UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDREW J. YELLOWBEAR, JR.,	)	
	)	
Plaintiff/Petitioner - Appellant,	)	
	)	
v.	)	**Case No.: 12-8048**
	)	
ROBERT O. LAMPERT, DIRECTOR OF WYOMING DEPARTMENT OF CORRECTIONS ("W.D.O.C."); STEVE HARGETT, WARDEN, WYOMING MEDIUM CORRECTIONAL INSTITUTION ("W.M.C.I."), Individually, and in Their Official Capacities,	)	**Appellant/Petitioner's Opening Brief**
	)	**On Appeal form the United States District Court for the District of Wyoming, Civil Action No.: 11-CV-346-J, The Honorable Alan B. Johnson, District Judge**
	)	
Defendants/Respondent – Appellee.	)	

NOTICE AND INSTRUCTIONS

If you proceed on appeal pro se, the court will accept a properly completed Form A-12 in lieu of a formal brief. This form is intended to guide you in presenting your appellate issues and arguments to the court. If you need more space, additional pages may be attached. A short statement of each issue presented for review should precede your argument. Citations to legal authority may also be included. This brief should fully set forth all arguments that you wish the court to consider in connection with this case.

New issues raised for the first time on appeal generally will not be considered. An appeal is not a retrial but rather a review of the proceedings in the district court. A copy of the completed form must be served on all opposing counsel and on all unrepresented parties and a proper certificate of service furnished to this court. A form certificate is attached.

APPELLANT/PETITIONER'S OPENING BRIEF

1. Statement of the Case. (This should be brief summary of the proceedings in the district court.)

a. Nature of the Case

Andrew J. Yellowbear, JR. ("Appellant" or in the alternative "Mr. Yellowbear"), after exhausting all available administrative remedies concerning the Defendants' denial of his request to participate in a Sweat Lodge ceremony or in the alternative his request to have segregated Sweat Lodge built in Protective Custody, sought judicial redress in the district court from what are undue, unreasonably restrictive, and substantial burdens on the free exercise of his Northern Arapaho/Native American religion by Robert O. Lampert, Director, Wyoming Department of Corrections ("WDOC") and Steve Hargett, Warden, Wyoming Medium Correctional Institution ("WMCI") (collectively "Defendants") at the WMCI. District Court Docket ("Doc.") #1 (Doc. 1).

His religious deprivation and discrimination claims were commenced *via* a verified prisoner civil rights complaint brought pursuant to 42 U.S.C. §1983 ("Doc. 1" or "Complaint'), the Free Exercise Clause of the First Amendment of the U.S. Constitution, the Fourteenth Amendment of the U.S. Constitution, the Religious Land Use and Institutionalized Persons Act of 2000cc, 42 U.S.C. §2000cc *et seq.* (RLUIPA), and the American Indian Religious Freedom Act, 42 U.S.C. §1996 *et seq.* (AIRFA) (Doc. 1 "CLAIMS" (pages 15-18).

The Appellant sought injunctive and declaratory relief in his Complaint (Doc. 1, "Claims" page 15-17 and "Prayer For Relief" page 18-19)("[A] verified complaint may be treated as an affidavit for purposes of summary judgment if it satisfies the standards for affidavits set out in Rule 56(e)." *Conaway v. Smith,* 853 F.2d 789, 792 (10th Cir. 1988) (per curiam)), (Doc. 1 "Prayer For Relief" (pages 18-19)).

b. Course of Proceedings

The Appellant filed his Complaint on November 7, 2011, asserting a violation of his civil rights at the WMCI by the Defendant's (Doc. 1). Accompanying his Complaint was a Motion to Proceed *In Forma Pauperis* (Doc. 4), which the district court later granted on November 17, 2011 (Doc. 10). On November 8, 2012, the district court entered an order mandating that the Appellant provide the name of the Warden or

Warden(s) of the WMCI in lieu of Defendant John Doe (Doc. 6). The Appellant promptly complied with the district courts order on November 15, 2012, when he submitted his Notice of Steve Hargett as Warden of WMCI as Defendant (Doc.8).

On November 22, 2011, the district court entered three (3) orders: 1) Order Requiring "Martinez" Report (Doc. 11); 2) Order Requiring Service of Complaint by the Clerk of Court and Requiring Response (Doc. 12); and 3) Notice Of Lawsuit And Request For Waiver Of Service And Summons (Doc. 13). The Defendant's filed an Answer and "Martinez" Report as well as a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and a memorandum in support thereof (Docs. 18, 19, and 20).

The Appellant filed his Response in Opposition to the Motion to Dismiss, to which the Defendants filed a Reply, to which the Appellant filed a Reply in Opposition (Docs. 21, 22, and 23). The district court thereafter entered a Notice and Order Pursuant to Fed. R. Civ. P 12(d) which indicated the Motion to Dismiss by Defendants was going to be treated as a motion for summary judgment under Fed. R. Civ. P. 56. Both the Appellant and Defendants were allowed additional time to file supplemental affidavits or declarations (Doc. 33). The Defendants filed their Supplemental Memorandum with the district court on June 20, 2012 (Doc. 35). The Appellant, in response, filed a Supplemental Reply Memorandum accompanied by four (4) affidavits (Doc. 36).

On June 12, 2012, the district court entered an Order Granting Summary Judgment For Defendants (hereinafter "Order") accompanied by a Judgment dismissing the case with prejudice (Docs. 37, 38). Later, On June 21, 2012, the Appellant submitted a timely Notice of Appeal and a Motion to Proceed *In Forma Pauperis* on Appeal as well (Docs. 39, 40). The district court on June 26, 2012, entered an Order Requiring Plaintiff To Provide Trust Fund Account Statement (Doc. 44), to which the Appellant promptly complied. On July 10, 2012, the district court entered an Order Granting Plaintiff's Motion To Proceed *In Forma Pauperis* On Appeal (Doc. 47).

c. Statement of Subject Matter and Appellate Jurisdiction

The Appellant sought injunctive relief; he also sought declaratory relief pursuant to 28 U.S.C. Section 2201 and 2202. This Court has appellate jurisdiction under 28 U.S.C. §1291 because the grant of summary judgment to the defendants is a final

judgment. As stated above, final judgment was entered June 12, 2112, and the Appellants timely notice of appeal was filed on June 21, 2012.

2. Statement of Facts Relevant to the Issues Presented for Review.

All pertinent facts are either admitted by the Defendant's or are judicially noticeable.

The Appellant is an enrolled member of the Northern Arapaho Tribe (Doc. 1, pages 3-4) *see also Yellowbear v. Wyoming Attorney General, et al.,* 525 F.3d 921, (10th Cir. 2008). Throughout his entire life and to the extent allowed by the prison setting Mr. Yellowbear observes, engages-in, and is a sincere practitioner of his Northern Arapaho/American Indian religion of which one of the key tenants, the "Sweat Lodge" ceremony plays a central, vital, and significant role.

He has taken part in most if not all of his tribe the Northern Arapaho's religiously significant ceremonies including but not limited to the yearly Northern Arapaho Sundance (participated four (4) times starting at age 16) and the more frequent Sacred Sweat Lodge Ceremony (Doc. 1, EXHIBIT-A 1, U.S. Department of Justice, Federal Bureau of Prisons, Technical Reference, Inmate Religious Beliefs and Practice 'Native American' (3-27-02) page-14, #18, *"Sacred Sweat Lodge Ceremony"* and page-21, for concise Sweat Lodge description and relevant religious elucidation).

In early January 2011, after three or more years of extreme isolation in lockdown ('the hole' where he endured 23 hours in-cell with 1 hour a day out of cell)(*non-disciplinary*), the Appellant was transferred to the WMCI from the Wyoming State Penitentiary. Having arrived at WMCI and after being placed in the prisons' segregation PC Unit (or "A-1"), the Appellant immediately inquired by Inmate Communication Form WDOC #320 (Inmate Communication Form) to both Mr. Joel Banham ("WMCI Chaplain"), and Mr. Willie LeClair ("WDOC/WMCI Native American Spiritual Advisor") on what religious services and/or ceremonies were available and allowed regarding sincere Northern Arapaho/American Indian religious practitioner's in A-1.

The Appellants inquiries to both the WMCI Chaplain and the WDOC/WMCI Native American Spiritual Advisor *via* the prisons' official inmate/staff communication process were; after three months never answered or addressed by either. The Appellant essentially attempted to query them about if Northern Arapaho/American Indian

segregated inmates from A-1 inmates could participate in the Sweat Lodge ceremony already being held bi-weekly on WMCI grounds.

At the time, all that was provided to Native American's who observe their religion in A-1 is what is equivalent to a rather jovial Native American *talking circle* complete with adult-slapstick, teasing, banter, and joking with a person described as a contracted WDOC/WMCI Native American Spiritual Advisor, a Mr. Willie LeClair who is an Eastern Shoshone tribal member. During the times relevant hereto, the Appellant has twice personally sat through this religious sham known as a Native American talking circle.

He has observed that the halfhearted and purported *religious ceremony* appears to only take place once a month in PC, and is in no way a traditional, sincere, or meaningful way in which to observe the Northern Arapaho or any aspects of the Native American religion in general. As such, and out of respect for himself, his Northern Arapaho/Native American religious values/heritage, and the WDOC/WMCI Native American Spiritual Advisor's buoyant service the Appellant has chosen to personally refrain from further participating in that sort of insincere Native American religious shenanigan.

The Appellant, of course, can not and does not speak on the appropriateness of this style of behavior amongst the Eastern Shoshone during their religious ceremonies. He can, however, say with a good degree of certainty and personal experience that this type of religious worship (i.e. banter and repartee) is offensive and disrespectful among the Northern Arapaho and Native American's in general in and during their respective religious ceremonies.

Although the Appellants' tribe the Northern Arapaho, and the Eastern Shoshone of which the WDOC/WMCI Native American Spiritual Advisor is a member of, jointly occupy the Wind River Indian Reservation, WY., they are distinctly separate in every aspect of their respective heritages (i.e., tribal customs, tribal governments, and religious beliefs). These tribes are the only two (2) federally recognized Native American tribes located in Wyoming. As such, members of these two (2) tribes comprise a majority of the Native American population currently in the custody of the WDOC at its facilities.

Other than his title, nothing has ever been provided to the Appellant delineating what authorizes the WDOC/WMCI Native American Spiritual Advisor to act as such. In

the Northern Arapaho/Native American religion self-designation/promotion as a ceremonial elder is looked upon with disdain, as such a prestigious accomplishment usually take's a life time to achieve or else is attained through a status given and recognized by the people of the tribe as a whole.

As far the Appellant is aware neither the Northern Arapaho Tribe nor their tribal elders have ever recognized the WDOC/WMCI Native American Spiritual Advisor's status to act as such with respect to him counseling their members who are currently within the custody of the WDOC. Again, the Northern Arapaho and Eastern Shoshone tribe's governments, religions, religious beliefs, and ceremonies are distinct from each other. [1*]

Given the fact that the WDOC/WMCI Native American Spiritual Advisor has never addressed or answered any of Mr. Yellowbear's previous and numerous WDOC Form 320's regarding the matters herein, it is obvious to tell whom and how he advised with respect to this particular Native American religious matter.

In stark contrast to what is provided and/or offered to Native Americans in A-1 in terms of religious ceremonial worship Mr. Yellowbear has witnessed that almost the full breadth of Anglo ("mainstream") religious services were provided to all other segregated inmates in A-1 on a weekly, routine, regular scheduled if not on a daily basis (i.e., Catholic, Presbyterian, Christian, Mormon L.D.S., Lutheran, and Jehovah's Witnesses); some of the religious services include the taking of communion.

On March 21, 2011, Mr. Yellowbear wrote a WDOC Form #320 to Michael Murphy (then "WMCI Warden") in which he informed him of the blatant disparities between the religious ceremonies' on A-1. Later on March 23, 2011, the WMCI Warden responded that the WMCI Chaplain would meet with the Appellant: "Mr. Yellowbear, Chaplain Banham will meet with you regarding this and to work out the details." (Doc. 1, EXHIBIT-A 2)

This never happened so on April 6, 2011, Mr. Yellowbear engaged in the official WDOC Grievance procedure by filing an Inmate Grievance Form (WDOC Form #321)

[1*] For the Courts elucidation on the vast differences between the Northern Arapaho and Eastern Shoshones' religion and religious preferences please *see Northern Arapaho Tribe, et al., v. U.S. Fish and Wildlife Service et al.,* Civil No.:11-CV-347-ABJ/(Doc's 18, 29, 30 (Footnote 16), and 36 "Eastern Shoshone Tribe *Amicus Curiae* Brief) Northern Arapaho Tribe case involving an eagle take permit under the U.S.F.W.S. Bald Eagle and Golden Eagle Protection Act, 16 U.S.C. §668 *et seq.*

with the WMCI grievance manager on precisely these same claims (hereinafter "WDOC Grievance #11-0175"). The central claim for relief that the Appellant requested, was that there be a "Segregated" opportunity for himself and other sincere practitioner's of the Northern Arapaho/Native American religion to partake in the bi-weekly Sweat Lodge ceremony at WMCI. (Doc. 1, EXHIBIT-B)

Other than the Appellant, at the time there were at least three (3) other Native American Inmates in A-1 that are sincere practitioner's of the Northern Arapaho/Native American religion in which the Sweat Lodge ceremony plays a significant role: a) Lester Dewey (enrolled member Northern Arapaho Tribe); b) Lorenzo Montez (Apache Ancestry); c) Floyd R. Blackburn (Oglala Sioux Ancestry). It should go without saying than, that at the time there was a large Native American Inmate population in A-1 which prescribe to the sincere observance of their Northern Arapaho/Native American religion in which the Sweat Lodge plays a central role.

Later on April 13, 2011, a Mr. Scott Lever (WMCI Grievance Manager) denied WDOC Grievance #11-0175, in which he provided obvious "arbitrary" and "capricious" reasoning concerning said denial "**Conclusion:** With the information provided by Chaplain Banham, the Grievance Manager finds grievance #11-0175 to be resolved/denied." (Doc. 1, EXHIBIT-C) The WMCI Grievance Managers' denial of WDOC Grievance #11-0175 seemed to indicate that the Appellants' religious deprivation grievance was entitled to less consideration/deference with respect to the WDOC/WMCI grievance process.

On April 13, 2011, Mr. Yellowbear filed an Inmate Grievance Appeal Form (WDOC Form #322) regarding the denial of his grievance with Mr. Michael Murphy (then "WMCI Warden"), in which he again restated his claims and requested relief. (Doc. 1, EXHIBIT-D)

On May 10, 2011, both Michael Murphy (then "WMCI Warden") and the WMCI Grievance Manager summarily affirmed, but in fact, greatly expanded the scope of their initial denial of WDOC Grievance #11-0175. (Doc. 1, EXHIBIT-E)

Later on May 11, 2011, the Appellant filed an Inmate Grievance Appeal Form (WDOC Form #322) regarding the denial of said grievance with Robert O. Lampert

("WDOC Director"), in which he once more restated his claims and requested relief. (Doc. 1, EXHIBIT-F)

On May 18, 2011, a JuDean Young, (WDOC Executive Assistant) sent Mr. Yellowbear a correspondence notifying him of WDOC's receipt of his grievance appeal. (Doc. 1, EXHIBIT-G)

On June 8, 2011, a Mr. Steve Lindly ("WDOC Deputy Director") acting for the WDOC Director summarily affirmed the denial of WDOC Grievance #11-0175. Sadly, as noted above these denials/affirmations of WDOC Grievance #11-0175 indicate that given Mr. Yellowbear's segregated status he and other Native American Inmates are, in fact, entitled to less administrative consideration when it comes to the issue of their meaningful and sincere practice of their religion in PC at WMCI (Doc. 1, EXHIBIT-H)

Mr. Yellowbear has previously successfully sued the WDOC Director as a Defendant in a previous 42 U.S.C. §1983 action regarding access to bald eagle feathers for his Northern Arapaho/Native American religious use purposes. *See Yellowbear v. Lampert, et al.,* 08-CV-013-ABJ (U.S.D.C. Wyo.)(Resolved by Consent Decree and Order of Dismissal between parties, of which allowed the Appellant to possess up to four bald eagle feathers for use in his religion).

The aforementioned legal claim resulted in a subsequent successful 42 U.S.C. §1983 prison administrative retaliation claim against the WDOC. *See Yellowbear v. Carruthers, et al.,* 09-CV-017-ABJ (U.S.D.C. Wyo.)(Resolved by settlement reached between parties, regarding substantiated claims of retaliation *via* an unlawful and unreasonable Strip/Frisk Search by Wyoming State Penitentiary staff that was conducted on the Appellant while returning a confiscated bald eagle feather and other religious materials during settlement negotiations in *Yellowbear* 09-CV-013-ABJ (case above)).

It should be noted that during the pendency of WDOC Grievance #11-0175, at no time did WDOC/WMCI staff attempt to talk to or meet with the Appellant to resolve this matter. This plethora of affirmations/denials constituted the final level of exhaustion concerning official WDOC/WMCI administrative remedies.

On June 15, 2011, Mr. Yellowbear filed with the U.S. Department of Justice, Civil Rights Division, Coordination and Review Section ("U.S. DOJ") a completed Complaint Form on the WDOC's violation of his U.S. Constitutional secured right to

observe his Northern Arapaho/Native American religion while incarcerated in PC at WMCI. The Complaint gave a complete administrative history of WDOC Grievance #11-0175 and its denial and the subsequent affirmation of said denial up to the Director of the WDOC. (Doc. 1, EXHIBIT-I)

On June 21, 2011, the Appellant, in a good faith effort to avoid litigation with the state of Wyoming, dispatched a correspondence to the Governor of Wyoming, Matthew H. Mead. In his letter to Governor Mead, Mr. Yellowbear reiterated his request and position on the WDOC's denial of his request for access to and use of a "Sweat Lodge" for his sincere observance of his Northern Arapaho/Native American religion in PC. In the alternative to the usurpation of the unlawful findings of WDOC Grievance #11-0175, the Appellant proposed that a *separate* Sweat Lodge be built on a bare 3 acre parcel of land adjacent to PC (A-Unit, Pod-1) which is already within WMCI's perimeter security fence. Basically, Mr. Yellowbear asked Governor Mead to reconsider the WDOC's affirmation of its denial of WDOC Grievance #11-0175. He further requested intervention and assistance in resolving this matter by Mr. Gary Collins (Northern Arapaho Tribal Liaison to the Governor). (Doc. 1, EXHIBIT-J)

On July 8, 2011, the Appellant received a letter from the WDOC Deputy Director which indicated that his (6-21-11) letter to Governor Mead was forwarded back to the WDOC. The WDOC Deputy Director indicated that he would be going to the WMCI to parley with Mr. Yellowbear about the subject matter of said letter (i.e., use of a Sweat Lodge in PC). The WDOC Deputy Director appeared to take personal offense to the Appellants correspondence to Matthew H. Mead, Governor of Wyoming "As the department's staff and I personally spend much time ensuring the department is meeting the inmates' constitutional rights in regards to religious practice, I disagree with your statement, the response to your recent grievance is "no more than their efforts at attempting to dispel and/or discredit my sincere issues."" (Doc. 1, EXHIBIT-K)

On July 18, 2011, a meeting between the Appellant, Michael Murphy (then "WMCI Warden"), and the WDOC Deputy Director took place in PC regarding what was requested by the Appellant in his (6-21-11) letter to Wyoming Governor, Matthew Mead. Which as stated above, was reconsideration of the denial of WDOC Grievance #11-0175, and/or in the alternative, construction of a separate Sweat Lodge in PC for sincere

Northern Arapaho/American Indian religious practitioner's to use. This meeting and its substance was documented by Mr. Yellowbear through an August 2, 2011, letter to the WDOC Deputy Director. (Doc. 1, EXHIBIT-L)

On August 5, 2011, a Mr. Philip Johnson, Paralegal, with the Special Litigation Section of the U.S. Department of Justice – Special Litigation Section sent a correspondence to the Mr. Yellowbear noting the receipt of his letter/Complaint (assigned U.S. DOJ Complaint #210-87-0/351586). The correspondence also indicated that the Special Litigation Section was considering whether to initiate an investigation pursuant to the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §2000cc into his discriminatory and deprivation based religious claims. (Doc. 1, EXHIBIT-M)

On August 18, 2011, the Appellant sent a letter to the WDOC Deputy Director in which he articulated the glaring differences between what his Northern Arapaho religion consisted of, and what was practiced in PC by the WDOC/WMCI's Native American Spiritual Advisor in his purported monthly *religious ceremony* which as stated; appeared to be nothing more than mere jovial banter and repartee. As noted above, Mr. Yellowbear further contended that he did not speak on the appropriateness of this type of behavior among the Eastern Shoshone during religious ceremonies, but he noted such behavior (i.e. banter and repartee) among the Northern Arapaho Tribe during their religious ceremonies was disrespectful. (Doc. 1, EXHIBIT-N)

On August 22, 2011, the WDOC Deputy Director responded to the Appellant's 8-2-11 letter in which he indicated that he took the matter under consideration and would be answering his request for a Sweat Lodge to be placed outside PC sometime soon. (Doc. 1, EXHIBIT-O)

Later on September 6, 2011, Mr. Yellowbear wrote a letter to the U.S. DOJ informing them of an error in their earlier letter which was addressed to the Appellant at the Wyoming State Penitentiary. He also inquired about what he should do if; as a result of his filing the above stated Complaint he experienced retaliation by WDOC/WMCI employees. (Doc. 1, EXHIBIT-P) His legitimate retaliation concern obviously stemmed from the above stated 42 U.S.C. § 1983 successful retaliation claim.

September 9, 2011, the Appellant sent a correspondence to the WDOC Deputy Director wherein he pointed out an obvious flaw in perhaps the central reason for

WDOC/WMCI's denial of his request to partake in a segregated Sweat Lodge ceremony separate from the WMCI general population *i.e.,* "A sweat lodge has to be done out of door on the earth where there would be no way to assure the anonymity you require." (Doc. 1, EXHIBIT-Q)

The Appellant noted the bizarre and inconsistent on-again off-again *anonymity requirement* for PC Inmates appears to be WDOC/WMCI's purported legitimate "penological interest" and/or reason for denying Mr. Yellowbear's request for access to and use of a Sweat Lodge for the sincere observance of his Northern Arapaho/Native American religion.

Even though for the meals of breakfast, lunch, and dinner pc Inmates are regularly exposed to visual inspection by general population ("GP") Inmates and vice-versa in the prisons (WMCI) cafeteria, the cafeteria is adjacent to one of the prisons main hallways/thoroughfares also known as A-Corridor. One full side of the prisons cafeteria is made up of a bank of large picture windows with a view out into A-Corridor, where GP Inmates walk by and regularly gawk at pc Inmates and vice-versa. Mr. Yellowbear pointed out this obvious contradiction in his earlier (9-9-11) correspondence to the WDOC Deputy Director: "It seems in this instance that there is an *Anonymity Requirement Contradiction* for PC inmates at WMCI with respect to the taking of our meals and the observance of my Northern Arapaho/Native American religion."

September 29, 2011, Mr. Yellowbear sent another correspondence to the U.S. DOJ in which he gave them an update on his continuing efforts to; short of litigation, resolve the WDOC/WMCI's discriminatory, draconian, and restrictive practices regarding his religious rights secured to him *via* the U.S. Constitution. (Doc. 1, EXHIBIT-R)

On October 25, 2011, Mr. Yellowbear sent a correspondence to Mr. Norman Willow, SR., who is a member of the Northern Arapaho Tribes' Business Counsel, said Business Counsel is the governmental body of the Northern Arapaho Tribe and represents the tribes' one half interest over the Wind River Indian Reservation land base, some 2,268,008 acres. In said letter, the Appellant summarized the adverse and discriminatory treatment he was experiencing at WMCI regarding the restrictions on the free exercise of his Northern Arapaho/Northern American religion.

He further elaborated on the inappropriateness of a state employee i.e., WDOC/WMCI Native American Spiritual Advisor, so-called *religious ceremony* "Norman, as you can see I am in a vexing dilemma where I and our Northern Arapaho religion have to be subject to the religious whims of a person who does not hold or respect our tribes' heritage or religious values sacred. Rather, his (Willie LeClair's) religious views are based on what he believes is in the best interest of his employer the WDOC as well as harboring some age-old personal bias against our peoples' purported infringement at Wind River." (Doc. 1, EXHIBIT-S)

Also on October 25, 2011, the Appellant sent a correspondence to the U.S. DOJ regarding U.S. DOJ Complaint #210-87-0/351586, and the apparent impasse regarding the WDOC's reconsideration of the denial of WDOC Grievance #11-0175. (Doc. 1, EXHIBIT-T)

And finally, on October 25, 2011, Mr. Yellowbear received correspondence from the WDOC Deputy Director (dated October 18, 2011), indicating that the WDOC would not be able to accommodate providing and/or allowing a segregated time for PC inmates to use the Sweat Lodge at WMCI, and that it would not be able to accomplish the placement of a Sweat Lodge in the area described in Exhibit-J. "At this time, we do not believe the department can meet this request." (Doc. 1, EXHIBIT-U)

At the end of the day, the correspondence was nothing more another instrument for the Defendants' to pile conjecture upon conjecture to justify their denial of Mr. Yellowbear's requests. The letter from the WDOC Deputy Director further said "The location you originally proposed, which is more out-of-view, is not a possibility due to fire marshal regulations." Even though this specific defense was lodged the WDOC has never provided to the Appellant or allowed him to view any specific findings, memoranda, or any other real documentation from the fire marshal mandating such.

For some reason the correspondence further cited and discussed an issue regarding Mr. Yellowbear's request that the dates of the Sand Creek Massacre (November 29) and the Battle of the Little Big Horn (June 25) be added to WDOC policy (i.e., WDOC Handbook of Religious Beliefs) as Holy Days/Spiritual Days of observance, honor, and remembrance. Mr. Yellowbear requested this because his tribe; the Arapaho were the victims' at Sand Creek and because members of the Northern Arapaho Tribe

also took part in the Battle of the Little Big Horn. (Doc. 1, EXHIBIT-V). The Appellants' request for Northern Arapaho/Native American Holy Days/Spiritual Days of observance, honor, and remembrance was later denied by the WDOC (Doc. 36, Affidavit of Andrew J. Yellowbear, JR., page 6, #20).

Standard of Review

Whether a party is entitled to summary judgment is a question of law over which this Court exercises *de novo* review. *See Hammons v. Saffle*, 348 F.3d 1250, 1254 (10th Cir. 2003)("This court reviews an award of summary judgment de novo, viewing the record in the light most favorable to the non-moving party. Moreover, this court construes a pro se party's pleadings liberally.").

3. Statement of Issues.

a. First Issue:

THE DISTRICT COURT ERRED IN RULING THAT UNDER RLUIPA ("1"), OR IN THE ALTERNATIVE THE FIRST AMENDMENT ("2") THE APPELLANT: "FAILED TO PROVIDE ANY FACTUAL EVIDENCE WHICH TENDS TO NEGATE THE REASONS OFFERED FOR DENIAL OF HIS USE OF THE GENERAL POPULATION SWEAT LODGE, OR THE DENIAL OF A SEPARATE SWEAT LODGE FOR PC."

Argument and Authorities:

1.) The Appellant has demonstrated a colorable claim under RLUIPA: In granting summary judgment for the Defendants, the district court failed to engage in analysis of whether a complete denial of Sweat Lodge was the least restrictive means of maintaining prison order and safety, in doing so it ruled that the Appellant did not provide *any* factual evidence that would trigger RLUIPA protections pertaining to his religious deprivation claims:

> "It is abundantly clear from the factual material presented by both Plaintiff and Defendants, Plaintiff's request to participate in a sweat lodge ceremony was not taken lightly." (Doc. 37, page 23).
>
> "Plaintiff has failed to provide any factual evidence which tends to negate the offered for denial of his use of the general population sweat lodge, or the denial of a separate sweat lodge for PC inmates. While both denials

> may well be a substantial burden on his sincerely held religious beliefs, the same are justified as the least restrictive means furthering the compelling government interest of safety and order at WMCI." (Doc. 37, page 27).

In summary RLUIPA provides "'no [state or local] government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution,' unless the government shows that the burden furthers a 'compelling governmental interest' and does so by 'the least restrictive means.' 42 U.S.C. § 2000cc1(a)(1)-(2). *See Kay v. Bemis,* 500 F. 3d 1214, 1221 (10th Cir. 2007); *see also* Gabriel S. Galanda, "Protecting Indian Prisoner Religious Freedom," *This Week From Indian Country Today*, (discussing RLUIPA and Sweat Lodge/Religious cases) Vol. 2, Issue 29 (August 8, 2012) www.IndianCountryMediaNetwork.com.

It defines a "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). *See Cutter v. Wilkinson,* 544 U.S. 709, 125 S. Ct. 2113 (2005)("*Cutter*")("Although RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion . . . the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity." *Cutter,* 544 U.S. at 725 n. 13.).

The Northern Arapaho/Native American religion is unique in its history, substance and form. *See* Stephen L. Pevar, "The Rights of Indians and Tribes" 'Ch. XII Civil Rights of Indians and Tribes,' (Page 260), (3rd Edition NYU Press)(stating: "Religion has special significance to Indians. In the traditional Indian perspective, religion is not something separate from life; the spirit world is part of everything, and one's goal is to live in harmony with nature. In few other societies is the role of religion as central to its members' existence as it is in Indian societies."); *and* 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.

Some courts, however, have disregarded RLUIPA's explicit statement that a practice need not be "compelled by, or central to, a system of religious belief" in order to be protected. *See Riggins v. Clarke,* 403 Fed. Appx. 292, 295 (9th Cir. 2010)(state corrections officials' refusal to allow prisoner to purchase prayer oils did not violate his

right to exercise his religion under RLUIPA, where "the record does not demonstrate that possessing prayer oils was a religious practice mandated by [prisoner's] faith"); *Murphy v. Missouri Dep't of Corrections,* 372 F.3d 979, 988 (8th Cir.), *cert denied,* 125 S. Ct. 501 (2004)(religious exercise burdened must involve a "central tenet" of, or be "fundamental" to plaintiff's religion).

RLUIPA further provides "This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g). *See Putzer v. Donnelly,* WL 2545566 at *6 (D. Nev. 2010)("RLUIPA is to be construed broadly in favor of the inmate."); *Freeman v. Texas Dep't of Criminal Justice,* 369 F.3d 854, 858 n.1 (5th Cir. 2004)("The RLUIPA standard poses a far greater challenge than does *Turner* to prison regulations that impose on inmates' free exercise of religion."); *Jova v. Smith,* 582 F.3d 410, 415 (2d Cir. 2009)("As a general matter, the RLUIPA imposes duties on prison officials that exceed those imposed by the First Amendment.").

This Court has found at least three circumstances which pertain to the application of RLUIPA with respect to what is a "substantial burden" on a prisoner's religious practice, of which all three (3) are applicable in this case as will be established bellow by Mr. Yellowbear. *See Abdulhaseeb v. Calbone,* 600 F.3d 1301, 1315 (10th Cir. 2010) stating:

> "We conclude that a religious exercise is substantially burdened under 42 U.S.C. 2000cc-1(a) when a government (1) requires participation in an activity prohibited by a sincerely held religious belief, or (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief, such as where the government presents the plaintiff with a Hobson's choice--an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief."

A.) Substantial burden found: The Defendant's denial of the Appellants' requests to regularly participate in a Sweat Lodge ceremony or in the alternative the construction of a separate Sweat Lodge for PC Inmates to use creates a substantial burden on the sincere exercise of his religion. Court's, including this one, have found that the denial of a Sweat Lodge is a substantial burden on Native American prisoner's religious

exercise. *See: McKinney v. Maynard*, 952 F.2d 350 (10th Cir. 1991); *Werner v. McCotter,* 49 F.3d 1476, 1480 (10th Cir. 1995)("We may take judicial notice of the central and fundamental role played by the Sacred Sweat Lodge in many Native American religions."); *Thomas v. Gunter*, 32 F.3d 1258 (8th Cir. 1994); *Allen v. Toombs*, 827 F.2d 563, 565 & nn.4, 5 (9th Cir. 1987); and *Farrow v. Stanley,* 2005 WL 2671541, at *8 (D.N.H. 2005)(Denial of a sweat lodge is a substantial burden on Native American prisoner's religious exercise.).

The Defendant's did not dispute that the Appellants religious beliefs are sincerely held (Docs. 18-1, p. 2; 20, p. 18 fn.2), and the district court found that denial of a Sweat Lodge was a substantial burden (Doc. 37, page 21-22) stating:

> "The facts presented by Plaintiff through his verified complaint as well as his subsequent affidavits are sufficient to support a conclusion he has been prevented from participating in "conduct motivated by a sincerely held religious belief," i.e., a sweat lodge ceremony. Plaintiff was, from early childhood, raised and taught by his family and tribal elders to observe the Northern Arapaho tribe culture and religion. He has participated in the Northern Arapaho Sundance, Smudging ceremony, Pipe Ceremony, as well as the Sacred Sweat Lodge Ceremony at issue. [Doc. 1, ¶ 9, pp. 3, 4; ¶ 42, pp. 13, 14; Doc. 1-1, p. 87; Doc. 21-1; Doc. 36-1]."

Because of the substantial burden placed on the Appellants Northern Arapaho/Native American religious practice by the Defendant's, he has for over one year been unable to observe said religion in a sincere and meaningful manner i.e., participating in a sacred Sweat Lodge Ceremony. *See Meyer v. Teslik,* 411 F. Supp. 2d 983, 989 (W.D. Wis. 2006)(Allegation that prison staff intentionally omitted prisoner from list of those allowed to attend Native American religious services stated substantial burden, even though prisoner only missed three services; "it is difficult to imagine a burden more substantial than banning an individual from engaging in a specific religious practice.").

During this timeframe, many Northern Arapaho/Native American religious occasions central the Appellants religion have passed with out his meaningful observance of them via the Sweat Lodge Ceremony: Northern Arapaho Sundance (*Hoseino'oowu'* "Offerings/Sacrifice Lodge"), Smudging Ceremony, Pipe Ceremony, the changing of the seasons, tribal naming ceremonies, daily prayer, and most importantly funeral services/observances. These ceremonies are traditionally performed in conjunction with

one another but in particular with the Sweat Lodge Ceremony at issue. (Doc. 36, Affidavit of Andrew J. Yellowbear, JR, in Opposition to Summary Judgment, #3 a) through d)).

B.) The Defendant's unsubstantiated "compelling governmental interest(s)" and "least restrictive means" claims: The U.S. Supreme Court has "never set forth a general test to determine what constitutes a compelling state interest." *Waters v. Churchill,* 511 U.S. 661, 671, 1114 S. Ct. 1878 (1994). Nonetheless, courts have uniformly held that maintaining institutional order and security is a compelling governmental interest. *See Cutter*, 125 S. Ct. at 2124 n. 13 ("prison security is a compelling state interest"); *Warsoldier v. Woodford,* 418 F.3d 989, 998 (9th Cir. 2005)("Nevertheless, the question here is not whether prison security is a compelling governmental interest. It clearly is).

Indeed, the Appellant does not attempt to dispute the need for prison security; especially for inmates in PC. He does, however, dispute unsubstantiated conclusory statements/administrative conjecture about the need to protect inmate security as having been sufficient to meet prison officials' burden under RLUIPA. *See Spratt v. Wall,* 482 F.3d 33, 39 (1st Cir. 2007)("to prevail on summary judgment, [prison officials] must do more than merely assert a security concern"); *Murphy v. Missouri Dep't of Corrections,* 372 F.3d 979, 988 (8th Cir. 2004); and *Lovelace v. Lee,* 472 F.3d 174, 191 (4th Cir. 2006).

The Defendant's, state that they have compelling governmental interests (i.e., maintenance of order and safety of the institution) by not allowing the Appellant to participate in the bi-weekly General Population ("GP") Sweat Lodge ceremony at the WMCI and in not building a separate Sweat Lodge in a segregated area for him to use.

They have failed to meet their burden in showing that their action, or in this case inaction(s), further a "compelling governmental interest" and is in fact the "least restrictive" means under RLUIPA.

C.) In its initial finding that the Defendant's met their burden under the RLUIPA standards (i.e., "compelling interest(s)" & "least restrictive means"), the district court found the following "contextual matters" persuasive:

a.) The Defendant's mere consideration of the Appellants request to participate in a Sweat Lodge ceremony, or in the alternative the construction of a separate Sweat Lodge

for PC (Doc. 37, page 22-23). As will be discussed below, the Defendant's conclusions after their myopic considerations do not stand up to strict scrutiny as required under RLUIPA.

b.) The Defendant's consultation with other state department of corrections (N.D., S.D., MT., N.M., CO., AZ., and OK.) regarding separate PC Sweat Lodges and their denial of access to them (Doc. 37, page 24). Although this information is illuminating, it really only proves the existence of severe restrictive practices on the observance of the Native American religion at other state prisons. Which does not support the Defendant's "least restrictive means," or "compelling governmental interest" burdens required under RLUIPA. *See Spratt v. Rhode Island Dep't of Corrections,* 482 F.3d at 42 ("evidence of policies at one prison is not conclusive proof that the same policies would work at another institution,").

c.) The Defendant's offer to transfer the Appellant to a different state via the Interstate Compact so he could be housed in GP and regularly participate in a Sweat Lodge ceremony (Doc. 37, page 24). Should the Appellant be forced to choose between being near family in the state of Wyoming or exercising his religion? More importantly, doesn't the Defendant's incessant attempts' to have the Appellant "request" to be transferred to another state deserve more scrutiny? *See Rouse v. Benson,* 193 F.3d 936, 941 (8th Cir. 1999)(allegation of transfer in retaliation for Native American religious exercise stated a valid constitutional claim); *Frazier v. Dubois,* 922 F.2d 560, 561-62 (10th Cir. 1990) *and cases cited.* In any event, it is hard to tell how transferring the Appellant to another state meets any of the "least restrictive means," or "compelling governmental interest" burdens required under RLUIPA.

D.) The district court moved on from these initial findings and noted the following: "legitimate institutional safety and order concerns which justify a finding denial of Plaintiff's request for a separate sweat lodge in the PC unit at WMCI, or use of the sweat lodge in the general population area, was not a violation of the RLUIPA." (Doc. 37, page 24-25).

d.) The district courts' first contention was that allowing the Appellant and other Native American's in A-1 to use the Sweat Lodge at WMCI would require locking down significant portions of WMCI to prevent contact with other non-protected Inmates. And

that "Inmates are placed in a PC unit to limit possible harm to them by prohibiting contact with inmates who are not in protective custody, and to the extent possible, maintain anonymity of PC inmates." (Doc. 37, page 25).

This is of course true and makes sense, but what neither the Defendant's or the district court have ever answered or addressed is the fact that for Inmates housed in lock-down (A-2), geriatric Inmates housed in (B-2), female Inmates housed in (B-3), not to mention PC Inmates (A-1) such facility-wide medical and general movement lock-down's already occur on an hourly/daily basis at WMCI. Hence, their concerns are unavailing.

e.) The district court and Defendant's also never addressed the fact that even though PC Inmates at WMCI, are on a daily basis, exposed to visual inspection and are routinely within "ear shot" of GP Inmates during meal times and when they are being moved to and from medical, the Defendant's still primarily profess a need for anonymity of PC Inmates from the non-protective Inmates. Thus, the district courts' finding of an "unreasonable burden" on the operations of WMCI where the Defendant's to accommodate such a move is misplaced and should stand serious consideration on appeal.

f.) In nixing the consideration of constructing a separate PC Sweat Lodge on a bare 3-4 acre piece of land adjacent to the A-1 housing unit, both the district court and the Defendant's cited an ostensible violation of a fire marshal code. In the end, they both really relied on the conspicuously bizarre "on-again" "off-again" anonymity requirement cited above as grounds for not considering the alternative PC Sweat Lodge. (Doc. 37, page 25-26).

The perceived threat as advertised by the district court and Defendants' for other non-protective Inmates who work in the laundry, industry, and vocational areas and warehouse to see the participants of the Sweat Lodge ceremony is superfluous and really not that hard to overcome. All that would need to be done is to simply hold the Sweat Lodge ceremony on the weekends when the non-protected Inmates are not working, this seems like it would not be an "unreasonable burden" for the Defendants' to accomplish.

With respect to the Defendants' first contention, to-date the Defendant's have not provided the Appellant with any official fire marshal findings or specific codes which

might have been violated were a Sweat Lodge constructed at the proposed location. It is worth noting that at the proposed Sweat Lodge location there already exists' an outdoor emergency fire hydrant. Hence, the district courts' findings are unfounded.

g.) The district court incorrectly assumed that the only person who could lead a Sweat Lodge ceremony was the WDOC/WMCI Native American Spiritual Advisor during his traditional work week time frame. (Doc. 37, page 26). To the Appellants knowledge the WDOC/WMCI Native American Spiritual Advisor has never submitted any affidavits to that effect. And besides, is there someone else who would or could run the Sweat Lodge ceremony on the proposed weekend schedule, possibly even a PC inmate? A practice not unfamiliar to the Defendant's *See* "Martinez" Report (Doc. 18, page 2). It appears that the district courts' findings on this issue contain no factual evidence.

h.) With respect to the proposed weekend Sweat Lodge ceremony, the district court seemed to find that it was going to be an imposition for the Defendants to "require a corrections officer be posted at the sweat lodge in order to maintain the required visual "within earshot" prohibition by non-protective custody inmates. [Doc. 18-1, p. 5]." (Doc. 37, page 26). Posting an officer during the proposed weekend Sweat Lodge ceremony doesn't seem like it should pose too much of an operational problem for the Defendant's, as the Defendants' already require officers to be present for security reasons at all other religious services at the WMCI.

i.) And finally, the district court seemed to conclude that the undertaking of the Sweat Lodge ceremony its self counseled against a separate/segregated PC Sweat Lodge ceremony at WMCI:

> "A prison's interest in order and security is always compelling. *See, e.g., Cutter,* 544 U.S. at 725 n. 13, 125 S.Ct. 2113; *see also Murphy,* 372 F.3d at 988 (acknowledging that "MDOC has a compelling interest in institutional security"). *** But no reasonable jurist, affording due deference to prison officials, can dispute that serious safety and security concerns arise when inmates at a maximum security prison are provided ready access to (1) burning embers and hot coals, (2) blunt instruments such as split wood and large scalding rocks, (3) sharper objects such as shovels and deer antlers, and (4) an enclosed are inaccessible to outside view." (The district court citing: *Fowler v. Crawford,* 534 F.3d 931, 939 (8th Cir. 2008); and *Lovelace v. Lee,* 472 F.3d 174, 190 (4th Cir. 2006) (Doc. 37, page 26-27).

The district court, however, did not explain how or why other Native American Inmates currently in GP at the WMCI should be exempt from this ominous finding with respect to their bi-weekly Sweat Lodge ceremony. *See Warsoldier v. Woodford,* 418 F.3d 989, 1000 (9th Cir. 2005)("Indeed, the failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish tat the defendant was using the least restrictive means."); *Hudson v. Dennehy,* 538 F. Supp. 2d 400, 411 (D. Mass. 2008)(citing dietary accommodations to Jewish, Buddhists, and Seventh Day Adventist inmates in finding denial of Halal food violated RLUIPA).

E.) The Defendant's presented the Appellant' "with a Hobson's choice--an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief." After denying him reasonable access to and use of a Sweat Lodge to engage in the meaningful and sincere observance of his Northern Arapaho/Native American religion, the only alternative the Defendant's have offered to the Appellant is his participation in inferior and supposed religious activity and conduct (i.e., a *Native American Talking Circle*) that is morally offensive to the traditional, meaningful, and respectful observance of the Northern Arapaho/Native American religion.

Moreover, it is nefarious religious behavior (i.e., banter, adult-slapstick, and repartee), long held to be strictly taboo among the Northern Arapaho and other Native American tribe's during their respective religious ceremonies (Doc. 36, AFFIDAVIT OF ANDREW J. YELLOWBEAR, JR, IN OPPOSITION TO SUMMARY JUDGMENT, #3. (1), page-2) stating:

> "(1) I would add that amongst the *Hinono' eino'* and Native Americans in general, there is a strict taboo on conducting these ceremonies in a halfhearted or insincere manner. To do so, would surely invite bad luck and disaster on those persons and their families who undertake such shameful and questionable activities."

The Defendants should not be heard or allowed to pretend that the "Hobson's choice" i.e., Native American talking circle with all of its banter, adult-slapstick, and

repartee is a legitimate, sincere, and meaningful alternative for the Appellant to participate in lieu of his participation in a Sweat Lodge ceremony.

It is clear from the facts and record that both denials are a unwarranted substantial burden on the Appellants' sincerely held religious beliefs, as such under RLUIPA, they are not justifiable as the least restrictive means furthering the Defendant's alleged "compelling government interest" of safety and order at WMCI.

2.) The Appellant has stated in the alternative, a valid claim under the First Amendment of the U.S. Constitution: The district court summed up its entire consideration, analysis, and denial of the Appellants First Amendment claim with the following sentence:

> "A finding the "compelling interest" standard has been met, because it is higher standard, thus answers as well, in the negative, the question of whether there has been a First Amendment violation." (Doc. 37, page 22-23).

In cases where RLUIPA relief is not available, prisoners' religious claims are governed by the First Amendment of the U.S. Constitution. Restrictions on prisoners' First Amendment rights are governed by the test set forth in: *Turner v. Safley,* 482 U.S. 78, 89 (1987)(the restriction is valid "if it is reasonably related to legitimate penological interests."). *See Beerheide v. Suthers,* 286 F.3d 1179, 1192 (10th Cir. 2002)(mandating co-pay from prisoners requesting Kosher meals violated First Amendment).

The *Turner* standard is somewhat deferential, but "not toothless." *Thornburgh, v. Abott,* 490 U.S. 401, 414 (1989). *See Makin v. Colorado Dep't of Corrections,* 183 F.3d 1205 (10th Cir. 1999); *Reed v. Faulkner,* 842 F.2d 960, 963 (7th Cir. 1988)(Prison officials may not "pil[e] conjecture upon conjecture" to justify their policies); *Armstrong v. Davis,* 275 F.3d 849, 874 (9th Cir. 2001), *cert. denied,* 537 U.S. 812 (2012)(prison officials cannot avoid scrutiny under *Turner* "by reflexive, rote assertions"); *cf. Miller-El v. Cockrell,* 537 U.S. 322, 340 (2003)("deference does not imply abandonment or abdication of judicial review").

Under the *Turner* standard, the following restrictions on religious exercise have been found to violate the First Amendment because they restrict prisoners' ability to attend religious services. *Mayweathers v. Newland,* 258 F.3d 930, 938 (9th Cir. 2001)(upholding injunction against disciplining Muslim prisoners for missing work to

attend Friday services); *Omar v. Casterline,* 288 F. Supp 2d 775, 781 (W.D. La. 2003)(refusal to tell Muslim prisoner the date or time of day to allow him to pray and fast states First Amendment claim).

Court's, including this one, have found that the denial of a Sweat Lodge is a substantial burden on Native American prisoner's religious exercise. *See Youngbear v. Thalaker,* 174 F. Supp. 2d 902, 914-15 (N.D. Iowa 2001)(one year delay in providing sweat lodge for Native American religious activities violates First Amendment); *McKinney v. Maynard*, 952 F.2d 350 (10th Cir. 1991); *Werner v. McCotter,* 49 F.3d 1476, 1480 (10th Cir. 1995)("We may take judicial notice of the central and fundamental role played by the Sacred Sweat Lodge in many Native American religions."); *Thomas v. Gunter*, 32 F.3d 1258 (8th Cir. 1994); *Allen v. Toombs*, 827 F.2d 563, 565 & nn.4, 5 (9th Cir. 1987); and *Farrow v. Stanley,* 2005 WL 2671541, at *8 (D.N.H. 2005)(Denial of a sweat lodge is a substantial burden on Native American prisoner's religious exercise.).

As stated above at a.), b.), d.), e.), f.), g.), h.), and i.), under the RLUIPA standard the Defendants' "compelling interest" burden has not been met, and because RLUIPA is the higher standard, thus answers as well, in the positive, the finding that there has been a First Amendment violation.

b. Second Issue

THE DISTRICT COURT ERRED IN FINDING THAT THE APPELLANT HAD NOT MET HIS BURDEN UNDER THE FOURTEENTH AMENDEMENT

Argument and Authorities:

The Appellant has met his burden under the Fourteenth Amendment: The district court bellow found the Appellants' Fourteenth Amendment claim unpersuasive:

> "The factual evidence before the Court, even taken in the light most favorable to Plaintiff as a party opposing a motion for summary judgment, is insufficient to support a conclusion Plaintiff was being treated differently from others similarly situated, and is completely devoid of any support for a finding his treatment was motivated by a discriminatory purpose. Plaintiff's personal dissatisfaction with the religious services provided to Native Americans in the protective custody unit at WMCI does not translate in a violation of Equal Protection." (Doc. 37, page 30).

The Fourteenth Amendment forbids a state to "deny any person within its jurisdiction the equal protection of the laws." *See* U.S. Const., Amend XIV. That means "that all persons similarly situated should be treated alike." *City of Cleburne Tex. v. Cleburne Living Center,* 473 U.S. 432, 439, 105 S. Ct. 3249 (1985). To deny equal protection, discrimination should generally be intentional; "disparate impact" standing alone does not violate equal protection guarantees. *See Lewis v. Jacks,* 486 F.3d 1025, 1028 (8th Cir. 2008) "Discriminatory purpose can be proved with various kinds of direct and circumstantial evidence that similarly situated inmates were treated differently."

In general, for a prisoner to make a claim under the Equal Protection Clause, the claim must meet two requirements: (1) it must state that you were treated differently from other prisoners who were in a similar situation or similar circumstances, *See Klinger v. Dep't of Corr.,* 31 F.3d 727, 731 (8th Cir. 1994); and (2) it must state that the unequal treatment resulted from intentional or purposeful discrimination, *See McCleskey v. Kemp,* 481 U.S. 279, 292, 107 S. Ct. 1756, 1767, 95 L. Ed. 2d 262, 278 (1987).

In the prison context, prisoner's are most likely to be able to make an equal protection claim if they have been discriminated against because of their "Race", *See Johnson v. California,* 543 U.S. 499, 512, 125 S. Ct. 1141, 1150, 160 L. Ed. 2d 949, 963 2005)("Johnson 543 U.S. 499 (2005)")(finding that a prisoner's 14th Amendment rights to equal protection are violated if the prison discriminates on the basis of race, unless the prison can demonstrate that such discrimination is *necessary* in order to achieve a *compelling* government interest), "Gender," "Ethnicity," *See Jean v. Nelson,* 711 F.2d 1455 (11th Cir. 1983), or "Disability," *See Green v. McKaskle,* 788 F.2d 1116, 1125 (5th Cir. 1986).

Prisoner's, like the Appellant, may also bring an equal protection claim if they are discriminated against because of their custodial status (i.e., the type of custody they are in, such as protective custody -vs.- general population, etc.). *See Williams v. Lane,* 851 F.2d 867, 881—82 (7th Cir. 1988)(disparate treatment of protective custody inmates denied equal protection where prison officials had no rational explanation for it); *Williams v. Lane,* 646 F. Supp. 1379, 1407 (N.D. Ill. 1986)(denial of group worship in protective custody was unconstitutional); *Williams v. Manternach,* 192 F. Supp. 2d 980,

992 (N.D. Iowa 2002)(finding that plaintiff made a valid equal protection claim by stating that he was treated differently as a "lifer" with regards to jobs and classification).

It is beyond dispute that Courts have the authority to uphold the legitimate restriction of privileges for segregated prisoners or prisoner's in PC. But as requested above and bellow, under the "rational basis" test, this Court should strike down the Defendant's distinctions because most of them make no sense or are in affect administrative red-herring's.

Contrary to previous decisions, under current case law, a prisoner need not be a member of a specific group or class that is discriminated against in order to bring an equal protection claim, the Supreme Court has ruled that an individual's, like the Appellant, who claims he or she has been treated differently from others similarly situated, by design and without rational basis, states an equal protection claim as a "class of one." *See Village of Willowbrook v. Olech,* 528 U.S. 562, 564-65, 120 S. Ct. 1073 (2000).

Some states have their own constitutional or statutory equal protection provision, and they may provide different standards from the usual federal authorities. *DuPont v. Commissioner of Correction,* 448 Mass. 389, 399, 861 N.E.2d 744 (2007). For reference, the Wyoming State Constitutional protections applicable here are: Constitution Of The State Of Wyoming, ARTICLE 1, Declaration Of Rights: § 2 Equality of all; § 18 Religious liberty; § 16 Conduct of jails.

Despite these protections, it is no secret that members of the Northern Arapaho (of which Mr. Yellowbear is an enrolled member of) and Native Americans in general have been historically been discriminated against not only in the distant past but also on a current basis in the state of Wyoming. *See Large, et al., v. Fremont County, Wyoming, et al.,* Case No. 05-CV-0270-ABJ (D. Wyo.)/Memorandum Opinion stating Findings Of Fact And Conclusions Of Law ("Memo")(April 29, 2010)(Up-held on appeal to this Court) The Honorable U.S. District Judge Alan B. Johnson holding:

> "The historical and current experiences of Indians in Fremont County must also be addressed. The long history of discrimination against Indians in the United States, Wyoming, and Fremont County is undeniable. The evidence presented to this Court reveals that discrimination is ongoing, and the effects of historical discrimination remain palpable." (Memo, Page 6).

> "the Court recognizes that this type of case inevitably involves the airing of dirty laundering, some amount of finger pointing, repeating of racial slurs, and a meticulous examination of a record that chronicles a shameful chapter in American history that resonates and in this case, a view into present-day race relations in Wyoming." (Memo, Page 18).

Throughout history the Northern Arapaho/Native American religion has been shown little deference, suppressed, and even prohibited by law. *See* "Through Indian Eyes," James J. Cassidy, Jr., Bryce Walker, and Jill Maynard (1997) stating:

> "native religious practices had come under attack across the continent in the name of assimilation. On the Great Plains, Indian agents in the 1980s had put a halt to the Sun Dance, a major yearly ritual for more than 20 different tribes, because it was considered "pagan"). Indian Dept. Rule No. 497 (4th) and (6th)(1884)(Sun Dance ceremonies "shall be considered 'Indian offenses'" punishable by withholding rations and imprisonment);
>
> John Rhodes: "An American Tradition: The Religious Persecution of Native Americans," 52 *Mont. L. Rev. 13* (1991);
>
> Russel L. Barsh: "The Illusion of Religious Freedom for Indigenous Americans," *65 Or. L. Rev.* 363 (1986);
>
> Walter Echo Hawk's: In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided (Fulcrum Publishing, 2010) (citing *Lyng v. Nw. Indian Cemetary Protective Ass'n,* 485 U.S. 439, 455 (1988)).

With respect to equality in observing religious freedoms in prisons, the Supreme Court has held in a previous case that "Reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." *Cruz v. Beto,* 405 U.S. 319, 322 n.2, 92 S. Ct. 1079 (1972)(Buddhist prisoner is entitled to "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts. . . ."); *McKinney v Maynard,* 952 F.2d 350 (10th Circuit, 1991)(allegation of denial of Native American religious rights was not frivolous, since the plaintiff alleged that other religions were treated differently).

This means prison officials are obligated to treat religions in an even handed manner. *See Al-Alamin v. Gramleym,* 926 F.2D 680, 668 (7th Cir. 1991)("qualitatively comparable" treatment required); *Lindell v. Casperson,* 360 F. Supp. 2d 932, 958 (W.D.

Wis. 2005)("The denial of a privilege to adherents of one religion while granting it to others is discrimination on the basis of religion in violation of the equal protection clause of the Constitution."); *aff'd,* 169 Fed.Appx. 999 (7th Cir. 2006)(unpublished); *Lucero v. Hensley,* 920 F. Supp. 1067, 1075 (C.D.Calif. 1996)(allegation that there are as many Native American as Jewish inmates and that there is a full-time rabbi, but not a full-time Native American chaplain, states an equal protection claim; defendants must show that they have "made a good faith attempt to treat different religious groups equally").

This Court and others have recognized this particular result in at least four (4) Native American religious cases. *See McKinney v Maynard,* 952 F.2d 350 (10th Circuit, 1991) holding:

> "Although the practice of Native American traditional religion may not conform as neatly to those accommodations already provided in a prison setting, that, standing alone, neither renders the claim of a Native American worshipper frivolous nor terminates the responsibility of prison officials to consider some accommodation. Indeed, the fact that prison authorities have made accommodations to other religions should provide some guidance in determining the frivolousness {952 F.2d 353} of Mr. McKinney's claim.");
> *Werner v. McCotter,* 49 F.3d 1476, 1480 (10th Circuit, 1995) ("We may take judicial notice of the central and fundamental role played by the Sacred Sweat Lodge in many Native American religions.");
> *Meyer v. Teslik,* 411 F. Supp. 2d 983, 989 (W.D. Wis. 2006)("it is difficult to imagine a burden more substantial than banning an individual from engaging in a specific religious practice.");
> *Smith v. Beauclair,* 2006 WL 2348073, at *7-8 (D. Idaho 2006)(Complete ban on Cherokee Sacred Fire ceremony and use of medicinal herbs, and denial of religious exemption from beard length, "violates RLUIPA");

Here, the Defendants are not denying Sweat Lodges at WMCI, rather, they are denying one prisoner (the Appellant), who is a "lifer" and PC Inmate reasonable access to a Sweat Lodge based on supposed security reasons relative to his placement in PC (Doc. 37, page 22-27). In general, most equal protection claims involve allegations that the Plaintiff (or the Appellant here), because of his membership in some group or category, has been treated unequally compared to persons who belong to some other group or category.

In this case, the Appellant has alleged that as a Northern Arapaho/Native American prisoner in PC his religion is being discriminated against by the Defendant's,

who appear to be showing more deference to the other mainstream religious services in PC: "Other religious services [one Baptist, two Catholic, two non-denominational, and two LDS groups] are provided weekly in the protective custody unit at WMCI by religious volunteers. [Doc. 18-1, p. 3.]." (Doc. 37, page 29-30). *See Wilson v. Moore,* 270 F. Supp. 2d 1328, 1353 (N.D. Fla. 2003).

In that, the daily/weekly ("frequency") religious services provided to the other mainstream religions in PC, far exceeds the paltry once a month sham known as the Native American talking circle. Again, the Defendant's should not be heard or allowed to pretend that the "Hobson's choice" i.e., Native American talking circle with all of its banter, adult-slapstick, and repartee is a legitimate, sincere, and meaningful alternative for the Appellant to participate in lieu of his participation in a Sweat Lodge ceremony.

After denying him reasonable access too and use of a Sweat Lodge to engage in the meaningful and sincere observance of his Northern Arapaho/Native American religion, the only alternative the Defendants have offered to the Appellant is his participation in inferior and supposed religious activity and conduct (i.e., a *Native American Talking Circle*) that is morally offensive to the traditional, meaningful, and respectful observance of the Northern Arapaho/Native American religion.

Moreover, it is nefarious religious behavior (i.e., banter, adult-slapstick, and repartee), long held to be strictly taboo among the Northern Arapaho and other Native American tribe's during their respective religious ceremonies (Doc. 36, AFFIDAVIT OF ANDREW J. YELLOWBEAR, JR, IN OPPOSITION TO SUMMARY JUDGMENT, #3. (1), page-2), stating:

> "(1) I would add that amongst the *Hinono' eino'* and Native Americans in general, there is a strict taboo on conducting these ceremonies in a halfhearted or insincere manner. To do so, would surely invite bad luck and disaster on those persons and their families who undertake such shameful and questionable activities."

In the prison context, this Court has taken up, considered, and rejected this particular result in at least one previous religious deprivation case. *See Beerheide v. Suthers,* 286 F.3d 1179, 1189 (10th Cir. 2002) stating:

> "For purposes of prisoners rights in the U.S. Const. amend. I free exercise context, there is a distinction between a religious practice which is a positive expression of belief and a religious commandment which the

> believer may not violate at peril of his soul. It is one thing to curtail various ways of expressing belief, for which alternative ways of expressing belief may be found. It is another thing to require a believer to defile himself, according to the believer's conscience, by doing something that is completely forbidden by the believer's religion."

Even after the Appellant made his concerns made, the Defendant's failed to address the matter of the sacrilegious ceremony speciously termed by them as a Native American talking/prayer circle. One court has spoken on the inappropriateness of certain kinds of "ill-suited" Native American spiritual advisors/medicine men who provide specious religious services in the prison setting. *See SapaNajin v. Gunter,* 857 F.2d 463, 465 (8th Cir. 1988) stating:

> "The Department contends primarily that no evidence was presented which showed that SapaNajin's religious beliefs were significantly different from those of the official medicine man, Elmer Running. While conceding that SapaNajin's beliefs are sincere, the Department argues that the complaints he had about Elmer Running's conduct of religious ceremonies were minor. Appellant further points out that on occasion SapaNajin asked to have Running minister to him.
>
> The District Court implicitly found that there was a significant clash between SapaNajin's and Running's beliefs when it held SapaNajin's First Amendment rights were violated. This finding is not clearly erroneous. Elmer Running is a Heyoka, a member of a group described by an expert witness as "institutionalized deviants" among the Sioux Indians. Such people are "contraries" and do things backwards from most Sioux. A Heyoka medicine man, for example, will conduct the worship service backwards and behave in an irreverent manner during ceremonies. He might laugh at a funeral and say yes when he means no. Elmer Running behaved in such an unusual manner when ministering to SapaNajin. We agree with the District Court that this constitutes a sizeable difference in religious practices."

Like the "deviant" conduct described in *SapaNajin*, the conduct by the Defendant's Native American Spiritual Advisor – Willie LeClair during the disgracefully described talking/prayer circle, is remarkably similar i.e., choosing to recite dark, sardonic, and adult slapstick as well as joking and teasing around during what should be a solemn time of sincere religious observance. *See Pugh v. Goord,* 184 F. Supp. 2d at 334 ("While the First and Fourteenth Amendment do not require that prison inmates have access to religious advisors whose own views are completely congruent to their own,

their protections are certainly not satisfied where the religious leader purportedly responsible for inmates' spiritual guidance overtly despises the deeply held belief of inmates under his charge.").

Although the Appellants' tribe the Northern Arapaho, and the Eastern Shoshone of which the WDOC/WMCI Native American Spiritual Advisor is a member of, jointly occupy the Wind River Indian Reservation, WY., they are distinctly separate in every aspect of their respective heritages i.e., tribal customs, tribal governments, and religious beliefs. *See* (Footnote 1* above).

Even under liberal scrutiny, the Appellant has been clear about what the religious groups are that he says are being treated differently than his. *See Trujillo v. Williams,* 465 F.3d 1210, 1228 (10th Circuit, 2006). As such, the Court should reverse the findings of the district court with respect to the Appellants Fourteenth Amendment claim and remand for trial on the merits.

c. Third Issue:

THE DISTRICT COURT ERRED IN HOLDING THAT THE DEFENDANT'S HAVE ELEVENTH AMENDMENT IMMUNITY IN THEIR OFFICIAL CAPACITIES FROM THE APPELLANTS' RELIGIOUS DEPRIVATION CLAIMS

Argument and Authorities:

The Defendant's do not enjoy Eleventh Amendment Immunity in their Official Capacities: Regarding the Defendants' Eleventh Amendment Immunity in their official Capacity (Doc. 1, page 1; Doc. 8, page 1), the district court held:

> "Plaintiff has failed to present any factual pleading or argument which addresses any of the noted four criteria, thus there is no basis to find an exception to immunity pursuant to *Ex Parte Young*. Plaintiff's claims against the Mr. Lampert and Mr. Hargett, in their "official" capacity, are thus barred by Eleventh Amendment immunity." (Doc. 37, page 31-32).

The Eleventh Amendment case-law has seemingly developed into a confusing area over the years which even the courts have admitted doesn't make much sense. *See Eng v. Coughlin,* 858 F.2d 889, 897 (2d Cir. 1988)("not . . . a model of logical symmetry, but marked rather by a baffling complexity"); *Spicer v. Hilton,* 618 F.2d 232, 235 (3d Cir. 1980)("Any step through the looking glass of the Eleventh Amendment leads to a

wonderland of judicially created and perpetuated fiction and paradox."). However, as will be discussed bellow this concern is not applicable to the case at hand.

Prison officials, like those in the case at bar, usually claim that they are protected by the Eleventh Amendment because they were *acting* in their officials capacities even if they were, like the Defendants here; also sued in their individual capacities. The Supreme Court has emphatically rejected this argument. *See Hafer v. Melo,* 502 U.S. 21, 27-28, 112 S. Ct. 358 (1991)("We hold that state officials, sued in their individual capacities, are 'persons' within the meaning of § 1983. The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personally liability under § 1983 solely by virtue of the 'official' nature of their acts.").

What is more, Congress has abrogated states' sovereign immunity under RLUIPA, which allows relief against a "government," defined to include State, county, city, and other governments and branches and agencies of governments as well as individuals, expressly for infringements of religious freedom. *See 42 U.S.C. § 2000CC-5(4)(A).*

In doing so, Congress relied on its powers under the Spending Clause and the Commerce Clause of the Constitution, and not § 5 of the Fourteenth Amendment, in enacting RLUIPA. *See Cutter v. Wilkinson,* 544 U.S. 709, 715, 125 S. Ct. 2113 (2005)(RLUIPA was enacted after the much broader Religious Freedom Restoration Act, which relied on Congress's Fourteenth Amendment authority, was struck down insofar as it applied to state government on the ground that it exceeded that authority. *Cutter,* 544 U.S. at 714-15 (citing *City of Boerne v. Flores,* 521 U.S. 507, 532-36, 117 S. Ct. 2157 (1997)). Compare to Americans with Disabilities Act, 42 U.S.C. § 12102(4)(A), with respect to partial abrogation of states' Eleventh Amendment immunity. *See U.S. v. Georgia,* 546 U.S. 151, 155-60, 126 S. Ct. 877 (2006).

It is clear that the Appellants' religious deprivation claims are well plead and that Congress has through the enactment of RLUIPA, allowed state prisoners, like the Appellant, to bring state prison religious deprivation claims to the federal courts for appropriate redress. Therefore, this Court should reverse the district courts' erroneous finding on this issue and remand back for trial on the merits.

d. Fourth Issue:

REGARDING THE APPELLANTS' 42 U.S.C. §1983 RELIGIOUS DEPRIVATION CLAIMS, THE DISTRICT COURT ERRED IN DETERMINING THAT THE DEFENDANT'S WERE NOT LIABLE IN THEIR INDIVIDUAL/PERSONAL CAPACITIES

Argument and Authorities:

The Defendant's are liable in their Individual/Personal Capacities for the Appellants 42 U.S.C. § 1983 Religious Deprivation Claim: On the issue of the Individual Capacity of the Defendant's (Doc. 1, page 1; Doc. 8, page 1) the district court ruled:

> "Plaintiff's own pleadings, however, fail to indicate any *personal* involvement in the alleged inappropriate actions and inactions by either Mr. Lampert or Mr. Hargett." (Doc. 37, page 32)
>
> "Plaintiff has failed to set forth factual allegations to fulfill the personal involvement requirement for individual § 1983 liability for both Mr. Hargett and Mr. Lampert." (Doc. 37, page 34).

42 U.S.C. § 1983**'s** first requirement is to show a "person" violated your constitutional or federal statutory rights. The legal definition of "person" for Section 1983 claims includes more than actual people, they include department of corrections director's, prison wardens, chaplains, guards, and medical staff.

Prisoners should name all "persons" who violated their rights as defendants, whether they are individuals, local government agencies, or both. They may name as many defendants as they choose, as long as *each* of them is *personally involved* in the wrong that they are claiming. Courts consider officials and local government agencies to be personally involved if they: 1.) Directly participated in the wrong; or 2.) Knew about the wrong but did not try to stop or fix it; or 3.) Failed to oversee the people who caused the wrong, such as by hiring unqualified people or failing to adequately train the staff; or 4.) Created a policy or custom that allowed the wrong to occur.

The situations in 1.), 2.), and 3.) are most common in cases when prisoners are challenging defendants' specific behavior or failure to act. The fourth situation occurs when prisoners challenge general prison rules. A prime example of a type 1.) situation; is a case in which an injured prisoner asked a guard for medical care. If the guard refused to

get the prisoner help, he might say that he directly participated in violating the prisoner's right to medical care. An example of a type 2.) situation could be a guard seeing a prisoner being attacked by other prisoners, but did not try and stop the attack.

In a type 3.) situation, prison officials may be liable for hiring unqualified people. *See Bd. of the County Comm'rs v. Brown,* 520 U.S. 397, 411–12, 117 S. Ct. 1382, 1392–93, 137 L. Ed. 2d 626, 644–45 (1997). Prison officials are culpable for failing to properly train or supervise their staff. *See City of Canton v. Harris,* 489 U.S. 378, 388–89, 109 S. Ct. 1197, 1204–05, 103 L. Ed. 2d 412, 426–27 (1989). Finally, in a type 4.) situation, prison officials can be liable for creating rules, policies, or customs that result in a violation of your rights. These can include written rules or policies. *See Shain v. Ellison,* 273 F.3d 56, 66 (2d Cir. 2001), or for having unwritten policies. *See Fairley v. Luman,* 281 F.3d 913, 918 (9th Cir. 2002).

Contrary to the district courts finding the Appellants Complaint, accompanying Exhibits, and Affidavits include the names of those people up and down the chain of command at WMCI and from the WDOC who can reasonably be said to have caused him to be subjected to a violation of law. Pursuant to Fed. R. Civ. P. Rule 11, their inclusion is well grounded in fact and warranted by law. *See Brubaker v. City of Richmond,* 943 F.2d 1363, 1373 (4th Cir. 1991)(a legal position violates Rule 11 if it "has 'absolutely no chance of success under the existing precedent.'").

The Appellant has truthfully set fort in his Complaint a rational basis for including both Defendant's Lampert and Hargett, inclusion; that would've permitted him to obtain a judgment against them if he proved his allegations. This standard would have been met by a reasonable expectation that evidence to that effect would have been obtained in discovery. *See Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 545, 127 S. Ct. 1955 (2007).

Courts have held that supervisory officials may be retained as defendants for purposes of discovery to identify culpable staff members. *See Davis v. Kelly,* 160 F.3d 917, 921 (2d Cir. 1998) and cases cited; *Donald v. Cook County Sherriff's Dep't,* 95 F.3d 548, 555-56 & n.3 (7th Cir. 1996)(discussing "allowing the case to proceed to discovery against high-level administrators with the expectation that they will identify the officials personally responsible").

Concerning the Appellants' substitution of Defendant Hargett in lieu of Defendant John Doe as the Warden of WMCI. On November 8, 2012, the district court ordered the Appellant to provide the name of the Defendant Warden or Warden(s) of WMCI (Doc. 6); he immediately complied with its order adding Defendant Steve Hargett as the current Warden of WMCI (Doc. 8).

Now, rather confoundingly, the district court seems to have taken the stance that Defendant Hargett, as *current* Warden of the WMCI, should not stand the "imposition of § 1983 liability." As stated above, this perplexing dilemma would've been remedied with discovery. *See Gillespie v. Civiletti,* 629 F.2d 637, 642-43 (9th Cir. 1980) finding the district court abused its discretion in dismissing the case with respect to John Doe defendants without requiring the named defendants to answer interrogatories seeking the names and addresses of the supervisors in charge of the relevant facilities during the relevant time period.

In conclusion, for the reasons stated above, this Court should reverse the district courts finding that the Defendants' level of personal involvement in the religious deprivation claims was merely incidental and not factual. Accordingly, the Court should remand back to the district court for trial on the merits.

e. Fifth Issue:

THE DISTRICT COURT ERRED IN ITS DECISION THAT THE DEFENSE OF QUALIFIED IMMUNITY SHIELDED THE DEFENDANT'S FROM THE APPELLANTS' RELIGIOUS DEPRIVATION CLAIMS

Argument and Authorities:

With respect to the Appellants Religious Deprivation Claims the Defendant's are not shielded by the Defense of Qualified Immunity: In finding that the Defendant's were shielded from the Appellants' First Amendment, Fourteenth Amendment, and RLUIPA claims the district court ruled:

> "While Plaintiff, even as prison inmate, has a First Amendment right to religious exercise, and a Fourteenth Amendment right to equal protection as well the protection of the RLUIPA, the factual allegations of his complaint and other pleadings, as previously discussed, fail to adequately prove a violation of either constitutional rights or of the RLUIPA. The Defense of qualified thus shields the Defendants." (Doc. 37, page 35).

On appeal, whether before or after entry of a final judgment, a court evaluating a claim of qualified immunity will be required to resolve at least two and, depending how the matter is conceptualized, potentially three issues. First, the court must determine whether the plaintiff has alleged the deprivation of an actual constitutional right. If so, the court must determine, second, whether the right was clearly established at the time of the alleged violation. And, third (or as part of the determination whether the right was clearly established), the court will decide whether the particular conduct of the official was a clearly established violation of the right at stake. In making these determinations, the court necessarily also will be determining which genuine issues of fact are material.

The Defendant's never stated or argued any factual deficiency with respect to the Appellants' religious deprivation claims, instead they argued: "Dismissal is warranted where, as here, a reasonable public official would not have known that his conduct was clearly unlawful." (Doc. 20, Page-6). A Court of Appeals has stated that ignorance of the law does not invoke the Qualified Immunity doctrine for Defendant's. *See Chandler v. Baird,* 926b F2d 1057, 1060 (11th Cir. 1991)(fact that neither defendant "understood" that their action were illegal did not establish qualified immunity).

The Defendant's further contended that they were entitled to Qualified Immunity because: "The present case presents a clear example of conduct that did not violate clearly established law. No controlling authority instructed prison officials that they are required to provide sweat lodge ceremonies to prisoners in segregation who cannot participate in the services offered to the general population. As argued below, this is not the rule of law. But if it is determined to be, the Defendants actions are nonetheless protected by the doctrine of immunity." (Doc. 20, Page-8).

As stated above, Court's, including this one; have spoken on the issue of whether or not the denial of a Sweat Lodge is a substantial burden on Native American prisoner's religious exercise under the First Amendment, RLUIPA, and RFRA. *See: McKinney v. Maynard*, 952 F.2d 350 (10th Cir. 1991); *Werner v. McCotter,* 49 F.3d 1476, 1480 (10th Cir. 1995)("McCotter"("We may take judicial notice of the central and fundamental role played by the Sacred Sweat Lodge in many Native American religions."); *Thomas v. Gunter*, 32 F.3d 1258 (8th Cir. 1994); *Allen v. Toombs*, 827 F.2d 563, 565 & nn.4, 5 (9th

Cir. 1987); and *Farrow v. Stanley,* 2005 WL 2671541, at *8 (D.N.H. 2005)(Denial of a sweat lodge is a substantial burden on Native American prisoner's religious exercise.); and *Youngbear v. Thalaker,* 174 F. Supp. 2d 902, 914-15 (N.D. Iowa 2001)(one year delay in providing sweat lodge for Native American religious activities violates First Amendment).

In analyzing whether a right was "clearly established" at the time of the incident in question, the Plaintiff may of course rely on a Supreme Court, Tenth Circuit, or other courts of appeals decisions directly on point, but such proof is not necessary as long as "the alleged unlawfulness was apparent in light of preexisting law" from other circuits. *See Seamons v. Snow,* 84 F.3d 1226, 1238 (10th Cir. 1996).

There need only be a "clearly established weight of authority." *See Medina v. City & County of Denver,* 960 F.2d 1493, 1497-98 (10th Cir. 1992). In the present case, and as described above, there is Tenth Circuit and other circuit/district court authority directly on point that defeats the Defendants' claim of qualified immunity. For some seventeen years the Tenth Circuit has recognized the necessity and significance of Native Americans Inmates participation in a Sweat Lodge Ceremony, even to the "most heavily restricted, risk group" McCotter.

In conclusion, the Appellant has made an adequate showing of his religious deprivation claims *via* the citation of facts and law set forth in his Complaint, Memorandum's, and Affidavit's. Moreover, if this Court holds that the right allegedly violated was not clearly established but refuses to decide whether such a right exists in the first place, there is a very real possibility that unconstitutional conduct will be undeterred because officials who thereafter continue to engage in the same conduct can point to the courts precedent as conclusive on the question of qualified immunity.

As such, the Court should reverse and remand this case back to the district court for trial on the merits.

4. Do you think the district court applied the wrong law? If so, what law do you want applied? The Appellants facts, five issues with argument and relevant authorities have been set forth in their entirety herein.

5. Did the district court incorrectly decide the facts? If so what facts? The district court mistakenly found that their currently exists at the WMCI an "actual"

separate PC yard with regular access provided to the PC inmate population, and that construction of the Appellants "proposed sweat lodge in the middle of the PC yard would obviously undermine the proper functioning of such yard." (Doc. 37, page 26).

At this time, there is "no" actual separate PC yard at the WMCI, which is why the Appellant proposed the consideration of using the vacant 3-4 acre parcel of land ("mistaken PC Yard") adjacent to the PC unit and within the WMCI perimeter security for construction of the segregated Sweat Lodge.

6. Did the district court fail to consider important grounds for relief? If so, what grounds? The Defendant's are not denying sweat lodges, rather, they are denying one prisoner ("the Appellant") access to the sweat lodge based on alleged PC security reasons. The Appellant is undoubtedly a PC prisoner, and courts routinely uphold the legitimate restriction of privileges for segregated prisoners.

Perhaps the difference here, though, is unlike many segregated prisoners in PC, the Appellants' PC status is apt to remain constant for the foreseeable future and might even be considered permanent, so the religious deprivation at issue is likely going to be permanent.

7. Do you feel that there are any other reasons why the district court's judgment was wrong? If so, What? District courts, like the one bellow, are from time to time careless in prison cases especially in determining whether there is a genuine issue of material fact, and in other cases they seem to hold *pro se* prisoners to unusually difficult standards in establishing factual disputes. Such appears to be the case here.

U.S. Court's of Appeal, however, routinely reverse these types of decisions. *See Dale v. Lappin,* 376 F.3d 652, 655-56 (7th Cir. 2004)(per curiam)(rejecting district court's view that plaintiff's statement consisted of "bald assertions" without "concrete facts" where he identified the employees from whom he requested forms, identified the forms requested, and recited other circumstance in detail); *Harris v. Ostrout,* 65 F.3d 912, 916-17 (11th Cir. 1995)(noting that lower court "overlooked" prisoners' affidavits).

8. What action do you want this court to take in your case? Because the Defendant's have failed to meet their burden of proof that denial of the Appellants' request to participate in Sweat Lodge ceremonies or in the alternative construction of a segregated Sweat Lodge for PC Inmates to use furthers compelling prison administrative

concerns, this Court should reverse the district courts' grant of summary judgment and judgment for the Defendants and grant the relief requested in Mr. Yellowbear's Complaint or the case should be remanded back to the district court for trial on the merits. The Court should consider granting any such other relief it deems appropriate under the circumstances.

9. Do you think the court should here oral arguments in this case? If so, why?

Oral argument is requested because the issues relevant are sufficiently complex and oral argument would benefit this Courts' understanding of the issues.

8-9-12
Date

Ambrose Yellowbear, Jr.
Signature

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2012 **I sent a copy of**
(Date)

the Appellant/Petitioner's Opening Brief to Melissa E. Westby, **at** Assistant
(Opposing Party or Attorney)

Attorney General for Wyoming, 2424 Pioneer Avenue, 2nd Floor, Cheyenne, WY 82002,

the last known address/email address, by First Class U.S. Mail, Postage Pre paid .
(state method of service)

8-9-12
Date

Ambrose Yellowbear, Jr.
Signature

CERTIFICATE OF COMPLIANCE

I certify that the total number of pages I am submitting as my Appellant/Petitioner's Opening Brief is 30 pages or less or alternatively, if the total number of pages exceeds 30, I certify that I have counted the number of words using Microsoft Windows xp Professional© "Word Count" and the total is 13,985 words, which is less than 14,000. I understand that if my Appellant/Petitioner's Opening Brief exceeds 14,000 word, my brief may be stricken and the appeal dismissed.

8-9-12
Date

Ambrose Yellowbear, Jr.
Signature