as an "expert in law enforcement, particularly in relation to enforcement against eagle violations." Tr. Tr. 357. Agent Goessman has been with the USFWS for over twenty years and worked as a wildlife law enforcement officer for over twenty eight years. Tr. Tr. 358. Goessman testified:

> Q. ... It's your understanding that under the current law there cannot be exceptions for Native Americans to shoot an eagle?
> A. Correct.
> Q. ... do you take inquires sometimes from citizenry about wildlife legalities or permitting issues?
> A. Yes.
> Q. If - - if someone called you to ask if a person could get a license to shoot an eagle for Native American religious purposes, would you tell them there's no provision for that currently?
> A. Currently there's no provisions for Native Americans to obtain a permit

to kill eagles.

Tr. Tr. 367-68.

This testimony illustrates what tribal members are being told when they ask for take permits. An individual who contacts their local USFWS office might not speak to an agent with as much experience as Agent Goessman, but the result would be the same. The individual will be told that there are no permits available to take a bald eagle for Indian religious purposes.

At the hearing and in its brief, the U.S. admitted it has a "preference" that Indians use the Eagle Repository rather than issuing take permits. See Tr. Tr. 263, 294-95; Aplt. Brf. p. 26, 31. Not only is that bald-faced paternalism, it also flies in the face of existing law. Congress's intent is made plain by the permit section of the BGEPA, which provides for the issuance of take permits. 16 U.S.C. §668(a). By enacting §668(a), Congress delegated no authority to any agency to promulgate any preference to the contrary and without such a delegation, federal agencies have no authority to promote their own policy "preferences."

The U.S. does not discuss take permits outside of the Regional Offices of the USFWS. Even a USFWS agent with *twenty eight* years of experience did not know of the existence of take permits for eagles. The U.S. admits that it does no outreach to Indians to inform them about take permits. The U.S. admits it prefers

that Indians use the federal Eagle Repository. Indians looking for an eagle take permit will be told "there's no provisions" for such permits. The USFWS exercises its "preference" by channeling requests through the federal Eagle Repository. Thus, the take permit system remains concealed and unused.

III. THE TRUST OBLIGATION AND AN EXECUTIVE ORDER REQUIRE OUTREACH TO INDIAN TRIBES REGARDING TRUST ASSETS.

The U.S. is either trying to mislead the Court or it truly misunderstands its fiduciary obligations to Indian tribes. The U.S. avers that the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-2000bb-4 ("RFRA") does not require the federal government to "advertise" the availability of take permits. While this may be true, the government's trust obligations to Indians require the disclosure of important information regarding trust assets.

The Supreme Court has recognized "the undisputed existence of a general trust relationship between the United States and the Indian people." United States v. Mitchell, 463 U.S. 206 (1983). Wildlife has been recognized as a trust asset. See Northern Arapahoe Tribe v. Hodel, 808 F.2d 741 (10th Cir. 1987). The federal government "has a common law fiduciary duty to fully and accurately inform Indian Trust beneficiaries about [its] management of the trust." Cobell v. Norton, 377 F.Supp.2d 4,13 (D.D.C. 2005)(citing Eddy v. Colonial Life Ins. Co of Am, 191F.2d 747, 750 (D.C. Cir. 1990)(stating "the duty to disclose material

information is the core of a fiduciary's responsibility, animating the common law of trusts ...."); Restatement (Second) of Trusts § 173 (common law trustee "is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know...").

The U.S. argues that RFRA :

> does not require the government to facilitate religious exercise or engage in *propaganda efforts* that make religious exercise easier for individuals. The availability of take permits is explicitly revealed in the Eagle Act and the regulations, both of which are publicly available. RFRA requires nothing more.

Aplt. Brf. pp. 24-25 (emphasis added).

However, making information "publicly available" does not fulfill the trust obligations owed to Indians when that "public information" is contradicted by USFWS employees such as a twenty-eight year veteran Agent Goessman. The U.S. cannot rely merely on "public information" to fulfill its trust responsibility when its agents deny that very information and when outreach efforts only include the availability of the Eagle Repository and then remain silent regarding the other option for tribal members – take permits. That argument shifts the onus of the fiduciary relationship from the trustee to the beneficiary, directly contrary to the core principles of trust law.

The U.S. would have the Court believe that its only obligation to Indians is premised on the RFRA. However, the fiduciary obligations owed to Indians are far broader and more deeply rooted than RFRA. Because of the fiduciary duties owed to Indian tribes, the federal government does not have the option of only providing outreach related to the Eagle Repository, as it currently does. Tr. Tr. 262-263.

Consistent with its fiduciary obligations, the U.S. has issued an Executive Order that requires executive departments and federal agencies to consult with tribes regarding matters affecting them. See Memorandum, *Government-to-Government Relations with Native American Tribal Governments*, 59 FR 22951 (Apr. 29, 1994) (stating that each executive agency "*shall consult*, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments")(emphasis added). There is nothing in the record showing that USFWS has consulted with tribal governments before deciding to limit its outreach information to the Eagle Repository. Another Executive Order is more specific. President Clinton issued an order which states,

> I am directing executive departments and agencies to work cooperatively with tribal governments and to reexamine broadly their practices and procedures to seek opportunities to accommodate Native American religious practices to the fullest extent of the law.

Memorandum, *Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes*, 59 FR 22953 (Apr. 29, 1994). There is nothing in the record showing that the USFWS consulted with tribal governments regarding take permits for Indian religious purposes or that it reexamined its "preference" to accommodate take permits following the issuance of these Executive Orders.

The fiduciary obligations owed to Indians and Indian tribes by the U.S. include an affirmative duty to disclose information. Making information "publically available" cannot be deemed to fulfill such basic duties. Anweiler v. American Electrical Power Service Corp., 3 F.3d 986, 990 (7th Cir. 1993)(finding that the duty exists when a beneficiary asks for information, and even when he or she does not); See also Eddy, 919 F.2d at 750. The U.S. cannot transfer its responsibilities onto the trust beneficiaries by requiring them to find information on trust assets. See Anweiler, 3 F.3d at 990. To do so would be tantamount to allowing the federal government to stand trust law on its head. Moreover, the U.S. failure to provide information to Indians and Indian tribes also violates the Executive Order requiring consultation as well as the Executive Order for the accommodation of Indian religious practices.

VI. RFRA PROTECTS WINSLOW FRIDAY FROM PROSECUTION

This Court has set forth its analysis for RFRA cases involving eagles and

eagle feathers in United States v. Hardman, 297 F.3d 1116, 1126-27 (10th Cir. 2002). In such cases, the defendant needs to show that his religious beliefs are sincerely held and that the regulations are a substantial burden upon his religious beliefs. Id. at 1126. Once such a showing has been made, the burden then shifts to the government to show that its actions advance a compelling governmental interest and are the least restrictive means of furthering that interest. Id. at 1127.

A. Winslow Friday's Religious Beliefs are Sincerely Held.

There has been no dispute that Friday's religious beliefs are sincerely held.

B. BGEPA Substantially infringes on Indian Religious Practice as a Matter of Law.

In Hardman, this Court stated, "[t]he eagle feather is sacred to Native American religions . . . *Any scheme that limits their access to eagle feathers therefore must be seen as having a substantial effect on the exercise of religious freedom*." Id. at 1126-27 (emphasis added). Other courts are in accord. The federal District Court in Nevada stated:

> experts in comparative religions have likened the status of the eagle feather in Indian religion to that of the cross in the Christian faith. In that the eagle feather enjoys such an exalted status in the Indian religion, *any* scheme which limits access of the faithful to their talisman must be seen as having a profound effect on the exercise of religious belief.

United States v. Thirty Eight (38) Golden Eagles or Eagle Parts, 649 F.Supp. 269,

276 (D. Nev. 1986)(emphasis in original). See also United States v. Abeyta, 632 F.Supp. 130, 1304 (D.N.M. 1986).

Any law or regulation that has the effect of limiting Indian access to eagles or eagle parts impinges on exercise of an Indian religion which requires the ceremonial use of eagles. It is beyond argument that the BGEPA limits access to eagles and eagle parts. Therefore, the BGEPA infringes on Indian religious practice as a *matter of law*. With respect to Friday, the government does not have a sufficiently specific compelling interest to overcome RFRA.

C. The Government's Burden Under RFRA.

Infringement on religious exercise can only be justified by a compelling governmental interest that cannot be achieved by a less restrictive means. The burden of showing compelling interest and least restrictive means rests upon the government.

Several cases make it clear that the government's burden is a heavy one. "Compelling interest" was defined in Sherbert v. Verner, 374 U.S. 398, 406 (1963) as an interest that poses "some substantial threat to public safety, peace and order." The Supreme Court stated, "only those interests of the highest order and not otherwise served can overbalance legitimate claims to free exercise of religion."

Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). This Court has ruled that the compelling interest test cannot be met through *generalized assertions* of government interest, but must be measured by the *specific action* that would apply to the affected individuals. See, e.g., O Centro Espirita Beneficiente Uniao v. Ashcroft, 342 F. 3d 1170 (10th Cir. 2003), Aff'd en banc, 389 F.3d 973 (10th Cir. 2004)(government's interest in banning hallucinogen drugs is not enough; government must show that it has a compelling interest in banning all uses of hoasca, the actual substance needed for the tea utilized in the plaintiff's religious ceremony). See also Yoder, 406 U.S. at 213 & 221 (while accepting the premise that education is a paramount state interest and "despite its admitted validity in the generality of cases," this is not enough to show a compelling interest; rather the government needed to specifically show it had a compelling interest in Amish children attending school after the eighth grade).

Therefore, general assertions by the government that the preservation of eagles is a compelling interest will not suffice. Rather, the government must show that enforcing the prohibitions in BGEPA *as to Friday* is necessary for the government to achieve its goal of protecting eagles. Gonzales v. O Centro Espirtia Beneficente Uniao Do Vegetal, 126 S. Ct 1211, 1220 (2006)(stating "RFRA requires the Government to demonstrate that the compelling interest test is satisfied

through application ‘to the person’ - - the particular claimant whose sincere exercise of religion is being substantially burdened”).

D. The Supreme Court Explicitly Rejected the “Slippery Slope” Argument Advanced by the United States.

The U.S. attempted to show that an increase in Indian population means there is a corresponding increase in practitioners of Indian religions which require an eagle for ceremonial use. This type of “slippery slope” argument is immaterial and disallowed by the Supreme Court. Gonzales, 126 S. Ct at 1223 (stating “[t]he Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to ‘rule[s] of general applicability.’") Furthermore, the U.S. expert on demographics, Darren Sherkat, did not take into account that there are 561 federally recognized Indian tribes and 561 different belief systems. See Tr. Tr. pp.s 335-347. There is no single “Indian religion” or “pan-Indian church.” Not all tribal belief systems venerate the eagle or require it for religious practice. The Northern Arapaho are among a very small minority of tribal belief systems that sacrifice eagles. Antonia M. De Meo, *Access to Eagles and Eagle Parts: Environmental Protection v. Native American Free Exercise of Religion*, 22

Hastings Const. L.Q. 771, 778 & 801 (1995)(stating, "contrary to public perception, Native American religious practices do not threaten or endanger the United States eagle population. Most Native American traditional practitioners only use eagle parts and feathers salvaged from dead eagles - - [most] do not kill eagles for religious purposes").

IV. THE U.S. FAILS THE TEST OUTLINED IN HARDMAN

In Hardman, this Court found that preservation of the bald eagle was a compelling interest, stating,

> [t]he bald eagle would remain our national symbol whether there were 100 eagles or 100,000 eagles. The government's interest in preserving the species remains compelling in either situation. *What might change depending on the number of birds existing is the scope of a program that we would accept as being narrowly tailored as the least restrictive means of achieving its interest.*

Hardman, 297 F.3d at 1128 (emphasis added).

As a buttress to its eagle protection interest, the government argued, and this Court agreed, that it had a compelling interest in preserving Indian culture and religion. The U.S. argued that allowing Indian religious practitioners who were non-Indian and therefore were not eligible under the BGEPA to have access to eagles and eagle feathers would harm the federal interest in protecting Indian culture. Id. at 1129, 1133. The Tribe agrees that the U.S. has a compelling interest in the preservation of Indian religion. That interest is directly at odds with the

prosecution of Friday.

In the past a declining population of bald eagles provided justification for efforts to preserve the species. Today, the bald eagle no longer needs the level of protection it once did. In fact, since 1999, the U.S. has proposed removing the bald eagle from the Endangered Species list due to its remarkable recovery.[5]

Long before the proposed delisting, Congress put a bald eagle take permit process in place as part of the program that was narrowly tailored as the least restrictive means of meeting the federal interest in eagle preservation. Despite the bald eagle's recovery, there has *never* been a take permit issued. Obviously, this does meet the standard set forth in Hardman. Congress set forth the "scope of the program" for eagle preservation in 1962 when it added the Indian religious take permit section to the BGEPA. Act of October 24, 1962. The preservation program was never fully implemented because of the federal government has failed to issue bald eagle take permits, even in the face of the increasing number of birds. As the

[5]The Department of Interior originally proposed removing the bald eagle from the Endangered Species Act's list of threatened species on July 6, 1999. 64 FR 36,454 (1999) That original proposal was reopened on February 16, 2006. Endangered and Threatened Wildlife and Plants; Removing the Bald Eagle in the Lower 48 States from the List of Endangered and Threatened Wildlife, 71 FR 8238 (2006). The United States Department of Interior finally removed the bald eagle from the Endangered Species list on June 28, 2007. See Attached Press Release, *Bald Eagle Soars Off Endangered Species List*, June 28, 2007.

bird recovered and its numbers increased, there should have been a corresponding decrease in restrictions on Indian religions. There has been no such decrease.

The U.S. makes the incendiary and misleading statement that the Defendant killed one half of the only nesting pair of bald eagles on the Wind River Indian Reservation. See Aplt. Brf. pp. 1, 14. The U.S.' own expert witness testified that breeding pairs are an imprecise way of measuring the population of eagles. Tr. Tr. 292. Another U.S. witness testified that before the Defendant took a bald eagle for use in the 2005 Sun Dance there was one breeding pair of bald eagles on the Wind River Indian Reservation and since the Defendant took that bald eagle there is *still* one breeding pair of bald eagles on the reservation. Id. at 349. This actually indicates the strength of the bald eagle population. Furthermore, the population of bald eagles in Wyoming "has reached a new high of more than 185 breeding pairs." Jared Miller, *Bald Eagle Numbers Soar*, Casper Star-Tribune (Casper, WY) May 15, 2007.

U.S. witness, Brian Milsap,[6] was asked a hypothetical under direct examination involving whether an area with only one breeding pair could sustain a take of one or two adult males. Tr. Tr. 292. Mr. Milsap replied,

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[6]Mr. Milsap was received as an expert in the area of eagle population management and biology, including reproductive patterns. Tr. Tr. 271-72.

> [w]e would want to look at more than just that. We would want to look at the regional population of bald eagles because the tribal boundaries, significant as they are, might not be a boundary to eagles coming and going[.]

Id.[7]

Mr. Milsap explained:

> Because if you think through what's actually happening when you remove eagles out of the population, it is actually the "floating adult" component that decreases because as vacancies appear in nest sites, floating adults move in right away.

Id. at 287.

Mr. Milsap also testified that such "floaters" are characteristic of "healthy eagle populations." Id. at 303. Another U.S. witness, Roy Brown, testified that there has been one active bald eagle nest on the Wind River Indian Reservation since 2000 and despite the Defendant's taking an eagle for use in the 2005 Sun Dance, that nest is still active. Id. at 349.

CONCLUSION

The bald eagle take permit for Indian religious purposes lives only in the federal statutes, federal regulations and in criminal charging documents. There has *never* been a take permit issued for a bald eagle. The U.S. has yet to do the requisite

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[7]Mr. Milsap informed the Court that he would want to look at more than breeding pairs and tribal boundaries. Tr. Tr. 292. Milsap stated that, in the case of golden eagles, the USFWS judges the eagle population from the distance of 140 miles. Id. 292-93.

biological studies needed prior to issuance. The Solicitor for the Department of the Interior has never been asked for an opinion on a bald eagle take permit for Indian religious purposes.

There has never been a permit issued in accordance with the terms of 50 C.F.R. §22.22, which authorizes permits "only to members" of tribes. That regulation means what it says and it supports the religious take permit section of the BGEPA. 16 U.S.C. § 668. The U.S. has offered no evidence that such a permit has ever been issued to an individual.

The government admits it does not discuss take permits outside of the Regional Offices of the USFWS. Although the U.S. provides outreach regarding the Eagle Repository, the government admits it does no outreach to Indians or to Indian tribes about the existence or the availability of take permits for Indian religious purposes. An expert government witness with nearly thirty years of employment in the USFWS did not know about the existence or availability of take permits and indeed believes that there is no provision for such permits.

The U.S. admits it prefers that Indians utilize the Eagle Repository rather than issuing take permits, in direct contravention with the explicit direction of Congress under the BGEPA. This preference, outreach which promotes this preference, the absence of outreach regarding take permits, and concealment of the

permit system from USFWS employees (and the Indians they speak to) creates an impenetrable regulatory system bent on channeling Indians exclusively through the Eagle Repository.

The U.S. forgets its fiduciary responsibilities to Indian tribes when it fails to provide information related to eagle take permits. The U.S. also violates two Executive Orders by failing to consult with Indian tribes.

Friday is protected from prosecution by RFRA. There has been no dispute about the sincerity of his religious beliefs and the BGEPA infringes upon his beliefs as a matter of law. The U.S. has failed to justify its infringement on Friday's religion. All of the U.S. attempts to make that justification have been premised upon generalized assertions of governmental interests in the preservation of eagles. There has been no showing that enforcing the BGEPA *as to Friday* is necessary to the preservation of eagles.

The U.S. fails the Hardman test. The scope of the eagle protection program that burdens Indian religion must be judged based upon the number of birds existing. Since 1999, the U.S. has proposed removing the bald eagle from the endangered species list because of its remarkable recovery but there has *never* been a bald eagle take permit issued despite the directive of Congress issued in 1962 when the Indian religious permit section was added to the BGEPA. Act of October

24, 1962, 76 Stat. 1246. See also, White 508 F.2d at 458.

Despite the U.S. argument that Friday "killed" one half of the only breeding pair of bald eagles on the Wind River Indian Reservation, there remains one breeding pair of bald eagles on the reservation. The Arapaho might say that the Creator gave the bald eagle to the Tribe and has replaced that eagle.

WHEREFORE, the Northern Arapaho Tribe respectfully requests that this Court affirm the District Court's Dismissal.

ORAL ARGUMENT

Oral argument is requested.

DATED this 29th day of June, 2007.

Respectfully submitted,

_____

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By: */s/ Christopher J. Schneider* (Digital)

ATTACHMENTS

Department of the Interior, Press Release, *Bald Eagle Soars Off Endangered Species List*, June 28, 2007.