

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)

DARRELL O'NEAL,)
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 FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

COME NOW Plaintiffs, by and through counsel, and respectfully move this Court for leave to amend the Amended Complaint, pursuant to Fed.R.Civ.Pro. 15(a)(2), to add a claim under the Establishment Clause of the U.S. Constitution. Upon consultation, Defendants reserved the right to object to this Motion. Plaintiffs' proposed Second Amended Complaint is attached hereto. Plaintiffs' Memorandum in Support of Motion for Leave to File Second Amended Complaint is incorporated herein by reference.

WHEREFORE, Plaintiffs pray that the Court allow the attached Second Amended Complaint to be filed in the above captioned matter.

Dated this 11th day of February, 2013.

Northern Arapaho Tribe and
Darrell O'Neal, 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 FOR LEAVE TO FILE SECOND AMENDED COMPLAINT was served upon the following by the methods indicated below on the 11th day of February, 2013:

Barbara M. R. Marvin	<input type="checkbox"/>	By Facsimile
Dept. of Justice	<input type="checkbox"/>	By U.S. mail, postage prepaid
Environmental & Natural Resources Div.	<input type="checkbox"/>	By Hand Delivery
P.O. Box 7611	<input type="checkbox"/>	By Overnight Courier
Washington, DC 20004	<input checked="" type="checkbox"/>	Electronic Filing

Nicholas Vassallo	<input type="checkbox"/>	By Facsimile
U.S. Attorney's Office	<input type="checkbox"/>	By U.S. mail, postage prepaid
P.O. Box 668	<input type="checkbox"/>	By Hand Delivery
Cheyenne, WY 82003-0668	<input type="checkbox"/>	By Overnight Courier
	<input checked="" type="checkbox"/>	Electronic Filing

Coby Howell	<input type="checkbox"/>	By Facsimile
Environmental & Natural Resources Div.	<input type="checkbox"/>	By U.S. mail, postage prepaid
Wildlife and Marine Resources Section	<input type="checkbox"/>	By Hand Delivery
c/o U.S. Attorney's Office	<input type="checkbox"/>	By Overnight Courier
1000 S.W. Third Avenue	<input checked="" type="checkbox"/>	Electronic Filing
Portland, OR 97204-2901		

Kimberly Varilek	<input type="checkbox"/>	By Facsimile
Office of Attorney General	<input type="checkbox"/>	By U.S. mail, postage prepaid
Eastern Shoshone Tribe	<input type="checkbox"/>	By Hand Delivery
P.O. Box 1644	<input type="checkbox"/>	By Overnight Courier
Fort Washakie, WY 82520	<input checked="" type="checkbox"/>	Electronic Filing

_____/s/_____
Andrew W. Baldwin

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)

DARRELL O'NEAL,)
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,)
Assitant Regional Director, Region 6,)
Migratory Birds and State Programs)

in their official capacities,)

Defendants.)

SECOND AMENDED COMPLAINT

COME NOW Plaintiffs (hereinafter "NAT" or "the Tribe"), and file their Second

Amended Complaint as follows:

PRELIMINARY STATEMENT

1. This action seeks to protect the traditional religious rights and freedoms of the Tribe and its members. Those rights include the limited taking of an eagle for traditional religious purposes of the Tribe. For two and a half years, Defendants failed or refused to issue a federal permit to allow the taking of an eagle by members of the Northern Arapaho Tribe for traditional Native American religious purposes. The denial placed members of the Tribe at risk of criminal prosecution for the taking of an eagle pursuant to their rights under the First Amendment of the United States Constitution, the Religious Freedom Restoration Act (“RFRA”), other federal laws, and the laws of the Tribe. The denial unreasonably burdened the religious rights and freedoms of tribal members, unlawfully interfered with the authority of the Tribe to protect and facilitate the taking of an eagle under the laws and customs of the Tribe, abused and exceeded Defendants’ lawful authority, and was arbitrary and capricious.

On March 9, 2012, Defendants issued an eagle take permit for lands within the State of Wyoming, but excluded all lands within the Wind River Indian Reservation. This action by Defendants continues to place members of the Tribe at risk of criminal prosecution in the permitted area, unlawfully denies a permit for areas within the Wind River Indian Reservation, and is otherwise in violation of federal law.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the Defendants and this action pursuant to 28 U.S.C. §§1331, 1343, and 1362, and the Administrative Procedure Act, 5 U.S.C. §706. The authority of Defendants to deny or interfere with rights, or to burden freedoms preserved, under

the Constitution, RFRA (42 U.S.C. §2000bb-2000bb(4)), and the sovereign authority of the NAT is a question of federal law. This Court is authorized to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§2201-2202.

3. Venue is proper because Plaintiffs reside or are located within the District of Wyoming; a substantial part of the events or omissions giving rise to the claims and the cause of action arose within the District of Wyoming; Defendants' official duties include the area within the District of Wyoming; and no real property is at issue.

PARTIES

4. The Plaintiff Northern Arapaho Tribe is a federally recognized Indian Tribe located on the Wind River Indian Reservation, Wyoming.

5. Plaintiff Darrell O'Neal is the Chairman of the Northern Arapaho Business Council, the duly elected governing body of the Tribe, and is also a member of the Tribe.

6. Defendant Daniel M. Ashe is the Director of the U.S. Fish and Wildlife Service ("USFWS"), a federal agency within the United States Department of the Interior.

7. Defendant Matt Hogan is the Assistant Regional Director of Region 6, Migratory Birds and State Programs, of the USFWS, a federal agency within the United States Department of the Interior.

FACTUAL AND GENERAL ALLEGATIONS

8. The taking and use of an eagle are an integral part of the traditional religious beliefs and ceremonies of the NAT and its members.

9. The Tribe has protected and facilitated the taking and use of an eagle for traditional religious and ceremonial purposes since time immemorial and currently does so

through Title 13 of the Northern Arapaho Code. (13 N.A.C. 101 *et seq.* attached as Exhibit 1 to the original complaint; publicly available at northernarapaho.com.)

10. Chairman O'Neal and other members of the Tribe are sincere adherents to the traditional religious beliefs and ceremonies of the Tribe, which occasionally require the taking and use of an eagle.

11. Among other on-going ceremonial uses, the Tribe's Sundance requires the taking and use of a religiously pure eagle in accordance with Northern Arapaho religion. The Sundance is conducted every summer.

12. The Bald and Golden Eagle Protection Act ("Eagle Act") is implemented by the Secretary of Interior acting through the USFWS. The Eagle Act was created to protect and preserve the bald and golden eagle for a number of reasons, including use of eagles "for the religious purposes of Indian Tribes." 16 U.S.C. §668a. It establishes a broad prohibition against possession of any part of an eagle without a permit.

13. Defendants are charged with the responsibility for issuing eagle take permits within the District of Wyoming pursuant to the Eagle Act and implementing regulations.

14. It is the policy of the United States to prohibit the taking of an eagle, even for religious purposes, without a federal permit. Members of the NAT who take an eagle without such a permit face a real threat of criminal prosecution. See United States v. Friday, 525 F.3d 938 (10th Cir. 2008).

15. The NAT is a federally recognized Indian tribe with sovereign authority to regulate the internal affairs of the Tribe and the conduct of its members, to the extent the same is not contrary to federal law.

16. The NAT has enacted Title 13 (Religious Freedom) of the Northern Arapaho Code, which protects and facilitates the occasional taking of an eagle strictly for traditional religious purposes by members of the Tribe on lands owned by the Tribe or its members within the Wind River Indian Reservation.

17. The NAT, on its own behalf and on behalf of its members, through its Business Council Chairman, applied for an eagle take permit from Defendants on October 7, 2009.

18. Between October 7, 2009, and March 9, 2012, Defendants requested and NAT provided additional information regarding the permit application and discussed the same in an effort to obtain the permit. Between October 7, 2009, and March 9, 2012, numerous ceremonies were conducted, including two annual Sundances, without a decision from Defendants regarding such permit. Defendants' failure or refusal to timely approve the permit application substantially burdened the practice of religion by the Tribe and its members.

19. On March 9, 2012, Defendants issued a permit to the Tribe to take up to two bald eagles for religious purposes. The permitted area includes lands within the State of Wyoming, but categorically excludes lands within the Wind River Indian Reservation.

20. As a matter of federal law, the laws of the State of Wyoming apply to activities of persons on federal (and other) lands within the State. Wyoming law prohibits and criminalizes the taking of an eagle. Exceptions to this prohibition may be made, only at the discretion of the Wyoming Department of Game and Fish, and not for religious reasons.

21. The March 9, 2012, permit also requires, by its terms, compliance with the laws of the State of Wyoming.

22. Defendants' March 9, 2012, eagle take permit is a sham. Any tribal member

taking an eagle pursuant to the March 9, 2012, permit is subject to arrest and prosecution by the State of Wyoming, whether the take occurs on federal, state or other lands (excluding the Wind River Indian Reservation). The permit categorically denies permission to take an eagle within the Wind River Indian Reservation, where State law is no barrier to the take of an eagle on tribal lands.

23. The Consultation Handbook of the USFWS provides that the Department “will carry out their responsibilities under the Act in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments. ...” Defendants’ failure or refusal to issue an eagle take permit on the Wind River Reservation or offer any viable alternative to accommodate the religious practices of tribal members violates the federal trust responsibility, tribal sovereignty, First Amendment of the Constitution, and statutory obligations of the USFWS.

24. Defendants have failed or refused to issue an eagle take permit to the NAT on the Wind River Reservation or otherwise accommodate the traditional religious practices of the Tribe with respect to the taking of an eagle. Defendants’ decision constitutes “agency action.” 5 U.S.C. §551(13).

25. The facts set forth above demonstrate an actual controversy within the meaning of the Declaratory Judgment Act, 28 U.S.C. §2201(a).

FIRST CAUSE OF ACTION - DECLARATORY
JUDGMENT - FREE EXERCISE CLAUSE

26. Plaintiffs reassert and incorporate by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

27. The Free Exercise Clause of the First Amendment to the U.S. Constitution

provides that Congress shall make no law “prohibiting the free exercise” of religion. Tribal members are subject to criminal prosecution for the taking or use of an eagle pursuant to the permit issued on March 9, 2012.

28. Defendants’ failure or refusal to issue such permit, set forth above, Defendants’ denial of a permit on the Wind River Indian Reservation, and the terms of the March 9, 2012, permit violate the Free Exercise Clause.

29. Plaintiffs are entitled to declaratory judgment and injunctive relief as set forth in their prayer for relief.

SECOND CAUSE OF ACTION -
DECLARATORY JUDGMENT - ESTABLISHMENT CLAUSE

30. Plaintiffs reassert and incorporate by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

31. The Establishment Clause of the U.S. Constitution provides that Congress shall make no law “respecting an establishment of religion.” Defendants erroneously found that an objection to Plaintiffs’ application for an eagle permit by certain members of the Eastern Shoshone Tribe is based on traditional Shoshone religious beliefs. If such objection is in fact based on traditional Shoshone religious beliefs, then Defendants’ action, with unlawful purpose or effect, endorses or promotes a religious sect of the Eastern Shoshone Tribe in violation of the Establishment Clause and First Amendment.

THIRD SECOND CAUSE OF ACTION -
DECLARATORY JUDGMENT - RFRA

32. Plaintiffs reassert and incorporate by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

33. The RFRA provides that governmental activity may not substantially burden the free exercise of religion unless that governmental activity is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.

34. The United States has a compelling governmental interest in fostering the culture and religion of federally recognized Indian tribes. Defendants' failure or refusal to issue such permit, set forth above, and the terms of their March 9, 2012, permit are directly contrary to that compelling interest and violate RFRA.

35. The United States also has a compelling governmental interest in the protection of eagles as a species. However, Defendants' failure or refusal to issue such permit, set forth above, and the terms of their March 9, 2012, permit do not advance that interest in the least restrictive means, as required by RFRA.

36. Defendants' failure or refusal to issue such permit, set forth above, and the terms of their March 9, 2012, permit substantially burden the free exercise of religion of the NAT and its members. Defendants have no compelling interest on which to base their refusal to act or to impose the terms of their March 9, 2012, permit. Even if such a compelling interest could be shown, Defendants have failed or refused to meet their duty to protect such an interest by the least restrictive means.

37. Defendants' failure or refusal to issue such permit, set forth above, Defendants' denial of a permit on the Wind River Indian Reservation, and the terms of the March 9, 2012, permit violate RFRA.

38. Plaintiffs are entitled to declaratory judgment and injunctive relief as set forth in their prayer for relief.

FOURTH CAUSE OF ACTION -
ADMINISTRATIVE PROCEDURE ACT

39. Plaintiffs reassert and incorporate by reference the allegations contained in the preceding paragraphs as though fully set forth herein.

40. Defendants' failure or refusal to act, set forth above, Defendants' denial of a permit on the Wind River Indian Reservation, and the terms of the March 9, 2012, permit constitute agency action that is in excess of statutory jurisdiction and authority.

41. In the alternative, Defendants' failure or refusal to act, set forth above, Defendants' denial of a permit on the Wind River Indian Reservation, and the terms of the March 9, 2012, permit are contrary to Plaintiffs' Constitutional and statutory rights.

42. In the alternative, Defendants' failure or refusal to act, set forth above, Defendants' denial of a permit on the Wind River Indian Reservation, and the terms of the March 9, 2012, permit are without observance of procedures required by law.

43. In the alternative, Defendants' failure or refusal to act, set forth above, Defendants' denial of a permit on the Wind River Indian Reservation, and the terms of the March 9, 2012, permit are arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.

44. Defendants' decision should be set aside and declaratory and injunctive relief provided to Plaintiffs as set forth in their prayer for relief.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray that this honorable Court will:

A) Enter declaratory judgment in favor of the Plaintiffs and against Defendants as follows:

1) Declare that Defendants have no legitimate rationale for their denial or refusal to grant an eagle take permit to the NAT or for imposition of the terms of their March 9, 2012, permit.

2) Declare that Defendants' failure or refusal to issue an eagle take permit or imposition of the terms of their March 9, 2012, permit constitutes a deprivation of rights or immunities established in the Free Exercise Clause and violates the Establishment Clause of the First Amendment and RFRA and as expressed and protected in Title 13 of the Northern Arapaho Code or other laws of the Tribe.

3) Declare that Defendants are without authority to fail or refuse to issue an eagle take permit or to impose the terms of their March 9, 2012, permit sought by the NAT, on its behalf or on behalf of its members, for traditional Northern Arapaho religious purposes.

4) Declare that 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.

B) Issue injunctive relief in favor of Plaintiffs and against Defendants as follows:

1) Order Defendants to issue an eagle take permit to the NAT, without improper restrictions or terms, with all deliberate speed.

2) Order Defendants to cease any further interference with efforts by the NAT 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.

3) Order Defendants to cease any further actions which violate the

Establishment Clause of the U.S. Constitution.

- C) Award to Plaintiffs all costs and attorney’s fees allowed by law.
- D) Grant such other and further relief as the Court deems just and equitable.

Dated this 11th day of February, 2013.

Northern Arapaho Tribe and
Darrell O’Neal, Plaintiffs

By: ____/s/_____
 Andrew W. Baldwin
 Berthenia S. Crocker
 Kelly A. Rudd
 Terri V. Smith
 Baldwin & Crocker, P.C.
 P.O. Box 1229
 Lander, WY 82520
 andy@baldwin-crocker.com
 (307) 332-3385
 FAX: (307) 332-2507
 ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing SECOND AMENDED COMPLAINT was served upon the following by the methods indicated below on the 11th day of February, 2013:

- | | | |
|--|-----|-------------------------------|
| 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
Environmental & Natural Resources Div.
Wildlife and Marine Resources Section
c/o U.S. Attorney's Office
1000 S.W. Third Avenue
Portland, OR 97204-2901

By Facsimile
 By U.S. mail, postage prepaid
 By Hand Delivery
 By Overnight Courier
 Electronic Filing

/s/

Andrew W. Baldwin

**UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING**

NORTHERN ARAPAHO TRIBE,)
on its own behalf and on behalf of its)
members, and)

DARRELL O’NEAL,)
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.)

**ORDER GRANTING MOTION FOR LEAVE TO FILE SECOND AMENDED
COMPLAINT**

Plaintiffs having moved for leave to file their Second Amended Complaint and having shown sufficient cause for the same,

IT IS HEREBY ORDERED that Plaintiffs’ Second Amended Complaint shall be filed herein by the Clerk of Court.

Dated this _____ day of February, 2013.

By the Court:

District Judge

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)

DARRELL O'NEAL,)
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
MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Plaintiffs provide the following Memorandum in support of their Motion for Leave to File Second Amended Complaint.

I. Introduction.

Plaintiffs seek leave to amend for the purpose of adding a claim under the Establishment Clause of the U.S. Constitution. The claim is inherent in, and indeed is a mirror image of, the existing claim under the Free Exercise Clause. Thus, the Establishment Clause issue has been argued by Plaintiffs in their Motion for Judgment on the Pleadings and subsequent memorandum. During the course of proceedings, Defendants' reliance on a religious-based objection from *Amicus* has come into focus as the sole reason for their denial of an on-Reservation eagle take permit. Although the Establishment Clause claim is included within the breadth of the original complaint, Plaintiffs seek leave to conform the pleadings to Defendants' specific rationale as presented to the Court and to clarify and provide particularity with respect to the First Amendment claim.

The proposed amendment would add the following substantive paragraph (¶31): "The Establishment Clause of the U.S. Constitution provides that Congress shall make no law 'respecting an establishment of religion.' Defendants erroneously found that an objection to Plaintiffs' application for an eagle permit by certain members of the Eastern Shoshone Tribe is based on traditional Shoshone religious beliefs. If such objection is in fact based on traditional

Shoshone religious beliefs, then Defendants' action, with unlawful purpose or effect, endorses or promotes a religious sect of the Eastern Shoshone Tribe in violation of the Establishment Clause and First Amendment." (The proposed amendment would also add references to the Establishment Clause in the prayer for relief (declaratory judgment and injunctive relief sections) and re-number and re-label headings accordingly.)

II. Leave to be Freely Given When Justice So Requires.

Fed.R.Civ.Pro. Rule 15 (a) (Amendments Before Trial) (b) provides that courts "should freely give leave [to amend their pleadings] when justice so requires." Foman v. Davis, 371 U.S. 178, 182 (1962) sets forth the standard for deciding when leave should be granted:

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be "freely given."

The most important factor is whether the opposing party will be unduly prejudiced. 6 Fed. Prac. & Proc. Civ. (3d ed.) §1487. Undue prejudice can arise when granting leave to amend will lead to extensive discovery, unnecessary confusion, delay of trial, or will surprise the opponent. Id. Introduction of an additional cause of action, by itself, is not sufficient reason to deny a motion to amend. 3 Moore's Federal Practice (2d ed. 1987) ¶15.08[2].

III. Factors in the Case at Bar Favor Granting Leave to Amend.

The relevant factors favor granting leave to amend.

(A) *Procedural Background.* Plaintiffs' Complaint (Doc. 1) was filed on November 7, 2011, at a time when Defendants had not acted on Plaintiffs' application for a permit to take eagles on the Wind River Indian Reservation. On March 9, 2012, Defendants denied Plaintiffs' application and issued an alternative permit to take eagles outside the Reservation. On March 30, 2012, Plaintiffs amended their Complaint to address this change in circumstance (Doc. 18). Plaintiffs' Amended Complaint states causes of action for declaratory and injunctive relief under the First Amendment (Free Exercise Clause) and the Religious Freedom Restoration Act (RFRA), and a claim under the Administrative Procedures Act (APA).

Defendants' Administrative Record or Record of Decision (ROD) was filed on March 13, 2012 (Doc. 16). The ROD identifies four potential grounds in support of Defendants' action on the permit application: (1) a "religious-based" objection by the Eastern Shoshone Tribe (EST); (2) an interpretation of the laws of the Tribes; (3) an interpretation of the laws of co-tenancy with respect to federal trust lands; and (4) an argument presented by EST that eagles are the property of both Tribes. Plaintiffs' Memorandum in Support of its motion for judgment addresses all of those potential grounds for the Defendants' decision (Doc. 30), including the Establishment Clause issues involved in any reliance by Defendants on a religious-based objection by the EST (Doc. 30 at p.14, fn 19). (See also Plaintiffs' proposed findings, Doc. 31 at p.14, fn 19.) Defendants filed their Answer on April 27, 2012 (Doc. 22). Plaintiffs also contest the religious nature of the objection, pointing to evidence in the ROD that the objection is rooted instead in tribal politics (Doc. 30 at 12, fn 16, ROD 000183-187) and showing that many Shoshones

participate in (and do not object to) the Arapaho Sun Dance, where the take of a clean eagle is required (Doc. 42-6 at para. 3).

Defendants' memorandum in opposition to Plaintiffs' motion for judgment relies on the religious-based objection by the EST but *none* of the other potential grounds identified in the ROD in support of Defendants' action on the permit application (Doc. 34).

The Court's Judgment, denying partial summary judgment to Plaintiffs and granting judgment to Defendants *sua sponte*, relies on the religious-based objection by the EST but none of the other potential grounds in the ROD. (Doc. 45). Plaintiffs' Motion to Alter or Amend the Judgment further addresses the Establishment Clause issue (Doc. 46, pp. 7-9).

(B) *Filing the Second Amended Complaint is not untimely and not done for improper purposes.* The basis for Defendants' action was not fully focused until after Defendants filed their memorandum in opposition to Plaintiffs' motion for judgment. Not until then did Plaintiffs begin to understand that Defendants rely solely on a religious-based objection from the *Amicus* in support of their decision. No reply brief from Plaintiff was required by the Court because the matter was scheduled for oral argument. The Court issued summary judgment for Defendants after oral argument without further briefing.

(C) *The proposed amendment is not made to address a repeated failure to cure deficiencies by amendments previously allowed.* Plaintiffs have amended their complaint only once – after Defendants issued their decision on Plaintiffs' eagle take permit application. In that

instance, the amendment was necessary to address the change in circumstances created by Defendants. The proposed amendment is the second request and, like the first, is prompted by what Defendants have since made apparent – that the sole basis for their decision denying the permit application is what they take at face value as a religious-based objection expressed by the *Amicus*.

(D) *Assertion of an Establishment Clause claim creates no undue prejudice to Defendants at this stage of proceedings.* Delay alone is not a sufficient reason to deny leave to amend – the delay must have resulted in prejudice to the opposing party. See *Beeck v. Aquaslide “N” Dive Corp.*, 562 F.2d 537 (8th Cir. 1977).

1. The amendment creates no unfair surprise to Defendants. An amendment is proper when the opposing party “should have recognized that the new matter included in the amendment would be at issue.” 6 Fed. Prac. & Proc. Civ. (3d ed.) §1487. Free Exercise and Establishment Clause issues under the First Amendment are often mirror-image. One treatise noted that government action struck down under the Establishment Clause in *Larson v. Valenta*, 456 U.S. 228 (1982) “also could have been invalidated under the free exercise clause,” under *Church of the Lukimi Bablu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), Rotunda & Nowak, *Treatise on Constitutional Law*, 4th ed., §21.3(a).¹ Establishment Clause questions are closely

¹ Plaintiff cited *Church of the Lukimi*, *supra*, in Doc. 30, p. 13, and Doc. 46, p. 6, and to the Court in oral argument, transcript, pp. 18, 19.

related to Plaintiffs' Free Exercise claim.² Addition of an expressly stated Establishment Clause claim will not change the fundamental thrust of the Complaint. The Establishment Clause claim does not involve any additional remedies not already sought.

Plaintiffs noted the *potential* for Establishment Clause issues before Defendants' memorandum in opposition to Plaintiffs' motion for judgment was filed. (Doc. 30 at p. 14, fn 19.) Plaintiffs also challenged whether the objection by *Amicus* was actually religious in nature (Doc. 30 at p. 12). Plaintiffs raised violation of the Establishment Clause again, after Defendants' memorandum was filed and the Court's judgment entered. (Doc. 46, pp. 7-9.)

2. The amendment will not create additional discovery, unnecessary confusion, or delay that would unduly burden Defendants.

When an amendment is proposed before the court has ordered discovery, as in the case at bar, Defendant will not be unduly burdened by allowing it. Djourabchi.v Self, Jr., 240 F.R.D. 5 at 13 (U.S.D.C., D.C. 2006).

In addition, when the claim sought to be added is "not remote" to the other claims, its addition is not likely to complicate or lengthen proceedings so as to unduly burden a defendant. Djourabchi, id. at 13-14. Again, the Establishment Clause claim is directly related to the other claims and rests on the same factual allegations. See Tefft v. Seward, 689 F.2d 637 at 639 (6th Cir. 1982) (when facts set forth in original complaint would support a cause of action for a

² They are also subsumed within the Administrative Procedures Act claim, which includes the allegation that Defendants' action is contrary to law.

constitutional tort, as well as for assault and battery, the amended cause of action for the constitutional tort is not so different as to cause prejudice to defendants).

The parties have not requested and the Court has not entered a scheduling order or a pre-trial order. Indeed, the parties have suggested that Plaintiffs' claims rest primarily on undisputed facts and might well be resolved as a matter of law. Extensive discovery³, confusion, or delay of trial may not be involved at all at this stage of proceedings.

3. Amendment is not futile. Finally, an amendment may be denied when it is frivolous, advances a claim or defense that is legally insufficient on its face or fails to include allegations to cure defects in the original pleading. 6 Fed. Prac. & Proc. Civ. (3d ed.) §1487. If the amended complaint fails to state a claim upon which relief may be granted, the amendment need not be allowed. Glick v. Koenig, 766 F.2d 265 (7th Cir. 1985). After a complaint has been dismissed, leave to amend may be denied when there is no material difference between the original and amended complaints. Bauchman v. West High School, 132 F.3d 542, 547 (10th Cir. 1997). But when a defendant "has yet to make any dispositive challenge to the complaint," amendment of the complaint is not futile. Djourabchi, *id.* at 13. The proposed amendment is neither frivolous nor legally insufficient on its face (nor is there a defect in the original complaint the amendment is designed to cure).

³ Plaintiffs reserve the right to fully respond to motions which might be filed in the future by Defendants, including, if justified, submission of additional declarations or limited discovery.

IV. Conclusion.

Plaintiffs' motion for leave to amend its complaint has not been made for improper purposes or to address repeated deficiencies in the complaint and will not unduly burden Defendants. Plaintiffs request that leave be granted to file their Second Amended Complaint (copy attached to Motion for Leave to File Second Amended Complaint).

Respectfully Submitted, Plaintiffs.

Dated this 11th day of February, 2013.

Northern Arapaho Tribe and
Darrell O'Neal, 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 MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT was served upon the following by the methods indicated below on the 11th day of February, 2013:

Barbara M. R. Marvin	<input type="checkbox"/>	By Facsimile
Dept. of Justice	<input type="checkbox"/>	By U.S. mail, postage prepaid
Environmental & Natural Resources Div.	<input type="checkbox"/>	By Hand Delivery
P.O. Box 7611	<input type="checkbox"/>	By Overnight Courier
Washington, DC 20004	<input checked="" type="checkbox"/>	Electronic Filing

Nicholas Vassallo	<input type="checkbox"/>	By Facsimile
U.S. Attorney's Office	<input type="checkbox"/>	By U.S. mail, postage prepaid
P.O. Box 668	<input type="checkbox"/>	By Hand Delivery
Cheyenne, WY 82003-0668	<input type="checkbox"/>	By Overnight Courier
	<input checked="" type="checkbox"/>	Electronic Filing

Coby Howell	<input type="checkbox"/>	By Facsimile
Environmental & Natural Resources Div.	<input type="checkbox"/>	By U.S. mail, postage prepaid
Wildlife and Marine Resources Section	<input type="checkbox"/>	By Hand Delivery
c/o U.S. Attorney's Office	<input type="checkbox"/>	By Overnight Courier
1000 S.W. Third Avenue	<input checked="" type="checkbox"/>	Electronic Filing
Portland, OR 97204-2901		

Kimberly Varilek	<input type="checkbox"/>	By Facsimile
Office of Attorney General	<input type="checkbox"/>	By U.S. mail, postage prepaid
Eastern Shoshone Tribe	<input type="checkbox"/>	By Hand Delivery
P.O. Box 1644	<input type="checkbox"/>	By Overnight Courier
Fort Washakie, WY 82520	<input checked="" type="checkbox"/>	Electronic Filing

_____/s/_____
Andrew W. Baldwin