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UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

NORTHERN ARAPAHO TRIBE, on its own behalf and on behalf of its members, and	)	
JIM SHAKESPEARE, Chairman, Northern Arapaho Business Council, in his official and individual capacities,	)	
Plaintiffs,	)	
vs.	)	
	)	Civil. No. 11-CV-347-J
DANIEL M. ASHE, Director, U.S. Fish and Wildlife Service, and	)	
MATT HOGAN, Assistant Regional Director, Region 6, Migratory Birds and State Programs	)	
in their official capacities,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

This memorandum is submitted in support of Plaintiffs' Motion for Judgment on the Pleadings, which seeks declaratory and injunctive relief under the Religious Freedom Restoration Act ("RFRA") in two respects: (1) declaratory judgment that the lengthy delay and inaction by Defendants in response to Plaintiffs' permit application violates RFRA and that Defendants must respond to future applications in a timely manner; and (2) declaratory judgment that the permit recently issued by Defendants violates RFRA and that Defendants must issue a permit which complies with RFRA. If the Court denies this Motion, Plaintiffs reserve for subsequent proceedings or trial all claims regarding the Free Exercise Clause, RFRA, the Administrative Procedures Act ("APA"), or as otherwise set forth in the Amended Complaint. If Plaintiffs' Motion prevails, remaining claims set forth in the Amended Complaint may become moot.

FACTS

Plaintiffs applied to Defendants for an eagle take permit under the Bald and Golden Eagle Protection Act ("BGEPA"), 16 U.S.C. §668 *et seq*., in October, 2009. ROD at 000224-27; 000235-38; and 000528 at para. 1.[1] Approximately eleven months later, in September, 2010, Defendants informed Plaintiffs that the application needed additional information. ROD at 000215-16 and 000528 para. 2. One month later, in October, 2010, Plaintiffs submitted the revised application Defendants requested and which Defendants admit "contained all the

[1] Citations to Defendants' administrative record and decision are to the applicable page of the "ROD" or Record of Decision.

information required by BGEPA regulations." ROD at 000528 para. 6.

In December, 2010, Defendants informed Plaintiffs they intended to consult with the Eastern Shoshone Tribe ("EST"). ROD at 000529 para. 9. On June 8, 2011, Defendants met with both the Northern Arapaho Business Council and the Eastern Shoshone Business Council sitting in joint session in Fort Washakie, Wyoming. Id. The Shoshone Business Council did not object to Plaintiffs' permit application, but requested an additional thirty days to consult with elders of both Tribes.[2] Id. The Northern Arapaho Business Council did not object in principle to consultation with tribal elders. Id. Throughout the application process, Plaintiffs made it clear to Defendants that prompt action was essential to meet the religious needs of the Northern Arapaho Tribe ("NAT"), including the annual need for eagles for the Tribe's Sun Dance.[3]

Defendants admit, in their findings and conclusions, that the proposed take of bald eagles by the NAT "is for *bona fide* religious purposes." ROD at 000531 para. 16. These religious purposes include "the taking of an eagle" for the Sun Dance which occurs "once every year." Id. Because a "clean" eagle is required, the re-use of eagle parts from the National Eagle Repository "was not a reasonable option" for the Tribe. ROD at 000533 para. 27. Use of the Repository "is not the least restrictive means of achieving the Service's compelling interests in protecting bald eagle populations and protecting NAT religion and culture." ROD at 000533 para. 26.

Plaintiffs' proposed take of up to two bald eagles on the Wind River Reservation ("WRR") for religious use "is within the annual take threshold established by the Service." ROD at 000531 para. 15. The proposed take by Plaintiffs "is compatible with the preservation of the bald eagle" under applicable regulatory standards. Id.

Defendants' eagle take permit to Plaintiffs is dated March 9, 2012, and was provided to Plaintiffs as part of the administrative record filed herein on March 13, 2012.

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[2] See ROD at 000138.

[3] See ROD at 000145; 000156; 000928-29; 001016-17.

LEGAL STANDARDS

Procedural Standard

A motion under Fed.R.Civ.P. 12 (c) is "designed to provide a means of disposing of cases when the material facts are not in dispute and a judgment on the merits can be achieved by focusing on the content of the pleadings and any facts of which the Court will take judicial notice." 5A Fed. Prac. & Proc. Civ.2d Sec.1367 (R12). The motion is most appropriate when made promptly after pleadings have been filed. Id.[4]

Religious Freedom Restoration Act

The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §2000bb *et seq*., was enacted in response to the U.S. Supreme Court ruling in Employment Division Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). Smith held that neutral laws of general applicability, such as Oregon's unemployment rules, are not subject to strict scrutiny under the Free Exercise Clause of the First Amendment to the Constitution even when they burden religious liberties. Id. Congress intended to "overcome the effects" of Smith and establish a statutory right ensuring that laws which substantially burden a person's religious exercise are subject to the "compelling interest" standard originally set forth in Sherbert v. Verner, 347 U.S. 398 (1963), and Wisconsin v. Yoder, 406 U.S. 205 (1972). See H.R. Rep. No. 88, 103 Cong., 2d Sess. at 8 (1993) and 42 U.S.C. §2000bb(b) (Congressional findings and purposes). RFRA restored the "compelling interest" test and established a claim or defense for persons whose exercise of religion is "substantially burdened" by the government. 42 U.S.C. §2000bb(b).

"A person whose religious exercise has been burdened...may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. §2000bb-1. RFRA applies to "all Federal law, and the implementation of that law."

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[4] In the event that matters outside of the pleadings are presented, "the motion must be treated as one for summary judgment" pursuant to Fed. R.Civ.P. 56(c). Fed.R.Civ.P. 12(d).

42 U.S.C. §2000bb-3. "RFRA provides a statutory claim to individuals whose religious exercise is burdened by the federal government." U.S. v. Wilgus, 638 F.3d 1274, 1279 (10th Cir. 2011); see also Navajo Nation v. United States Forest Service, 535 F.3d 1058, 1068 (9th Cir. 2008). RFRA provides an "alternative remedy to review under the APA."[5] See South Fork Band Council of Western Shoshone v. U.S., 2009 WL 73257 (D. Nev.).

Under RFRA, the government may substantially burden a person's exercise of religion only if the burden furthers a compelling governmental interest using the least restrictive means. 42 U.S.C. §2000bb-1-(b). The initial burden lies with the claimant to establish a *prima facie* claim that the government action being challenged substantially burdens a sincere exercise of religion. Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001). "Exercise of religion" is defined by reference to the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§2000bb-2(4), 2000cc-5(7)(A).

Once this initial burden is met, the burden shifts to the government to show that its action (1) furthers a compelling governmental interest, and (2) is the least restrictive means of furthering that interest. 42 U.S.C. §2000bb-2(3); O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft, 314 F.3d 463, 466 (10th Cir. 2002), *aff'd* 546 U.S. 418 (2006). The government's burden is specific – it must demonstrate that the compelling interest test is satisfied through application of the challenged law to "the particular claimant whose sincere exercise of religion is being substantially burdened." Id. at 430-31.

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[5] While Plaintiffs have stated a claim under the APA, the Amended Complaint also states a separate and distinct claim under RFRA (Doc.#18, Amended Complaint, ¶¶30-36), and for declaratory and injunctive relief based on RFRA. See Bell v. Hood, 327 U.S. 678, 684 (1946) (recognizing the "jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution").

Review of Agency Action

Plaintiffs' Motion is brought pursuant to RFRA, a statute which Defendants are not charged with administering. Deference to agency action under Chevron U.S.A. Inc v. Natural Resources, 467 U.S. 837 (1984), is inappropriate when the courts are charged with adjudicating statutory rights which an agency does not administer. See Adams Fruit Co., Inc. v. Barrett, 494 U.S. 638 (1990) (no deference to Secretary of Labor's interpretation of a provision of the Migrant and Seasonal Agricultural Workers' Protection Act establishing a private right of action because the judiciary, and not the Department of Labor, adjudicates private rights of action under the statute). RFRA §§2000bb-1(c)[6] and 2000bb-1(b)(1) call for intense and particularized scrutiny of government action by the courts. See Gonzales v. O Centro Espirita Beneficiente Uniao De Vegetal, 546 U.S. 418, 430-431 (2006). Neither are Defendants' decisions about pure questions of federal law, nor their decisions about pure questions of tribal law, entitled to deference. See Slingluff v. Occupational Safety & Health Review Committee, 425 F.3d 861, 866 (10th Cir. 2005).

ARGUMENT

The regulation of eagles creates a substantial burden on Plaintiffs' sincere exercise of religion. Defendants have a compelling interest in making eagles available to Plaintiffs for religious use. Defendants have failed to meet their burden of showing that their action, or inaction, furthers a compelling governmental interest in the least restrictive means.

1. Eagle regulation creates a substantial burden on Plaintiffs' sincere exercise of religion.

Defendants agree "that the take of bald eagles by the NAT as proposed in its application

[6] Under RFRA §2000bb-1(c), "a person whose religious exercise has been burdened in violation of this section may assert that violation as a **claim or defense** in a **judicial proceeding** and obtain appropriate relief against **a government**." (Emphasis added.)

is for *bona fide* religious purposes." ROD at 000531, para. 16 ("Findings"). Defendants also acknowledge court rulings that the permitting process under BGEPA "substantially burdens the exercise of religion." ROD at 000532, para. 20 ("Findings"). "The eagle feather is sacred in many 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 belief." U.S. v. Hardman, 297 F.3d 1116, 1126-27 (10th Cir. 2002). "A religiously pure eagle tail is needed to complete the Sun Dance in accordance with the Northern Arapaho religion." U.S. v. Friday, 525 F.3d 938, 947 (10th Cir. 2008).[7] A law that limits "access to the eagle needed for the ceremony substantially burdens [NAT members'] ability to exercise their religion by sponsoring and taking part in the Sun Dance." Id. "Because of the Sun Dance's purity requirement, the availability of [eagle] parts from the Repository neither minimizes the burden imposed on [Northern Arapaho] religion nor renders the scheme less restrictive than it otherwise would be." Id.

Because Plaintiffs have met these initial showings, the burden shifts to the government to establish that its action (or inaction) furthers a compelling governmental interest and is the least restrictive means of furthering that interest.

2. Defendants' compelling governmental interests include making the eagle available for use by the Northern Arapaho Tribe.

The parties agree that Defendants have a compelling governmental interest in protecting eagles as a species.[8] However, Defendants also have a compelling governmental interest in protecting the exercise of NAT religion.[9] In United States v. Hardman, 297 F.3d 1116, 1128 (10th Cir. 2002), the Court stated:

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[7] The ruling appears twice in the ROD at 000778-821 and 000859-902.

[8] See Complaint and Answer, para. 33.

[9] Defendants agree they have a compelling interest in fostering the culture and religion of Tribes; see Complaint and Answer at para. 32.

> We have little trouble finding a compelling interest in protecting Indian cultures from extinction, growing from the government's "historical obligation to respect Indian sovereignty and to protect Native American culture."

Id. (citing Rupert v. Director, U.S. Fish and Wildlife Serv., 957 F.2d 32, 35 (1st Cir. 1992); see also Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210, 1216 (5th Cir. 1991).

One of the reasons for this compelling interest is that Indian religions historically have been suppressed and even outlawed. Once Indian tribes had been forced onto reservations, the federal government was actively trying to destroy and dismantle Indian life, culture and religion. Indian ceremonial practices were heavily targeted in the movement to end tribal life. The Sun Dance, one of the most important Arapaho ceremonies, was forbidden.[10] One commentator made this statement:

> For most of the United States' history, the federal government has actively discouraged and even outlawed the exercise of traditional Indian religions. For more than a century, the government provided direct and indirect support to Christian missionaries who sought to "convert[] and civiliz[e]" the Indians. From the 1890s to the 1930s, the government moved from beyond promoting voluntary abandonment of tribal religions to, in some instances, affirmatively prohibiting those religions. On those reservations where it had authority, the Bureau of Indian Affairs outlawed the "'sun dance' and all other similar dances and so-called religious ceremonies," as well as the "usual practices of so-called 'medicine men.'" It was not until 1934 that the federal government fully recognized the right of free worship on Indian reservations.[11]

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[10] See *Through Indian Eyes*, 337 (James J. Cassidy, Jr., Bryce Walker, Jill Maynard eds., 1997) (explaining, "native religious practices had come under attack across the continent in the name of assimilation. On the Great Plains, Indian agents in the 1880s had put a halt to the Sun Dance, a major yearly ritual for more than 20 different tribes, because it was considered "pagan"). See also Indian Dept. Rule No. 497 (4th) and (6th) (1884) (Sun Dance ceremonies "shall be considered 'Indian offenses'" punishable by withholding of rations and imprisonment).

[11] Jack F. Trope, *Protecting Native American Religious Freedom: The Legal, Historical, and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act*, 20 N.Y.U. Rev. & Soc. Change 373, 374 (1993) (internal citations omitted).

In BGEPA, Congress directed the Secretary of the Interior to permit the taking of eagles for certain purposes, including for the "religious purposes of Indian tribes." 16 U.S.C. §668a.

As a result, the analysis is not only one in which a compelling governmental interest (protection of the eagle as a species) is weighed against the free exercise of religion (which requires occasional take of an eagle). Allowing eagles to be taken for use in legitimate Native American ceremonies is itself a compelling Federal interest.

3. Defendants have not met their burdens under RFRA.

Defendants' action is directly contrary to the Federal interest in making the eagle available to the NAT and fails to further any other compelling governmental interest at all, let alone in the "least restrictive means" required by RFRA.

A. Defendants' delay in processing Plaintiffs' permit application violates RFRA.

Plaintiffs applied for an eagle take permit, to be used primarily in the annual Sun Dance, in October, 2009. ROD at 000224 and 000528 at para. 1. Eleven months later, Defendants informed Plaintiffs that the application needed additional information. ROD at 000215-16 and 000528 para. 2. In October of 2010, Plaintiffs submitted the revised application Defendants requested (Defendants concede it "contained all the information required by BGEPA regulations," ROD at 000528 para. 6). Defendants granted a permit on March 9, 2012, nearly two and a half years after the application was submitted.[12]

On the question about what kind of delay is unreasonable, the Tenth Circuit has said that "three months would have given [Arapaho tribal member Winslow Friday] ample time before the

[12] Defendants call Plaintiffs' revised application a "second" one, presumably to make the Defendants' delay seem less unreasonable. While Plaintiffs disagree with this characterization, even the delay between the "second" application and the issuance of a permit was nearly one and a half years.

Sun Dance" to acquire a permit from Defendants.[13] U.S. v. Friday, 525 F.3d 938 at 954 (2008). The Tenth Circuit expressed "hope that the FWS is aware of the problems" it created for Mr. Friday, including what the District Court called the Agency's "undue foot-dragging." Id.

Plaintiffs are entitled to a declaratory judgment that two and a half years to process an eagle take permit for Plaintiffs burdens their rights under RFRA and is not the least restrictive means of advancing a compelling governmental interest. Defendants should be permanently ordered and enjoined to process such applications within three months of submission. Plaintiffs are also entitled to judgment that Defendants may not wait eleven months to inform Plaintiffs that Defendants consider an application insufficient. If a submission is considered by Defendants to be incomplete for any reason, Defendants should inform Plaintiffs within thirty days so that the process may continue to move forward in a timely fashion.

B. Defendants' "permit" makes no accommodation at all for Plaintiffs' religious freedoms on the Wind River Reservation.

Plaintiffs' application sought an eagle take permit within the WRR. ROD at 000226 and 000238. Defendants have flatly denied this request. The permit categorically excludes the take of an eagle for religious purposes anywhere within the WRR.[14]

Defendants' decision to deny a permit on the WRR does not advance the government's interest in making the eagle available for use by the NAT – indeed, it impedes it. The take of an eagle outside the WRR, where it is prohibited under State law, is problematic. See Section 3.C.

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[13] The Chief of the Division of Migratory Bird Management at FWS (Brian Milsap) testified in Friday "that the Hopi permit took approximately three months to process the first time." Friday, id., at 954.

[14] The "location where authorized activity may be conducted" is "Wyoming, outside the exterior boundaries of Wind River Reservation." ROD at 000671, para. 10.

herein.[15] Because Defendants make no accommodation at all for the exercise of Plaintiffs' religious freedom on the WRR, they have not met the "least restrictive means" test required by RFRA. Nor does the denial of the permit on the WRR further any legitimate interest of the United States.

Defendants denied a permit on the WRR on three stated grounds: (1) an expression of "religious" intolerance from the EST; (2) an interpretation of the laws of the Tribes; and (3) a requirement that Plaintiffs' co-tenant grant permission for the exercise of Plaintiffs' federal rights. See ROD at 000533 para. 27 ("Findings"). Defendants appear to rely on a fourth ground advanced by the EST: (4) that eagles are property owned by both Tribes. None of these grounds presents compelling governmental interests sufficient to support the denial. When considering each basis, Defendants accepted as accurate the stated views of the EST and did so without analysis or consideration of the views or laws of the NAT.

i. Defendants' reliance on "religious" intolerance to the permit is contrary to law.

The Findings make two references to objections by the EST to issuance of an eagle take permit to the Northern Arapaho based upon the beliefs of the EST: (1) "because bald eagles are sacred" to the EST, ROD 000530 at para. 11, and (2) "both Tribes share deeply held, but contrary, beliefs about bald eagles and take," ROD at 000530, para. 11; ROD at 000532, para. 22. Defendants felt that they "had to consider whether the EST's religious beliefs were infringed by granting the NAT's permit application." ROD at 000532, para. 18. The ROD does not discuss the "contrary" beliefs of the EST regarding eagle take, except to characterize them as

[15] The greater the distance tribal members must travel from their homes on the WRR to obtain an eagle, the more difficult to find suitable locations for eagle take and the greater their personal expenses for travel, lodging or other logistics. This Court has noted the high rate of poverty on the WRR in other contexts. Large v. Fremont County, 709 F.Supp. 1176 at 1218 (D.Wyo. 2010) (41.6% of Indians in Fremont County live below poverty line).

"religious." Id. Nothing submitted by EST to Defendants says its objection is "religious" in nature.

The fact that the eagle is sacred to Tribes does not dictate that an eagle cannot be taken for ceremonial use. Indeed, the opposite is true. Eagles are sacred to the Northern Arapaho, who need to take them, on occasion, for religious purposes. U.S. v. Friday, 525 F.3d 938 at 947.

The administrative record does not support the conclusion that taking of eagles by the NAT is in fact offensive to EST or to their religious ceremonies.[16] Although EST may not require a "clean" eagle, EST also participates in annual Sun Dance ceremonies, which require eagle parts and feathers.[17] Historically, both NAT and EST members took eagles for these religious purposes, including during the time before the Federal Eagle Repository was created in the 1970s.[18] The fact that the eagle is sacred to EST does not lead to the conclusion that taking

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[16] Apparently, the taking is personally offensive to some Shoshones. On July 7, 2011, the EST conducted a referendum vote to determine whether to dismantle its office of the Attorney General ("AG"). A "no" vote was a vote to keep the office intact. Supporters of the AG distributed flyers across the WRR announcing that the Arapahos "are KILLING OUR EAGLES for their OWN purposes [emphasis in original]." "The Office of Attorney General's Office [sic] helps to protect us from these people" within the Tribe who are "IN FACT doing Satan's work by being selfish and self serving." The flyer concludes by saying that "To vote 'Yes' [to terminate the AG] is to vote ARAPAHO!! VOTE 'NO' to VOTE SHOSHONE." See ROD at 000183-187; 001016-1020 (same documents at two locations in the ROD).

[17] Weeks, Rupert. Pachee Goyo, History and Legends from the Shoshone at 58-60. Laramie: Jelm Mountain Press, 1981. For the Shoshone Sun Dance, "get an eagle, face it east;" the eagle will help anyone who goes into the ceremony sick. Trenholm and Carley. The Shoshonis: Sentinels of the Rockies at 40. Norman: University of Oklahoma Press, 1964. The Sun Dance is believed to have originated with the Arapaho or Cheyenne Tribes and the Wind River Shoshone Sun Dance was "influenced largely by the Arapahoes." Id. at 37. A member of the Comanche Tribe is thought to have introduced to the Wind River Shoshone a "new Christianized version of the dance" in the 1820s. Id. at 38.

[18] See also Voget, Fred W. The Shoshoni-Crow Sun Dance at 179. Norman: University of Oklahoma Press, 1984.

one for religious ceremonial use is contrary to EST beliefs.

More importantly, the First Amendment and RFRA prohibit the federal preference of one religion over another. In mainstream democratic society, majority opinions usually have the greatest influence on governmental policies and law. Governmental burdens on one religious practice typically derive from the opinions of people who belong to a different, more widespread, faith. This is precisely what the First Amendment and RFRA protect against. "Indeed, it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.'" Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) (internal citations omitted). In Church of the Lukumi Babalu Aye, the City expressed concern "that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety." Id. at 535. Community members considered religious practices of the Church "abhorrent to its citizens." Id. at 542. This is just the kind of religious intolerance the Free Exercise Clause and RFRA protect us against:

> The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular.

Id. at 547.

Defendants may hear the views of an Indian tribe. What Defendants cannot do is yield to the "importunate demands" of others, who profess a belief different than that of the Northern Arapaho. Even if NAT's religious practice were offensive to certain members of the EST, this could not serve as a basis for Defendants' denial of the permit. The religious sensibilities of

others is not a compelling governmental interest under RFRA.[19]

ii. Defendant's reliance on the Law & Order Code is contrary to law and ignores its own record.

The permit is "conditioned upon strict observance of all applicable state, local, tribal, or other federal law." ROD at 000671 at 11.B. See also ROD at 000528, para. 5.

Defendants conclude, without any analysis, that the joint laws of the Tribes, the Shoshone and Arapaho Law & Order Code ("S&A LOC"), override federal law and unambiguously prohibit eagle take under all circumstances.[20] Defendants ignore the laws of the NAT and adopt wholesale the EST position that the S&A LOC cannot be amended without the express permission of the EST, acting first through the General Council of the EST, and later through the Joint Business Council ("JBC").[21]

As a result, Defendants categorically exclude the WRR from the permit. ROD at 000671, para. 10. Rather than leave questions of tribal law to the Tribes or Tribal Court to determine, Defendants have decided that those laws prohibit the take of an eagle, even for religious purposes. The result is that Defendants' myopic view of what tribal law requires becomes a matter of federal policy which conflicts with the Free Exercise Clause, RFRA, and tribal law.

Those portions of the S&A LOC most relevant to the issue include §§16-1-8 (fishing

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[19] Defendants' denial of the NAT permit application creates Establishment Clause problems as well. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 244 (1982). The federal government must be neutral when it comes to competition between sects. Id. at 246. When the government grants preference to one religion over another, that action is suspect and the courts "apply strict scrutiny in adjudging its constitutionality." Id.

[20] Incongruously, Defendants say the same condition in the permit allows the take of an eagle outside of the WRR, where State law prohibits it. See Section 3.C. herein.

[21] Defendants profess to take no position on the applicability of the S&A LOC to NAT members, ROD at 000528-29, para. 5, then proceed to deny the permit on the WRR to avoid potential violation of the "Joint Tribal Code" (S&A LOC), ROD at 000533, para. 27.

regulations; wildlife declared property of the Tribes); 16-8-6 (game code regulations; bald eagle "protected from all hunting, taking or harassment on the Reservation"); 16-8-7 (game code regulations; golden eagle "completely protected from any hunting, trapping, shooting or taking on the Reservation"); 16-8-24 (game code regulations; take of birds prohibited except "as may be authorized by the Tribe"); and 14-13-4 (code of civil procedure; policy of the Tribes to protect rights of individuals afforded by the U.S. Constitution and the Indian Civil Rights Act or "ICRA"). ICRA provides that no Tribe shall "make or enforce any law prohibiting the free exercise of religion," 25 U.S.C. §1302(a)(1).

Legislative history of the joint tribal fish and game regulations provides important context. These fish and game regulations were imposed on the Tribes on an emergency basis by federal regulation in 1984. 49 FR 39308-01, 1984 WL 119905 (F.R.).[22] In 1980, the EST approved a set of fish and game laws, but the NAT did not approve on the basis that the Shoshone law was too restrictive. In 1983, "there was an extensive kill of big game animals" and regulation became necessary because "wildlife could be reduced to a point where normal propagation and recovery will not occur." Id. Northern Arapaho Tribe v. Hodel, 808 F.2d 741 (10th Cir. 1987), upheld the regulations and left both Tribes with a choice – adopt the regulations as their own or abide by them as a matter of federal law. See Hodel at 746. As a result, the Tribes approved the regulations in the S&A LOC, and the 1984 federal regulations are no longer in effect. In most instances, the federal regulations were copied verbatim in the S&A LOC. For example, the 1984 regulations at 25 C.F.R. §244.6 (endangered species) and §244.7 (protected species of birds and mammals) are identical to the Tribes' regulations at S&A LOC §§16-8-6 (endangered species) and 16-8-7 (protected species of birds and mammals). The 1984 regulation at 25 C.F.R. §244.24 (taking birds) is virtually identical to S&A LOC regulation §16-8-24

[22] The federal regulations recognized "[t]he fact that each tribe has its own council and governs itself separately." Id. at 2.

(taking birds).[23] When S&A LOC §16-8-6 (endangered species) was enacted in 1988, the bald eagle was listed by the U.S. Fish and Wildlife Service as an endangered species. The bald eagle has since recovered and was de-listed as endangered in 2007. 72 Fed.Reg. 37346 (July 9, 2007). These provisions of the S&A LOC have not been amended since enacted in 1988.

There are fatal flaws in Defendants' approach.

● Federal law is supreme. The Supremacy Clause of the U.S. Constitution makes the First Amendment, ICRA, and RFRA superior over any conflicting laws of a state or tribe. No tribe shall "make or enforce any law prohibiting the free exercise of religion. ..." ICRA, 25 U.S.C. §1302(a)(1). As a government, the NAT is required to accommodate the religious needs of individuals. So must the EST and Defendants. The S&A LOC is ineffective to the extent it is contrary to the ICRA or RFRA.

● The S&A LOC is internally conflicting. The S&A LOC guarantees the right of religious freedom to tribal members by reference to the ICRA. See S&A LOC §14-13-4. The internal conflict between the section which guarantees religious freedom and the regulation which prohibits the taking of an eagle should be resolved to preserve federal and traditional tribal rights.

● The Northern Arapaho Code resolves the conflict. Title 13 of the Northern Arapaho Tribal Code[24] recognizes the S&A LOC conflict with federal law and the internal conflict within the S&A LOC itself. "Provisions of the Shoshone and Arapaho Law and Order Code ('S&A LOC') which prohibit for all purposes the taking of an eagle are contrary, in some circumstances, to the traditional and federal rights of the Northern Arapaho Tribe and its members with respect to the right to take an eagle for traditional ceremonial purposes. Such

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[23] The federal regulations authorize the Bureau of Indian Affairs to allow the taking of birds, and the tribal regulations authorize the Tribes to do so.

[24] The Northern Arapaho Code [N.A.C.] is available on Westlaw [Northern Arapaho C. __ N.A.C. __] and at www.northernarapaho.com.

provisions also conflict with S&A LOC §14-13-4, which declares the policy of the Tribes to protect 'the safeguards afforded to individuals by the Constitution of the United States and the Indian Civil Rights Act'." 13 N.A.C. 101(c).

The Northern Arapaho Code then addresses and reconciles the conflict. "The provisions of this Code rescind, amend, or supersede the provisions of Shoshone and Arapaho Law & Order Code ("S&A LOC") Sections 16-1-8, 16-8-6 and 16-8-7 (Wildlife, Endangered Species, and Protected Species), or any other provisions of the S&A LOC, only to the extent they are contrary to and therefore rescinded, amended, or superseded by rights recognized under Northern Arapaho tribal law and tradition, the free exercise clause of the First Amendment of the United States Constitution, the Religious Freedom Restoration Act, or other applicable federal law." 13 N.A.C. 102(b).

In addition, provisions of the S&A LOC which prohibit the taking of an eagle are *regulatory*, not statutory. The relevant chapter is labeled "Implementation of Game Code by Regulation" and §16-8-1 of the same chapter sets out "the purpose of these regulations." Regulations which are unauthorized by or in conflict with statutes are invalid and unenforceable. See 2 Am Jur 2d Administrative Law 225 (regulation may not contravene statute). 13 N.A.C. 102(b) is consistent with this fundamental principle.

Defendants have also concluded that the S&A LOC alone governs the NAT on "Arapaho-only [owned] trust lands," ROD 001043, even though that is clearly not the case. NAT governs its own activities on NAT lands pursuant to the NAT gaming, housing, labor code, and other laws of the NAT. See Northern Arapaho Code. The EST has its own separate laws on similar subjects. For example, EST regulates its own gaming activities on EST-only owned lands.[25] It also has its own housing and landlord-tenant laws applicable on jointly owned lands

[25] For EST Gaming Code, see http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gamingordinances/shoshonetribe/shoshoneord031004.pdf.

leased to the EST.[26]

Defendants turn a blind eye to the laws of the NAT, treating those laws as having no force or effect. See ROD at 000528-33 ("Findings"). Defendants appear to agree with EST that once a joint law is enacted, it cannot be amended or rescinded except by action of the Shoshone General Council and the JBC.[27] However, in fact, a number of sections of the S&A LOC are no longer valid despite the lack of JBC action. For example, the S&A LOC continues to include §§12-1-1 *et seq*., which establish and empower the Wind River Housing Authority. Yet that joint authority was in fact dismantled after the NAT created its own, separate housing authority in 1996. Despite EST's effort to prevent NAT's creation of a housing authority as a matter of Arapaho law, by claiming that only the JBC could amend or rescind the S&A LOC, the Court ruled otherwise. See Eastern Shoshone Tribe v. Northern Arapaho Tribe, 926 F.Supp. 1024, 1032 (D.Wyo.1996). The laws creating and regulating the Wind River Housing Authority in S&A LOC §§12-1-1 *et seq*. are no longer in effect despite the lack of action by JBC.

● Arguments by EST are unavailing. Defendants accepted as accurate a number of ill-conceived and discredited arguments presented by EST to the effect that the JBC has plenary power over both Tribes under a "common sovereignty" theory such that neither Tribe may enact or amend laws except through the JBC.[28] For reasons set out below, Defendants' reliance on

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[26] The EST housing laws, which may be enacted as a code or by resolution, do not appear to be publicly available.

[27] The S&A LOC itself provides that it "may be amended by the Joint Tribal Business Council," not by the Shoshone General Council. S&A LOC §1-1-5.

[28] Defendants rely on two letters from EST attorney Varilek – one dated January 26, 2010 (ROD at 000004-7), and one dated December 6, 2011 (ROD at 001042-48). See also ROD at 000528 and 000530 ("Findings").

these arguments is in error.[29]

The authorities on which Defendants rely include an alleged joint tribal constitution and by-laws (ROD at 000035-39), a 1963 Solicitor's opinion (ROD 000040), Hodel, supra, and the S&A LOC. See also ROD at 000004-7 [Varilek letter]. Defendants conclude that once the JBC approves a resolution or code, neither Tribe can ever vary from that action without the prior consent of the other Tribe, which must occur as part of the JBC "process." If the Tribes had consolidated into a single government in which JBC had some authority based on a shared sovereignty of the consolidated governments, the argument might hold water. But that is not the case.

Separate Tribes; Separate Governments. Each Tribe has separate treaties with the United States (the Northern Arapaho treaties include the September 17, 1851, Treaty of Fort Laramie and the Treaty of May 10, 1868; the Shoshone treaty is the July 3, 1868, Treaty with the Eastern Band Shoshoni and Bannock). Each Tribe is listed separately among the federally recognized tribes. See 25 C.F.R. §83.6 (b) notice of list of federally recognized tribes, and, for example, the notice at 56862 Federal Register Vol. 48, No. 248, Friday, December 23, 1983, Notices, at 56863.

Each Tribe has its own laws, including separate rules for their own General Council meetings, elections of tribal officials, and membership enrollment requirements. Members of the NAT cannot vote for candidates in Shoshone elections or attend Shoshone General Council meetings and vice versa. Each Tribe has separate housing authorities, gaming regulatory agencies, utilities, child protection agencies and rules, child support statutes, public benefits programs, and other governmental services and regulations. (The EST acknowledges that each

[29] On June 8, 2011, Plaintiffs received from Ms. Varilek a copy of her letter to USFWS dated January 16, 2010. As a result, Plaintiffs were able to respond, see ROD at 000542-55. Plaintiffs could not respond in the administrative record to additional arguments made in Ms. Varilek's letter to USFWS dated December 6, 2011, because Plaintiffs did not receive a copy of that letter until Defendants provided the ROD to the Court on March 13, 2012.

Tribe has "independent legislative processes." ROD at 000005 [Varilek letter].) The fact that the Tribes have agreed to form certain agencies or approve certain laws though joint action does not mean that all governmental authority flows through a joint business council; indeed, quite the contrary.

"Each tribe governs itself separately by vote of the tribal membership at general council meetings or by vote of its elected business council. A joint business council of representatives from both tribes deals with certain matters of common interest." Hodel at 744.

Title 6 of the Northern Arapaho Code finds and declares that "[t]he Northern Arapaho Tribe is separate and distinct from the Eastern Shoshone Tribe. Without limitation, the Tribes each have their own separate language, culture, history, membership, tradition, voting rights, and governing bodies. Although both Tribes share common ownership in trust lands on the Wind River Reservation, and cooperate in a number of endeavors, they have never consolidated as one legal entity. The Northern Arapaho Business Council ['NABC'] is authorized to act, and historically has acted, only in its own capacity on behalf of the Northern Arapaho Tribe and not with authority over the Eastern Shoshone Tribe. The Eastern Shoshone Business Council acts on behalf of the Shoshone Tribe and not with authority over the Northern Arapaho Tribe." 6 N.A.C. 103(G).

No "Common Sovereignty." Significantly, Defendants ignore Eastern Shoshone Tribe, supra, at 1032 (regarding housing).[30] There, this Court rejected the argument of the EST that the NABC could not act independently of the JBC in matters affecting the reservation generally. The NAT argued that the joint council is a joint powers board operating with the consent of each Tribe, but without any authority independent of each Tribe. The EST had presented a "common sovereignty" theory which the Court rejected. Id. The EST did not appeal that ruling, which is

[30] Defendants forget that the U.S. agreed with the NAT position which prevailed in Eastern Shoshone Tribe, id. at 1026 (Mr. Vasallo appeared for federal defendants). Plaintiffs presented this and additional authority to Defendants, see ROD at 000542-55.

final and binding. See also Northern Arapaho Tribe v. State of Wyoming, 2002 WL 31961497 (D.Wyo. Feb 6, 2002, No. 00-CV0221-J), *aff'd* 429 F.3d 934 (10th Cir. 2005), where this Court rejected a theory that the State was obligated to negotiate a gaming compact only with the JBC. Wyoming had argued that the NAT's "governmental decision making is subject to the approval of another Tribe [the Shoshone]." (2002 WL 31961497, p. 3.)

No Constitution. The "constitution" on which Defendants rely[31] was never approved by the Northern Arapaho Tribe or by the Eastern Shoshone General Council. In fact, the "constitution" was presented and relied upon by the EST in Eastern Shoshone Tribe, supra, at 1032, as "evidence" in support of its "common sovereignty" theory. This Court found, after an evidentiary hearing on the matter, that "that document [the 'Constitution and Bylaws for Governing the Indians of the Wind River Reservation'] has never been adopted by the supreme authority of the Eastern Shoshone Tribe, that is, the General Council. Nor was it adopted by the Northern Arapaho." Hearing transcript, pp. 131-132. The fact that the "constitution" was considered but not approved by the Tribes shows a positive intent *not* to consolidate tribal governments into a joint council, or otherwise. The very document upon which Defendants rely was presented, briefed, and argued to this Court, which found it to be little more than something of historic interest.

Defendants also rely on a 1963 memo from the Department of Interior, Office of the Solicitor, which noted that it had been "common practice for their business councils to act jointly in all matters of common interest" and that meetings of the JBC are, "in effect, a joint meeting of both Business Councils."[32] Office of the Solicitor, *Memorandum A-63-1027.9*, Sept. 13, 1963. Like the "constitution" presented to this Court in Eastern Shoshone Tribe, supra, the Solicitor's

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[31] ROD at 000035-39. By its own terms, the document is one that was merely "recommended to our respective [tribal] Councils for adoption." ROD at 000039 (Section V).

[32] ROD at 000040.

Memorandum was presented by the EST in that case as "evidence" in support of its "common sovereignty" theory. Like the "constitution," the letter was rejected by the Court as woefully insufficient. The Solicitor's *Memorandum* was "hardly a definitive position on the part of the government concerning the relationships by and between these parties [the Tribes]." Eastern Shoshone Tribe, supra, hearing transcript, p. 133.

The Shoshone and Arapaho Tribal Court recently ruled that the NAT was entitled to file its own, separate breach of contract and related claims against an oil company operating on land jointly owned with the EST for breach of a jointly executed oil and gas lease. The EST did not file any similar claims against the company. EST argued that it was an "indispensable party" to the NAT claims and, because the claims had not been filed jointly, they must be dismissed. The Tribal Court concluded that EST failed to present "any grounds for the Court to dismiss the NAT's ancillary claims against Encana and DHS." March 30, 2011, Order Denying the Eastern Shoshone Tribe's Motion to Dismiss, The Estate of Jeremy Jorgenson, et. al. v. DHS Drilling Company and Encana Oil and Gas (USA), Inc., CV-09-0012, Shoshone and Arapaho Tribal Court, ROD at 000555.

The notion that the JBC has plenary power under a "common sovereignty" theory, or that neither Tribe may act except through the JBC, has been squarely rejected by the Federal and Tribal courts.

The JBC is a Joint Powers Board. The hallmark of a joint powers board is that it consists of more than one governing entity, meeting together on matters of common interest, and taking action jointly when each entity chooses to do so. The joint powers board itself does not control the actions of its participants. Rather, the participating entities act cooperatively when they believe it is in their best interests, and decline to act jointly when they believe that joint action is not in their best interests or when consensus cannot be reached between them. The 1963 Solicitor's *Memorandum* accurately describes the functions of a joint powers board. Nothing cited in the *Memorandum* refers to a consolidation of tribal governments or to the JBC as a body

with authority over the constituent members of the joint entity, see Eastern Shoshone Tribe, supra.

The JBC has been described as a body "which is composed of the Business Councils of each Tribe." Dry Creek Lodge v. Arapahoe and Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980). Like the Solicitor's *Memorandum*, this also describes a joint powers board, which is composed of the governing bodies which voluntarily participate in it.

Consistent with Hodel and the ruling in Eastern Shoshone Tribe, Northern Arapaho law describes the JBC as "a joint powers board, the authority of which is dependent upon the separate authority of the Northern Arapaho Business Council and the Eastern Shoshone Business Council (or other authority of the Eastern Shoshone Tribe as determined by that Tribe). When the joint business council takes action, it does so as the Business Council of each Tribe acting cooperatively and in concert with each other." 6 N.A.C. 103(G).

The JBC is best understood as a joint entity which takes action from time to time on certain matters of interest to both Tribes. But when political deadlock prevents JBC from acting, that problem does not result in a concomitant loss of sovereignty by either Tribe. The EST does not obtain a veto over the rights of the NAT simply because JBC has failed to act.

Hodel Does Not Address or Apply to First Amendment Rights. Defendants also rely on Hodel, which says neither Tribe may claim a right to hunt "to a point of endangering the resource in derogation of the other tribe's rights." Hodel at 750. This does not support Defendants' conclusions, either. First, the right to take an eagle for religious purposes is not the same as a right to hunt or fish for any other purpose. Instead, the religious right is primarily based on traditional tribal law, the U.S. Constitution, and RFRA. Second, Hodel expressly refers to the rights of each Tribe as separate and distinct – not something subject to an overriding right or veto by the JBC. The Tribes "have managed reservation wildlife both jointly and separately." Hodel at 744. Although the EST could enact a game code to govern its own members, it could not regulate the NAT or its members. Id. at 744-45. Third, no one has argued or provided any

empirical evidence in the ROD to support the notion that taking an eagle for religious purposes would "endanger the resource." To the contrary, Defendants found that Plaintiffs' proposed take of eagles "is within the annual take threshold established by the Service" and "compatible with the preservation of the bald eagle" under applicable regulatory standards. ROD at 000531 para. 15.

JBC does not provide equal representation. EST asserts that both Tribes are equally represented through the JBC, ROD at 001043, even though NAT members comprise nearly two-thirds of the tribal membership of the two Tribes.[33] If all action must be approved by JBC, thousands of members of the NAT would be disenfranchised. Incongruously, EST also acknowledges that each Tribe has its own separate legislative process and that JBC merely "confirms" those independent legislative processes. Id. (This accurately describes JBC's authority as akin to a joint powers board.) Defendants' reliance on these arguments is also in error.

● Summation. Defendants do not explain why they disregard the laws of the NAT which deal directly with eagle take permit issues. See 13 N.A.C. 101 *et seq.*, ROD at 000251-57. These laws provide an interpretation of the S&A LOC which reconciles internally conflicting provisions of that law (restrictions against eagle take and ICRA) and conforms it to ICRA, Free Exercise Clause, RFRA, and Northern Arapaho religious tradition. Defendants do not once mention the laws of the NAT in their "Findings." (Copy of 13 N.A.C. 101 *et seq.* provided to Defendants on November 10, 2010, see ROD at 000251 and 000356, acknowledging receipt.)

Nor do Defendants explain why tribal law prevents the issuance of an eagle take permit on the WRR, but Wyoming State law, which prohibits the take of an eagle on federal (and other) lands outside of the WRR, does not. See Section 3.C. herein.

By categorically excluding the WRR from the eagle take permit, Defendants favor EST

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[33] NAT membership in March, 2012, was 9,516 (69.5% of total); EST membership was 4,170 (30.4% of total).

"religious" intolerance over Plaintiffs' religious freedoms; ignore the laws of the NAT; misconstrue the nature and authority of the two Tribes as separate sovereigns; endorse wholesale the erroneous position of EST regarding matters of tribal law;[34] and provide that misinterpretation with the force of federal policy. Defendants' approach has long been discredited and ignores Plaintiffs' rights under the Free Exercise Clause and RFRA. Defendants cannot categorically exclude the WRR from the permit. Defendants have failed to meet their burden to show that denial of the NAT permit on the WRR furthers a compelling governmental interest by the least restrictive means.

iii. Defendants' reliance on EST's failure to grant express permission as a landowner is contrary to law.

The third factor expressed in Defendants' decision to deny a permit on the WRR was the "land owner consent issue." ROD at 000533, para. 27. The permit provides that it may not be exercised "unless the permittee possesses all applicable permits or written permission from the agency/landowner." ROD at 000671, para. G.

Most of the federal trust lands on the WRR are held for the benefit of both Tribes, but not all. The NAT owns about 135 acres in trust and over 10,000 acres in fee within the WRR.[35] It is therefore clear that land ownership is not an independent basis for Defendants' denial of the permit – if it were, the permit would have been granted for takes to occur on lands owned only by the NAT.

The absence of landowner permission is not a basis for denial of a permit under BGEPA

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[34] Defendants' "Findings" do not even acknowledge arguments presented by NAT on this subject, let alone consider or analyze them.

[35] NAT informed Defendants that NAT owned lands separately from the EST. ROD at 000143.

or applicable regulations.[36] To the extent the permission of a landowner may be required in order for Defendants to issue an eagle take permit to Plaintiffs, there is no obstacle of any kind to the issuance of a permit for lands owned solely by the NAT. Furthermore, the rights of the NAT, as landowner, includes the authority to grant permission for the taking of an eagle for religious purposes on lands co-owned by NAT and EST. The fact that many lands on the WRR are owned by both Tribes together does not prevent the free exercise of religion on those lands by members of the NAT for three main reasons.

First, the EST is a *government* which cannot infringe on the free exercise rights of individuals. (See 25 U.S.C. §1302, ICRA and S&A LOC §14-13-4.) Northern Arapaho law addresses this directly. "The fact that some lands on the Wind River Reservation are owned by both the Northern Arapaho and the Eastern Shoshone Tribe together does not prevent the free exercise of religion on those lands by members of the Northern Arapaho Tribe pursuant to Northern Arapaho tribal law and tradition, the free exercise clause of the First Amendment of the United States Constitution, the Religious Freedom Restoration Act, or other applicable federal law. No government may substantially burden the exercise of religion absent a showing that such burden furthers a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest." 13 N.A.C. 104(c)(i).

Second, even if EST were treated merely as a *private* co-owner or co-tenant of lands owned by both Tribes, NAT may allow its tribal members to take eagles on such lands, so long as doing so does not result in a "waste" of the land. Nothing in the record suggests "waste" will occur as a result of the take of an eagle on the WRR. Nor will injury to the eagle population result. NAT's proposed take "is compatible with the preservation of the bald eagle." ROD at

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[36] That an eagle take permit is not also a permit to trespass is a different issue. Here, Defendants have categorically prohibited a take on the WRR based on lack of landowner permission. The permit need only state that it does not authorize activity which would constitute a trespass, and leave that issue to the permittee and landowners.

000531 para. 15.

The Tribes each hold an equal undivided equitable interest in most of the trust lands at Wind River. See U.S. v. Shoshone Tribe, 304 U.S. 111, 114 (1938). This ownership is akin to a tenancy in common. See 7 R. Powell & P. Rohan, Real Property §51.01[3] (M. Wolf ed. 2001); see e.g. Torgeson v. Connelly, 348 P.2d 63 (Wyo. 1959) (owners of undivided interest in oil and gas rights in and under realty are tenants in common); Taylor v. Brindley, 164 F.2d 235 (10th Cir. 1947) (same); Dilworth v. Fortier, 405 P.2d 38 (Okla. 1964) (same).

As co-tenants, each Tribe has the right to use the whole of the real property, subject to a restriction that the use cannot result in an "ouster" of the other co-tenant from that property. "Any cotenant of real property generally has a right to enter upon the common estate and to take possession of the whole. This right is subject to the equal right of the other co-tenants, with whose right of possession the cotenant may not interfere." 20 Am.Jur. 2d Co-Tenancy and Joint Ownership §41. "Until an actual ouster is shown, the possession of the common property by one cotenant is prima facie, or presumptively, the possession of all." Id. All tenants in common have a right to occupy all of the property and if one chooses not to do so, that does not give him or her the right to exclude the occupying tenant or impose an occupancy charge. See 51 A.L.R.2d 388. The taking of an eagle pursuant to a permit will not result in an "ouster" of EST from jointly owned lands.

Furthermore, tribal law already grants such permission. Consistent with the law of co-tenancy, the presence of members of either Tribe on jointly owned lands has been deemed *not* to constitute a trespass: "...permission to go upon tribal land shall be presumed for those members possessing proof of their membership in the Tribes or relationship as a member of the immediate family of an enrolled member." S&A LOC §14-21-2(4).

Northern Arapaho law directly addresses co-tenancy in the context of an eagle take permit. "As co-owner and co-tenant of lands owned by both Tribes, the Northern Arapaho Tribe may permit the religious rights of its tribal members to take eagles on such lands, so long as the

same does not result in a substantial injury to those lands. No more than one permit per year shall be granted under this section. To the extent practicable, the Northern Arapaho Business Council will consult with the Eastern Shoshone Business Council prior to issuance of a permit under this section and accommodate reasonable objections by that Council to a permit application." 13 N.A.C. 104(c)(ii). This law adequately protects the rights of EST as co-tenant, while also providing reasonable accommodation of individual religious rights.

Unless the action of one tenant results in an "ouster" of the other, the law of co-tenancy does not allow one tenant to deny the use of common property by the other. Here, the co-tenant (EST) is a *government* and the permit to be issued by the other co-tenant (NAT) is for mere occupancy of the land by a tribal member (which occupancy is already granted by tribal law) for the limited purpose of exercising his or her First Amendment and RFRA rights to the free exercise of religion.

Third, nothing in BGEPA or applicable regulations authorizes Defendants to deny a religious use permit to one tenant based on the absence of consent from a co-tenant. Even if there were regulatory support for Defendants' permit denial, the United States cannot substantially burden the free exercise of religion without a showing that doing so furthers a compelling governmental interest and is the least restrictive means of furthering that interest. All of the jointly owned lands of the Tribes are held in trust for them by the United States, which holds legal title. Put another way, Defendants can and must "consent" to the free exercise of religious rights of Plaintiffs on those federal trust lands. Defendants cannot deny the free exercise rights of the Arapaho people on the grounds that one co-tenant has not taken affirmative action to protect those same rights.

Although these points were presented to Defendants, ROD at 000138-52, their "Findings" make no mention and provide no analysis of them.

iv. Defendants' reliance on so-called joint ownership of eagles is contrary to law.

Finally, Defendants implicitly rely on an argument in the December 6, 2011, letter from attorney Varilek that eagles are a jointly owned tribal resource which the NAT cannot take without EST (or JBC) permission. ROD at 000530, para. 10.

"Ownership" of wildlife by governments, as that term is used, does not refer to absolute and exclusive dominion, possession and control. Governments do not own wild animals in that sense – "ownership" is not the usual proprietary interest, "but is solely for the purposes of regulation and preservation [of wild animals] for the common good." 4 Am.Jur.2d Animals §11. Nor do governments, or anyone else, control wild animals that have not been reduced to possession. See 35 Am.Jur.2d Fish, Game and wildlife Conservation §1. To the extent that animals in the wild are capable of any kind of "ownership," they are "owned" by the government in its sovereign capacity for the benefit of its people, with the resultant power to regulate the taking of wildlife by its citizens. See New Mexico State Game Commission v. Udall, 410 F.2d 1197 (1969). Otherwise, no one "owns" wildlife unless and until it has been reduced to possession. See Lacoste v. Dept. of Conservation of State of Louisiana, 263 U.S. 545 (1924). Therefore, government "ownership" of wildlife is only the power to regulate people and their activities vis-a-vis wild animals. The EST cannot regulate the NAT or its members, particularly in derogation of the Free Exercise Clause and RFRA.

Even a landowner does not acquire property rights to wild animals naturally existing on his or her land unless they are reduced to actual possession and control. See Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936) and 35A Am. Jur. 2d Fish, Game, and Wildlife Conservation §1 (2012).

C. Defendants' "permit" is a sham outside of the Wind River Reservation, where State law prohibits the take of an eagle for religious purposes.

Federal law makes State laws applicable to the use of a federal permit issued under

BGEPA.

By its terms, the permit is "conditioned upon strict observance of all applicable state, local, tribal, or other federal law." ROD at 000671 at 11.B.[37]

Further, the permit is expressly subject to federal regulations, including "50 CFR parts 10, 13 and 22," ROD at 000672 at 11.K, which make state law applicable. The regulations promulgated at 50 CFR 10 implement the BGEPA and are enforced by the U.S. Fish and Wildlife Service. 50 CFR 10.3 states: "[n]o statute or regulation of any State shall be construed to relieve a person from the restrictions, conditions, and requirements contained in this subchapter B." The federal regulation further provides: "[i]n addition, nothing in this subchapter B, nor any permit issued under this subchapter B, shall be construed to relieve a person from *any other requirements* imposed by a statute or regulation *of any State* or of the United States, including any applicable health, quarantine, agricultural, or customs laws or regulations, or other Services enforced statutes or regulations [emphasis added]."

Other federal regulations also show that the States have broad authority and responsibility for management of fish and wildlife on Bureau of Land Management (BLM) lands. See 43 CFR 4. The BLM requires that state law regulate hunting and that before a person can hunt or shoot on public lands, they must become familiar with state law and regulations that govern the activity. See www.blm.gov/wo/st/en/prog/Recreation/recreation_national/

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[37] The current application form for the Federal Native American Eagle Take Permit says "Any permit as a result of this application is not valid unless you also have any required State or Tribal permits or approvals associated with the activity." See http://www.fws.gov/forms /3-200-77.pdf (revised 9/2010). (This requirement was not on the original application that NAT filled out in October, 2009.) At least four other kinds of federal permits issued for the take of an eagle also require adherence to state regulations and permits. See Federal Eagle Exhibition Permit: http://www.fws.gov/forms/3-200-14.pdf; Federal Migratory Bird Rehabilitation Permit: http://www.fws.gov/forms/3-200-10b.pdf; Federal Permit For Eagle Take Necessary To Protect An Interest In A Particular Locality: http://www.fws.gov/forms/3-200-71.pdf; Federal Permit For Eagle Nest Removal: http://www.fws.gov/forms/3-200-72.pdf.

Shooting_sports_Hunting.print.html.

In Kleppe v. New Mexico, 426 U.S. 529 (1976), the Supreme Court ruled that while the federal government possesses preemptive jurisdiction over the public domain under the Property Clause, Congress and States exercise concurrent, not mutually exclusive, jurisdiction over that public domain. The States retain "broad trustee and police powers over wild animals within their jurisdiction." Id. at 545.[38]

State criminal statutes are applied to individuals acting on federal lands within Wyoming. In O'Brien v. State, 711 P.2d 1144 (Wyo. 1986), the Wyoming Supreme Court said the application of the State's criminal laws in a federal wilderness area did not violate the Supremacy Clause of the U.S. Constitution. Wyoming retains jurisdiction with respect to fish and wildlife in the national forests located within State borders. Id. at 1148-49. In so ruling, the Court relied in part on 16 U.S.C. §1133(d)(7), which provides that nothing in that chapter "shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish in the national forests."

State law prohibits the taking of an eagle. W.S. §23-3-101 states: "Any person who takes an eagle is guilty of a high misdemeanor punishable as provided in W.S. §23-6-202(a)(ii)." The punishment for violating this law is one year in prison and up to a $10,000 fine. Id. No exceptions are permitted.

The Wyoming Game and Fish Department ("WGF") is responsible for regulating fish and wildlife in Wyoming. There are no State regulations or procedures that allow any exception for the take of wildlife for religious purposes and none that would allow the take of an eagle in contravention of W.S. §23-3-101.

As to wildlife generally, WGF may grant permits to take an animal for scientific or educational purposes. W.S. §23-1-302(a)(xiii). WGF regulations include a catch-all category of

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[38] Wyoming regulates activities on some federal lands by specific statute. See W.S. §§23-1-105 (Seedskadee federal refuge) and W.S. 23-1-106 (Bear River federal refuge).

"special purpose permits" for other than scientific or educational purposes, but the regulations make no reference to the take of eagles.[39] In any event, no "special purpose"permit from WGF could override W.S. §23-3-101, which plainly makes the take of an eagle for any purpose a crime. An administrative agency's authority to promulgate rules is circumscribed by the statutes that govern its activities. Rules promulgated in excess of an agency's authority are null and void. See McLean v. Hyland Enterprises, Inc., 34 P.3d 1262, 1270 (Wyo. 2001).

Were the NAT to challenge Wyoming to issue an eagle take permit, the Tribe would have no recourse under RFRA. RFRA was enacted pursuant to Congress' enforcement powers under section 5 of the Fourteenth Amendment. The Supreme Court in City of Boerne v. Flores, 521 U.S. 507 (1997), held that those powers were insufficient to overcome the protections against federal authority afforded to states by the Tenth Amendment. RFRA, in other words, is applicable to the federal government but not to the States.

Defendants' permit merely invites tribal members to be arrested and prosecuted by the State of Wyoming instead of by the federal government. The permit unduly burdens Plaintiffs' free exercise of religion and fails the least restrictive means requirement under RFRA.

Conclusion

Defendants have failed to meet their burden of proof that denial of the NAT permit on the WRR furthers a compelling governmental interest in the least restrictive means. Plaintiffs are entitled to judgment as a matter of law as follows:

1. Declaratory judgment that:

A. Two and a half years to process an eagle take permit for Plaintiffs burdens Plaintiffs' rights under RFRA and is not the least restrictive means of advancing a compelling governmental interest. Further, Defendants may not wait eleven months to inform Plaintiffs that

[39] See http://wgfd.wyo.gov/web2011/Departments/Hunting/pdfs/Regulations_Ch33_Nov2010.pdf. All permits are subject to the discretion of the WGF.

Defendants consider an eagle take application insufficient; rather, they must do so promptly and within thirty days of receipt of the application. Defendants' delay in processing Plaintiffs' permit application violates RFRA.

B. Defendants' permit makes no accommodation at all for Plaintiffs' religious freedoms on the WRR. Defendants cannot categorically exclude the WRR from Plaintiffs' eagle take permit. Nor can Defendants impose conditions which make it more difficult than necessary for Plaintiffs to exercise rights recognized by the permit.

C. Defendants' denial of the permit on the WRR based on "religious" intolerance is contrary to law.

D. Defendants' denial of the permit on the WRR based on the Shoshone and Arapaho Law and Order Code is contrary to law and improperly ignores the laws of the NAT.

E. Defendants' denial of the permit on the WRR based on EST's failure to grant express permission as a landowner is contrary to law.

F. Defendants' denial of the permit on the WRR based on so-called joint ownership of eagles is contrary to law.

G. Defendants' permit is a sham outside the WRR, where state law prohibits the take of an eagle.

H. Defendants' failure or refusal to issue an eagle take permit on the WRR constitutes a deprivation of rights established in RFRA and as expressed and protected in Title 13 of the Northern Arapaho Code or other laws of the Tribe.

I. Defendants are without authority to fail or refuse to issue an eagle take permit to Plaintiffs for traditional religious purposes or to impose terms inconsistent with the Court's judgment in this matter.

J. The NAT may protect and facilitate the taking of an eagle by its own members for traditional Northern Arapaho religious purposes, pursuant to Title 13 of the Northern Arapaho Code, or otherwise.

2. Injunctive relief against further violations of the federal rights of the Plaintiffs as set forth in the Court's declaratory judgment, including orders requiring Defendants to:

A. Process eagle take applications within three months of submission.

B. Issue an eagle take permit to the Plaintiffs, without improper restrictions or terms, within twenty (20) days of entry of judgment in this matter.

C. Cease any further interference with efforts by the Plaintiffs to protect and facilitate the free exercise of traditional Northern Arapaho religion by its members, pursuant to Title 13 of the Northern Arapaho Code, or otherwise.

Dated this 31st day of May, 2012.

Northern Arapaho Tribe
and Jim Shakespeare, Plaintiffs

By: /s/

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS was served upon the following by the methods indicated below on the 31st day of May, 2012:

Barbara M. R. Marvin	[ ]	By Facsimile
Dept. of Justice	[ ]	By U.S. mail, postage prepaid
Environmental & Natural Resources Div.	[ ]	By Hand Delivery
P.O. Box 7611	[ ]	By Overnight Courier
Washington, DC 20004	[X]	Electronic Filing
Nicholas Vassallo	[ ]	By Facsimile
U.S. Attorney's Office	[ ]	By U.S. mail, postage prepaid
P.O. Box 668	[ ]	By Hand Delivery
Cheyenne, WY 82003-0668	[ ]	By Overnight Courier
	[X]	Electronic Filing
Coby Howell	[ ]	By Facsimile
Environmental & Natural Resources Div.	[ ]	By U.S. mail, postage prepaid
Wildlife and Marine Resources Section	[ ]	By Hand Delivery
c/o U.S. Attorney's Office	[ ]	By Overnight Courier
1000 S.W. Third Avenue	[X]	Electronic Filing
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Kimberly Varilek	[ ]	By Facsimile
Office of Attorney General	[ ]	By U.S. mail, postage prepaid
Eastern Shoshone Tribe	[ ]	By Hand Delivery
P.O. Box 1644	[ ]	By Overnight Courier
Fort Washakie, WY 82520	[X]	Electronic Filing

/s/
Andrew W. Baldwin