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UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

NORTHERN ARAPAHO TRIBE, on its own behalf and on behalf of its members, and	)	
DARRELL O'NEAL, Sr. Chairman, Northern Arapaho Business Council, in his official and individual capacities, Plaintiffs,	)	
vs.	)	
	)	Civil. No. 11-CV-347-J
DANIEL M. ASHE, Director, U.S. Fish and Wildlife Service, and	)	
MATT HOGAN, Assistant Regional Director, Region 6, Migratory Birds and State Programs	)	
in their official capacities,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON REMAINING CLAIMS

INTRODUCTION

This case presents the question of whether an agency of the United States Government can ban adherents of the Northern Arapaho religion from practicing a ceremony central to their faith on the reservation that is their home. The U.S. Fish and Wildlife Service ("FWS," "Agency" or "Government") has fashioned a policy and issued a permit that prohibits the Tribe and its members from doing so. The prohibition is ostensibly based on "religious beliefs" and "objections" of certain members of a neighbor tribe. The Government elevates and converts those objections into a permit restriction that violates the First Amendment, disregarding one of the most cherished principles of liberty in American democracy – the *individual* right to the free exercise of religion.

This memorandum is submitted in support of Plaintiffs' Motion for Summary Judgment on Remaining Claims, which seeks declaratory and injunctive relief under the First Amendment and similar relief under the Administrative Procedures Act ("APA"). Plaintiffs' claims under the Religious Freedom Restoration Act ("RFRA") were dismissed by the Court (Doc.# 45 and 49). Many of the facts, legal authorities and issues involved in the RFRA claim overlap with the claims at issue here. Plaintiffs incorporate herein by reference their earlier submissions and memoranda to the Court (Doc.# 29, 30, 42, 46) and address the Constitutional and APA claims more specifically below.

PROCEDURAL BACKGROUND

Plaintiffs ("Tribe" or "NAT") applied to the Government for an eagle take permit under the Bald and Golden Eagle Protection Act ("BGEPA"), 16 U.S.C. §668 *et seq.*, in October, 2009. FWS ROD at 000224-27; 000235-38; and 000528, para. 1.

On June 8, 2011, the Government met with both the Northern Arapaho Business Council and the Eastern Shoshone Business Council ("SBC") sitting in joint session ("JBC") in Fort Washakie, Wyoming. *Id.* The SBC did not object to NAT's permit application, but requested an additional thirty days to consult with elders of both Tribes. *See* FWS ROD at 000138.

The Tribe filed this lawsuit on November 7, 2011, because the Government still had not acted on NAT's permit application. In response to the lawsuit, on March 9, 2012, FWS issued an eagle take permit. The permit bars Plaintiffs from the take of eagle on the Wind River Indian Reservation, where most Northern Arapaho people live.

The Government has explained that the Agency fashioned the permit restriction based on objections from certain members of the Eastern Shoshone Tribe ("EST"), who claim that the ceremonial take of an eagle in the Arapaho religious tradition offends the "religious beliefs" of the objectors. Consultation between the FWS and EST "was complete" on December 13, 2011, FWS ROD at 002291, para. 11.

The Government considered *U.S. v. Wilgus*, 638 F.3d 1274, 1290 (10th Cir. 2011), and construed the holding to require FWS to give great weight to the objection. FWS ROD at 000532, para. 18 ("the EST's religious beliefs were infringed by granting the NAT's permit application."). The Government reached a decision that requires reservation residents who practice in the Arapaho religious tradition to travel away from the place where they live to conduct certain ceremonies to avoid offending the sensibilities of the objectors.

RECENT RECORD DEVELOPMENTS

The Government submitted a supplemental administrative record to the Court regarding the second permit (effective March 1, 2013) (Doc.#74). It then submitted additional supplements to its original record (Doc.#75), including objections to a NAT permit from certain EST members. The Government's issuance of an off-reservation permit, and its denial of an on-reservation one, created a unique set of religious questions and concerns for the NAT, which are nowhere addressed in the Government's original or supplemental record.

The NAT, in its governmental role, undertook a review of these concerns which was open to the public and resulted in input from tribal elders and other EST and NAT members and academicians. NAT endeavored to determine whether a permit allowing the ceremonial take of an eagle in Wyoming, but banning the ceremonial take on the Wind River Reservation ("WRR"),

meets the religious needs of those who practice in the NAT tradition. NAT concluded that it does not. The Tribe determined certain facts and reached conclusions regarding both the federal and the Tribe's permit system, which is operated under the laws of the Tribe (declaration of Susan Johnston and records of the NAT, attached as Plaintiffs' Exhibit 3).[1] References to the NAT's administrative record are to NAT ROD at [page], and references to the Government's administrative record are to FWS ROD at [page]. A timeline of key events of record is provided in Appendix A, attached hereto.

Among other facts, the NAT record shows that one current member of the EST Business Council, along with many other EST members, is a yearly participant in the NAT Sun Dance; NAT ROD at 028 and 032-33; that traditionally, EST "got their eagles from the wild," NAT ROD at 038; and that "this objection [by EST] is political and not a real dispute over traditional values and ceremonies," NAT ROD at 040. "It is unfortunate that the Shoshone elected leaders have opposed Arapaho traditional ceremonial needs." NAT ROD at 036.

UNDISPUTED FACTS

The following summarizes material facts which are before the Court and not subject to dispute.

1. The take of eagles proposed by Plaintiffs is for bona fide religious purposes. The Government admits that the proposed take of bald eagles by the NAT "is for *bona fide* religious purposes." FWS ROD at 000531, para. 16. These religious purposes include "the taking of an eagle" for the Sun Dance which occurs "once every year." *Id*. Because a "clean" eagle is required, the use of eagle parts from the National Eagle Repository "was not a reasonable option" for the Tribe. FWS ROD at 000533, para. 26. Use of the Repository "is not the least restrictive means of achieving the Service's compelling interests in protecting bald eagle populations and protecting NAT religion and culture." FWS ROD at 000533, para. 26.

[1] Plaintiffs' Exhibit 1 (Title 13, Northern Arapaho Code - Religious Freedom) and 2 (July 5, 2011, letter from Defendant Hogan) are attached to its initial Complaint, Doc.#1.

2. The take of an eagle is itself a central religious ceremonial practice and is part of the Sun Dance ceremony. The Government admits that "[t]he take of the eagle used in the offering for the Sun Dance is itself part of the ceremonies leading up to the Sun Dance... the sponsor's role and responsibilities, including the taking of an eagle, are important components of the Sun Dance and are part of the accepted cultural practices leading up to the Sun Dance." FWS ROD at 531 (16). *See also* NAT ROD at 011 (Anderson letter) ("eagle hunting was and is a ceremonial practice carefully done within [prescribed] limits..."); NAT ROD at 035 (C'Hair declaration) ("The take of an eagle is itself a religious ceremonial practice"); and NAT ROD at 071.

3. The proposed take is compatible with preservation of a healthy eagle population. The Government admits that NAT's proposed take of eagles on the WRR for religious use "is within the annual take threshold established by the Service." FWS ROD at 000531, para. 15. The proposed take by NAT "is compatible with the preservation of the bald eagle" under applicable regulatory standards. *Id*.

4. The Government's ban of the take on the WRR is grounded solely on objections from Shoshone tribal members who are offended by Arapaho religious practices. The Government found that "[a]llowing take on the WRR would burden the EST's religious and cultural beliefs." FWS ROD at 002280, para. 8. The Agency has been steadfast in its position that objections by the EST members prevent it from issuing a permit on the WRR. FWS ROD at 002278, para. 2, 000842, 000922-23, 000189, and 000532, para. 18.

As discussed below, the question whether these objections are bona fide "religious beliefs" attributable to all Shoshone people is highly dubious and in dispute. Nevertheless, the record is now clear that the Government's decision is based solely on those objections.

5. The proposed take does not burden religious <u>practices</u> of members of another Tribe. The take of eagles by NAT does not prevent Shoshone tribal members from practicing in any religious tradition that any Shoshone tribal member may choose. The proposed take does

not prevent Shoshones from obtaining their own eagles and eagle parts for religious use from the Federal Repository, which some prefer (Doc.#44, 9-28-12 motion proceedings trans., Varilek at 51-52) and *see* NAT ROD at 072-74 and at 039, Leonard declaration ("The take of an eagle, when done properly in accordance with tradition, does not effect [sic] or interfere with the traditions or religious rights of Shoshone members [like myself]"). The proposed take in no way burdens Shoshone members who practice in the Northern Arapaho tradition and who need a "clean" eagle for the NAT Sun Dance in which they participate. NAT ROD at 028, 032-33. Nor would the proposed take prevent Shoshones from participating in any other religious activity, like services at the Roman Catholic or Latter Day Saints churches in Fort Washakie, located on the WRR.

There is no evidence in the record that the ceremonial take of an eagle by NAT on the WRR (or anywhere) would criminalize, prevent, or burden any religious *practice* of members of the EST, nor pose a "threat of extinction" to EST, *U.S. v. Hardman*, 297 F.3d 1116, 1128 (10th Cir. 2002).[2]

DISPUTED FACTS

The following are material facts before the Court, regarding which there is a substantial dispute:

1. The question whether the objections upon which the Government relied are based on "religious belief" is disputed. *Amicus* has asserted that Shoshone tribal members do not take eagles for religious purposes and objected to an on-reservation NAT permit on those grounds. There is no substantial evidence to support this claim. A careful review of the record shows that the objections are more accurately characterized as an asserted "50% right and interest in every

[2] The Government does make the bare assertion at one point that the ceremonial take of an eagle would burden EST "religious practices concerning the sacredness of bald eagles." Doc.#47 at 3. But it identifies no ceremony or practice of the EST curtailed by an intentional eagle take by NAT. The Government has since clarified its reliance on the theory that a NAT permit burdens "EST's religious and cultural beliefs." FWS ROD at 002280, para. 8.

eagle," Doc.#36 at 28, or anti-Arapaho prejudice that is personal or political in nature, rather than a "belief" that is religious. *See* Doc.#30 at 12, Doc.#46 at 3, and NAT ROD at 072-074.

2. The question whether "killing eagles" is prohibited as a matter of Shoshone religion and culture is disputed. This is closely related to the question about whether certain EST members are really objecting on their own "religious" grounds, but is also a distinct question about Shoshone history and culture. In the event the Court ultimately concludes that FWS has a duty regarding EST traditional religious beliefs, NAT disputes that their proposed take on the WRR offends those beliefs. *See* Doc.#30 at 12, Doc.#46 at 3, and NAT ROD at 072-074.

In light of these disputed facts, it would be improper for the Court to dismiss NAT's Complaint based on either of these disputed factual premises.[3]

Nonetheless, as described below, the Court can grant summary judgment to the NAT because, regardless of these factual disputes, the Government has failed under strict scrutiny to meet its burden by demonstrating a compelling governmental interest in banning the take of an eagle by Arapahos on the WRR. Likewise, as a matter of law, the Government's action violates the APA and must be set aside.

LEGAL STANDARD

A motion under Fed.R.Civ.P. 56 should be granted where the moving party shows there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

[3] When the Court granted summary judgment to FWS *sua sponte* at an earlier procedural stage, it had not yet had the opportunity for a careful review of the Agency's factual findings and determinations under the APA.

ARGUMENT

I. The Permit Restriction Violates the Religion Clauses of the First Amendment.

Governmental action that "criminalizes religiously inspired activity" is subject to strict scrutiny. *Bowen v. Roy*, 476 U.S. 693, 706 (1986). "To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (internal citations omitted) (1993). "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Id.* The government's burden is specific – it must demonstrate that the compelling interest test is satisfied through application of the challenged law to "the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro Espirita Beneficiente Uniao De Vegetal v. Ashcroft*, 546 U.S. 418, 430-31 (2006). The Religion Clauses (Free Exercise and Establishment) are mutually supportive, and doctrines under one are relevant to the other as well. Lawrence H. Tribe, *American Constitutional Law* (New York, 1978) at 814-15.[4]

The parties agree that the Government has a compelling governmental interest in protecting eagles as a species,[5] but that compelling interest is not at issue here because the Government concedes that NAT's proposed take does not threaten the eagle population.

Instead, the Government contends that the compelling governmental interest that justifies

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[4] "Allocating religious choices to the unfettered consciences of individuals under the free exercise clause remains, in part, a means of assuring that church and state do not unite to create the many dangers and divisions often implicit in such an established union. Similarly, forbidding excessive identification of church and state through the establishment clause remains, in part, a means of assuring that government does not excessively intrude upon religious liberty." *Id.*

[5] *See* Amended Complaint and Answer, Doc.#18 and Doc.#22, para. 33 in each.

the ban on NAT religious activity arises from objections from certain Shoshone individuals who claim the Arapaho religious practice offends their "religious beliefs." In addition to the factual deficiencies in the record, the Government errs as a matter of law. The fact that some may harbor "religious beliefs" that are "offended" by the religious practices of others cannot constitute a compelling government interest. *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1063 (9th Cir. 2008). Further, the permit restriction, based as it was on a non-existent compelling interest, creates excessive entanglement with religion.

NAT is entitled to summary judgment on its First Amendment claim because the following elements are established beyond genuine dispute: (1) the Government action burdens religious activity by criminalizing it; (2) the Government has no compelling interest in doing so; and (3) the Government ignores the least restrictive means requirement in fashioning its permit restrictions.

A. Denial of an eagle take permit on the WRR burdens the religious activity of practitioners of the Northern Arapaho Religion by criminalizing that activity.

On behalf of itself and its members, NAT sought an eagle take permit *within* the WRR. FWS ROD at 000226 and 000236. The WRR, where most NAT members live, comprises approximately 2.3 million acres of land in central Wyoming. *U.S. v. Mazurie*, 419 U.S. 544, 546 (1975). The Government denied this request. The permits issued by FWS (2012 and 2013) categorically exclude the take of an eagle for religious purposes by members of the NAT anywhere within the WRR.[6] Without a permit, the take of an eagle on the WRR is a crime.

[6] The 2012 permit provides that the "location where authorized activity may be conducted" is "Wyoming, outside the exterior boundaries of Wind River Reservation." FWS ROD at 000671, para. 10. The same restriction applies to the 2013 permit. FWS ROD at 002241, para. 10.

16 U.S.C. §668(a); *U.S. v. Friday*, 525 F.3d 938 at 941 (10th Cir. 2008).[7] The prohibition against religious take of an eagle on the WRR "criminalizes religiously inspired activity." *Bowen* at 706. As such, the Government must show a "compelling governmental interest" in overriding NAT's free exercise rights and that the Government has met that compelling interest using the least restrictive means. *Lukumi* at 533.

B. The Government has not demonstrated any compelling interest which justifies criminalizing the religious activity of Arapaho practitioners.

The Government contends that a religious-based objection by certain members of the EST, who do not believe in taking an eagle for religious purposes, serves as its compelling interest and justifies making criminal the ceremonial take of an eagle by members of the NAT for their own religious purposes. The Government's analysis does not withstand scrutiny.

1. The Government was misled into concluding that all Shoshone people are offended by the use of eagles in the Arapaho religious tradition.

As its own record makes clear, the Government's determination that Shoshone people have "religious beliefs" that are "offended" by the taking of eagles is based on input from a handful of individual commentors: (1) Mr. Wade LeBeau; (2) Kimberly Varilek, Esq, Attorney General for the EST; and (3) unidentified elders and members of SBC on a conference call with FWS.

Viewed through the lens of strict scrutiny, where the Government must carry the burden, these comments cannot support the determination that all traditional Shoshone people hold "religious beliefs" that are offended by a religious ceremony of the Arapaho.

Mr. LeBeau may well be one of the unidentified EST "elders" on whom the Government relies, but any reliance on Mr. LeBeau is misplaced. Mr. LeBeau is a disgruntled former NAT

[7] Mr. Friday "was charged under federal law with shooting an eagle without a permit [on the WRR], which is forbidden by the Bald and Golden Eagle Protection Act." *Id.*

employee who devotes long hours to espousing hateful views that the NAT and its members have no rights at all at the Wind River Reservation.[8] Mr. LeBeau has himself said the dispute between the Tribes in the case at bar is political or legal, not religious:

> This was NEVER about religious freedom, it is about the dishonorable Arapahoe trying to set precedent that you don't have to ask the TREATY TRIBE for permission to do anything. BUT YOU DO!! This is about the Arapahoe trying to take this reservation from the SHOSHONE tribe.

Plaintiffs' Exhibit 4. When an Arapaho says the case at bar "is NOT about treaty rights... it's about the religious rights... of northern arapaho tribal members," Mr. LeBeau responds:

> Only people WITHOUT treaty rights say [what] you say.
>
> * * *
>
> The Arapahoe tribe LOST the EAGLE case because the Shoshone Tribe opposed it. Every case that comes up that will involve them actually having equal rights to the Shoshone will be shot down because the SHOSHONE are the ONLY tribe with treaty rights."

Id.

In response to a draft Wyoming interpretive plan which includes some Arapaho history about the Sand Creek massacre, Mr. LeBeau assures the State employee that she will be banned from the Wind River Reservation, which he sees as subject solely to Shoshone rule:

> You cannot place a foot on our reservation... This is the SHOSHONE RESERVATION and we are going to make sure we are represented correctly AS WE DICTATE.

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[8] In just one example, Mr. LeBeau tells the Arapaho to "Get out of here. Go. Assert your treaty rights. Go. Quit mooching off Shoshone people. Go. You can't cause you have NOTHING without the Shoshone tribe! We don't need you to be here, you need us. And you know that and hate it." Plaintiffs' Exhibit 4, attached hereto.

Plaintiffs' Exhibit 5. Protecting the sensibilities of Mr. LeBeau from offense does not constitute a compelling governmental interest. *See Everson v. Board of Education*, 330 U.S. 1, 12 (1947) ("cruel persecutions were the inevitable result of government established religions").

Similarly, the representations of the Shoshone Attorney General at oral argument cannot support the determination of the Government. Statements of counsel are not evidence. *Olenhouse v. Commodity Credit Corp*., 42 F.3d 1560, 1576 (10th Cir. 1994). The Government improperly gives Ms. Varilek's comments special emphasis, having made them part of its administrative record, FWS ROD at 002287-88. A careful review of her comments during the pre-decisional phase of the record reveals objections that are personal or political in nature, rather than religious. *See* Doc.#30 at 12, fn. 16, FWS ROD at 001016-20. The Government ignored her apparent political alliance with Mr. LeBeau, as well as the fact that she was running for reappointment on an anti-Arapaho platform. *Id.* More troublingly, comments provided by Ms. Varilek make no mention of the fact that many EST tribal members practice in the Northern Arapaho religious tradition. NAT ROD at 073. In using her office to characterize the "offense" and "religious beliefs" of the EST, Ms. Varilek has left many members of that Tribe behind, and effectively misled the Agency.[9] In the post-decisional record compiled by the Government, we see increasing emphasis from Ms. Varilek on EST "religious beliefs," which serves to bend what began as political objections into the rhetoric of *Wilgus*. The views are entitled to no more weight that those of other government attorneys who argue in favor of government action or legislation that infringes on the First Amendment rights of individuals. *See, e.g.,* 1987 Fla. Op. Atty. Gen. 146 (1987) (opining that the City of Hialeah "may adopt an ordinance prohibiting the

[9] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 642 (1943).

religious sacrifice of animals within the city) (view rejected by the Supreme Court in *Lukumi*.) The EST AG's advocacy in protecting certain constituents from offense is not evidence to be weighed in the balance, and does not constitute a compelling government interest that satisfies the requirements of strict scrutiny.

Aside from the commentary by Mr. LeBeau and Ms. Varilek, the remainder of the evidence of Shoshone "religious beliefs" is derived from a conference call, where unidentified participants expressed a view that their beliefs were offended by Arapaho religious practice and described a traditional Shoshone catch and release[10] technique to harvest eagle tail feathers. The participants in the call glossed over eagle bone whistles, whole eagle wings, and tail fans used in the Shoshone religious tradition, failing to explain how the eagle might have fared without these parts after its "catch and release." NAT ROD at 073. Through the lens of strict scrutiny, this phone call is inadequate to establish a compelling governmental interest. Moreover, the characterization of the call conflicts with the weight of evidence before the Court about Shoshone "religious beliefs." *Id.*

2. Protecting "religious belief" from offense is not a compelling interest under *Navajo*.

If we set aside the evidentiary problems with FWS' determination that Shoshone "religious beliefs" are "offended" by Arapaho religious practice, and accept, *arguendo*, these assertions at face value, the Government still cannot overcome its burden under strict scrutiny to demonstrate a compelling government interest.

The Government contends that its compelling interest lies in protecting certain Shoshone "religious beliefs" that are offended by Arapaho religious practice. Here, the Government

[10] "Catch and release" is a "take" under FWS regulations. "Take means pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest or disturb." 50 C.F.R. §22.3. Apparently, the Government looks the other way when EST members perform the "catch and release" form of take, which is also a crime unless done pursuant to a federal permit.

equates "religious beliefs" with "religious practices," and ignores the crucial distinction between these two concepts clarified in the leading case that addresses it head-on.[11]

In *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008), Indian tribes and their members opposed the use of recycled wastewater to make artificial snow for skiing in the San Francisco Peaks on the grounds that doing so "will spiritually contaminate the entire mountain and devalue their religious exercises" there. *Id.* at 1063. The District Court found that although the religious beliefs were sincere:

> ... there are no plants, springs, natural resources, shrines with religious significance, or religious ceremonies that would be physically affected by the use of such artificial snow... Plaintiffs continue to have virtually unlimited access to the mountain, including the ski area, for religious and cultural purposes. On the mountain, they continue to pray, conduct their religious ceremonies, and collect plants for religious use.

Id. The grant of a permit to NAT would not physically affect any EST religious ceremony; nor would any eagle population be adversely affected. EST members who object to the NAT permit remain free to pray, conduct their ceremonies and obtain their eagles from the Federal Repository, and to enjoy the unimpaired wild population of eagles that traverse the WRR.

The Ninth Circuit analyzed the difference between burdens on traditional Indian religious *beliefs* and burdens on Indian religious *activity*, saying:

> Thus, the sole effect of the artificial snow is on the Plaintiffs' subjective spiritual experience. That is, the presence of the artificial snow on the Peaks is offensive to the Plaintiffs' feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain. Nevertheless, a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a 'substantial burden' - a term of art chosen by Congress to be defined by reference to Supreme Court precedent - on the free exercise of religion. Where,

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[11] By contrast, the distinction was not an issue in *Wilgus*, where the court seems to use the terms indiscriminately.

> as here, there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct which would violate Plaintiffs' religious beliefs, *there is no 'substantial burden' on the exercise of their religion. Were it otherwise... [e]ach citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires.* Further, giving one religious sect a veto over the use of public park land would deprive others of the right to use [that land].

Id. at 1063-64 (emphasis added). Here, the "sole effect" relied upon by the Government as a compelling interest is the contention by some members of the EST that their "subjective spiritual experience" may be diminished if they know that NAT members will take an eagle for the NAT Sun Dance because that practice offends them.[12] Defendants improperly grant some EST members veto power over the use of all lands on the WRR for the ceremonial take of an eagle because it offends the sensibilities of those members.

The position urged by the Tribes in *Navajo Nation*, if adopted, also would have created unmanageable governmental obligations. Government could not function effectively if it prohibited activities based on the "religious sensibilities," and the religious-based objections, of tribal members. *Id.* at 1064, citing *Lyng v. Northwest. Indian Cemetery Protective Ass'n.*, 485, U.S. 439, 452 (1988). In the implicit recognition of this important distinction, federal agencies are directed "to accommodate Native American religious *practices*," not beliefs (emphasis added). Memorandum of President Clinton, April 29, 1994, 59 F.R. 22953.

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[12] The Agency is apparently less concerned with the "subjective spiritual experience" of EST members who worship in the Arapaho tradition. Conversely, the Government gives short shrift to individuals who might have "religious beliefs" that are "offended" by Arapaho practices but live off-reservation and are therefore more exposed to having their "subjective spiritual experience" interfered with by an Arapaho practitioner with a permit to take an eagle off the WRR.

3. Government has identified no compelling interest that advances public safety, peace or order.

With the understanding from *Navajo* that burdening religious "beliefs" is different than burdening religious "practices," it becomes even more clear that the Government has failed to identify a compelling governmental interest that justifies the permit restriction.

Government action which advances *even legitimate governmental interests* when measured "only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Lukumi* at 546. "Actions and practices falling within the bounds of the free exercise clause can only be overcome by governmental interests 'of the highest order'." *International Society for Krishna Consciousness, Inc. v. Barber,* 650 F.2d 430, 444 (2nd Cir. 1981), citing *Wisconsin v. Yoder*, 406 U.S. 205 at 215 (1972). Limitations on free exercise "are justified only by a compelling interest in public safety, peace or order." *Id.* [13]

There is nothing in the record that shows that the permit restriction serves to protect public safety, peace or order.

4. The Government's reliance on *Wilgus* is misplaced.

The Government relies on *Wilgus* and related precedent as the basis for its contention that protecting certain Shoshone "religious beliefs" amounts to a compelling interest. Broadly, the *Wilgus* case stands for the principle that protection of traditional religious practices of federally recognized Indian tribes can serve as a compelling governmental interest when the supply of eagle parts is limited. Beyond that, *Wilgus* does not support the Government's criminalization of the ceremonial take of an eagle by tribal members on the WRR. The factual circumstances in *Wilgus* are markedly dissimilar from those in the case at bar.

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[13] Thus, a compelling interest in public safety, peace or order was sufficient to overcome religiously motivated polygamy and the forced sale of religious periodicals by minor children. *See Reynolds v. U.S.*, 98 U.S. 145 (1878) and *Prince v. Commonwealth of Massachusetts,* 321 U.S. 158 (1944).

(a) The supply and demand problem addressed in *Wilgus* does not apply to the case at bar.

Wilgus was narrowly concerned with the problem of allocating scarce eagle parts from the Repository between Indian and non-Indian practitioners when there are not enough parts to meet demand. *Wilgus* relied upon certain key facts in its analysis. First, the fact that eagle populations are on the rise does not necessarily mean the Federal Repository will see a corresponding increase in eagle parts and feathers. *Wilgus* at 1291. Therefore, the population rise would not reduce or mitigate competition as between Indians and non-Indians for eagles from the Repository. Second, the demand for eagles by tribal members far outstrips the supply available from the Repository. *Id.* If the demand were lower, making eagles available to non-Indians might not be as harmful to tribal members. Third, the court found it difficult to estimate non-Indian demand on parts from the Repository, if they were allowed access. However, Afro-Caribbean religious practitioners alone could number as many as one million, and certainly would increase demand on limited Repository resources. *Id.* The court regarded "the demand for eagle feathers to be essentially a zero-sum game." *Id.* at 1293.

None of these facts is present in the case at bar. Nothing in the record suggests that the ceremonial take from the wild sought by NAT will have any impact on the supply of eagle parts available to EST from the Repository. In fact, the Government has concluded that the ceremonial take proposed by NAT will have no appreciable effect on the wild population, from which the Repository is ultimately supplied. FWS ROD at 000531 at para. 15. "The vast majority of deceased birds turned in to the Repository die from electrocution or collision with a vehicle." *Wilgus* at 1291.

Wilgus rejected options that would allow non-Indians to obtain eagles from the Repository because "feathers and eagle parts will be diverted away from members of federally recognized tribes, the very people that the governmental interest protects." *Id.* at 1295.

Allowing the ceremonial take of an eagle by NAT on the WRR protects NAT members without limiting the supply of eagles or eagle parts available to EST through the Federal Repository.

The federal interest in protecting "religious beliefs" of individual EST members who have put forth objections, if it extends that far, is not "of the highest order" sufficient to overcome the Free Exercise rights of Indian practitioners of NAT religion. *Wilgus* acknowledges a valid governmental interest in the protection of tribal ceremonies based on the political status of Indian tribes when the supply of eagle parts was limited. But protection from offense of the asserted religious *beliefs* of some individual tribal members has never been held to be "of the highest order" necessary to protect public safety, peace or order, or otherwise sufficient to overcome the Free Exercise rights of anyone, let alone to criminalize the religious activities of another Tribe or its members.

(b) *Wilgus* creates no compelling governmental interest in suppressing Indian religions.

By criminalizing the ceremonial take of an eagle by NAT on the WRR, the Government has effectively suppressed NAT religion. The EST and the NAT is each a separately federally recognized Indian Tribe, and nothing in *Wilgus* or BGEPA supports federal action criminalizing the religious practices of one Tribe in order to avoid offending the beliefs of some members of another Tribe. *Wilgus* protects tribal members who need eagles and eagle parts or feathers for traditional ceremonial practices. It does not empower one Tribe to use the Government to block another Tribe's efforts to obtain an eagle for ceremonial purposes. The Government turns *Wilgus* on its head in construing it as a barrier to accessing eagle parts for Native Americans who practice in the Northern Arapaho tradition.

If, under *Wilgus*, the federal government can criminalize a religious ceremony of the NAT based on the alleged religious-based objections of the EST, can it also prohibit other ceremonies the EST or another tribe finds offensive to its beliefs? Could FWS ban the Hebrew

ceremony of Kaparot, or ceremonies in the Santoria faith? The answer is no. *Lukumi*.

Wilgus weighed the federal interest in (1) protecting certain Indian religious practices, coupled with (2) protecting eagles as a species, against asserted Free Exercise rights of Mr. Wilgus, a non-Indian. The ban applicable to Mr. Wilgus was not based on the idea that some tribal members would be offended by his religious practices. Rather, the ban applicable to Mr. Wilgus' religious activity was supported by a need to protect eagles as a species *and* to protect Indian religious activity, which depends on a supply of eagle parts and feathers. The result would be entirely different if tribal members were merely offended by Mr. Wilgus' religious practice and his activity had no negative effect on the supply of deceased eagles available to tribal members. In that case, Mr. Wilgus' Free Exercise rights would prevail.

"The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Lukumi id.* at 547.

C. The Government's gerrymandering of geographic areas for different religious practices is not the least restrictive means.

Even if we assume the Government can criminalize NAT religious practices on the WRR at the request of others who may be offended by them, "[t]he government must also show that no less restrictive means to achieve its end are available." *International Soc.* at 444. The Government has attempted to "balance" what it sees as competing duties under *Wilgus* to two Tribes with religious traditions which are asserted to be in conflict by allowing the NAT religious practice only outside the WRR. The "balance" criminalizes the ceremonial take of an eagle anywhere on the reservation of the NAT and requires NAT (and many EST) members to go outside of their reservation for this central part of their Sun Dance ceremonies. By contrast, those EST members who are offended by NAT Sun Dance tradition are free to practice and

promote their views from home.

Religious co-existence and toleration were contemplated by authors of the Constitution. In *Lukumi*, the City of Hialeah criminalized certain religious conduct (animal sacrifice) by members of the Church. *Id*. at 527-28. The Supreme Court struck down the application of City ordinances prohibiting that religious activity by Church members. The Court did not once suggest that the Free Exercise Clause allowed a "balance" of competing religious views between those of the Church and those who opposed it. Nor did the Supreme Court allow the City to ban Church activities everywhere except *outside* the boundaries of the municipality. Yet, this is precisely what the Government has done in the case at bar. NAT members may only obtain an eagle central for use in the Sun Dance if the ceremonial take occurs *outside* the WRR boundaries, because that religious activity offends the religious sensibilities of some members of the EST. If this approach were valid under the Free Exercise Clause, *Lukumi* would have had a completely different outcome. The Government's denial of an on-Reservation permit and issuance of an off-Reservation one accomplishes an impermissible "religious gerrymander" rejected by the Court. *Id.* at 535, citing *Walz v. Tax Comm'n of New York City*, 397 U.S. 664 at 696 (1970) ("Neutrality in its application requires an equal protection mode of analysis. The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders," Harlan, J., concurring).

Furthermore, the Government's decision to exclude the entire reservation from the ceremonial take of an eagle by NAT does not further any proper interest under *Wilgus*.[14] The federal interest is in protecting existing Indian religious *practices* against repression, not in burdening those practices based on the religious *beliefs* asserted by some of the members of

[14] The Agency treats the location of a take as irrelevant. FWS ROD at 532 para.17. The NAT has explained the significance of the location, which is chosen by the eagle itself. NAT ROD at 071-72.

another tribe. *See* Memorandum of President Clinton, *id.*

Finally, the Government has acknowledged, at least in passing, that the Shoshone and Arapaho Tribal Court could have a role in deciding important issues in this case. FWS ROD at 002278, para. 2. The only way Tribal Court can make any meaningful determination is if the Government *issues* the permit,[15] subject to any applicable laws of the Tribe. In fact, this condition already applies to the issued permit[16] and is a standard provision on FWS permits of this kind. Issuance of a permit subject to Tribal law allows for the protection of legitimate cultural or other concerns of both Tribes in the least restrictive means.

D. Granting the permit would avoid excessive entanglement in religious issues.

Among the actions forbidden under the First Amendment, government action "must not foster an 'excessive government entanglement with religion'." *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971), citing *Walz* at 674. Here, denial of the permit on the WRR entangles FWS in identification of the core "traditional" EST religion (the one, "true" EST religion) subject to protection under *Wilgus*.[17] It also entangles Government in ongoing effects of the annual permit on religious practices of EST and NAT members and the intent of individual EST members who object on "religious" grounds. As we have seen, whether EST traditional religion is "offended" by the ceremonial take of an eagle remains an issue of fact contested by members of both Tribes. NAT ROD at 072-74.

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[15] As long as the permit on the WRR is denied, there is nothing the Tribal Court can do to prevent criminal prosecution by the United States for the ceremonial take of an eagle by a tribal member without a federal permit.

[16] FWS ROD at 000071 (2012 permit) and 002241 (2013 permit), para. 11.B. ("The validity of this permit is also conditioned upon strict observance of all applicable foreign, state, local, tribal or other federal law.")

[17] *U.S. v. Ballard*, 322 U.S. 78, 86-87 (1944) ("Law in a nontheocratic state cannot measure religious truth.").

These very concerns may be resolved, and are best resolved, by the Tribes themselves as a matter of tribal law and custom determined in their Tribal Court. NAT ROD at 074-75; *see Federal Indian Law*, Cohen (2012 ed.) at 4.05[4]. To avoid the continuing entanglement into questions of a religious nature, the Agency should issue the permit subject to applicable laws of the Tribes, as FWS customarily does with such permits and as it has already done for the off-reservation permit. FWS itself seemed to favor, then ignore, this approach. The views of James Dubovsky, the Chief of the Division of Migratory Bird Management, Mountain and Prairie Region were that:

> [Denial of the NAT permit] based on another tribe not supporting issuance of that permit... puts us in a very bad position, as the arbiter of appropriate disposition of eagles among tribes... I would hope we could [issue the permit] with the understanding that the permit does not authorize any activity that is inconsistent with tribal laws. Thus, we plan to issue the permit, and any issues remaining are the result of tribal laws and regulations and would need to be worked out amongst the tribes, and not involve our office.

FWS ROD at 000283 and 000908. Defendant Matt Hogan, Assistant Regional Director, Region 6, Migratory Birds and State Programs, concurred. FWS ROD at 000481-82. For reasons not explained in the record, the Government has foreclosed this valuable approach by categorically denying any take permit on the WRR.

Relief sought. NAT requests that the Court declare the denial of an eagle take permit to NAT on the WRR to violate the Religion Clauses of the First Amendment and enjoin FWS from enforcing that permit restriction. Standard permit conditions requiring compliance with other applicable law may remain in the permit. Questions of tribal law, custom, and religious tradition should be left to the Tribes themselves to resolve through the Tribal Court or other appropriate means.

II. In violation of the APA, the FWS bans a traditional religious ceremony of the NAT anywhere on the Wind River Indian Reservation.

Just as the Agency's refusal to issue a permit to the NAT fails to meet the strict scrutiny standards under the First Amendment, the decision likewise does not meet the requirements set out in the Administrative Procedures Act, 5 U.S.C. §706(2) ("APA"). Review under these requirements establishes that the decision is unlawful and should be set aside.

The FWS is charged by Congress with the responsibility of implementing the BGEPA, which embodies Congress' intent that Native Americans like NAT practitioners have access to eagles for religious purposes, and provides a permit process for taking eagles from the wild. 50 CFR §22.22. The APA provides for relief when government agencies err in implementing the laws of the United States, or act erratically or unreasonably in doing so. In this case, the Agency has veered erratically across and beyond the breadth of its lawful obligation to implement BGEPA. At one extreme, where this case began, the Agency issues no permits. The Agency then dis-entrenches and quickly reaches a determination that the permit poses no threat to a viable eagle population, but ranges beyond their discretion and lawful authority into an evaluation of political and "religious" objections to the permit. As described below, the record reflects a sequence of wrong turns, where the Agency's conduct is arbitrary, capricious and contrary to law.

Standard of Review

Judicial review of agency action is governed by §706 of the APA and requires a "determination of (1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion." *Olenhouse, id.*, at 1573-74.

> The duty of a court reviewing agency action under the "arbitrary or capricious" standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made.

> In reviewing the agency's explanation, the reviewing court must determine whether the agency considered all relevant factors and whether there has been an abuse of discretion. Agency action will be set aside "if the agency relied on factors which Congress has not intended for it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Id. at 1574 (internal citations omitted).

A. Under 50 C.F.R. §22.22, the Agency's charge is to issue permits based on biological science so that viable eagle populations are protected.

The regulation implementing the BGEPA's exception for "Indian religious purposes" appears at 50 C.F.R. §22.22. Subsection (c) of the regulation answers the question, "How do we evaluate your application for a permit?" as follows:

> We will... only issue a permit to take... when we determine that the taking... is compatible with preservation of the... eagle. In making a determination, we will consider, among other criteria, the following:
>
> > (1) The direct or indirect effect which issuing such a permit would be likely to have upon the wild populations of ... eagles; and
> >
> > (2) Whether the applicant is an Indian who is authorized to participate in bona fide tribal religious ceremonies.

Thus, the only enumerated criteria which FWS is authorized by its own regulation to evaluate are the viability of the population and the sincerity of the religious belief of the Indian applicant. The Agency found both these criteria satisfied. That should have been the end of its evaluation.

Injecting a new criterion – namely, whether traditional religious beliefs of another Indian Tribe within the geographical area of the permit application would be "offended" – is clearly outside the scope of the statute and the regulations, and indeed well beyond the statutory

authority and the expertise of the Agency. "For *Chevron*[18] deference to apply, the Agency must have received Congressional authority to determine the particular matter at issue in the particular manner adopted." *City of Arlington v. F.C.C.*, 133 S.Ct. 1863, 1874 (2013) (distinguishing *United States v. Mead Corp.*, 533 U.S. 218 (2001), denying *Chevron* deference to action by an agency with rulemaking authority that was not rulemaking). When an agency interprets a statute lying "outside the compass of its particular expertise" no deference is due. *Hydro Resources, Inc. v. U.S.E.P.A.*, 608 F.3d 1131, 1146 (10th Cir. 2010). Any suggestion that a religious objection factor falls within "other criteria" under 50 C.F.R. §22.22 would lack merit as contrary to the purpose of the statute. "Agency action will be set aside if the agency relied on factors which Congress has not intended for it to consider." *Olenhouse, id*. at 1574.

B. The Agency's *ultra vires* foray into "religious objections" resulted in erroneous factual determinations.

Having strayed beyond the two factors set forth in the regulation, the Government reached a conclusion that an eagle take is offensive to Shoshone religious beliefs. "Agency action will be set aside if the agency... offered an explanation for its decision that runs counter to the evidence before the agency[.]" *Olenhouse, id.* at 1574. As discussed earlier in this Memorandum, the Agency conclusion rests on a flawed factual foundation. The pre-decisional record compiled by FWS reveals no evidence that "religious beliefs" are "offended." Appendix A summarizes the contents of the administrative record relevant to the substance of these objections. There is no substantial evidence to support the Agency's conclusion about "religious objections." *See Olenhouse, id.* at 1575 (internal citations omitted) ("agency action will be set aside if it is unsupported by substantial evidence... 'it is impossible to conceive of a non-arbitrary factual judgment supported by evidence that is not substantial in the APA sense'"). Viewed generously, the record contains three references to personal or "cultural" objections to

[18] *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

the permit. One comes from Mr. Lebeau. *See* FWS ROD at 000381-84. The other comes from Ms. Varilek. *See* FWS ROD at 002288. The last comes in a finding, FWS ROD at 002291, which makes passing reference to a telephone call with SBC and unidentified elders, the substance of which is not contained within the record. These scintilla are inadequate to support the Agency's determination. *Olenhouse, id.* at 1581 (scintilla evidence inadequate).[19]

Perhaps the most noteworthy feature of the pre-decisional record is that Messrs. Hogan and Dubovsky recommended issuance of the permit to NAT within the WRR and the State of Wyoming. *See* p. 22, *supra.* Somehow, internally, these recommendations did not carry the day. Instead, the Agency swerved off into the business of "religious objections."

C. The Agency's *ultra vires* foray into "religious objections" ignored the First Amendment.

With no special expertise in religious matters, it is not surprising that, when the Agency began considering religious objections as factor, that analysis was untethered from the First Amendment. As discussed earlier in this Memorandum, the permit restriction fashioned by the Agency runs afoul of the Free Exercise Clause. Under the APA, these violations of the First Amendment by the Agency are "contrary to law" and must be set aside.

Furthermore, the Agency's action violates the Establishment Clause. "[T]rue religious liberty requires that government... effect no favoritism among sects... and that it work deterrence of no religious belief." *Larson v. Valente*, 456 U.S. 228, 246 (1982) (internal citations omitted). The Government's denial of an on-reservation permit endorses the religious beliefs of some EST members as more important than the religious beliefs and practices of any Indian practicing in the Northern Arapaho religion.

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[19] By contrast, evidence of the religious practices of the NAT regarding the Sun Dance, and the ceremonial take of an eagle required for Sun Dance, are well documented (*see U.S. v. Friday*, 525 F.3d 938, 10th Cir. 2008), NAT ROD at 67-75, and admitted as facts by the Government (*see* FWS ROD at 531, finding 16).

"When government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship." *McCreary County, Ky. v. ACLU*, 545 U.S. 844, 883 (2005) (O'Connor, concurring). "By enforcing the [First Amendment and Establishment] Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat." *Id.* Here, the Government makes NAT members who believe and participate in the Arapaho Sun Dance "outsiders," both figuratively and literally. To conduct the ceremonial take of an eagle, NAT (and many EST) members must go outside their own reservation homes, while other EST members enjoy the privilege that comes from federal support for their religious-based objection to the NAT religious ceremony. The Government leaves the ceremonial take of an eagle on the WRR "for the prosecutor." This violates the Establishment Clause, and is therefore contrary to law under the APA.

D. The procedures that were utilized by the Agency violate due-process.

An agency's decision is "arbitrary and capricious" if it was not the result of procedures that comport with principles of due-process and fair play. *Olenhouse, id.* at 1583. Here, the record reveals serious due process violations.

The "religious objections" factor is absent from the BGEPA regulation, but was created by the Agency in the course of its review of the application. FWS failed to notify the applicant that "religious objections" was a factor at all, let alone the central one, in its deliberation. *See* Appendix A (timeline). By creating this factor and failing to provide notice of that action to NAT, the Agency violated due process. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Agency action deprived NAT of an opportunity to put forth

comments that address the secret "religious objections" factor, in violation of due process. *Id*. As a result, the record compiled by the Agency regarding this factor consists only of objections from EST individuals. These objections were provided to NAT after this action was filed with the Court and the Agency submitted its ROD. *See* Appendix A (timeline). NAT had no opportunity to provide input on the "religious objections" factor prior to the Agency decision, which violated due process.[20] "[A]gency action will be set aside if the administrative process employed violated basic concepts of fair play." *Olenhouse*, *id.* at 1583.

The Agency also improperly relies on post-hoc rationalizations, in violation of the APA. The Agency relies on portions[21] of transcripts of oral argument from the *Amicus*, with record supplements. The oral argument took place approximately six-months after final agency action. Decisions based on "post hoc" rationalizations must be set aside. *Olenhouse*, *id.* at 1577.

E. The Agency failed to properly weigh the federal interest in fostering NAT culture and religion.

Under the APA, agency action will be set aside if the agency failed to consider an "important aspect" of the matter. *Olenhouse*, *id.* at 1574. While giving preclusive weight to asserted EST traditional beliefs in connection with *Wilgus*, the Agency failed to consider the powerful effect of a criminal ban on eagle take by practitioners of NAT traditional religion on the WRR and failed to properly weigh its obligation under BGEPA to ensure access to "clean" eagles as a means of fostering Northern Arapaho culture and religion. As part of that failure, FWS ignored the Religious Freedom Code, enacted by NAT, which establishes an on-reservation

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[20] After the FWS ROD was filed with the Court and obtained by NAT, the Tribe undertook a careful consideration of permit issues affecting the Tribe, including these "religious objections." The Tribe provided public notice and accepted public comment during its review, and issued findings and conclusions in its governmental role. *See* NAT ROD at 067-75.

[21] Proffering transcript excerpts from one particular lawyer for inclusion in the administrative record, as opposed to the whole transcript, is arbitrary and capricious.

eagle take permit system for NAT members and finds that traditional ceremonies of the NAT "are an integral part of the Tribe itself and essential to the survival and well-being of the Tribe and its members." 13 N.A.C. 101(a), FWS ROD at 000253 (ignored in Agency findings, FWS ROD at 528-33).

The ceremonial take of an eagle on the WRR is a central part of the Tribe's efforts to raise its children in traditional Arapaho ways. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Yoder*, 406 U.S. at 232. *Yoder* ruled that Amish religious beliefs, and the right of Amish parents to teach those beliefs to their children, outweighed the State's interest in compulsory public education past the age of sixteen. Like the Amish, the Northern Arapaho "mode of life has thus come into conflict increasingly with requirements of contemporary society exerting a hydraulic insistence on conformity to majoritarian standards." *Id.* at 217. The choice presented by FWS means that NAT members may be impermissibly "forced to migrate to some other and more tolerant region" *id.* at 218, outside the WRR, to engage in the ceremonial take of an eagle and to teach that traditional practice to their children. For the Arapaho, a more tolerant region does not appear to be close at hand. *See Large v. Fremont County, Wyo.*, 709 F. Supp.2d 1176 (Wyo. 2010) ("The long history of discrimination against Indians in the United States, Wyoming, and Fremont County is undeniable... discrimination is ongoing... [and includes] culturally-erosive policies..." *Id.* at 1184).

The NAT has found that its ability to raise its children "in traditional Arapaho ways is vital to our continued existence as a people." NAT ROD at 070. "Opportunities to teach traditional values and ceremonies, and nurture spiritual understanding, is naturally done close to home, where we are comfortable and where we are not surrounded by customs and expectations

that exist in non-Indian culture." *Id.* "The ability to teach our children all of our ceremonies, including the Sun Dance and the proper way an eagle may be taken for Sun Dance, is interfered with if we cannot conduct one of those important ceremonies here at home, on the WRIR." NAT ROD at 039 (Leonard dec.) and 070.

Relief sought. NAT requests that the Court set aside that portion of the FWS decision denying the eagle take permit to NAT on the WRR as violating the provisions of the APA. The Agency has no special expertise regarding questions of tribal law, custom, and religious tradition, which should be left to the Tribes themselves to resolve through the Tribal Court or other appropriate means.

III. Conclusion.

The ceremonial take of an eagle for NAT Sun Dance has been an on-going religious practice on the WRR for over 135 years. The Tribe embarked on a protracted process to obtain a federal permit after NAT member Winslow Friday was prosecuted by the Government for taking an eagle for Sun Dance without one. Ultimately, FWS denied NAT's application to take an eagle on the Tribe's 2.3 million acre reservation and issued, instead, a permit for areas in Wyoming excluding the WRR. The ban of an eagle take by NAT religious practitioners criminalizes a central ceremonial practice of the NAT on the Tribe's own reservation. The ban is based on objections from EST members who say their traditional religious beliefs are offended by the NAT religious practice.

In denying the on-reservation permit, FWS strayed beyond its statutory and regulatory authority, creating a "religious objections" factor in the process. On unfamiliar ground, the Agency allowed itself to be misled, by a mere scintilla of evidence, into determining the one true EST "traditional religious belief" and then concluding that the NAT religious practice is offensive to that belief. The Agency ignored the fact that eagle take by NAT has created no burden on the religious practices of any EST members. Compounding its legal and evidentiary

errors, FWS gave preclusive weight to the asserted EST beliefs without fair notice or opportunity to the NAT to respond and without careful consideration of the effect of the FWS decision on NAT religious practitioners.

More fundamentally, the Agency's denial of an on-reservation permit violates central tenets of American democracy and Constitutional law – the individual's right to the free exercise of religion and to raise one's children in their own religious tradition. The Government must show a compelling interest in preserving the public peace, safety or order to overcome these basic rights. The protection of Indian religious beliefs said to be offended by a religious practice of others is not such an interest. Gerrymandering zones of tolerance, or of intolerance, based on religious sensibilities is not permitted by the First Amendment. The Agency's charge is to make eagles available as needed to protect the religious traditions of tribal members, not to become entangled in determining what are, or are not, traditional Indian religious beliefs or how to weigh those, one against the other. The Government's ban on eagle take by NAT religious practitioners on the WRR must be set aside.

Dated this 14th day of October, 2013.

Northern Arapaho Tribe
and Darrel O'Neal, Sr., Plaintiffs

By: /s/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON REMAINING CLAIMS was served upon the following by the methods indicated below on the 14th day of October, 2013:

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Dept. of Justice	[ ]	By U.S. mail, postage prepaid
Environmental & Natural Resources Div.	[ ]	By Hand Delivery
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