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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

NORTHERN ARAPAHO TRIBE, *et al.*,	)	Case No. 2:11-cv-347-J
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	

DANIEL M. ASHE, Director, U.S. Fish and)
Wildlife Service, *et al.*,)
)
Respondents.)

FEDERAL RESPONDENTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Daniel M. Ashe, Director of the United States Fish and Wildlife Service ("Service"), and Matt Hogan, Assistant Regional Director, Region 6 Migratory Birds and State Programs, U.S. Fish and Wildlife Service, (collectively "Federal Respondents") respectfully oppose the Plaintiffs' Motion for Leave to File a Second Amended Compl. ("Pls.' Mot. for Leave"), ECF No. 59.

Background

The Northern Arapaho Tribe ("NAT") and the NAT's Chairman (collectively, "Plaintiffs") first brought suit against the United States Fish and Wildlife Service ("FWS") in November 2011, challenging the FWS's alleged inaction or delay in connection with the NAT's application for a permit under the Bald and Golden Eagle Protection Act that would allow the NAT to take bald eagles for use in their religious ceremonies. In March 2012, FWS issued a permit allowing the NAT to take up to two bald eagles within the State of Wyoming during the period from March 1, 2012 to February 28, 2013, but requiring that the eagle take must occur outside the boundaries of the Wind River Reservation, which the NAT shares with the Eastern Shoshone Tribe ("EST"). On March 30, 2012, Plaintiffs filed their currently operative, First Amended Complaint, ECF No. 18, alleging that FWS's decision to issue the permit with the off-

reservation limitation violates the Free Exercise Clause of the United States Constitution, the Religious Freedom Restoration Act ("RFRA"), and the Administrative Procedure Act ("APA").

In May 2012, Plaintiffs moved for partial relief only with respect to their RFRA claim. ECF No. 29. Following briefing and oral argument on Plaintiffs' motion, on November 5, 2012, the Court denied Plaintiffs' motion, granted partial summary judgment in favor of Federal Respondents as to Plaintiffs' RFRA claim, and ordered Plaintiffs to advise the Court "of whether and how they wish to proceed regarding their Free Exercise and APA claims" within 30 days. ECF No. 45. Plaintiffs then filed a motion to alter or amend the judgment, ECF No. 46. The Court denied that motion and again ordered Plaintiffs to advise the Court whether they would proceed on their remaining claims or "voluntarily withdraw those claims and seek an appeal." ECF No. 49.

Plaintiffs then filed a motion requesting certification for interlocutory appeal, ECF No. 50, which the Court denied, ECF No. 54. In a status conference on January 30, 2013, *see* ECF No. 56, Plaintiffs then advised the Court that they would seek leave to amend their complaint by adding a claim that FWS' issuance of the eagle take permit with the off-reservation limitation violates the Establishment Clause of the Constitution. On February 11, 2013, more than four months after the Court's summary judgment ruling, Plaintiffs filed their current motion for leave.

Plaintiffs' motion should be denied. Plaintiffs have unduly delayed in adding this claim and they seek to do so now in order to circumvent the effect of the Court's ruling on their RFRA claim, which effectively denies them much, if not all, of the relief requested in their First Amended Complaint.

Argument

Under clear precedent in the Tenth Circuit, a motion to amend is '"subject to denial'" if '"the party seeking amendment knows or should have known of the facts upon which the proposed amendment is based but fails to include them in the original complaint . . .."' *Frank v. U.S. West*, *Inc.*, 3 F.3d 1357, 1366 (10th Cir. 1993) (quoting *Las Vegas Ice & Cold Storage Co. v. Far West Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990)). Here, the record shows, and Plaintiffs themselves concede, that they knew of the facts upon which their proposed Establishment Clause claim is based nearly a year ago, and certainly well before the extensive proceedings on their motion for judgment as to their RFRA claim. This alone should be dispositive with respect to their current motion.

The facts upon which Plaintiffs based their proposed amendment are the very same facts that were known to the Tribe and its Chairman when Plaintiffs originally filed the First Amended Complaint. Plaintiffs admit that as of March 13, 2012, when Federal Respondents lodged the Administrative Record, they knew that one of the grounds, (in fact, the first of four grounds), for FWS's decision to issue the eagle take permit with the off-reservation limitation was "a 'religious-based' objection by the . . . EST." *See* Plaintiffs' Mem. in Supp. of Mot. for Leave ("Pls.' Mem.") 4, ECF No. 59-3. Plaintiffs also admit that they addressed this ground for the decision in their initial motion for judgment on the pleadings, *id.*, and indeed, in that motion, they expressly asserted that the issuance of the permit with the off-reservation limitation on eagle take, which the NAT considered a denial of their permit application, "creates Establishment Clause problems as well." Pls.' Mem. in Supp. of Mot. for J. on the Pleadings, ("Pls.' MJP

Mem.") 14 n.19, ECF No. 30. These two parts of the record in this case alone show that Plaintiffs could have included their proposed Establishment Clause claim in their First Amended Complaint, or, alternatively, that they could have taken steps to amend that pleading at some time prior to filing their motion for judgment on the pleadings, which required the parties to expend considerable time and efforts in briefing and arguing Plaintiffs' RFRA claim. And certainly, they could have proposed this amendment long before the Court issued its ruling, which Plaintiffs now find may have a decisive effect with respect to all of the claims alleged in the First Amended Complaint.

Plaintiffs claim, however, that they should be granted leave to amend now because the basis for the challenged permitting decision, although known to them, "was not fully focused until after Defendants filed their memorandum in opposition to Plaintiffs' motion for judgment," and that it was only then that Plaintiffs began "to understand that Defendants rel[ied] solely on a religious-based objection from [the EST] in support of their decision." Pls.' Mem. 5. First, this argument is belied by Plaintiffs' unequivocal statement in May 2012 that FWS's issuance of the permit with the off-reservation limitation on eagle take "creates Establishment Clause problems." Pls.' MJP Mem. 14 n.19, Moreover, Plaintiffs' counsel's statements at oral argument on September 28, 2012, and statements in the Motion to Alter or Amend the Judgment show that Plaintiffs were and continued to be well aware of the facts that they now allege in support of their proposed Establishment Clause Claim,[1] and again, Plaintiffs themselves concede as much.

[1] *See* Transcript of Oral Argument 18-19 (arguing that federal interest in protecting the practice of Native American religions, although "generally valid[,]" "does not extend to promoting or

See Pls.' Mem. 7. More importantly, however, allowing Plaintiffs leave to amend their pleading merely because Federal Respondents' opposition to their motion and the Courts' subsequent ruling may have brought facts of which they were well aware into somewhat sharper focus falls short of satisfying the standard for granting leave to amend in the Tenth Circuit. Contrary to Plaintiffs' assertion, and the case from the Eighth Circuit on which they rely in support, "[i]n the Tenth Circuit, untimeliness alone *is* a sufficient reason to deny leave to amend" *Duncan v. Manager, Dept. of Safety, City & County of Denver*, 397 F.3d 1300, 1315 (10th Cir. 2005) (emphasis added) (citing *Frank*, 3 F.3d at 1365).[2] This is especially true "when the party filing the motion has no adequate explanation for the delay." *Frank*, 3 F.3d at 1365-66 (citing *Woolsey v. Marion Laboratories, Inc.*, 934 F.2d 1452, 1462 (10th Cir. 1991), *Las Vegas Ice & Cold Storage Co.*, 893 F.2d at 1185, and *First City Bank v. Air Capitol Aircraft Sales*, 820 F.2d 1127, 1133 (10th Cir. 1987)).

Plaintiffs offer no explanation as to why they did not: a) include an Establishment Clause claim in their First Amended Complaint, which was filed after Federal Respondents lodged the administrative record that contained FWS' "findings memorandum"; or b) seek leave to amend prior to filing their motion for judgment on the pleadings by which time they clearly recognized

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expanding the practice of traditional Indian religion, [which] would likely run afoul of the Establishment Clause."); Mot. to Alter or Amend J. 7-9, ECF No. 46 (arguing that, in its summary judgment ruling, the Court misapplied legal precedent and that the result "violates the Establishment Clause").

[2] *See* Pls.' Mem. 6 ("Delay alone is not a sufficient reason to deny leave to amend") (citing *Beeck v. Aquaslide "N" Dive Corp.*, 562 F.2d 537 (8th Cir. 1977)).

the potential for such a claim, *see* Pls.' Mem. 7; or, c) at the very least, why they waited seek leave to amend until four months after they knew the basis of the Court's ruling on their RFRA claim, which they argue was the final aspect of the proceedings that brought their proposed claim "into focus." *See id.* at 2, 5, 7.[3] By seeking amendment at this late stage of the litigation -- after the Court's summary judgment ruling, (and only after having attempted and exhausted all other available procedural remedies short of dismissing their remaining claims and seeking appeal) -- it appears that the purpose of Plaintiffs' proposed amendment is to attempt to circumvent the full effect and finality of the Court's judgment. In such circumstances, the Court should not allow amendment. *Cf. Trujillo v. Bd. of Educ.*, No. Civ. 02-1509JBRLP, 2005 WL 3663713, at *4 (D.N.M., Oct. 9, 2005) ("A court should not allow an amendment whose purpose is to prevent termination of the case on a motion to dismiss or on summary judgment").

Conclusion

Plaintiffs have waited too long after they knew of the facts upon which their proposed amendment is based, and which they now claim may entitle them to relief. For this reason, their Motion for Leave to File a Second Amended Complaint should be denied.

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[3] Moreover, Plaintiffs waited to seek leave to add their proposed Establishment Clause claim until a scant 17 days before the permit currently at issue in their First Amended Complaint expires. FWS has issued a new permit for the next year (i.e., March 1, 2013 to February 28, 2014), but that permit issuance is a new agency action, which would require lodging of a new administrative record. Even if Plaintiffs may be able to maintain their existing claims under a recognized exception to the mootness doctrine, it is unclear whether such an exception would allow Plaintiffs to amend their complaint to challenge a new agency action. In any event, these facts further underscore the untimeliness of Plaintiffs' motion.

Dated: February 21, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing will be e-filed February 21, 2013, and will be automatically served upon counsel of record, all of whom appear to be subscribed to receive notice from the ECF system.

/s/ *Barbara M.R. Marvin*
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