Andrew W. Baldwin (Wy. Bar No. 5-2114)
Berthenia S. Crocker (Wy. Bar No. 5-1821)
Kelly A. Rudd (Wy. Bar No. 6-3928)
Terri V. Smith (Wy. Bar No. 7-4685)
Baldwin, Crocker & Rudd, P.C.
P.O. Box 1229
Lander, WY 82520
(307) 332-3385
FAX (307) 332-2507
Attorneys for Plaintiffs

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.	)	

MOTION TO ALTER OR AMEND JUDGMENT

COME NOW Plaintiffs and respectfully move the Court to reconsider the judgment entered herein (Doc.45) and to alter or amend it as requested below. Plaintiffs consulted with Defendants' counsel, who does not consent to this Motion.

Legal Standards

A motion to alter or amend a judgment may be made within twenty-eight (28) days of entry of the judgment. F.R.C.P. Rule 59(e). Grounds warranting reconsideration include the need to correct manifest errors of law or fact and to prevent manifest injustice. Demasse v. ITT Corp., 915 F.Supp. 1040 (D.Ariz. 1995). It is also proper when a court has misunderstood the facts or a party's position or argument. Gregg v. American Quasar Petroleum Co., 840 F.Supp. 1394 (D.Colo. 1991).

ARGUMENT

Plaintiffs believe it was clear error (1) to grant summary judgment to Defendants and (2) to deny summary judgment to Plaintiffs. The Court misapprehended certain facts and factual issues, unique aspects of the case at bar, and controlling law such that reconsideration of the judgment is warranted to prevent manifest injustice, as set forth below.

1. The Court Erred in Perceiving a Burden on Shoshone Religious Freedom.

The judgment does not address the point that allowing a limited take of eagles by

Plaintiffs produces no burden at all on the religious practices of Shoshone tribal members represented by *Amicus Curiae*, who remain free to obtain their deceased eagles and eagle parts from the Federal Repository, their preferred source.[1]

Furthermore, the record shows that many members of the Shoshone Tribe participate in the Arapaho Sun Dance, where a "clean" eagle is required.[2] Thus, the position set forth in the *amicus* brief appears to represent only one religious faction within the Shoshone Tribe.

Defendants have not carried their burden of proof under RFRA that issuing the permit Plaintiffs request would create any burden whatsoever on Shoshone cultural practices.

(A) The Federal Interest Protects a Supply of Eagles for Religious Practices – Not Objections to the Religious Practices of Others. Defendants have a compelling interest in protecting traditional Indian cultures from extinction *by preserving a sufficient supply of eagles for religious practices conducted by tribal members*. See U.S. v. Hardman, 297 F.3d 1116,1128, 1134 (10th Cir. 2002). In discussing this interest, the Tenth Circuit has said that while allowing unlimited take of eagles for use in Indian ceremonies would, in the short term, promote Indian

---

[1] The Repository has "been acknowledged and identified [by the Shoshone Tribe] as a proper and appropriate process" for obtaining eagles. Counsel for *Amicus*, oral argument tr. at 52. "[T]here are use of eagle parts [in the Shoshone Sun Dance], but those are acquired after that eagle has been deceased. There's no active mechanism or belief in the Shoshone culture or tradition that we would go and take that eagle for that purpose." Id. at 56.

[2] See C'Hair Decl, Doc. 42-6, para. 3 ("... I have personally seen and know many members of the Eastern Shoshone Tribe who actively participate in the Northern Arapaho Sun Dance, where a 'clean' eagle is required for ceremonial purposes.")

cultural practices, "[t]his would, however, presumably lead to the extinction of eagles, which would in turn disserve the government's interest in protecting tribal religion." U.S. v. Wilgus, 638 F.3d 1274, 1290 (10th Cir. 2011). The federal interest in protecting Indian cultures from extinction is thus in balancing "supply-and-demand" for eagles, Id. at 1283, and in providing to tribes "as much of a very scarce resource (eagle feathers and parts) as possible." Id. at 1295. The federal interest is in protecting existing Indian religious practices against repression, not in burdening those practices based on objections by those who disdain the religion.

(B) Shoshone Practices Are Neither Threatened Nor Endangered. Like Plaintiffs, the Shoshone need a supply of whole eagles, eagle bone whistles, eagle tails, heads, wings, talons, or other parts for the Shoshone Sun Dance or other ceremonies,[3] none of which can be obtained from the eagle unless the eagle is *dead*.[4] The *Amicus* Shoshones prefer that eagles *they* use for ceremonial purposes be supplied by the Repository,[5] where death is most frequently caused by electrocution or vehicle collision. Wilgus at 1291. In other words, for them, death may be caused by any number of means – *so long as it is not* one caused by an Arapaho tribal member as part of an Arapaho religious ceremony. This is a critical fact which Defendants and the judgment misapprehend.

---

[3] See historical reference materials cited in Doc.30 at fn. 17 and 18.

[4] Eagle parts for the Shoshone Tribe are "acquired from an eagle after its death," *Amicus* Brief, Doc. 36 at 26.

[5] Counsel for *Amicus*, oral argument tr. at 52.

Neither the ROD nor the judgment examines just what Shoshone practice Defendants say they are protecting.[6] If Defendants are able to identify it, they then must show how issuance of a permit to Plaintiffs would be contrary to the federal interest in protecting that practice. Defendants have failed to meet their burden of proof under RFRA, and Plaintiffs are entitled to judgment on this basis.

The record does not support an award of summary judgment for Defendants, either. Defendants assert that "killing eagles for any purpose violates the EST's religious beliefs." Doc. 34 at 36, fn. 13.[7] Yet, death for any number of purposes is precisely what supplies the Federal Repository, which the Shoshone identify as the "proper and appropriate" source for deceased eagles for Shoshone cultural practices. Oral argument tr. at 52. And, as noted above, many Shoshone members participate in the Arapaho Sun Dance.[8] At a minimum, there is a dispute of fact about what Shoshone practices, if any, are implicated.

(C) Defendants Cannot Protect Religious Intolerance. A Shoshone objection – *not* to reducing the supply of dead eagles for *their own* ceremonial use, but to reducing the take of eagles for ceremonial use by *another* Tribe – is simply not legitimate. Intolerance of the

---

[6] The Shoshone have asserted what they say is a religious-based objection, but neither the Defendants nor the judgment explain what facts might support that assertion or an assertion that any Shoshone practice is put at risk by issuance of a permit to take two eagles.

[7] No one explains how this might possibly square with the Shoshone need for an adequate supply of eagles which have been killed or how it interferes with Shoshone religious practice.

[8] C'Hair Decl, Doc. 42-6, para. 3.

religious practices of others is not one which Defendants can protect under Wilgus, or otherwise. Defendants cannot recognize or yield to this kind of objection. The judgment does not examine this point at all and misses Plaintiffs' argument under Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) ("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.") An objection to the death of eagles for one specific purpose – to meet the religious needs of Plaintiffs – is not legitimate. The judgment erred in dignifying intolerance for Arapaho religious practice as a factor that must be balanced.

Nor is the *Amicus* objection to the *reason* for the particular death of an eagle a *cultural* interest at all. Defendants have failed to show that the assertion by *Amicus* is anything more than a personal objection by some Shoshones to the take of an eagle for Arapaho religious purposes.

(D) A Limited Take Permit On-Reservation Adequately Protects the Religious Practices of Both Tribes. Limiting the annual take to only two eagles within the Reservation protects the eagle population, provides "clean" eagles for Plaintiffs, and enhances the supply of deceased eagles and eagle parts for *Amicus*. Defendants have determined that Plaintiffs' proposed take of up to two bald eagles for religious use "is within the annual take threshold

established by the Service," ROD at 000531 para. 15, and "is compatible with the preservation of the bald eagle" under applicable regulatory standards. Id. The issuance of an on-Reservation permit to Plaintiffs protects the need of both Tribes for a supply of live, and of dead, eagles.

Conclusion. In a clear error of law, the judgment misconstrues the federal interest in the case at bar. Defendants' decision does not protect a Shoshone practice; rather, it impermissibly promotes religious intolerance at the expense of Plaintiffs' (and many Shoshones') religious practices and free exercise rights. *Amicus* objects not to a supply of deceased eagles (upon which, in fact, they rely), but to the taking of an eagle specifically for the religious purposes of the Northern Arapaho (and many Shoshones). The judgment does not examine the nature of the *Amicus* objection or what Defendants' denial of an on-Reservation permit actually protects. These questions, at a minimum, raise issues of fact for trial.

2. The Wilgus "Balancing" Test was Misapplied and the Result Violates the Establishment Clause.

The judgment relies on the analysis in U.S. v. Wilgus, 638 F.3d 1274 (10th Cir. 2011), where that court balanced Wilgus' free exercise rights against two other compelling interests – "eagle protection and providing [eagle feathers] for the religious needs of members of federally-recognized tribes." Judgment, Doc. 45 at 18, citing Wilgus at 1290. Wilgus decided that the government's interest in protecting the eagle as a species (which also advanced its interest in providing eagle feathers for tribal members) aligned against and outweighed the free exercise rights of Mr. Wilgus (a non-Indian). Allowing both Indians and non-Indians to obtain eagle

feathers or parts from the Federal Repository would have increased demand on an already short supply and decreased the likelihood that Indian needs would be met. Wilgus at 1291, 1294.[9]

As Wilgus makes clear, the federal interest in protecting Indian religious practice is in providing a viable eagle population from which tribal members may harvest eagles and eagle parts. The federal interest does not extend to protecting the religious sensibilities of some (who say they engage in a different practice or belief than that of another) over the free exercise rights of others. Favoring one religion over another invokes serious Establishment Clause issues. Larson v. Valente, 456 U.S. 228, 224 (1982).

The take proposed by Plaintiffs will not reduce the eagle population to a degree that would threaten its health as a species or otherwise have an appreciable effect on the eagle population. ROD at 000531 para. 15. The take of eagles by Plaintiffs can readily lead to an *increase* in available eagle parts to members of the Shoshone Tribe[10] because tribal members are expressly permitted by regulation to transfer eagle parts between themselves (and without regard

[9] It also would make for an unworkable law enforcement scheme by removing from law enforcement "one of the few tools FWS has at its disposal to distinguish between lawful and unlawful possession [of eagle parts]... the distinction between members and non-members of federally recognized tribes." Wilgus at 1292. The case at bar presents no similar problem.

[10] The *Amicus* Shoshone acknowledge they receive dead eagles and parts "through ceremonial practices" and as gifts, as well as through the Federal Repository. *Amicus* Brief, Doc. 36 at 26.

to membership in any particular tribe). 50 C.F.R. 22.22(b)(1).[11] Unlike in Wilgus, where Indians and non-Indians would compete for access to a limited resource,[12] Defendants' biological analysis has *already balanced* Plaintiffs' request against the government's interest in protecting the eagle population, both for the sake of the species and to meet the needs of Shoshone tribal members. Thus, the equation in Wilgus was entirely different from the one in the case at bar.

3. The Judgment Erred in Overlooking the State Law Ban on Eagle Take.

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. A State statute prohibits the taking of an eagle. W.S. §23-3-101 ("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.

Defendants assert that despite this express prohibition, Wyoming can and will exercise its discretion by granting such a permit. Defendants' argument fails at the summary judgment stage for at least two reasons. First, Defendants are wrong as a matter of law that the Wyoming Fish and Game Department can grant to Plaintiffs an exception to this criminal statute. Second, Defendants provide no affidavit or other offer of proof to support their assertion that the

[11] Eagle parts may be transferred "from one Indian to another in accordance with tribal or religious custom." 50 C.F.R. 22.22(b)(1).

[12] The issue was "supply and demand." Wilgus at 1283.

Department would in fact exercise its discretion in favor of Plaintiffs' request. Defendants have not carried their burden under RFRA and are not entitled to summary judgment.

After more than a two-year wait for federal action, now Plaintiffs must launch and successfully complete a legal challenge to W.S. §23-3-101, or convince Wyoming to exercise discretion in Plaintiffs' favor, in order to make the federal permit meaningful.[13] The judgment did not consider the status quo under State law, which already fully protects the asserted position of the *Amicus* Shoshone that they do not kill eagles. If Defendants were right to engage in a balancing of Plaintiffs' religious practices against *Amicus'* objections, then Defendants have it upside-down. Requiring Plaintiffs to alter the status quo outside of the Reservation, where State law already advances the *Amicus* position, imposes an unnecessary, and even insurmountable, burden on Plaintiff's free exercise rights.[14]

The judgment did not consider the ban under State law or the additional burden this places on Plaintiffs. Nor did the judgment weigh this burden, nor the benefit conferred on *Amicus* by the status quo, in evaluating any kind of "balance" struck by Defendants.

---

[13] Plaintiffs enjoy no rights under RFRA vis-a-vis the State of Wyoming, City of Boerne v. Flores, 521 U.S. 507 (1997), and Wyoming does not share Defendants' interest in protecting Indian religious practices, which makes a challenge outside the Reservation even more difficult than the one Plaintiffs have made in the case at bar.

[14] Under the "least restrictive means" test, Defendants and the Court have considered the off-reservation environment in analyzing Plaintiffs' request for an on-reservation permit.

4. The Court Failed to Consider Less Restrictive Alternatives.

The judgment concludes that "[n]o alternatives in the record strike such a balance in a way that is less burdensome on Plaintiffs' religious exercise." Doc. 45 at 21. The judgment identifies the four alternatives which Defendants considered, but does not address the ones Defendants did not consider – (1) issuance of a permit on lands owned solely by the Northern Arapaho Tribe, within the Wind River Reservation, and (2) issuance administered under Title 13 of the Northern Arapaho Code. These were presented to Defendants and to the Court (see ROD 000142-143, 000251, 000251-257;[15] C'Hair decl., Doc.42-6, pp. 2-3, para. 6; and oral argument transcript pp. 22-25). Under 13 N.A.C. 104, the Northern Arapaho Tribe proposes to grant eagle take permits to Arapaho tribal members on lands owned (a) solely by individuals, (b) solely by the Arapaho Tribe, and (c) jointly by the Shoshone and Arapaho Tribes. As to joint lands, Plaintiffs would issue only *one* permit per year and would do so in consultation with the Shoshone Tribe. 13 N.A.C. 104(c).

Defendants ignored these alternatives and the Court's judgment does not consider them. Plaintiffs request that the judgment be amended to require Defendants to issue a permit on lands owned solely by the Arapaho Tribe or, alternatively, on lands owned solely by individuals, the Tribe, or jointly owned tribal lands, subject to 13 N.A.C. 104(c).

[15] The Arapaho Code also appears in the ROD at 000270-275, 298-303, 571-576, and 592-597.

Conclusion

Historically, the Sun Dance ceremony of plains Indian tribes has been actively repressed and even outlawed by federal authority. Doc. 30 at 8. Today, members of the Northern Arapaho Tribe continue to face arrest and prosecution for taking an eagle essential to that religious ceremony. The Arapaho have waited two and a half years for a federal permit which tells them to go ask someone else – to go ask the State of Wyoming if it will please allow the take of an eagle essential for traditional religious ceremonies. Defendants' action protects no cultural practice of the Shoshone Tribe, but instead promotes an intolerance of Arapaho tradition. Plaintiffs respectfully request that the Court reconsider the judgment in order to prevent a manifest injustice.

WHEREFORE, Plaintiffs respectfully move that the Court reconsider the judgment issued herein and alter or amend it to (1) require Defendants to issue an on-Reservation permit to Plaintiffs or, in the alternative, (2) issue an on-Reservation permit on Arapaho owned lands; (3) issue an on-Reservation permit on individually owned, Arapaho-owned, or jointly owned lands, all subject to the conditions set out in 13 N.A.C. 104; or (4) set aside the issuance of summary judgment for Defendants so that remaining issues of fact may be tried by the Court.[16]

Dated this 27th day of November, 2012.

---

[16] The judgment directs Plaintiffs to inform the Court about how Plaintiffs plan to proceed with their remaining claims under the First Amendment and the APA. Doc. 45 at p.22. Trial on the RFRA claim would dovetail well with trial on these other claims, since many of the factual issues are likely to overlap.

Northern Arapaho Tribe
and Jim Shakespeare, Plaintiffs

By: /s/
Andrew W. Baldwin
Berthenia S. Crocker
Kelly A. Rudd
Terri V. Smith
Baldwin, Crocker & Rudd, P.C.
P.O. Box 1229
Lander, WY 82520-1229
(307) 332-3385
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing MOTION TO ALTER OR AMEND JUDGMENT was served upon the following by the methods indicated below on the 27th day of November, 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
Portland, OR 97204-2901		

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