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.	)	

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Defendants delayed their decision on Plaintiffs' eagle take permit application for two and half years and acted on the application only after Plaintiffs filed their original Complaint.[1] Eventually abandoning all but a "religious-based" objection to support their denial of an on-Reservation permit, Defendants complain about delay by Plaintiffs in seeking leave to state an Establishment Clause claim. Defendants make no showing of undue delay or undue prejudice that would result from an amendment at this stage of the proceeding.

1. Plaintiffs' motion is not untimely. Defendants cite Duncan v. Manager, Dept. of Safety, City & County of Denver, 397 F.3d 1300 (10th Cir. 2005) and Frank v. U.S. West, 3 F.3d 1357 (10th Cir. 1993) for the general proposition that untimeliness, alone, is a sufficient reason to deny leave to amend or supplement a complaint. Defendants ignore the meaning of "untimeliness."

Duncan said courts should refuse leave to amend *only* on a showing of undue delay, undue prejudice, bad faith or dilatory motive, failure to cure deficiencies in amendments previously allowed or futility of amendment. Id. at 1315. Duncan thus follows the formula set out in Foman v. Davis, 371 U.S. 178, 182 (1962). Under Duncan, "untimeliness" means "undue delay," not *any* delay.[2] Plaintiffs have pointed out that "delay alone is not a sufficient reason to

[1] Plaintiffs application was submitted to Defendants on October 7, 2009. The original Complaint was filed on November 7, 2011. The application was denied (and an alternative permit issued) on March 9, 2012.

[2] In Duncan, the district court determined that the probative value of evidence a party sought to add by amendment was "substantially outweighed" by the possibility of unfair prejudice to the opposing party and confusion. Id. at 1315. The moving party sought to supplement her complaint "based on evidence that would not be admissible in court." Id. Whether the court considered this important to the analysis of "undue" delay or an analysis of "undue" prejudice, or another factor, is unclear.

deny leave to amend,"citing Beeck v. Aquasilde "N" Dive Corp., 562 F.2d 537 (8th Cir. 1977). Neither Duncan nor Frank are inconsistent with this principle.

In Frank, the motion to amend was determined to be untimely because it was filed four months after the court's deadline for the amendment of pleadings. Id. at 1366. In the case at bar, discovery has not been scheduled or undertaken and no pretrial orders have been issued.[3]

2. Defendants do not demonstrate undue prejudice. The most important factor for courts is whether the opposing party will be unduly prejudiced by the amendment. 6 Fed. Prac. & Proc. Civ. (3d ed.) §1487. Defendants do not explain how amendment of the Complaint at this stage of proceedings will unduly prejudice their interests.

3. The amended complaint would not "circumvent" judgment on the RFRA claim. Defendants argue that Plaintiffs' proposed amendment is an attempt to "circumvent" the finality of the Court's grant of summary judgment.[4] Doc. 60 at 7. Defendants do not explain how the proposed amendment could have this effect. The Establishment Clause claim no more "circumvents" the partial summary judgment than do any of the remaining claims under the First Amendment or the Administrative Procedures Act.

Defendants resisted Plaintiffs' motion for interlocutory appeal in part on the grounds that a successful appeal "would still leave substantial litigation to continue in the district court." Doc.

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[3] Any suggestion by Defendants that all the facts have been developed and discovered to date is undermined by their recent statement that a new permit to Plaintiffs has created a new record. Defendants say the 2013 "permit issuance is a new agency action, which would require lodging of a new administrative record," Doc. 60 at 7, fn.3. If this is correct, the facts and legal positions of Defendants may have shifted. This is currently unknown to Plaintiffs, who have not yet obtained a copy of this new administrative record. To the extent Defendants seek to adjust or supplement their own administrative record, Plaintiffs may need to respond.

[4] The Court granted summary judgment for Defendants *sua sponte*, without a motion for summary judgment from Defendants.

53 at 9.[5] The addition of the Establishment Clause claim would make express that which is implied in the Free Exercise claim and which would be included in the "substantial litigation" Defendants say would have remained after an interlocutory appeal.

Plaintiff's Motion for Leave to File Second Amended Complaint (Doc. 59) should be granted.

Dated this 27th 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

[5] Defendants now say the Court's ruling on the RFRA claim "effectively denies [Plaintiffs] much, if not all of the relief requested." Doc. 60 at 3.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Reply was served upon the following by the methods indicated below on the 27th 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	[ ]	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